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THE PROCEDURE REGARDING THE ADMISSION OF GUILT

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Abstract
Considering the present normative framework, even if in criminal matters the transactions between the judicial organs, which exercise the procedural function of indictment, and the defendant are not permitted, the admission of guilt appears as an incipient form of negotiation of penalty. In anticipation of a future special procedure regarding the accord of admission of guilt, the present institution has generated a great amount of controversy which has, inevitably, caused a matchlessly practice to appear. The purpose of this study is to identify the primary consequences of the norms which now regulate the judgment regarding the admission of guilt and to offer concrete and punctual solutions to the grave problems generated by a defective normative framework. The article has as basic study a documentary material which is comprised not only of normative guidelines, but also of a judicial practice generated by the application of these norms for almost a year. Last, but not least, the actual dimension of the admission of guilt procedure is also underlined by the dealing of the legal issues introduced by the Constitutional Court's recently handed down decisions in these matters.

Keywords: *admission of guilt, special procedure, guilt acknowledgment, penalty, judgment.*

Introduction

The Constitutional Court in its attempt to eliminate the contradictions generated by the appearance of a deficiently regulated institution, has pronounced two important decisions in the matter of admission of guilt.

Being only a supervisory organism with jurisdictional attributions, the Constitutional Court, through the two decisions mentioned above, has determined a legislative intervention which would transpose, on a normative level, the findings of the constitutional litigation court.

By adopting the Government's Emergency Ordinance no. 121/2011, the content of the institution of judgment in case of admission of guilt has gained new dimensions, whose judicial consequences will manifest in the cases of trials started before the coming into force of this procedural institution.

The goal of the present article is to identify the procedural impediments generated by the introduction in Romanian Criminal Procedure of the judgment in case of admission of guilt.

The study also proposes appropriate solutions for the problems which appeared as a consequence of the intervention of the Constitutional Court.

The purpose of Law No. 202/2010, at both declarative and institutional levels, was the simplification and acceleration of the judicial activity criminal in nature.

With respect to the settlement of criminal causes in the first court of law, the lawmaker's intervention materialized into the introduction (regulation) of a new special procedure for judging the causes in case guilt is acknowledged.

Anticipating the new similar institutions regulated by the future Criminal Procedure Code, *i.e.* judgment in case guilt is acknowledged (the new Criminal Procedure Code, Art. 374) and the settlement of causes under the acknowledgement agreement (the new Criminal Procedure Code, Arts. 478-488), the current institution generated, as a result of a deficient regulation, a non-unitary judicial practice and doctrine-related controversies.

Although institutions with a similar content are recognized in normative terms also in the legislation of other European states (Germany, France, Greece, Belgium), the settlement of criminal

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causes in the first court of law through a simplified procedure, even based on guilt acknowledgement, should present serious guarantees for the person who is to be convicted.

It is precisely the absence of sufficient guarantees, complying with both the exigencies related to the protection of the trial-related rights of the accused, and with the purpose of the criminal lawsuit, as foreshadowed in Art. 1 of the current Criminal Procedure Code, the fact that led to the dispute of this institution.

The juridical consequences of introducing this new institution claimed the intervention of specialized organisms meant to rectify the emerging deficiencies.

Therefore, before establishing the current juridical nature and the finality of judgment in case of guilt acknowledgement, the interventions of the Constitutional Court and of the Government foreshadowing the current content of this institution need to be analyzed.

In this way, the Constitutional Court was notified of the exception referring to the unconstitutionality of the provisions of Art. 320^1 of the Criminal Procedure Code, which exception was raised in files regarding criminal causes which are in different times of the lawsuit (judgment on the merits, appeal, second appeal and challenge to enforcement).

To motivate this exception, authors stated that the provisions of Art. 320^1 of the Criminal Procedure Code breach the constitutional provisions of Art. 15 regarding the Universality of law, of Art. 16 regarding Equality in rights and of Art. 21 regarding the free Access to justice, of Art. 23 para. (11) regarding the presumption of innocence, of Art. 24 para. (1) regarding the right to defense, of Art. 53 regarding the Restriction of the exercise of certain rights or freedoms, and of Art. 124, para. (2) regarding the uniqueness, impartiality and equality of justice, and of Art. 6, paragraph 1 of the Convention for the protection of human rights and fundamental freedoms regarding the Right to a fair trial.

The authors of the exception also stated that the provisions of Art. 320^1 para. (1) of the Criminal Procedure Code breach the application of the most favorable law principle, equality in front of the law and public authorities and the right to a fair trial, since it creates the possibility that, in the event that two co-perpetrators are referred to judgment in different files, the judicial inquiry starting for one of them and not for the other one, only the latter should benefit, in case of guilt acknowledgment, from a reduction of the penalty limits provided under the law.

Examining the exception raised in the files which are in the merits, in the appeal and second appeal stages, for which no final rulings were issued, the Court ascertained that the disputed provisions do not order *in terminis* with regard to a different penalization of those persons who are in the same juridical situation.

Being a newly introduced institution, its implementation into the criminal lawsuit system may generate, due to differing interpretations, consequences related to the annihilation of the retroactive application of the more favorable criminal law, for discriminating considerations which do not pertain to a certain attitude assumed by the defendants or to any other objective and reasonable reasons.

The Court also emphasized that such drawbacks could have been removed by introducing transitory norms in the body of Law No. 202/2010.

In this sense, the Court referred to the jurisprudence of ECHR (Ruling of September 17, 2009, issued in the Scoppola versus Italy cause), specifying that although the lawmaker did not provide *in terminis* the way to be followed in case of guilt acknowledgement by the defendants who were referred to judgment under the former law, but who, overrunning the trial-related time for the beginning of judicial inquiry and until the final settlement of the cause, are to be judged according to the new law, the Court established that the more favorable law application principle is applicable in such a case.

In this way, in the case of such transitory situations, consideration should be given to the mixed nature of the provisions of Art. 320^1 of the Criminal Procedure Code, which consecrate a kinder character by reducing penalty limits.

In conclusion, the Court ascertained that the provisions of Art. 320^1 of the Criminal Procedure Code are not constitutional to the extent that they do not permit the application of the more favorable criminal law to all the juridical situations born under the former law, which continue to be judged under the new law until the conviction order remains final.

With respect to the exception raised in the files which are in the challenge to enforcement stage, for which final rulings were issued, the Court ascertained that the exception related to the unconstitutionality of the provisions of Art. 320^1 of the Criminal Procedure Code referring to the judgment under guilt acknowledgment is not connected to the settlement of the causes in which it was invoked, because –as revealed by its marginal name- the wording contemplated a judgment, belonging, with the exception of transitory situations, only to the merits and which must be also applicable only until a final ruling is issued.

Consequently, it is not susceptible of the applicability of the more favorable criminal law retroactivity principle.

With regard to the provisions of Art. 320^1 para. (8), providing a judge's possibility to reject the request for the defendant's guilt acknowledgement and to proceed with judgment according to the common law procedure, the Court ascertained that –due to its equivocal meaning- the article wording does not meet the clarity and predictability requirements which should have been contained by any normative provision. Thus, in the absence of certain objective criteria, the possibility granted to a judge may turn into an abuse that cannot be censored.

The Court established that the prevailing issue is not the establishment of the defendant's deeds or of the data regarding his/her person (the meanings of these criteria do not have univocal correspondents as compared to the ownership of other terms from the criminal law or criminal lawsuit fields), but the determination of the circumstances that a deed exists and that, according to the evidence produced, it was perpetrated by the defendant, and not by any other person.

Therefore, not the mere acknowledgment of guilt is decisive for rendering efficient a lawsuit performed within the limits of lawfulness and impartiality, as they constitute only a procedural condition, but the establishment of guilt [*is decisive*].

Any eventual criteria instituted by Art. 320^1 para.4 of the Criminal Procedure Code are insufficient for characterizing Art. 320^8 as a clear and predictable norm.

Consequently, the Court ascertained that the provisions of Art. 320^1 para. (8) fail to offer the persons brought to justice the trial-related rights and guarantees sufficient to defend the interests related to their trial position.

For these considerations, the Constitutional Court, by its Decisions Nos. 1470 and 1483 of November 8, 2011 admitted the unconstitutionality exception and established that the provisions of Art. 320^1 of the Criminal Procedure Code are unconstitutional to the extent that they remove the application of the more favorable criminal; the Court also admitted the unconstitutionality exception of the final paragraph of Art. 320^1, ascertaining that it is unconstitutional, and it rejected as inadmissible the unconstitutionality exception of the provisions of Art. 320^1 raised within the challenge to enforcement.

In order to harmonize the provisions of Art. 320^1 of the Criminal Procedure Code with the Decisions issued by the Constitutional Court and in order to avoid a non-unitary judicial practice, Emergency Government Ordinance No. 121 was enacted on December 22, 2011 for the amendment and supplement of certain regulatory acts. This Ordinance amended Art. 320^1 of the Civil Procedure Code, in the sense that para. (4) of the articles currently has the following wording: *"The court of law shall settle the criminal side when the evidence produced within the criminal prosecution indicates that the deed exists, it can be construed as a crime and it was perpetrated by the defendant", while para. (8) provides that "the court of law shall reject the request when it finds that the evidence produced within the criminal prosecution are not sufficient to establish that the deed exists, it can be construed as a crime and it was perpetrated by the defendant. In this case, the court shall proceed with the judgment of the cause according to the common law procedure".*

In conclusion, further to the matters stated by the constitutional control court, the lawmaker complied, and established clear and precisely formulated criteria, according to which, in each and every case, the competent courts of law shall deem whether the admission or the rejection of the request for judgment is required in case of guilt acknowledgment.

Although they have a special character by comparison to their application field, the provisions consecrating such criteria are coming under the general conditions according to which the criminal side is settled in the first of law. Thus, according to Art. 345 para. 2, a defendant shall be convicted if the court of law finds that a deed exists, it can be construed as a crime and it was perpetrated by the defendant.

In spite of this new legislative intervention, the logical and juridical connection between the settlement of the request for judgment in case of guilt acknowledgment and the settlement of the criminal side on the merits, in the first court of law, shall be consolidated, in the sense that the admission of the request for judgment according to this special procedure is also foreshadowing the merits solution.

As we shall show hereinbelow, the conviction solution is the only solution possible in case of guilt acknowledgment, so that the report on the admission of the request to apply such procedure shall have an interlocutory nature.

Moreover, when they verify the fulfillment of the conditions necessary to apply this procedure, in fact they appreciate in advance also the evidencing material relevant for the merits of the cause, since the same conditions are necessary both for the admission of the request for judgment in case of guilt acknowledgment and for the ruling of the conviction solution: *that the deed exists, that it can be construed as a crime and that it is perpetrated by the defendant.*

Since it involves essential elements of the conflict relation, the analysis of these conditions prior to the judicial inquiry and the debate stage seems a risky operation, which may be sometimes equated to a form of prior ruling.

In order to be able to judiciously identify the consequences of any interventions occurring in this field, a careful, institutional and functional analysis of the judgment in case of guilt acknowledgment is required for the beginning.

Even if it is not legally qualified in this respect, the judgment procedure in case of guilt acknowledgment has the nature of a proper special procedure, since its object is represented by the clarification of the content of the juridical conflict relation and, implicitly, by the entailment of the criminal liability of the perpetrators of crimes.

In this way, it becomes the fourth proper special procedure known in our judicial system, after the procedure for the prosecution and judgment of certain flagrant crimes, the procedure in the causes with underage criminals and the procedure for entailing the criminal liability of a legal person, all of these procedures implying the settlement of the merits.

The analysis of the content of Art. 320^1 indicates that the procedure in case of guilt acknowledgment is primarily composed of the norms of a regular procedure, supplemented by complementary and mandatory provisions; an express mention in this regard would have been useful, according to the model of the regulation of the special procedure applicable to underage individuals.

Unlike the other proper special procedures, this procedure contains norms derogatory only with reference to the judgment in the first court of the causes in which guilt acknowledgment occurs.

This special procedure essentially implies a simplified judicial inquiry, which takes place during a single hearing; in the essence of express provisions, the performance of the criminal prosecution, of the preliminary stage, of the debate, deliberation, ruling and drafting of the decision related to the judgment in the first court, as well as the performance of judgment in the challenge means shall be done according to the regular procedure of common law.

The procedure in case of guilt acknowledgment shall apply in every criminal cause except for those causes regarding crimes punished by life imprisonment.

The exception shall operate regardless of the provision of life imprisonment as an alternative punishment by imprisonment or as an autonomous punishment. We believe that the interdiction shall apply even if the crime retained as incumbent on the defendant remained an attempt, because the text refers to the punishment provided by law for the crime contemplated by the criminal action exerted in the cause, regardless whether, in fact, the crime was perpetrated in its standard form or it remained an attempt.

The procedure shall be initiated further to the defendant's personal statement, made verbally in front of the court of law or made under an authenticated writ.

This expression of will must occur until the commencement of the judicial inquiry, so until the reading of the notification act.

The lapse of this lawsuit term shall lead to the rejection of the request as filed late; a solution should be ordered under a separate court report as provided by Art. 320^1 para. 8, and not simultaneously with the merits settlement sentence.

In case the re-judgment of the cause was ordered further to the admission of the appeal or of the second appeal, the court that would proceed to the re-judgment of the cause might theoretically apply this special procedure, if the decision to admit the appeal or the second appeal cancels all the procedural acts performed in front of the first court, while the re-judgment limits do not explicitly or implicitly prevent guilt acknowledgement.

This solution results from the fact that the law does not make any distinction in such a situation, and the provisions of Arts. 384 and Art. 385^{19} establishing the procedure of re-judgment in case of admission of the appeal or second appeal provide that such procedure shall be performed according to the rules of judgment in the first court (Special Part, Title II, Chapters I and II, therefore and Art. 320^1), which shall apply accordingly.

In case guilt is acknowledged during the criminal prosecution, the judicial activity shall be carried out according to the usual procedure, as long as there are no derogations in this respect, and – according to Art. 202, para. 2- the duties of the criminal prosecution body related to the collection of the evidence necessary for a just and complete settlement of the cause need to be fulfilled even if the accused person or the defendant acknowledges his/her deed.

The statement made by the defendant during the guilt acknowledgment procedure must contain two ordering acts: an act for the acknowledgment of the deeds retained in the court notification act, and an act requesting that the judgment should be made on the basis of the evidence produced in the criminal prosecution stage.

In consideration of this aspect, guilt acknowledgment should not apply to those defendants who were underage at the crime perpetration time, even if their ordering acts were approved by their legal representatives.

This solution results, in the absence of an express provision, from the manner in which the law regulated this procedure, and it is confirmed by the fact that another special procedure for prosecution and judgment shall be applied to those underage persons who perpetrated crimes; these persons shall automatically benefit from a cause for reducing the punishment limits by half, according to the substantive provisions of Art. 109 of the Criminal Code.

Also, at the level of principles, the special procedures pre-judging the merits cannot be applied concomitantly, due to the legal treatment related to derogatory norms, which solution results also from the interpretation of the provisions of Art. 479 para.1.

The essential premise for the special procedure in case of guilt acknowledgment is the existence of a criminal prosecution stage in which the evidence would have been duly produced and sufficient for the entailment of criminal liability.

The partial acknowledgment of the deeds retained in the notification act is not sufficient for the procedure application, as in civil law. Such an incomplete acknowledgment may be, however, appreciated as a judicial mitigating circumstance.

Even if the defendant acknowledges his/her guilt, his/her statement cannot have an absolute character.

In this way, if the evidence were unduly produced in the criminal prosecution stage, the defendant's acknowledgment statement made under the conditions of Art. 320^1 cannot cover the produced illegality.

The court of law, in virtue of its active role and of its obligations deriving from the regulation manner of the proof burden in the criminal lawsuit, does not have any possibility, according to Art. 64 para. 2, to use this proof, not even to apply the special procedure for guilt acknowledgment.

This solution is the consequence of the fact that the sanction which occurs, under Art. 64 para. 2, in the case of the means of evidence illegally obtained, has a *sui generis* character, and it consists in a general impossibility to use the unlawfully obtained information in evidence; this sanction of "dismissal" shall not be confounded with nullity, which knows, at least as far as relative nullity is concerned, the confirmation possibility.

If the special procedure is applied, the judicial inquiry shall be simplified and shall imply the performance of only two acts with a probating character: a mandatory act, hearing the defendant, and an eventual act, the production of evidence by writs as mitigating circumstances.

The drafting manner of Art. 320^1 reveals the following intention of the lawmaker: this simplified judicial procedure, just like the proper judgment, in fact, should be performed during a single court hearing.

As a result, if the production of evidence by writs as mitigating circumstances requires another court hearing, the court shall either reject the evidence and shall settle the cause according to the special procedure, or they shall continue judging the cause according to the common law procedure.

Also, if the settlement of the civil action at law requires the production of evidence, the severance of such action is imposed.

In such a hypothesis, even if the solution to be issued in the civil action at law depends on the evidence to be produced, yet such solution shall be largely subordinated to the conviction solution (the only possible one) issued in the special procedure, due to the *res judicata* authority of the decision settling the criminal action with respect to the existence of the deed, of the person who committed it and of the guilt of such person (Art. 22).

To be able to settle the criminal side based on the special procedure, the court must analyze the evidence produced in the criminal prosecution stage and must deem it as sufficient, so that it should lead to the result that the deed exists it is a crime and it was committed by the defendant.

The law permits a change of the juridical classification of the deeds retained as incumbent on the defendant within this procedure; however, the new classification needs to be covered as far as its constitutive content is concerned by the already produced evidence; if the new classification is not supported by the probating evidence, the judgment shall continue according to the usual procedure with the production of the evidence necessary to clarify the cause in all respects.

As we have shown, the special procedure in the case of guilt acknowledgment shall be initiated by the defendant's verbal statement, made in front of the court of law, or by his/her written statement, made in the form of an authenticated writ.

Failing an express provision, in case there is a crime-related complex formed of several defendants in a criminal cause, and only some of such defendants request to be judged on the basis of guilt acknowledgment, then, if the court admits their request, the court should severe the cause, under the same report, forming a new file regarding the deeds of those defendants who requested the application of such procedure; this file shall be settled according to the special provisions applicable in this field.

The initial file, in which the application of the special procedure was not requested, shall be judged according to the norms of common law.

The procedure *per se* implies the succession of the following acts: interrogating the defendant in order to confirm his/her request and in order to make sure that such defendant is aware of the implications of his/her acknowledgment (Art. 320^1 para.3), hearing the defendant, the eventual production of writs for mitigating circumstances (320^1 para. 2), as well as raising for the contradictory discussion by the parties and the prosecutor of the defendant's request to apply the special procedure.

Concerning the first aspect, the law indicates that the court of law is bound to ask the defendant whether s/he requests that judgment should take place on the basis of the evidence produced in the criminal prosecution, known and recognized by him/her.

This last hearing does not have any legal coverage since, in the Romanian criminal procedure, no evidentiary means, not even the statement made by the defendant to acknowledge his/her deed, has a character binding on the court of law only through the fact of confirmation, appropriation or failure to challenge by the party to which such means relates.

As a consequence of the binding nature of the criminal action at law, as well as in consideration of the principles of truth discovery, official nature and active role, the court of law has the duty to appreciate the evidence under the imperative conditions of Arts. 62 and 68, inclusively from the perspective of their production by another judicial body.

If the evidence was obtained by violence, threats or by any other means of constraint or through the failure to comply with the procedure for producing evidence in the criminal prosecution stage, as we have shown, they cannot be used (*or are dismissed*) even in the special procedure for guilt acknowledgment and even if the defendant shows that s/he recognizes them.

The evidence by writs as mitigating circumstances can be approved only for the defendant and only if such evidence can be produced at the hearing in which the procedure is performed.

For the other parties, the law does not permit the approval of evidence by writs or of any other evidence, unless such is necessary for the settlement of the civil action at law and this action was severed.

Art. 320^1 para. 3 provides that, after hearing the defendant, the court of law shall allow the prosecutor and the other parties to plead. The analysis of the content of the entire article reveals that, at this time of the lawsuit, the prosecutor and the parties shall not be allowed to plead <u>on the merits</u>, but with respect to the defendant's request to be applied the special procedure.

Thus, after disputing the defendant's request, the court of law may ascertain the failure to meet the conditions provided by law.

In this situation, the request shall be rejected under a report, while the court shall continue to judge the cause according to the common law procedure.

If the court finds that the conditions for acknowledgment are met, the court shall admit the request and shall allow the prosecutor and parties to plead on the merits, since this procedure also implies a distinct stage of the debates, according to Art. 320^1, para. 6.

After the admission of the request for the application of the special procedure, the only solution through which a cause can be settled is the conviction solution; as a result, the admission of the request under a report has an interlocutory nature.

The punishment limits shall be reduced, however, by one third, in case of punishment by imprisonment, or by one fourth, in case of punishment by fine.

This special procedure implies, therefore, a distinct cause for reducing the punishment, a procedure which is unknown in case of the other proper special provisions. At the same time, the cause for reduction implied by the guilt acknowledgment procedure is the only such cause regulated by the procedural and substantive law.

Since the law does not contain any express interdictions, in the special procedure for guilt acknowledgment, other causes for mitigating or reducing the punishment, provided in the general or special part of the Criminal Code may be simultaneously applied, if their applicability is ascertained

by means of the evidence produced in the criminal prosecution stage or by means of the writs produced as mitigating circumstances directly in front of the court of law.

The lawmaker unfortunately omitted to regulate the manner in which the punishment should be established in case of a competition between the reduction cause provided by this procedure and the causes provided by the general or special part of the Criminal Code.

The conviction solution shall be ordered under a sentence, this being the only type of Court ruling by mean the cause is settled on the merits in the first court, regardless whether such settlement occurs by way of the common law procedure, or by way of the special procedure.

Failing a contrary provision, the conviction sentence in case of guilt acknowledgment shall be subject to appeal or only to a second appeal, under the conditions of the common law.

In consideration of the purpose of this procedure, good use could have been made of a provision which should either regulate the final character of the sentence ruled in this field, or which should limit the reasons for appeal or second appeal only to issues pertaining to a re-consideration of the conditions under which the procedure can be applied, to any eventual consent flaws; or to the defendant's error related to the object or person, according to the model of other decisions ruled in case of acknowledgment, but in the civil field.

In conclusion, after we established the nature and functionality specific to this institution with a hybrid character in the criminal field, which involves substantial consequences in procedural norms, we have to point out the limits or the material applicability of the procedure, by comparison to the issues consecrated by the Constitutional Court with respect to the more favorable criminal law application principle.

In this sense, the transitory provisions regulated under Art. XI of Emergency Ordinance No. 121/2011 are extremely important; the said ordinance becomes thus *lex generalia* in this field.

In order to establish the application in time of the norms composing the judgment procedure in case of guilt acknowledgment and to settle the potential conflict of applicable regulatory acts, the Constitutional Court identified 3 analysis hypotheses.

1. A first situation envisages the hypothesis in which defendants were referred to judgment after the enforcement of Law No. 202/2010. With regard to such defendants, the text allows no discussion whatsoever, being applicable in its entirety. Since the procedural norms have an immediate application, guilt acknowledgment may also be pleaded in the causes in which criminal prosecution was carried out under the former law, as long as –at the time when the request was filed- the maximum term established in this respect, *i.e.* the reading of the notification act in the first court of law, was not overrun.

2. A second situation is that in which defendants, although having been referred to judgment prior to the issue of Law No 202/2010, the lawsuit term for initiating the judicial inquiry was not overrun. The text is applicable without any differentiation whatsoever also in this case.

3. A third situation envisages the case of those defendants who were referred to judgment under the former law, but who overran the term for the initiation of the judicial inquiry. For this last category, two sub/groups may exist; these two sub-groups have a differing legal treatment.

In this way, if the defendants have already been finally judged under the former law, the entry into force of Law No. 202/2010 cannot affect the positive and negative effects generated by the fact that a court order remained final. Consequently, it is not susceptible of the applicability of the retroactivity principle of the more favorable law.

Also, a contrary thesis cannot be admitted, since the stability of juridical relations would be impaired; in the absence of such stability, we cannot speak about the rule of law.

As a result, if the provisions of Art.320^1 of the criminal Procedure Code are invoked in causes that are finally settled by way of reviews, challenges pending cancellation, challenges to enforcement, etc., such request must be rejected as inadmissible.

In the case of the second sub-group, envisaging the defendants referred to judgment under the former law who overran the initiation time of the judicial inquiry, but who have not been finally

judged yet, the provisions of Art. 320^1 of the Criminal Procedure Code shall be applied according to the transitory provisions of EGO No. 121/2011.

According to Art. XI of this regulatory act, in the causes pending for judgment in which the judicial inquiry in the first court had started prior to the enforcement of Law No. 202/2010, the provisions regarding judgment in case of guilt acknowledgment shall accordingly apply at the first hearing with the complete procedure that immediately follows the entry into force of this emergency ordinance.

Therefore, even if the special provisions for reducing punishment may be applied also to these defendants, such provisions should be invoked in consideration of certain procedural conditions which are just as precise (the first hearing with the complete procedure that immediately follows the entry into force).

Also, the provisions of Art. 320^1 of the Criminal Procedure Code may be invoked in compliance with this procedural term, even if the respective criminal cause is judged in the first court or in appeal or second appeal. The interpretation derives from the wording, which refers to causes that are generally pending for judgment, without distinguishing the type of judgment (in the first court, in challenge means or in re-judgment after cancelation or cassation), therefore prior to the remaining final of court ruling for merits settlement.

Conclusions

Ever since it appeared the institution of judgment in the case of admission of guilt has generated doctrinal controversy and an uneven judicial practice.

The intervention of the supervisory constitutional court has determined, after only one year of existence, the normative content of this institution.

Despite the double intervention, jurisdictional as well as legislative, the procedure of judgment in case of admission of guilt further presents numerous controversial aspects.

This institution represents a form of transition of the regulations in the new Criminal Procedure Code, expected to come into force in the near future..

The evolution of the changes of the present institution will offer the legislative bodies the solution for a supple and coherent normative framework in the matter of the admission of guilt agreement.

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VIOLATING THE RIGHT TO PRIVATE LIFE UNDER THE NEW ROMANIAN PENAL CODE

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Abstract
It is more and more difficult nowadays that the private life of a person to remain out of other people intervention and out of public visibility. In this context, the present paper is concentrated of a new criminalization included in The New Romanian Penal Code - article 226 from this law. It is about the violation to the right to private life which is for the first time incriminated by the Romanian Penal Code.

Keywords: *private life protection, criminal liability, The New Romanian Penal Code, crime*

INTRODUCTION

1. This study focuses on the new legal framework concerning the private life penal protection, as it results from the New Romanian Penal Code. It is well known that, nowadays it is more and more difficult nowadays that the private life of a person to remain out of other people intervention and out of public visibility. That is why the Romanian legislator felt the need to create a special chapter dedicated to the facts which violate the domicile and the private life.

2. From our point of view it is very important for all the actors involved in applying the penal law to correctly understand the law, because this is the indispensable premise for a correct application in particular cases. That is why the present study aims to analyze the constitutive elements of the offence incriminated by the article 226 New Romanian Penal Code and to explain them in accordance to some settlements of the European Court of Human Rights.

3. We will use the monographic analyze method to reveal the main elements of the crime of private life violation. Also, the study will focus on the way the European Court of Human Rights case decisions influenced the new criminalization. Moreover, we will put the new offence in the larger framework created by the legal rules included in the Chapter IX from the Title dedicated to the crimes against the person from the special part of the New Romanian Penal Code.

4. In terms of the Romanian doctrine in the field of interest, the present study has the merit to be among the first studies ever published on this topic. At national level it was already observed that the European Court of Human Rights pays a special attention to the domicile and private life protection. An important number of decisions of the European judicial institution were given in this domain and realized a large concept of private life, which cannot remain out of penal law protection. The Romanian legislator accepted in 2009 this perspective.

A NEW PENAL CODE AND A NEW CONCEPTION ON PRIVATE LIFE PROTECTION

In June 2009, the Romanian Parliament adopted the Law no. 289 concerning the New Romanian Penal Code[1] which is about to enter into force in short time[2]. This new law abolished the Law no. 301 from 2004[3] concerning a former project of penal code, and the Law no. 294 from 2004

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[1] Published in the Romanian Official Journal, First Part, no. 510 from 24 June 2009.

[2] According to article 446 from this law, the new code will enter into force at a moment to be indicated by a law which will be especially adopted to rule the entering into force of the code. Until now, this law is still a draft.

[3] Published in Romanian Official Journal, First Part, no. 575 from 29 of July 2004.

on execution of punishments and measures ordered by the court in criminal proceedings[4], two normative acts which have never been intro force[5]. In this way, it is possible for Romania to have in a short time a new Penal Code, a modern one, adapted to the need to combat more efficient the nowadays antisocial behaviours.

The new code was elaborated in a period during which Romania was the subject of several condemnation in cases brought in front of European Court of Human Rights by its` nationals. That is why the Romanian legislator made consistent efforts to adapt the new code to the European standards. This effort manifested also in the field of private life protection.

A clear proof of this effort is the fact that in this legal instrument there is a special chapter dedicated to the offences against the private life. This chapter has no correspondent in The Penal Code which is into force since 1969, but has in its content both new offences definitions (the violation of professional office) and definitions of some traditional offences (the violation of the domicile).

In the legislator's new conception, a special chapter is needed in order to assure better protection for this important social value. In this way, the importance of the value will be stressed and all the society will receive the right message.

In this chapter, there are four articles which refer to crimes traditionally known by the Romanian legislation: the violation of the domicile (article 224 New Romanian Penal Code), the disclosure of the professional secret (article 227 the New Romanian Penal Code), but also, to crimes defined for the first time in our legislation: the violation of the professional office (article 225 New Romanian Penal Code) and the violation of the private life (article 226 New Romanian Penal Code).

The social value protected by all these legal norms is represented, according to the doctrine, by all the social relations which refer to the people's intimacy ant to the right to have a normal life, with the respect of private life against the acts that could endanger it[6].

THE RIGHT TO PRIVATE LIFE FROM THE EUROPEAN COURT OF HUMAN RIGHTS PERSPECTIVE

According to the article 8 from The European Convention of Human Rights:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

As observed, the Article 8, in the first part, paragraph 1, sets out the precise rights which are to be guaranteed to an individual by the State – the right to respect for private life, family life, home and correspondence. In its second part, the Article 8 paragraph 2 makes it clear that those rights are not absolute in that it may be acceptable for public authorities to interfere with the Article 8 rights in certain circumstances. These must be only interferences which are in accordance with law and necessary in a democratic society in pursuit of one or more of the legitimate aims listed in Article 8

[4] Published in Romanian Official Journal, First Part, no. 591 from 1st of July 2004.

[5] This technique was possible due to the modification of Law no. 24 from 2004 concerning the legislative technique rules (published in Romanian Official Journal, First Part, no. 777 from 25 August 2004 – by the Urgent Ordinance of the Govern no. 61from 2009 - published in Romanian Official Journal, First Part, no. 390 from 9 June 2009). According to a new text, under article 1^1, a normative act may be modified and even abolished before the moment of entering into force. So, the Law 301 from 2004 is not and never were the active Romanian Penal Code, even some electronic documentation sources indicate it in this position – ex. http://legislationline.org/documents/section/criminal-codes.

[6] V. Dobrinoiu, N. Neagu, Drept penal, Partea specială, Editura Wolters Kluvert, Bucureşti, 2011, p. 176.

paragraph 2 will be considered to be an acceptable limitation by the State of an individual's Article 8 rights[7].

In the doctrine it is observed that, concerning this article, that The Court has held that, given the fundamental nature of the Convention rights, the first paragraph should be widely interpreted, and the second one narrowly. Rights must therefore be "stretched", and limitations limited. Also, individuals need only show that there was an interference with a right protected by the Convention in their case; the State then bears the onus to prove that that interference was lawful and justified in Convention terms.[8]

As it concerns the definition of the private life, as a social value, protected by the penal law, according to the European Court, this is a broad concept which is incapable of exhaustive definition[9]. The only consensus which exists is that the concept is clearly wider than the right to privacy, however, and it concerns a sphere within which everyone can freely pursue the development and fulfilment of his personality. In a particular decision, the European Court stated that it would be too restrictive to limit the notion of private life to an "inner circle" in which the individual may live his own personal life as he chooses and to exclude there from entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings[10].

It is said that the 8th article of the European Convention of Human Rights is only the first text from a series of four articles which protect rights meaning the social respect due to the individual[11]. In this series are included: the right to the private life and to a family life, the right to domicile and to correspondence (article 8), the right to the freedom of thought, conscience and religion (article 9), the freedom expression, and to information (article 10) and the freedom of association (article 11).

In this context, it is accepted by the doctrine that the respect for the private life is a complex right, with multiple aspects, as it results from the European Court of Human Rights jurisprudence. It includes, for instance, the privacy (the private life secrecy), the right to a personal identity and, as a new come, the right to a healthy natural environment[12].

The first component refers to the private life secrecy, as a right to live protected from the foreign eyes, as a right to be left alone. This right includes also the protection of the domicile, as the space the private life takes place. Under this prerogative enters the private opinion secrecy, protected against the correspondence secret violations or against any modern investigation methods authorities might use: tapping, creation and communication of personal data files, storing and using data without person's accord[13].

The protection is extended over the particulars' intrusions and that is why the state has the duty to prevent and to punish the abusive behaviours by a strict legal regulation of the private detectives and journalists' responsibility.

The absence of protection against press intrusions or the disclosure in the media of highly intimate, non-defamatory details of private life has not yet been subject to significant challenge in European Court of Human Rights jurisprudence. Some complaints have been declared inadmissible

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[7] Ursula Kilkelly, The right to respect for private and family life. A guide to the implementation of Article 8 of the European Convention on Human Rights, http://echr.coe.int/NR/rdonlyres/77A6BD48-CD95-4CFF-BAB4-ECB974C5BD15/0/DG2ENHRHAND012003.pdf.

[8] Douwe Korff, The Standard Approach under Articles 8 – 11 ECHR and Article 2 ECHR, http://ec.europa.eu/justice/news/events/conference_dp_2009/presentations_speeches/KORFF_Douwe_a.pdf.

[9] Costello-Roberts v. the United Kingdom, judgment of 25 March 1993, para. 36.

10 Niemietz v. Germany, judgment of 16 December 1992. 11 Appl. No. 8257.

[11] Corneliu Bârsan, Convenția europeană a drepturilor omului, Comentariu pe articole, Editura C.H. Beck, București, 2005, pag. 593.

[12] Bianca Selejan-Guțan, Protecția europeană a drepturilor omului, Editura C.H. Beck, București, 2004, p. 150..

[13] Leaner v Suedia Case, 1987.

for failing to exhaust domestic remedies[14]. Determination of whether issues might arise under private life in relation to press intrusion might be influenced by the extent to which the person concerned courted attention, the nature and degree of the intrusion into the private sphere and the ability of diverse domestic remedies to provide effective and adequate redress.

This is the component the Romanian legislator from 2009 chose to protect by criminalizing the facts described by the article 226 from The New Romanian Penal Code.

THE PRIVATE LIFE VIOLATION UNDER THE NEW ROMANIAN PENAL CODE

Under all these influences, in the article 226, the New Romanian Penal Code incriminates for the first time in Romania, the private life violation. The offence consist, in its basic form, in a behaviour of a person who affects the private life of a person, without legal justification, by photography, by capturing or recording images, by listening with technical instruments or by tapping a private conversation held in a house, in a room. In a close relationship with this first form, the second paragraph of the article 226 of the Romanian New Penal Code states that represent an even more serious offence these facts: the unlawful disclosure, dissemination, presentation or transmission of sounds, conversations or images provided in the first paragraph to another person or to the public.

According to paragraph 5 from the article 226, represents an offence even the fact to place without an authorization technical devices to audio or video tapping, in order to commit the private life violation.

According to the Romanian doctrine, the norm from the article 226 New Romanian Code respond to a necessity to prevent the unlawful use by the press, by any person or by some specialized authorities of modern technical recording instruments in order to tape private conversation and to interfere with the victim 's right to privacy[15]. In the same time, it is observed that the new criminalization is formulated in a manner which allows the press to fulfil its role in a democratic society, and to realize a correct equilibrium between the right to private life and the freedom of expression[16].

That is because the legal text itself, in the paragraph (4), indicates four causes to justify the facts described by the rest of the provisions. In these cases the fact will lose its unlawful character: the author participated to a conversation with the victim and taped the sounds, the images or the conversation in this occasion, having a legal interest to do this; the victim explicitly acted in a way to make her (him) seen or heard by the author; when the author tapes a person committing a crime or proves an offence; when the author tapes public interest information, and their divulgation brings more important advantages than the prejudice created for the individual.

The criminal law specialists[17] have already expressed their concern about this last hypothesis, because it will be impossible as in concrete situations to determine when the prejudice produced by the divulgation act is less important than the prejudice for the private life. That is because often this prejudice has a moral nature, which makes it impossible to quantify.

Such an offence might be committed in the future by a private detective hired by a jealous wife who uses technical recording at distance instruments to tape images or conversations the husband has with his mistress in her home[18].

Because of the way the legal text is formulated, there are already disputes in the doctrine concerning the incriminated behaviour. For instance, in one opinion, this element is represented by

[14] Case no. 18760/91 v. Ireland, 1993; Case no. 28851/95 and 28852/95, Spencer v. the United Kingdom, 1998.

[15] P. Dungan, T. Medeanu, V. Paşca, op cit., p. 247.

[16] V. Dobrinoiu, N. Neagu, op. cit., p. 175-176.

[17] P. Dungan, T. Medeanu, V. Paşca, op cit., p. 254.

[18] V. Dobrinoiu, N. Neagu, op. cit., p. 176.

the „private life perturbation", seen as any action which facilitates by all means a direct contact with someone's private life[19]. In another opinion, the illegal behaviour consists from facts such as shooting, capturing or recording images, listening with technical instruments or tapping a private conversation held in a house, in a room[20]. We agree this second opinion, because the private life perturbation is the result which the offence produces and not the interdicted behavior.

There are some essential conditions to be met in order to establish the offence was committed. Firstly, it is necessary to see that all the acts described by the law were committed without having a valid legal order to allow them, or, without having the victim's consent. This special condition takes into account the fact that, under some particular circumstances, it is possible for the judicial authorities to tape the sounds, the conversations or the images without breaking the law. For instance, according to the article 138 from the New Romanian Penal Procedural Code, during the investigations may be used some special survey techniques. Among these techniques there are: the interception of conversations and communications, the access to a computer, the video, audio photo survey, the localisation or the taking of a person, getting the phone calls listing, etc. So, it is possible to conduct all this activities without committing the offence defined by the article 226 from the New Romanian Penal Code. But, in order to remain in the legal framework, all the conditions imposed by the law must be respected. For instance, according to the article 140 from this legal instrument, the technical survey is possible only after the judge for rights and liberties authorises it. In special cases, the prosecutor has also this possibility, but only for a short duration (48 hours).

Secondly, in the assimilated modality, it is necessary to observe that the offender disseminated the sounds, the conversations or the images to other people or to the public. In the doctrine it is opinionated that, in this modality, when the person keeps the sounds, the conversations or the images for himself, the offences defined by the article 226 paragraph 2 the New Romanian Penal Code cannot be committed[21].

Defined as we have seen, the private life violation offence from the article 226 of the New Romanian Penal Code has a modern content, in accordance with the legal texts from other European countries legislation.

For instance, the Penal Code of Spain, in the first chapter from the 10th title defines „The offences against the intimacy, the right to a personal image and the right to the privacy of the domicile". According to the article 197.1 from this chapter, a person will be punished for facts committed in order to discover someone's secrets or to affect someone's private life, without the victim's consent will use personal documents, letters, postal messages, electronic postal messages, or intercepts he victim's communications or uses interception, transmission, tapping technical instruments.

In the same way, the Italian Penal Code regulates, in the article 615 bis, the offence of illicit interference with someone's private life. According to this text, anyone who, using audio or video taping devices gets in unlawful way information or images which affect someone's private life will be punished under this legal text.

CONCLUSIONS

1. The present paper has as a starting point the Romanian legislator's decision to include under the penal law protection a new area – the private life.

The decision was taken under the influence of some European Court of Human Rights decisions. Moreover, the social value protected by the legal norms from this chapter is defined not by the national legislation, but by the European judicial institution decisions. The new offence is about to become effective in particular situations (once the New Romanian Penal Code will enter into

[19] P. Dungan, T. Medeanu, V. Paşca, op cit., p. 251.
[20] V. Dobrinoiu, N. Neagu, op. cit., p. 176.
[21] P. Dungan, T. Medeanu, V. Paşca, op cit., p. 253.

force). That is why the present paper analyzed its particularities in order to facilitate a better understanding of the new legal text.

2. This study represents a documentation source for every person interested in criminal law field, both theorists and practitioners. The impact on the doctrine will be an important one because there are only a few such studies published in Romania, which reveal the specific elements of a new offence incriminated by The New Romanian Penal Code – the private life violation. Also, the paper has the merit to include an analysis of the way the European Court of Human Rights jurisprudence has influenced the definition included in the article 226 from The New Romanian Penal Code.

The study will be interesting for the practitioners in order to have a doctrinal guidance when the new law will enter into force. In this way, the text will be better understood and better applied.

3. This study opens the perspective for future researches related to this topic. It is about a new domain included under the influence of the Romanian penal law and that is why such future studies should concern some particular aspects of the right to private life and the way penal law succeeds in creating effective guaranties for their protection. It might be interesting to observe the component of the right to a healthy natural environment and the way that the penal legislation protects it. A subject like this is interesting from the both theoretical and practical perspective as well.

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INTERNATIONAL TRAFFIC OF NARCOTICS

NICOLETA-ELENA BUZATU*

Abstract
The present essay tries to analyze the infringement referring to the international traffic of narcotics, an infringement regulated, together with other infringements regarding the traffic of narcotics, by Law no 143 of July 26, 2000 with regard to the prevention and fight against the illicit traffic and consumption of narcotics. Article 3 of this Law stipulates that the bringing in and the taking out of the country, as well as the import and export of dangerous narcotics without a legal approval are punished with prison from 10-20 years and with the interdiction of certain rights. In paragraph 2 of the same article it is mentioned that whether the deeds enumerated in paragraph 1 refer to narcotics of a very high risk, the prison penalty is from 15-25 years and the interdiction of certain rights. The analysis of the infringement referring to the international traffic of narcotics is made in conformity with the structure mentioned in the doctrine and includes: the object and the subject of the infringement, the constitutive content: the objective aspect including the material element, the immediate consequence and the casualty connection; the subjective aspect of the infringement, as well as form and modalities of these infringements and the respective applicable sanctions.

Keywords: *traffic, trafficker, dangerous narcotics, high risk narcotics, infringement*

Introduction

All through history the narcotics phenomenon had an ascending evolution; although in antiquity the healers used them with medical and therapeutic aims, nowadays they are cultivated, manufactured and commercialized by transgressive networks akin to the organized criminality.

Today, the traffic of stupefacients has turned into a rough reality for the contemporary world. After 1990 Romania has changed from a transit country into narcotics consuming country: from the lighter to the high risks narcotics consumption.

The consumption of various categories of narcotics - of a vegetal or synthetic origin - has disastrous consequences for the human body and for the social relationships the addicts participate in.[1] The gravity of this addiction or flagellum - as it is rightly considered to be - arouses the interest of the states and of the whole international community. Various measures have been taken: from social and medical, involving the police or the army to a war declaration against the producers of cocaine or opium.[2]

A large quantity of narcotics is already known, but the effects of the highly advanced technologies are the appearance of newer and more numerous synthetic substances. The clandestine labs permanently change their locations for not being traced and, the costs for the manufacturing of certain narcotics are higher in the detriment of others. Some categories of narcotics are manufactured more frequently than the others: opium, morphine, heroine, cannabis, cocaine, L.S.D. – dextro-lysergic acid diethylamide, mescaline and ecstasy.

The illicit traffic of narcotics is considered to belong to "the highly serious criminal transbounadry branches" - mentioned by the Reform Treaty of the European Union, signed in Lisbon

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[1] The term "addict" defined by Law no 143/2000 on the illicit traffic and consumption of narcotics was replaced with "consumer" by art 1, point 2 of Law no 522/2004.

[2] Emilian Stancu – *Introduction in General Criminology,* II[nd] edition, (Bucharest: "Dimitrie Cantemir" Christian University, 1996), p. 112.

on December 13, 2007 in art 69 B, in the attempt of giving it a unique definition and with a view to create a common basis for improving the cooperation among the European countries.

Content

In the current speech the *drugs* are the products and the stupefacient or toxic substances, given the same definition and prohibited by the national and international legislations.

In the Dictionary of Penal Law and Penal Procedures[3] the *drug* is defined from two aspects: 1) a substance used in the preparation of pharmacy/medicinal drug products 2) a name applied to certain substances (cocaine, morphine) which then when swallowed inhibit the nerve centers and produce a state of physical and psychical inertia. Within certain conditions, such types of disturbances can lead to acts of penal irresponsibility. The drugs that are considered to be stupefacient are submitted to a special legal regime.

The Dictionary of Criminology[4] offers a definition taken over from DEX to which the following specification is added: "They can be identified by modern methods offered by physics and chemistry, as gas – chromatography, thin layer of chromatography, infra red spectrophotometry, etc."

In the opinion of the World Health Organization[5] the *drug* is the substance that, once absorbed by a living organism, modifies one or several functions of the respective organism. In agreement with certain recommendations given by this International Body, substances or classes of psychoactive substances (drugs) that produce such modifications and generate addiction are: alcohol, opium containing substances, compounds of cannabis, sedatives and hypnotics, cocaine, hallucinogens, volatile solvents, other psychoactive substances and substances belonging to different classes, used in a mix association.

In a strictly pharmacologic way, the *dug* is a substance used in medicine, whose abusive consumption can produce physical or psychological addiction or serious troubles of the mental activity, perception and behaviour.[6] In this context, the name of *drug* is applied to the substances that are also known as *stupefacients.*

In conformity with art 1 of Law no 143/2000, *drugs* are defined as being plants and stupefacient or psychotropic substances or mixtures containing such plants and substances (included in tables I - III), classifying drugs into two large categories:

1. High risk drugs: heroine, mescaline, morphine, amphetamine, cocaine, codeine, opium, phencyclidine, etc

2. Dangerous drugs: cannabis, cannabis resin, cannabis oil, diazepam, meprobamat, etc.

Very many persons are involved in activities connected with drugs traffic and consumption; for them there are no national or geographical frontiers especially because the two already mentioned activities disregard the frontier and have a transboundary character.

The transport of drugs is made is various ways: from the human body to land vehicles, aircrafts or ships. They use false matriculated land vehicles wearing transit numbers or private automobiles which do not appear in the police records. The drugs are also hidden in auto-trains (of

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[3] George Antoniu, Costică Bulai – *Dictionary of Penal Law and Penal Procedure,* (Bucharest: Hamangiu Printing House, 2011), pp. 301-302.

[4] Nicolae Dan, Ion Anghelescu (coord.) – *Dictionary of Criminology,* (Bucharest: Scientific and Enciclopedic Printing House, 1984), p. 62.

[5] Founded in 1948, it is the specialized Health Agency of the USA. Its aim is to ensure that all the nations get the highest health level. The WHO has a decisive role in adopting prophylactic measures for preventing and fighting against the abusive usage of drugs and the setting forth of methods for treating the addicts. In conformity with the provisions of the Unique Convention on Stupefacients of 1961, the WHO appoints a number of five persons, out of which two are members of the International Organization for the Control of the Stupefacients.

[6] See more in Ioan Dascălu, Cristan-Eduard Ştefan, Cătălin Ţone, Maria Surduleac – *Drugs and the Organized Crime,* (Craiova: Sitech Printing House, 2009), p. 31.

the TIR type) with or without the knowledge of the driving personnel, in general, scattered among perishable nutriments for not being kept in the customs for a too long time.

The transports entering or leaving Romania without an import or export certificate, as well as those that do not correspond to the certificate specifications are retained by the competent authorities until the legal justification or until the final decision of the Court which decided their confiscation.[7]

The fight against the illicit drugs traffic and consumption used to be and still is s really complex social national and international preoccupation. Its evolution, its effects and the ways meant to solve all these aspects are the main concerns of all the institutions of the states as well as of the public opinion, because this is an utterly serious and dangerous phenomenon with negative effects for the sanity of the population and for the economic and social stability, as well for the favorable evolution of the states' democratic institutions.

Since very ancient times people knew about the proprieties of the drugs[8] but, it is round the second half of the XIXth century that the states of the world realized the proportions of this phenomenon and it was no longer than the XXth century that initiatives meant to control - at the planetary level - the traffic of stupefacients appeared.

In the striving efforts to control and - at the same time - adapt the international legislation to this situation, the Romanian law-maker adopted Law no 143 of July 26, 2000 on preventing and fighting against illicit drug traffic and consumption.[9] Through the Decision of the Government no 860 of July 28, 2005[10] the Regulations to apply the dispositions of Law no 143/2000 regarding the prevention and fighting against the illicit traffic and drug consumption, together with its further modifications was approved.

The Legal Content of the infringement regarding the international traffic of drugs

Art 3 of Law 143/2000 stipulates that „bringing or taking drugs off the country, as well as the import and export of dangerous drugs, without authorized certificated can be punished with prison from10-20 years and with the interdiction of rights.

If the deeds stipulated in paragraph 1 refer to high risk narcotics, the penalty is from 15-25 years followed by the interdiction of rights."

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[7] Traian Dima, Alina-Gabriela Păun – *Illicit Drugs (Law no 143/2000, Jurisprudence and Commentaries),* (Bucharest: Universul Juridic Printing House, 2010), p. 187.

[8] For more details about the history of the drugs, see Emilian Stancu – *quoted work,* pp. 615-619; Ioan Gârbuleț – *Traffic and Illicit Drug Consumption. Essay on Legislation, Doctrine and Jurisprudence,* (Bucharest: Hamangiu Peinting House, 2008), p. 7 and next.; Bercheşan, Vasile Bercheşan, Constantin Pletea – *Drugs and the Traffickers of Drugs,* (Piteşti: Paralela 45 Printing House, 1998), pp. 90-112.

[9] Published in the Official Gazette no 362 of August 3, 2000. Amended by Law no 169/2003 on modification and completion of the Penal Code, of the Penal Procedural Code and of some special laws; Law no 39/2003 on preventing and fighting against organized criminality; Law no 522/2004 for modifying and completing Law no 143/2000 on preventing and fighting against the illicit traffic and consumption of drugs; the Emergency Ordinance of the Government no 6/2010 for the modification and completion Law no 143/2000 on preventing and fighting against the illicit traffic and consumption of drugs and for the completion of Law no 339/2005 regarding the juridical regime concerning herbs, substances and the stupefacient and psychotropic substances; Law no 92/2010 about the approval by the Emergency Ordinance of the Government no 6/2010 for modifying and completing Law no 143/2000 and for completing Law no 339/2005 regarding the juridical regime concerning herbs, substances and the stupefacient and psychotropic substances; the Government Decision no 575/2010 for actualizing the Annex of Law no 339/2005 regarding the juridical regime concerning herbs, substances and the stupefacient and psychotropic substances, as well as the Annex to Law no 143/2000 on preventing and fighting against the illicit traffic and consumption of drugs, The Emergency Ordinance of the Government no 105 of November 30, 2011 for the modification of art 1 of Law no 143/2000 on preventing and fighting against the illicit traffic and consumption of drugs, as well as of art 8 of Law no 339/2005 regarding the juridical regime concerning herbs, substances and the stupefacient and psychotropic substances, published in the Official Gazette, Part I, no 855 of December 5, 2011.

[10] Published if the Official Gazette of Romania, Part I, no 749 of August 17, 2005.

The Object of Infringement

The juridical object of the infringement stipulated in art 3 of Law no 143/2000 consists of the social relations connected with the public health, whose existence and normal evolution depend on the strict observance - by all those whom the law addresses to - of the legal dispositions regulating the regime of drugs traffic, as well as the social relations referring to the health of the drugs addicts.[11]

By the deed incriminated in art 3 of Law 143/2000 the customs juridical regime is also involved. Thus, Law no 86/2006 - Customs Code of Romania[12] - stipulates in art 271 that "the illegal bringing or taking off the country of weapons, ammunition, explosives, drugs, precursors, nuclear materials or other radioactive and noxious substances, debris, residua or any other dangerous chemical materials, is considered a qualified smuggling infringement and is punished with prison from 3-12 years and with the interdiction of rights, unless the penal law does not stipulate a greater punishment."

The Romanian law-maker intended to protect - through penal law norms - the social relationship that appear in connection with the establishment of certain interdictions regarding the transboundering of the goods subordinated to special regimes, such as narcotics, and which cannot be brought or taken off the country without observing the conditions imposed by the law.

The two incriminatory laws create a set of qualifications meant to be solved according to the principle of subsidiarity. The incriminatory norm included in art 271 of the Customs Code is applied only when the penal law does not stipulate a greater penalty; this means that art 3 of Law no 143/2000 has priority as it stipulates a greater penalty than the one applicable for the infringement of qualified smuggling.

The *material object* of the infringement is the dangerous drugs and the high risk drugs as stipulated in the Annex Tables of Law no 143/2000 that is I, II and III, which are submitted to the national control.

In case the forbidden activities which become the material element of the objective aspect of the infringement stipulated in art 3 of the above mentioned law are using other plants, substances, products or medicine that are not considered by the law maker to be narcotics submitted to the national control, then the deed could not be counted among the infringements connected with the international traffic of narcotics.

The penal investigation body is obliged to order a technical and scientific analysis in conformity with art 112 and 113 of the Penal Procedural Code in order to establish whether it is about dangerous drugs or high risk drugs. These results will finally decide for their juridical specification.

Subjects of the infringement

The law maker does not ask for any special quality from a subject as to consider that his deed is an infringement, so that the direct *active subject* of this infringement is not qualified. Then when the active subject is a member of the medical personnel or is a member of an organization which is legally involved in the fight against drugs or exercises an office investing him with public authority, and the deed was committed while he exercised his office, one can speak about the aggravating circumstance stipulated in art 14 of Law 143/2000.

This infringement is liable to penal consequences in all its aspects: co-participation, instigation and complicity.

The *main passive subject* is the state. The *secondary passive subject* is the natural person who suffers the already produced consequences or those to be produced because of the committed deed that could endanger his health.

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[11] Mihai Adrian Hotca, Maxim Dobrinoiu – *Crimes Provided in Special Laws. Commentaries and Explanations.* 2nd edition, (Bucharest: C.H. Beck Printing House, 2010), p. 160.

[12] Published in the Official Gazette Part I no 350 of April 19, 2006, with further modifications.

The objective aspect

The bringing or taking off the country, the import or export of dangerous drugs - without a certificate - is practically the *material element* of this infringement.

The bringing or taking off the country dangerous drugs or high risk drugs is, in fact, that action through which they are introduced in the country.

The taking off the country of these drugs is that action through which the dangerous or the high risk drugs are taken off the country.

The import[13] means the total operations with a commercial character through which goods produced in or bought from other countries are introduced in another country.

The export[14] is that operation with a commercial character through which part of the goods produced, processed, completed or repaired in one country are sold in the markets of other countries.

In agreement with art 20 of Law no 339/2005 regarding the juridical regime of plants, substances and stupefacient and psychotropic compounds, the import-export with plants, substances and compounds included in Tables I, II and III of the Annex of this law are made in the basis of a export-import license, issued by a specialized department of the Ministry of Health for each and every operation, in conformity with the pattern stipulated by the methodological norms of this law.

Art 21 stipulates that all import-export operations with plants, substances and compounds included in tables I, II and III of the annex can be made only by the holder of the license mentioned by the law, in the limit of the annual estimations.

In agreement with art 27 the commercial, customs or transport documents, as well as other expedition documents shall mention the names of the plants and of the substances - the way they are inscribed in the tables of the international conventions - and, depending on the situation, the commercial name of the products, the exported quantities from the national territory or of those to be exported, the name and address of the exporter, of the importer and of the receiver.

According to art 28 of Law no 339/2005 regarding the juridical regime of plants, substances and stupefacient and psychotropic products it is forbidden the storing in warehouses and in the free zones of the plants, substances or products containing stupefacient or psychotropic native or imported substances. On the territory of Romania there also forbidden imports simulating transports directed to a customs warehouse; the only exception is when the competent authority of the importing country mentions its approval in the license accompanying the transport.

In art 29 of the above mentioned law it is mentioned that the transports entering or leaving Romania - without an import - export license - as well as those which are not in conformity with the accompanying license are retained by the competent authorities until the transport is justified and legal or until the definitive and irrevocable decision of the court shall order the confiscation of the transport.

In conformity with art 31, a transport crossing the Romanian territory with plants, substances or products containing substances mentioned in tables I, II and III of the annex to Law no 339/32005 is allowed only if the import-export license accompanying the transport is presented to the customs checking points. The destination of a transport that transits Romania can be modified only if a new import-export license is issued by the competent authority of the exporting country. No transport of plants, substances or products containing substances mentioned in tables I, II and III of the annex to Law no 339/32005 transiting Romania cannot be submitted to any treatment meant to alter its nature or packing.

In agreement with art 32 of Law no 339/2005 the above mentioned regulations are not in force in case of a transport by air. In case the aircraft lands or is submitted to an emergency landing,

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[13] *DEX - Explanatory Dictionary of the Romanian Language* II[nd], (Bucharest: "Univers Enciclopedic" Printing House, Academy of Romania, 1998), pp. 478.

[14] *Idem,* pp. 359.

the transport will be considered the same as any other transport from Romania to the country of destination only in unloading conditions or if the circumstances require such a procedure.

The immediate consequence of the infringement provided by art 3 is applicable in case the public health and the health of the consumers are endangered; it is also available for the national customs regime.

In the present case the *casualty implication* shall not be proved, as it derives in the ex re, by the very deed committed, so that the state of risk in case of committing such infringements is inevitable.

The subjective aspect

From the subjective point of view, in case of an international traffic of drugs infringement, the described deed shall be committed intentionally. Intention means that the doer knew about the nature of the products or of the substances his action was aimed at. The intention can either be direct or indirect.

The *mobile* that determined the action of the doer and the *aim* in view do not influence the existence of the subjective aspect of the international traffic of drugs infringement. They can be taken into account in the individualization of the judiciary penalty.

Forms. Modalities. Sanctions

Forms

Both preparatory deeds and the attempt are incriminated.

The infringement mentioned in art 3 paragraph 2 of Law no 143/2000 is committed in the form of an attempt not in the form of a committed deed then when the infringement was discovered on the corridor leading to the exist from the country, before crossing the border of Romania.[15] The attempt is punished, in conformity with art 13 of the above mentioned law. The production or the obtaining the means or instruments, as well as the measures taken with a view to committing these infringements is also considered to be attempts in the international traffic of drugs infringement.

Modalities

In practice, beside the norms analyzed in the paragraph about the material element, there can be other numerous modalities for committing such infringements. The incriminatory text includes two types of infringements/ crimes: simple and aggravating.

In the case of the simple type the traffic of drugs refers to dangerous risks and, in the second case it refers to the high risk drugs. The difference between these two types is given by the object of the crime/ infringement.

Sanctions

Bringing or taking off the country, as well as the import or the export of dangerous drugs - without legal permission - is punished with 10-20 years and the interdictions of rights.

If the deed refers to high risk dugs, the punishment is prison for a period of 15-25 years and the interdiction of certain rights.

The Court can dispose the security measure of expulsion in case of foreign citizens, as stipulated in art 117 of the Penal Code.

The drugs, as well as other goods that were the object of the crime mentioned in art 3 are confiscated, as provided in art 17 of Law no 143/2000. In case these things are not found, the convict is obliged to pay their equivalent value. There are also Money confiscated money, values or any other goods obtained through the selling of drugs or of other goods that made the object of the infringement mentioned in art 3. The sums resulted from the confiscated money and goods are considered incomes of the state budget and are put in a special account of the state budget.

[15] The High Court of Justice and Cassation, Penal Department, decision no 4914/2003, Penal Law Magazine no1/2004, p. 174. For *in extenso* content of this decision see a www.scj.ro.

Conclusions

The evolution of our country with regard to the traffic of drugs was influenced by several factors: social, politic and economic but also by her geographical position in the European continent, by the insufficient legislative measures able to regulate the drugs problem in the post-totalitarian years, by the lack of a police specialized in fighting against such crimes and by the lack of necessary technical devices.

In conformity with the national reports regarding the drugs, the traffic is in a remarkable ascension proved by the increasing number of confiscations.

Firm measures shall be taken - at the level of the society - for making the people aware of the risks deriving from the drugs traffic and consumption. The state institution shall also cooperate and have common actions in order to fight against this phenomenon. This flagellum can be eradicated from the very beginning, but it can be kept under a drastic control.

The necessity of incriminating and penalizing the bringing and taking off the country, as well as the import or export of dangerous drugs and of high risk drugs is materialized by the already analyzed text of law, especially because this phenomenon afflicts the public health, the order of law and economic security of any state.

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JUDICIAL ASSISTANCE OF A WITNESS IN THE CRIMINAL TRIAL

BOGDAN-FLORIN MICU *

Abstract
As the title suggests, this study will analyze the controversial issue of a witness' legal assistance. The term "controversial" is used due to the fact that in the Criminal Procedure Code there is no mention of judicial assistance for a witness, only that for the defendant, injured party, civil party and the civil responsible party. Despite this lack of regulation, the Romanian Constitution and European Union legislation introduce the principle to a fair trial according to which any person involved has the right to be legally assisted. The article will begin with a short presentation of what the quality of a witness entails and what does legal assistance mean. Further on into the study, it will be demonstrated beyond any doubt that a witness can very easily become a defendant, and without proper legal assistance the fundamental principles of law can be broken. A problem can also be identified if one considers the fact that a defendant does not have to declare facts which might incriminate him, whereas the witness has to declare all that he knows, and thus he can incriminate himself. All these issues shall be dealt with in this study, as well as some propositions of lege feranda because there may be a growing need for a more rigorous regulation of this issue.

Keywords: *assistance of witness, Criminal Procedure Code, defendant, perjury, equitable trial*

Introduction

Judicial assistance of a witness, despite not being regulated in the Criminal Procedure Code, is an issue that can arise anytime during a criminal trial, thus it needs to be dealt with. According to the Romania's Constitution, in article 21 and to the European Union's legislation, in article 6 of the European Convention of Human Rights, all people are entitled to a fair trial, which entails being legally assisted. Despite regulating the right to a fair trial of any citizen, a few article further the Constitution regulates the right to legal assistance, in article 24, but it specifies that the parties of the trial have this right.

An interpretation of the word "parties" is in order, due to the fact that the Criminal Procedure Code includes in this category the defendant, the injured party, the civil and the civil responsible parties. Lato sensu, the witness should be included because he can become a defendant, if he declares anything that is not true or that could incriminate himself.

Apart from the Constitution, and the European legislation, there is also the law (51/1995) which regulates the legal profession, in which it is stipulated that a lawyer should represent the legal interests of any person and the client is used, without exemplifying any specific qualities.

As mentioned above, any person has the right to a fair trial. On a close analyses of this statement, we can and should understand that not only the parties, as defined in the Criminal Procedure Code, have this right and implicitly the right to legal assistance, but also the witness, the expert and other people who are involved in the criminal trial.

The Criminal Procedure Code outlines the cases in which legal assistance is mandatory, all of them include the defendant, the other parties having the right to choose a lawyer, or if they cannot afford it, one will be provided if requested. The problem encountered is that a witness must declare everything he knows, whereas the defendant declares only what he considers only what he considers to be necessary, and cannot incriminate himself through his declarations. By not having a lawyer

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present, a witness can declare facts that may incriminate him, or he may perjure himself and thus quickly become a defendant. Legal assistance is needed in order to insure that his legal rights and liberties are protected.

Before a witness is questioned the criminal judicial body informs him about the object of the cause and he is presented the facts that must be proved through his testimony and he is told that he must declare everything he knows. What is not told to him is that he can have a lawyer present at any time, chosen or appointed for him. Thus, the witness may declare a fact that might incriminate him, becoming a defendant, and not being able to invoke a breach of procedure, his testimony being admissible in court against him.

This situation should be specifically regulated, the right to a lawyer should be made known to the witness so that his rights and liberties will not be breached and the principles of a fair trial and of finding of the truth will be upheld.

Legal assistance.

Any person implicated in the criminal trial can provide his own defense, but legal assistance can also be provided. By legal assistance we understand the support given by lawyers to their clients, including advice, clarifications and interventions, as specialists in the domain.[1] It is regulated in the Criminal Procedure Code, in articles 6, 171, 172 and 173.

According to article 6 of the Criminal Procedure Code, the right to defense is guaranteed to the accused person, to the defendant and to the other parties all throughout the criminal trial.

During the criminal trial, the judicial bodies must ensure the parties' full exertion of their procedural rights, under the circumstances stipulated by the law and must administrate the evidence necessary for defense.

The judicial bodies must inform the accused person or the defendant, immediately and before hearing, of the deed of which he is held responsible and of its judicial status, and must ensure the preparation and exertion of his/ her defense. Any party is entitled to assistance by defender during the criminal trial.

The judicial bodies must inform the accused person or the defendant, before his/ her first statement, on his/ her right to be assisted by a defender; this will be recorded in the official report of the hearing. Under the circumstances and in the cases stipulated by the law, the judicial bodies must provide judicial assistance for the defendant, if the latter has not chosen a defender.[2]

Due to the fact that legal assistance is given by lawyers, and only by them, it was also defined as "technical assistance" by some specialists in the field.[3] There are two types of legal assistance: voluntary or mandatory.

Voluntary assistance constitutes the rule[4] and it means that the parties can choose whether or not to be assisted by a lawyer. The defendant has the right to be assisted by a lawyer during the whole criminal trial, during the criminal investigation and the actual judgment. Previous regulation did not oblige the criminal judicial body to inform the defendant of his right to be assisted. Actual regulation introduced the rule that the defendant should be informed, but it mentions nothing about the witness.

A legal assistance contract is signed between the lawyer and the client, and a fee is agreed upon by the two. If a party wishes to hire a lawyer, the court can give a continuance so that one can be chosen or appointed.

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[1] O. Stoica, "Rolul avocatului în realizarea dreptului de apărare a cetățenilor", R.R.D. nr. 3/1972, pg. 111 – 112.

[2] Article 6 of the Criminal Procedure Code.

[3] G. Leone, "Dritto procesuale penale", ed. VII, Neapole, 1968, p. 204.

[4] Ion Neagu, „Tratat de procedură penală. Partea generală.", Bucureşti, 2008, p. 237.

Some categories of people (those stipulated in law 25/1990) can have free legal assistance, and the person can choose the advocate, contrary to other legislation that stipulates that those who can have free legal assistance must accept the lawyer who is appointed to them.[5]

Apart from voluntary legal assistance, there is also mandatory assistance, stipulated in the Criminal Procedure Code. This type of assistance applies only for the defendant, and the criminal judicial body is mandated to provide assistance if he cannot afford to. Not being provided with legal assistance is a breach of procedural regulations and all the acts drawn up can be annulled.

According to article 171, the accused person or defendant has the right to be assisted by a defender all throughout the criminal investigation and the trial, and the judicial bodies must inform him/her of this right.

Judicial assistance is obligatory when the accused person or defendant is a juvenile, military in service, military with reduced service, called-up reservist, student of a military educational institute, held in a re-education center or in a medical-educational unit, when arrested in another case, or when the criminal investigation body or the court appreciate that the accused person or defendant could not defend himself/herself, as well as in other cases stipulated by the law. During the trial, judicial assistance is obligatory, also in the cases in which the law provides for the offence committed life detention or imprisonment for 5 years or more. When judicial assistance is obligatory, if the defendant has not chosen a defender, measures are taken for appointing one ex officio.

When judicial assistance is obligatory, if the chosen defender does not appear, without reason, at two consecutive summons, according to the case, at the date established for an action of criminal investigation or at the date settled for trial, thus creating difficulties for the development and solution of the criminal trial, the judicial body appoints an ex officio defender to replace the chosen one, granting him/her the necessary time to prepare the defense, which may not be shorter than 3 days, except the solution of requests regarding preventive arrest, when the due time may not be shorter than 24 hours.

The delegation of the ex officio defender ceases once the chosen defender appears. If the defender is absent from the trial and cannot be replaced, the case is postponed.

When judicial assistance is obligatory, the criminal investigation body will ensure the presence of the defender at the defendant's hearing. In case the defender of the accused person or defendant is present at the performance of a criminal investigation act, this will be mentioned and the act is also signed by the defender. The arrested accused person or defendant has the right to get in touch with the defender, the confidentiality of talks being ensured.

Article 173 stipulates legal assistance for other parties, assistance which is not mandatory. The defender of the victim, of the civil party and of the party bearing the civil responsibility has the right to draw up requests and statements. During the trial, the defender exerts the rights of the party that he/she assists.

When the court considers that, for certain reasons, the victim, the civil party or the party bearing the civil responsibility cannot handle their own defense, it orders, ex officio or upon request, enforcement of the measures for appointing a defendant.

Statements of the witnesses as means of evidence

The first provisions that deal with the witness' rights and liberties, but also with his/her obligations are from article 78 to article 86. Article 78 offer a definition of what a witness is: the person who knows of any fact that may lead to finding the truth in the criminal trial.

There are people who cannot be witnesses and who may not declare what they know if they prefer it so. The person obliged to keep a professional secret cannot be heard as witness in relation to facts and circumstances that he/she learned about while exerting his/her profession, without the

[5] W.J. Ganhof van der Meersch, "Convention europeene de droits de l'homme", 1983, p.148.

approval of the person or institution. Also, the accused person or defendant's spouse and close relatives are not obliged to testify as witnesses.

The quality of witness comes before that of defender, in relation with the facts and circumstances that a person learned about before becoming defender or representative of one of the parties. Also, according to article 82 the injured person may be heard as witness, if he/she does not constitute himself/herself as a civil party and will not take part in the trial as victim.

Also, the Criminal Procedure Code stipulates the possibility for a juvenile to be heard as a witness. Up to 14 years old, his hearing will be conducted in front of one of his parents or of his tutor.

The witness is obliged to come at the place and on the day and hour mentioned in the summons and has the duty to declare everything he or she knows in relation to the deeds of the case. The witness is first asked about his name, surname, age, address and occupation.

After the identity of the witness is confirmed he/she will be asked whether he/she is a spouse or relative of any of the parties and about his/her relations with the latter, as well as whether he/she has suffered any damage as a result of the offence, so that the risk of any prejudice against the defendant is eliminated.

Before being heard, the witness will take the following oath: “I swear to tell the truth and not to hide anything that I know. So help me God!” The witnesses who, from reasons of conscience or religion, do not take the oath, will utter the following formulation in front of the court: "I oblige myself to tell the truth and not to hide anything that I know."[6]

After taking the oath the witness will be informed that, by not telling the truth, he commits the offence of false testimony. The witness is informed about the object of the case and the deeds and circumstances for whose proof he/she was proposed as witness, being asked to declare everything he/she knows in relation to them.

After the witness has given his statement, he may be asked questions connected to the deeds and circumstances that need to be acknowledged in the case, related to the parties' person, as well as to the way in which he learnt about the things declared.

If there is evidence or solid indications that by declaring the real identity of the witness or his/her place of domicile or residence the life, corporal integrity or freedom of the latter or of another person might be endangered, the witness may be given permission not to declare this information, being attributed a different identity under which to appear in front of the judicial body.

This measure may be disposed by the prosecutor during criminal prosecution and by the court during trial, upon motivated request from the prosecutor, witness or any other entitled person.

The information about the real identity of the witness is mentioned in an official report that will be kept at the prosecutor’s office which performed or supervised the performing of the criminal investigation or, according to the case, at the court, in a special place, in a sealed envelope, in conditions of maxim security.

The official report will be signed by the person who handed the request, as well as by the one who disposed the measure. The documents concerning the real identity of the witness shall be presented to the prosecutor or, according to the case, to the panel of judges, in conditions of strict confidentiality. Other persons who may be heard as witnesses that were attributed another identity are undercover investigators.

According to the Criminal Procedure Code there are special modalities of hearing the witnesses who are protected. If there are appropriate technical means, the prosecutor or, according to the case, the court may allow the witness to be heard without actually being present at the place where the criminal investigation body is or in the room where the judgment takes place, through technical means.

[6] Criminal Procedure Code, article 85.

Recording the witness' statement will be performed in the presence of the prosecutor. The witnesses may be heard through a television network, with the image and voice distorted so as not to be recognized. The statements of the witnesses heard are recorded through technical video and audio means and are rendered entirely in written form.

Apart from his obligations of being present on the day decided by the criminal investigation body and to declare what he knows related to the facts and circumstances that he witnessed, he has also rights: according to article 68 Criminal procedure Code he is entitled to protection against violence and threats like any other person who gives statements during the trial, the right to ask that his statement (given so that he considers it to be accurate) is recorded and to refuse to answer any questions which are unrelated to the cause, and he has proprietary rights, the right to be awarded legal expenses, travel and boarding expenses and the income which he lost from his workplace because he had to be present in court.

Legal assistance of a witness during the criminal trial

As presented above, legal assistance is stipulated for the parties of the criminal trial, and especially for the defendant there are cases of mandatory assistance. Introducing a norm which would regulate legal assistance for a witness is necessary so that the fundamental principles of the criminal trial are upheld.

Article 81 of the Criminal Procedure Code contain the provisions according to which a juvenile can be a witness in a criminal trial, if he is up to 14 years old, but his hearing will be conducted in front of his parents, tutor or a person to whom he/she has been given for upbringing and education.

There are two problems which can arouse from this legal disposition. On the one hand, there is no mention of a lawyer in this article. The parents, the tutor or the person to whom the education of the juvenile has been given are sufficient to guaranty the rights and liberties of the juvenile because they do not have the necessary judicial training.

A lawyer is necessary when a juvenile is questioned, especially taking into consideration the fact that the people involved are emotionally involved and professionally unprepared to protect the interests and safety of the juvenile involved in the criminal trial.

On the other hand, only juveniles who are up to 14 years old can be questioned with the obligation of the parents to be present. There is no mention of juveniles who 14 and older. According to the Penal Code, minors who are between 14 and 16 is presumed to be responsible, but it is necessary to prove this through evidence before he can be held responsible for his actions.

If defendants who are minors between 14 and 16 years old need to be proven responsible for their actions, then why should witnesses of this age be considered to be responsible for what they are declaring? A lawyer needs to be present to these questionings so that the accuracy of these declarations be established correctly and so that these minors are not influenced in any way.

Juveniles' mental stability can be altered by what they have seen, they can be frightened and confused and they certainly do not have any knowledge of legal regulations, they cannot know what are their rights and liberties, therefor they should have somebody qualified to represent their interests.

The Criminal Procedure Code stipulates confrontation as a method to verify the veracity of statements. Articles 87 and 88 state that if there are contradictions between the declarations of persons heard in the same case and if it is necessary for the clarification of the case, the respective persons are confronted, the persons confronted are heard on the deeds and circumstances in relation to which the previous declarations contradict each other. The criminal investigation body or the court may approve that the confronted persons ask one another questions. The declarations made by the confronted persons are written down in an official report.

These confrontations can be emotionally unstable for all the participants involved, they can be accused of offences and so the presence of a lawyer is highly necessary to keep the defendants,

injured and civil parties and witnesses, especially if they are minors, well aware of their rights and obligations.

Mandatory legal assistance is stipulated in article 171 of the Criminal Procedure Code and is applicable only to defendants. There is a disposition that states that if a defendant is a minor then the legal assistance is mandatory. If legal assistance is mandatory for a defendant who is a juvenile, then a witness who is a juvenile should be granted the same procedural protection. Legal assistance should be mandatory for all juveniles, without distinction to whether they are defendants, injured or civil parties or witnesses.

Another issue that should be discussed is that during the criminal investigation or during the judgment, a juvenile witness can become a defendant in the current trial or in a different one by declaring something that is inaccurate or by not declaring everything he/she knows.

After identifying the witness, it is made known to him that if he does not declare everything he knows or what he declares is not the truth, than he commits the offence of false testimony, or perjury.

According to the Criminal Code, the offence of false testimony is the act of a witness who, in a criminal, civil or disciplinary cause or in any other cause in which witnesses are heard, makes false statements, or does not tell everything he/she knows regarding the essential circumstances concerning which he/she was questioned, shall be punished by strict imprisonment from one to 5 years.

Apart from the offence of perjury, a witness, due to the fact that he/she has to declare everything he/she knows, may reveal facts or circumstances that can incriminate him, whereas the defendant is not bound by this obligation.

If, in light of his testimony, a witness incriminates himself or commits perjury then he becomes a defendant and has the right to be assisted by a lawyer. The witness can become a defendant in the criminal trial in which he was declaring or in a separate one.

Through his statements a witness can become an author, accomplice, instigator or coauthor. If the penalty is higher than 5 years than legal assistance is mandatory.

Also if the witness who becomes a defendant is a minor, then the legal assistance is mandatory no matter of the punishment. In the case when legal assistance becomes mandatory, any statement given without this assistance cannot be used in the trial due to procedural breaches, because all statements must be signed by the advocate as well as the defendant.

Another reason for which legal assistance should be accessible for witnesses is article 6 of the European Convention on Human Rights which states that in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

The minimum rights guaranteed are also outlined: to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; to have adequate time and the facilities for the preparation of his defense; to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

This article refers to a person against whom a criminal charge exists, the defendant, but it has proven that a witness can become such a person through his statements, thus legal assistance should be available and also permitted to the witness, this right should be recognized for all those involved not only the parties.

It can be argued that the presence of an advocate of the witness is most needed during the criminal investigation, due to the fact that this phase is not public and it may present a danger to the rights of the witness, he can incriminate himself, he can give a less than objective testimony due to error, or under the influence of the criminal investigation bodies.

This provision does not preclude, however, the witness' right to have legal assistance of a lawyer throughout the criminal process. Given the fact that all processes are presumed to be public, the lawyer shall be entitled to attend the public processes in which his client as a witness makes statements, obviously, having procedural right.

Despite being able to be present, in theory, at the actual trial the advocate cannot intervene in favor of his client, cannot speak on behalf of the witness because a witness' testimony is given, exclusively, in consideration of his person. The testimony is important to the trial because it is a personal recollection of the facts and circumstances which occurred. During the trial the witness can incriminate himself and he can commit perjury, if he does not have the legal assistance of an advocate, who is qualified and who knows the law.

Despite the fact that a witness does not have the duty to inform the criminal investigation body of his own initiative, the quality of a witness is gained once he/she is called to give a statement, if the criminal investigation body discovers that the witness had knowledge of a crime having been committed and did not inform the proper authorities than the witness may be accused of committing the crimes regulated in articles 170 and 262 of the Criminal Code: non-denunciation (the act of non-denunciating the commission of any of the offences provided in art. 155-163, 165, 166^1, and 167 shall be punished by strict imprisonment from 2 to 7 years.) and the non-denunciation of certain offences (the act of not denunciating the commission of any of the offences provided in art. 174, 175, 176, 211, 212, 215^1, 217, 218 and 276 shall be punished by strict imprisonment from 3 months to 3 years).

According to the New Criminal Procedure Code offers the witness a little more protection than the present one. When a person gives statements his/her health should be taken into consideration. Concerning this aspect, the New Criminal Procedure Code stipulates that if during a hearing of a person, he/she accuses excessive tiredness or the symptoms of a disease which affects his/her physical or psychological capacity to participate at the hearing, then the judicial body must put a stop to the hearing and takes measures so that the person is consulted by a medic.

The principle of loyalty of administration of evidence is also outlined in the New Criminal Procedure Code. Therefore, it is forbidden to use violence, threatening or other means of constraint as well as promises in the scope of obtaining evidence (in this case a statement from a witness).

Tactics or methods of hearing the witnesses or parties which may affect a person's ability to remember or to consciously and voluntarily relate the facts, the interdiction applies even when the person gives his/her consent to be heard using such a method.

Also, it is forbidden for the judicial bodies or other persons who act on their behalf to provoke a witness to commit or to continue to commit a criminal act in order to obtain new evidence. The statements which have been obtained through torture cannot be used during the criminal trial.

Article 118 is introduced in the New Criminal Procedure Code, as an element of novelty and states that a witness' statement cannot be used against him/her in a criminal trial against him/her.

The European law also protects the witnesses through articles that regulate the right to a fair trial, the right to be protected against torture, inhumane treatments or unlawful prosecution.

There have also been opinions which state that a witness should not be legally assisted during the prosecution or the judgment. Such is the opinion of the prosecution office of the High Court, according to which a witness does not have to be assisted due to the fact that he is not a party in the criminal process, and if a new criminal trial begins against the witness, because of his/her statements, then the witness, as a defendant is entitled to legal assistance.

Conclusions

The witness is an important factor in determining the outcome of a trial. His/her statements can shed light on the events which took place and can assist the courts in determine whether a crime has been committed and whether the defendant is the one at blame or not.

The European Convention of Human Rights guarantees the right to a fair trial. Legal assistance plays a big role in a trial. Despite the fact that the witness is not a party in a trial, this does not entail that he/she is not entitled to be assisted.

Through his/her statements, a witness may commit perjury and so a new criminal trial may begin against him/her or he/she may incriminate him/herself and so he/she may be included in the existing trial as a coauthor, instigator or accomplice.

There are opinions for and against the legal assistance of a witness in a criminal trial. The main reasons against are the fact that the witness is not a party in the trial and that, if he/she commits perjury and a new trial begins then the witness beneficiates of all the rights the defendant has.

The New Criminal Procedure Code includes some dispositions which offer the witness a few more rights: statements given by him/her cannot be used against them, they are protected against torture or any method which may affect their ability to correctly remember the events.

To conclude, despite the fact that the witness is not a party in the criminal trial, he/she should be legally assisted during the criminal trial, in order to insure the protection of the right to a fair trial.

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PROCEDURAL IMPLICATIONS OF THE ILLEGAL ADMINISTRATION OF EVIDENCE DURING A CRIMINAL TRIAL

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Abstract
As the title suggests, the purpose of this study is to analyze the procedural implications of the illegal administration of evidence. The present paper begins with a short presentation of criminal trial probation, and continues with the analyses of the conditions with which a proof has to comply in order for it to be administered in the trial, as well as the analyses of the procedures of administration themselves. Another part of the study deals with the principles that should govern the administration of evidence during the criminal trial, respectively the principle of legality and loyalty (regulated in article 64 respectively 68 of the Criminal Procedure Code) as well as the European Court of Human Rights regulations. In spite of the weak criminal framework that exists regarding the illegal administration of evidence, the outcome of a trial can be radically changed based on how the evidence is administered. Therefore, this study also focuses on the consequences of the illegal administration of evidence in the criminal trial, which will be dealt with by analyzing which sanction should be applied, if any exists. The study will not be based solely on the normative guidelines, but also on the judicial practice contained in decisions, which exist in this criminal framework, given by various courts in the country. Last, but not least, this study shall present the legal changes which will occur once the new Criminal Procedure Code shall come into force.

Keywords: *administration of evidence, criminal trial probation, legality and loyalty principles, Criminal Procedure Code, criminal framework*

Introduction

One cannot imagine a criminal trial without evidence. In doctrine it has been defined as being the element with informative relevance over all aspects of the criminal cause.[1] Articles 62 to 135 of title III of the Criminal Procedure Code regulate the means of evidence. The outcome of a trial relies on the legality of illegality of the evidence administered.

According to article 62 of the Criminal Procedure Code in order to find out the truth, the criminal investigation body and the court must clarify the case under all its aspects, on the basis of evidence.

Article 63 states that any fact that leads to the acknowledgement of the existence or non-existence of an offence, to the identification of the person who committed it and to the discovery of the circumstances necessary for the fair resolution of the case is considered evidence.

The value of the evidence is not established in advance. The criminal investigation body and the court appreciate each piece of evidence according to their own convictions, formed after examining all the evidence administrated, and using their own conscience as guide.

The means of evidence are outlined in article 64, these are: the testimonies of the accused person or the defendant, the testimonies of the victim, of the civil party or of the party who bears the civil responsibility, the testimonies of the witnesses, the writings, the audio or video recordings, the photos, the probative material means, the technical-scientific findings, the forensic findings and the expertise.

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[1] Dongoroz I, „Explicații teoretice ale Codului de procedură penală român", ed II, C.H. Beck, 2003, București,p. 168.

Beginning with this article the illegality of evidence is brought into discussion and it is clearly stipulated that pieces of evidence that were illegally obtained may not be used in the course of the criminal trial.

Before regulating each mean of evidence individually, the Criminal Procedure Code regulates the problems of administrating the evidence, the right to prove the inconsistency of evidence, the conclusiveness and usefulness of evidence and the interdiction of means of constraint. The task of administrating the evidence during the criminal trial belongs to the criminal investigation body and to the court.

Upon request from the criminal investigation body or the court, any person who knows of a piece of evidence or holds a means of evidence must reveal or present it. The accused person or the defendant benefits from the presumption of evidence and is not obliged to prove his/her innocence.

In case there is evidence for his/her guilt, the accused person or the defendant has the right to prove their inconsistency.

During the criminal trial the parties may propose pieces of evidence and may request their administration. The request for administration of a piece of evidence cannot be rejected, if the respective piece of evidence is conclusive and useful.

Approval or rejection of requests shall be motivated. It is forbidden to use violence, threats or any other constraints, as well as promises or encouragement with the purpose of obtaining evidence. Also, it is forbidden to force a person to commit or to continue committing an offence with the purpose of obtaining evidence.

European Dispositions Regarding the Illegality of Evidence

With the European Convention of Human Rights a series of problems regarding the legality of evidence have arisen. Illegally obtained evidence consists of evidence obtained in violation of a person's human rights guaranteed by the European Convention of Human Rights. It will usually be in breach of their right to respect for private life under article 8 ECHR or in violation of the prohibition on torture, inhuman or degrading treatment or punishment guaranteed by article 3 ECHR.

Article 6 European Convention of Human Rights requires a presumption of innocence on the accused. To prove its case, the prosecution must obtain evidence, and not only one piece of evidence, but as many as possible in order to be able to corroborate them.

The prosecution may resort to improper means to gather evidence in support of their position especially if obtaining evidence in conventional ways proves unfruitful. Evidence obtained in this matter cannot be accepted so that the right to a fair trial and the principle of finding out the truth.

The exercise of the courts discretion to exclude evidence has not been drastically altered as a result of the incorporation of the European Convention of Human Rights into domestic law by way of the Human Rights Act 1998.

The European Court of Human Rights confirmed that real evidence obtained in breach of the accused's right to private life guaranteed by article 8 ECHR such as through covertly obtained video or audio recordings remains admissible and does not violate the accused's right to a fair trial guaranteed by article 6 ECHR as the right to private life is not an absolute right.

The fact that their decisions are in accordance with article 3 ECHR is guaranteed by the courts which states that torture and inhuman or degrading treatment or punishment are strictly prohibited.

The guarantee is given due to the fact that the right against torture is an absolute right. It acts as a means to ensure conformity with the accused's fundamental right against self-incrimination and is also a means of deterrence, to ensure that torturers will never be rewarded for their improprieties.

According to article 148 of the Romanian Constitution, the European legislation has to be applied, thus the right to a fair trial, the right to respect of private life and article 3 against torture need to be upheld during a Romanian criminal trial.

Analysis of the Means of Evidence

In order to determine what the conditions for the legality of evidence are, an analysis of each means of evidence is required. The Criminal Procedure Code begins with article 69 with the statements of the accused person or the defendant.

According to this article the statements given by the accused person or defendant during the criminal trial may lead to the truth only to the extent to which they are corroborated with facts and circumstances resulted from all the evidence in the case.

Article 71 regulates the modality of hearing, thus every accused person or defendant is heard separately. During the criminal investigation, if there are several accused persons or defendants, each of them is heard without the others attending.

The accused person or defendant is first left to declare everything he/she knows in relation with the case. The hearing of the accused person or defendant cannot begin by reading or reminding the statements that the latter has previously given in relation with the case. The accused person or defendant cannot present or read a previously written statement, but he/ she may use notes for details that are difficult to remember.

Another means of evidence are the statements of the victim, the civil party and the party bearing the civil responsibility. The hearing of the victim, of the civil party and of the party bearing the civil responsibility is conducted according to the provisions regarding the hearing of the accused person or defendant, enforced accordingly. (article 77)

Witnesses' statements can prove to be a crucial means of evidence. When there are contradictions between the declarations of the persons heard in the same case, the respective persons are confronted, if this is necessary for the clarification of the case. These statements, despite being a crucial part in finding the truth need to be corroborated with other evidence.

According to article 89 documents may serve as means of evidence if they contain reference of deeds or circumstances that may contribute to revealing the truth. The forms in which any statement is to be recorded, at the stage of criminal prosecution, shall be recorded and numbered beforehand, as forms with a special status, and after filling in, will be introduced in the case file.

One of the most controversial means of evidence is audio or video interceptions and recordings. Article 91 regulates conditions and cases of interception and recording of conversations or communications, the bodies performing interception and recording, certification of recordings, image recordings and checking the means of evidence.

These means of evidence may be technically examined at the request of the prosecutor, of the parties or ex officio. The recordings presented by the parties, may serve as means of evidence, if they are not forbidden by the law.

The interceptions and recordings on magnetic tape or on any other type of material of certain conversations or communications shall be performed with motivated authorization from the court, upon prosecutor's request, in the cases and under the conditions stipulated by the law, if there are substantial data or indications regarding the preparation or commitment of an offence that is investigated ex officio, and the interception and recording are mandatory for revealing the truth.

The authorization is given by the president of the court that would be competent to judge the case at first instance, in the council room. The interception and recording of conversations are mandatory for revealing the truth, when the establishment of the situation de facto or the identification of the perpetrator cannot be accomplished on the basis of other evidence.

The authorization of interception and recording of conversations or communications is done through motivated closing, which shall comprise: concrete indications and facts that justify the measure; reasons why the measure is mandatory for discovering the truth; the person, the means of communication or the place subject to supervision; the period for which the interception and recording are authorized.

The Criminal Procedure Code contains regulations of material probative evidence. The objects that contain or bear a trace of the deed committed, as well as any other objects that may serve

to reveal the truth may serve as material means of evidence. The objects that were used or destined to be used for committing an offence, as well as objects that are the result of an offence are also material means of evidence. (article 94 and 95).

Technical – scientific and legal – medical acknowledgments and expertise are also considered to be means of evidence. Article 112 states that when there is the danger that some means of evidence might disappear or some states of facts might change, and the immediate clarification of deeds and circumstances related to the case is necessary, the criminal investigation body may resort to the knowledge of a specialist or technician, ordering ex officio or upon request a technical-scientific acknowledgment.

The technical-scientific acknowledgment is usually performed by specialists or technicians working for or affiliated to the institution to which the criminal investigation body belongs. It may also be performed by specialists or technicians working for other bodies.

Article 115 states that the operations and conclusions of the technical-scientific and forensic acknowledgment are written down in an official report. The criminal investigation body or the court, ex officio or at the request of any of the parties, if they consider that the technical-scientific or forensic report is not complete or that its conclusions are not accurate, has it redone or orders an expertise.

When redoing or completion of the technical-scientific or forensic acknowledgment is ordered by the court, the report is sent to the prosecutor, in order for the latter to take measures for its completion or redoing.

Articles 116 to 127 regulate expertise as a means of evidence. When, for the clarification of certain deeds and circumstances of the case, in order to find out the truth, the knowledge of an expert is necessary, the criminal investigation body or the court order, ex officio or upon request, an expertise.

When the criminal investigation body or the instance discover, ex officio or upon request, that the expertise is not complete, it orders an expertise supplement, either to the same expert or to another.

Also, when it is considered necessary, the expert is asked for supplementary written explanations or is called to give verbal explanations in relation with the expertise report. In this case, the hearing is conducted according to the provisions regarding the witnesses' hearing.

Supplementary written clarifications may also be requested from the forensic service, the criminological expertise laboratory or the specialized institute that completed the expertise. If the criminal investigation body or the court has doubts about the accuracy of the expertise report conclusions, they order a new expertise.

Field investigation and reconstruction play an important role in the criminal process. Article 129 stipulates that field investigation is done when it is necessary to establish the situation of the place where the offence was committed to find out and settle the traces of the offence, to establish the position and condition of the material means of evidence, and the circumstances of the offence.

The criminal investigation body performs the above mentioned investigation in the presence of assistant witnesses, except for the case when this is impossible. The investigation is performed in the presence of the parties, when this is necessary. The parties' failure to come after having been informed does not impede the investigation.

The accused person or defendant who is held or arrested, if he/she cannot be brought to the investigation place, is informed by the criminal investigation body that he/she has the right to be represented and is ensured, if he/she requires it, representation. The court performs the field investigation after summoning the parties, in the presence of the prosecutor, when the latter's attendance in the trial is obligatory.

The criminal investigation body or the court may forbid the persons who are present or come to the place of investigation to communicate between them or with other persons, or to leave before the investigation is over.

The criminal investigation body or the court, if they find it necessary for checking on and clarification of some data, may perform a total or partial field reconstruction of the way and conditions in which the deed was committed.

If the procuring of evidence is proving to be difficult for the judicial body it has at his disposal the rogatory commission and delegation. When a criminal investigation body or the court cannot hear a witness, perform a field investigation, take away objects or perform any other procedural act, they may address another criminal investigation body or another court, who have the possibility to perform them.

Initiating the criminal action, taking preventive measures, approving the evidence gathering procedure, as well as ordering the other procedural acts or measures are not the object of the rogatory commission. The rogatory commission may only address a body or a court that are equal in rank. (article 132)

When the rogatory commission was ordered by the court, the parties may ask questions that will be communicated to the court which is to form the rogatory commission. At the same time, any of the parties may ask to be summoned when the rogatory commission is formed. When the defendant is under arrest, the court that will form the rogatory commission appoints an ex officio defender who will represent the defendant.

The criminal investigation body or the court may order, the performance of a procedural act by delegation as well. Only a hierarchically inferior body or court may be delegated. The dispositions regarding the rogatory commission are enforced accordingly in the case of delegation.

Analysis of Modifications in Romanian Legislation

With time the legislation in the matter of evidence has changed. Also the new Criminal Procedure Code brings about numerous modifications. The Law no. 202/2010 has modified article 91^6 regarding the verification of evidence.

If in the previous legislation these means of evidence could only be subject to a technical expertise, in the present, these can be the object of any kind of expertise destined to assure their conformity with reality.

Furthermore, by eliminating the restriction referring to the possibility of a technical expertise of the means of evidence and only this, the possibility of a complex evaluation of the information obtained through audio or video recordings arouse. [2]

The Law no. 135/2010 (the New Criminal Procedure Code) also introduces a few novelties in this domain.

The first novelty appears with the definition of means of evidence. This definition has not been changed much, but the necessity of the evidence contributing to the finding of the truth is outlined, as a general principle of the criminal trial.

Apart from the means of evidence regulated in the present Criminal Procedure Code, the legislator has introduced any other means of evidence which is not contrary to the law. Photographs have also been introduced as a specific means of evidence.

Article 98 of the New Criminal Procedural Code introduces a whole new topic, respectively the object of probation, this being the existence of a crime and it having been committed by the defendant; the deeds regarding civil responsibility, when a civil party exists; the facts and the factual circumstances on which the applicability of law is based; any circumstance necessary for the just solving of the cause.

The burden of proof is also modified. Unlike the present legislation which sets that the burden of proof pertains to the judicial body and the court in article 99 of the New C.P.C. it is clearly stated that the burden of proof pertains to the prosecutor, in a criminal case, and in a civil one to the civil

[2] Zarafiu Andrei, "Legea nr. 202/2010. Procedură penală. Comentarii şi soluţii.", ed. C.H. Beck, Bucharest, 2011, p.45.

part or to the prosecutor who exerts the civil action in the case when the injured party is without the capacity to exercise his/her rights of his capacity is diminished.

Also, it is stated that the suspect or the accused which is innocent until proven guilty, not being obliged to prove his innocence, also has the right not to contribute to his own prosecution. During the criminal trial the injured party, the suspect and the other parties have the right to propose to the judicial bodies the administration of evidence.

During the prosecution, the criminal investigation body gathers and administers evidence both in favor and against the suspect or accused, ex officio or at request. During the judgment, the court administers evidence at the request of the prosecutor, of the injured party or the other parties and, subsidiary, ex officio, when it considers it necessary for its own conviction.

The request regarding the administration of evidence formulated during the prosecution or during the judgment of the persons entitled is accepted or rejected by the judicial bodies.

The judicial bodies can reject such a request when: the means of evidence is not relevant; when the means of evidence already administered are considered sufficient; when the means of evidence is not necessary because the fact is notorious; the evidence is impossible to obtain, the request has been formulated by a person who is not entitled or the administration of evidence is contrary to the law.

The principle of loyalty of administration of evidence is also outlined in the New Criminal Procedure Code. Therefore, it is forbidden to use violence, threatening or other means of constraint as well as promises in the scope of obtaining evidence.

Tactics or methods of hearing the witnesses or parties which may affect a person's ability to remember or to consciously and voluntarily relate the facts, the interdiction applies even when the person gives his/her consent to be heard using such a method.

Also, it is forbidden for the judicial bodies or other persons who act on their behalf to provoke a person to commit or to continue to commit a criminal act in order to obtain new evidence.

The evidence which has been obtained through torture, as well as the evidence derived from this cannot be used during the criminal trial. Also, evidence which has been obtained illegally cannot be used in the criminal trial.

In exceptional cases, these dispositions do not apply if the means of evidence presents imperfections or procedural irregularities which do not produce a maleficence which cannot be removed without the exclusion of the evidence.

The derived evidence is excluded if it has been obtained directly from the illegal obtained evidence and could not be obtained in another way.

An article on the appreciation of evidence has also been introduced. The evidence does not a predefined value and is subject to the free appreciation of the judicial bodies after having evaluated all the evidence administered in the case.

In taking a decision regarding the existence of the crime and the guilt of the defendant the court decides with motivation, making references to all the evidence administered. A conviction is given only when the court is convinced beyond reasonable doubt. The decision of the court cannot be based solely on the testimony of the undercover agent or on the statements of the protected witnesses.

When a person gives statements his/her health should be taken into consideration. Concerning this aspect, the New Criminal Procedure Code stipulates that if during a hearing of a person, he/she accuses excessive tiredness or the symptoms of a disease which affects his/her physical or psychological capacity to participate at the hearing, then the judicial body must put a stop to the hearing and takes measures so that the person is consulted by a medic.

A series of incriminations are set in order to exclude the possibility of using of evidence obtained illegally. Thus, one can find in Title IV of the special part of the new Criminal Code the abusive investigation (the promise, threats or violence against a prosecuted or trailed person in a case made by a prosecuting body, a prosecutor or a judge in order to determine that person to make a statement or not, to make a false testimony or to withdraw his testimony), the inhuman treatment of

the person (forcing a person to execute a penalty, security or educative measure in any other way than the one stipulated by law, forcing a person to degrading or inhuman treatment during the arrest, detention or the execution of a safety or educative measure or imprisonment), or torture (the act of the public officer who has an office which implies the exercise of the state authority, or of any other person who acts upon the instigation of or with express or tacit consent of a person, causing serious mental or physical sufferings to someone.). The New Criminal Procedure Code introduces elements of novelty which concern each means of evidence regarded individually. For example, articles have been introduced regarding the use of undercover investigators, supervised delivery, the identification of the number holder, the owner or the user of a telecommunication system or of an access point to an informatics system, the obtaining the list of the phone calls.

A disposition which has never even been mentioned in previous codes is included in the New Criminal Procedure Code is the photographing and the taking of the fingerprints of the suspect, the defendant or of other persons.

The judicial bodies may decide, that the suspect of defendant and other persons be photographed or fingerprinted, even without their consent, if there exists a suspicion that they have committed a crime, if they were present at the scene of the crime.

The judicial investigation body can authorize that a photograph of a person be made public, when this measure is necessary in order to establish his/her identity or, in other cases in which the publication of the photograph is important for the continuance of the criminal investigation in optimal conditions.

If it is necessary to identify the fingerprints which have left at the scene of the crime on certain objects or of the persons who can be put at the scene or who have a relation to the crime, the criminal investigation body may take the fingerprints of the persons who are supposed to have been in contact with those objects, respectively photographing those who are believed to have any relation to the crime or who have been present at the scene of the crime.

Also, as an element of novelty, exhumation is introduced as a means of evidence, in the category of expertise. Exhumation can be disposed by the prosecutor or by the court in order to establish the cause of death, to help identify the body or any other elements which are needed for solving the case. The exhumation is done in the presence of the judicial investigation body.

The New Procedural Code outlines the special surveillance techniques. These are: the interception of communications and discussions; the access to an informatics system; audio, video surveillance or photographing; location and tracking through technical means; obtaining the list of telephone conversations; retaining and searching of the mail; solicitation and obtaining of data regarding financial transactions; the use of undercover investigators; supervised delivery, the identification of the number holder, the owner or the user of a telecommunication system or of an access point to an informatics system, the obtaining the list of the phone calls.

As jurisprudence, there is the Decision of the High Court, no. 199 from the 18th of February 2010. In this decision the court ascertained that from the time when the biological evidence had been taken and upon their analyses three days had passed. Thus, the legal dispositions had been breached (art. 6 (a) of the Order no. 376 of 10 April 2006 of the Minister of Health and article 14 (3) of the Order no. 376 of 10 April 2006 of the Minister of Health).

These dispositions state that biological samples taken must be submitted for processing immediately, being accepted that, in exceptional cases, it is carried out in maximum 3 days and only on condition of being kept in a refrigerator at a temperature between 0 and 4 degrees Celsius.

The Court also noted that the prosecution had failed to prove the alleged emergency situations that had caused delays in the transportation and deposition of the biological samples, thus exceeding the time allowed by the legal norm which guarantees the keeping of the biological samples unaltered and which ensures the correct outcome of the final report. Furthermore, it was not proven by any evidence, that the biological samples collected from the accused were kept under conditions imposed by the said legal disposition.

Conclusions

The outcome of a criminal relies mainly on the relevance of the evidence administered. It is not sufficient to administer only one piece of evidence, no matter if it consists of a statement, writing or surveillance, but it has to be corroborated with other means. Only the admission of guilt of the defendant can be sufficient in a criminal trial.

Administration of evidence which has been obtained through a method which is contrary to the law is considered to be a breach of national as well as European law. As regards to European law article 3, 6 and 8 ECHR that guarantee the right to a fair trial, to one's private life and the right to be protected against torture.

In the present, but especially in the New Criminal Procedure Code, there are articles which contain regulations against the use of illegal obtained evidence. This kind of evidence cannot be used during a criminal trial, nor can any other evidence derived from those obtained illegally, if it cannot be proved that the respective evidence could be obtained by other method which is legal.

The prosecutor must administer evidence both in favor and against the accused, without prejudice. The defendant does not have the obligation to prove his own innocence, the burden of proof falls upon the judicial bodies.

There are two principles which should be taken into consideration when the judicial bodies want to administer evidence. The principle of legality presupposes only the administration of the means of evidence provided by law, under the conditions set by the Criminal Procedure Code, specialized legislation and the case law of the European Court of Human Rights.

The second principle is that of loyality which stipulates that use of violence, promising an illegal benefit, threatening with an unjust prejudice or using any other illegal constraining means for the purpose of gathering evidence are forbidden.

Also, any hearing methods or techniques that affect one's ability to remember or tell consciously and voluntarily the deeds that represent the object of the evidence shall not be used. Apart from respecting these two principles, general conditions of evidence cannot be drawn up due to the fact that every piece of evidence is unique both in content and in the method of how it is obtained. Therefore, the judicial bodies, in order to avoid any illegality, must, very attentively, analyze the conditions specific to each means of evidence.

To conclude, the illegal administration of evidence is and will continue to be severely sanctioned by the legislator. Excluding the evidence is a specific procedural sanction, applicable to the evidence administered by breaching the two principle presented above. A difference shall be made between this sanction and the annulment applied to most of the trial or procedural acts.

Excluding the evidence can be ordered if there is a substantial and significant infringement of a legal provision on administering the whole evidence which affects the whole outcome of the criminal trial.

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THE CRIMINAL LIABILITY OF CORPORATIONS – OVERVIEW ON RECENT CASE LAW OF THE ROMANIAN COURTS

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Abstract
Although the criminal liability of corporations is now consecrated in Romanian for more than five years, there is however some reticence in engaging the liability of such person. Nonetheless, in the past years, it can be noticed an emergence of the files where the problem of the criminal liability of corporations is raised. The purpose of this paper is to present the main issues from the Romanian case law in this field. Several topics are to be mainly discussed, such as the enforcement of criminal sanctions such as the winding-up or the diffusion of the decision, the application of precautionary measures and interim measures against corporations, the possibility to call a corporation in the criminal trial both as accused and as third party called liable for other person's acts etc. During this analysis, it can be noticed that the most common crimes perpetrated by corporations are related to employment issues, copyright, corruption, illegal drug trafficking etc. Therefore, the objectives pursued by the present study are to provide an approach on the most recent court decisions where criminal charges against corporations were carried out and to see how the relevant legal provisions were applied in these cases.

***Keywords**: criminal liability, corporations, sanctions, precautionary measures, interim measures*

Introduction

As mentioned in a previous study[1], in Romania, the criminal liability of corporations was first announced by the doctrine, recommended through an important number of applicable international documents until it (re)gained its place in the Romanian legislation in 2006, when Law no. 278/2006 for the modification of the Criminal Code and of other laws[2] was adopted. Until that moment, only the administrative liability of corporations could have been engaged.

The criminal liability of corporations therefore celebrated its first five years of life in the Romanian legislation. Like in the situation of any new institution, it is obvious that there are numerous problems raised by the case law in the field of the criminal liability of corporations. Although there are few decisions given by the Romanian courts so far, the issues that such decisions address start to create a framework of the most important matters raised by the "new" institution. Moreover, there are many other files currently being judged by the Romanian courts where the criminal liability of corporations is engaged. This is why it is particularly important to study these decisions or the relevant indictments in this field.

In order to answer these questions, the present study shall present the main issues answered by the Romanian courts in the field of the criminal liability of corporations. In this respect, the relevant decisions shall be evaluated following the same topics as the ones studied for the analyze of the material aspects of the criminal liability of corporations, namely the conditions required by the law in order to engage the criminal liability of corporations and the criminal and criminal procedural consequences.

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[1] See Andra-Roxana Ilie, „Considerations regarding the Criminal Liability of Corporations – the Romanian Way", (CKS e-Book 2011): 120-121.

[2] Published in the Official Journal no. 601 of July 2006. The provisions regarding the criminal liability of corporations entered into force 90 days after this date.

As mentioned already, the criminal liability of corporations is still a new institution in the Romanian legislation. Hence, there is little case law and little literature on this topic. However, this study shall not deal with all the matters that the said case law refers to. Therefore, this paper is meant to offer a perspective over the main issues raised so far by the criminal liability of corporations in Romania.

I. Relevant case law regarding the conditions required by the law for the criminal liability of corporations

According to art. 19^1 of the Romanian Criminal, the corporations[3], excepting the State, the public authorities and the public institutions which develop activities which cannot form the object of the private field are criminally liable for the crimes committed when performing the object of activity, to their benefit or on their behalf. The Code also states that the criminal liability of corporations does not exclude the criminal liability of the natural person who contributed, in any manner, to the perpetration of the same offence.

The main questions raised by this article in the recent case law refer to the domain of the criminal liability of corporations. In this respect, it must be reminded that the doctrine, either Romanian or foreign (from the states which inspired the Romanian legislator) affirms that the criminal liability of such entities is general[4]. This means that it is applicable to all legal persons and to all crimes, provided by the Criminal Code or by special laws.

Therefore, the case law in the field of the domain of the criminal liability of corporations include its analysis from both personal perspective, through the examination of the legal persons which can be subjects of the criminal liability (**1**), and material one, through the delimitation of the crimes which can be perpetrated by a legal person (**2**).

1. The legal persons which can be subjects of the criminal liability: tendencies of the Romanian courts

Regarding the legal persons subject to criminal liability, art. 19^1 of the Romanian Criminal Code clearly states that the corporations, excepting the State, the public authorities and the public institutions which develop activities which cannot form the object of the private field are criminally liable.

Based on this article, it is clear that all private legal persons can be liable under the Romanian Criminal Code, including the commercial companies. Actually, this category of legal persons is mainly concerned by art. 19^1 of the Code, taking into account that they are frequently met in the economic landscape and the most capable of perpetrating crimes through their activities, but the Criminal Code also concerns syndicates, economic interests groups, European economic interest groups, owners associations, political parties, associations, foundations etc.

It can be stated without any doubt that the Criminal Code concerns the lucrative legal persons, as well as the ones without lucrative purpose. Of course, the criminal liability of corporations was mainly created for the lucrative legal persons[5]. In this respect, taking the example of France, a country with more experience than Romania in this field, it is important to mention that, out of 97 decisions against corporations, given in the first four years after the consecration of their criminal liability, 60 were given against commercial companies (limited liability companies or stock companies)[6].

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[3] For the purpose of this paper, we used the term "corporation" in order to define the collective entities which are liable under the Romanian Criminal Code. As explained below, only the legal persons (which acquired legal personality) can be held responsible, with the exceptions provided by the law.

[4] Francis Le Gunehec and Frédéric Desportes, *General Criminal Law,* (Paris: Economica, 2006), 573.

[5] See Le Gunehec and Desportes, *General Criminal Law,* 573.

[6] See Claude Ducouloux-Favard, "Four Years of Criminal Sanctions against Corporations", *Recueil Dalloz* (1998): 395.

In Romania as well, from the analysis of the first decisions against legal persons, it can be noticed that only commercial companies were sentenced. Although the law recognizes the possibility to engage the criminal liability of all kind of commercial companies, it must be noticed that mostly limited liability companies were subject to criminal proceedings and penalties.

In order to decide on this matter, the courts have also sentenced the directors of the companies Indeed, although according to the Romanian Criminal Code, the criminal liability of corporations is distinct from the one of its legal representatives (also meaning that the first one can be engaged without even being necessary to identify a responsible natural person), the courts tend to

The analysis of pending trials leads to the same conclusion: from all the range of legal persons, prosecutions are being carried out only against limited liability companies. There is one exception known so far, a file where three limited liability companies are being prosecuted together with an association having as object the common administration of pasture, lawns and forests (*asociatie composesorala,* in Romania), established based on the provisions of Law no. 1/2000 for the reconstitution of ownership right over agricultural and forestry fields[7]. The association is being prosecuted for money laundering and forgery, the file currently being judged by the Harghita Tribunal.

In accordance with the principle according to which only legal persons (persons which acquired legal personality), are criminally liable, no prosecutions were carried out against person which lack legal personality, as it would be difficult to establish who could represent such entities in a criminal trial and the enforcement of sanctions would be hard to conceive with respect to the principle of the personal character of the criminal liability[8]. There is still no case law against corporations which perpetrated offences before the finalization of their registration procedure or during the transformation phase. There is however a criminal trial where a corporation is being judged through its liquidator, as it deals the insolvency procedure. It is therefore confirmed, although the Criminal Code is silent in this matter, that the corporation is criminally liable during the insolvency procedure, taking into account the fact that it does not lack legal personality.

With respect to the public institutions, their criminal liability is excluded only if they develop an activity which cannot form the object of the private field. As mentioned in previous studies, such solution is yet criticizable. Normally, in the legislations of the States which provide the same exception, only the legal persons which committed the crime while performing an activity which cannot form the object of the public domain are excluded. Such opinion also exists in the New Criminal Code.

Until now, there is only one public institution subject to criminal prosecutions, i.e. a public hospital which is being prosecuted for manslaughter of six babies following a fire caused by a short circuit. The file is currently being judged by Bucuresti District 6 Court.

With respect to other public legal persons, it must be mentioned that, as resulting from art. 19^1 of the Romanian Criminal Code, the criminal liability of the State and of public authorities is expressly excluded.

2. The most common crimes perpetrated by corporations

The domain of the criminal liability of corporations also includes the determination of the crimes which can be committed by moral persons, meaning the material domain of the criminal liability of corporations[9]. The Criminal Code into force, unlike Law no. 301/2004[10], provides for a

[7] Published in the Official Journal no. 8 of January 12, 2000.

[8] See Florin Streteanu and Radu Chiriţă, *Criminal Liability of Corporations* (Bucharest: C.H. Beck, 2007), 100.

[9] See Andra-Roxana Ilie, *The engagement of criminal liability of corporations,* (Bucharest: C.H. Beck, 2011): 99-120.

[10] Please note that Law no. 278/2006 is not the first law on the criminal liability of the legal person. Some precationnary measures against corporations were provided by the Criminal Code in 1937. Also, Law no. 299/2004 on criminal liability of legal persons for crimes of forgery of currency or other values (published in the Official Journal no.

general liability, meaning that corporations can be held liable for all crimes provided by the Criminal Code or by special laws.

As mentioned in a previous study[11], the justification of the special liability, provided by Law no. 301/2004 and other foreign laws is related on the crimes which could be attributed to corporations. It was mentioned that such entity cannot commit crimes such as rape, incest, bigamy, desertion etc. However, it must be noticed that all these crime can be perpetrated by corporations, as instigator or accomplice. It is therefore almost impossible to identify a crime which can totally exclude the implication of a legal person from its perpetration[12]. A corporation can be thus sentenced for being accomplice to rape when it allows natural persons to enter its headquarters on this purpose or for helping natural persons committing bigamy, by furnishing forged papers[13].

The criminal decisions against corporations given so far engaged their liability for crimes related to copyright[14], accidental injuries and breaches of the labor law[15], fraud, tax dodging[16]. Also, there are currently criminal prosecutions against corporations for illicit drug trafficking, tax dodging, money laundering, manslaughter, bribery, forgery, using or presenting forged documents which have as a result obtaining European funds and other crimes provided by special laws.

Therefore, it can be noticed that the most common crimes perpetrated by corporations are related to employment issues, copyright, corruption, illegal drug trafficking, money laundering, tax dodging, meaning mostly economic crimes. Such conclusion confirms the idea that the criminal liability of corporation was recognized especially for those type of crimes, as they are most likely to be perpetrated by such entities.

II. Relevant case law regarding the consequences of a criminal trial against corporations

Of course, once a criminal trial begins against a corporation, there are two sorts of consequences which could be triggered. The first category refers determines the analysis of the criminal sanctions applicable to corporations (**1**), whilst the second one relates to the provisions of the Criminal Procedure Code. In this respect, it must be underlined that, when the criminal liability of corporations was set forth in the Romanian Criminal Code, the legislator also modified the Criminal Procedure Code, by introducing a special chapter in this respect (**2**).

1. The most common criminal sanctions applied to corporations

Under the Romanian Criminal Code, there are only two categories of sanctions which can be applied to corporations: a main penalty and complementary penalties.

The single main sentence which may be inflicted on the commercial companies is the fine. The criminal fine which may be inflicted on the commercial companies is between the common limits RON 2,500 and RON 2,000,000 (approximately euros 575 – euros 460.000). The Criminal Code provides that the fine it must be calculated taking into account the penalty provided by the law for the natural person. Thus, in the cases in which, for an offence perpetrated by a natural person, the

593 of July 1, 2004) came into force in 2004, but could not be applied in the absence of appropriate procedural provisions. Also Law no. 301/2004 on the Criminal Code (published in the Official Journal no.575/2004) provided for the criminal liability of corporations, but it never came into force and was repealed by Law no. 286/2009.

[11] See Ilie, „Considerations regarding the Criminal Liability of Corporations – the Romanian Way": 123.

[12] See Andra-Roxana Ilie, "Between the Principle of Specialty and the General Criminal Liability of Legal Persons. View on the New Criminal Code", *4 Curierul Judiciar* (2009): 234.

[13] See Streteanu and Chirită, *Criminal Liability,* 397.

[14] See Sibiu Tribunal, criminal decision no. 105/2009, in Anca Jurma, *The Legal Person – Subject of the Criminal Liability* (Bucharest: C.H. Beck, 2010), 246-248; Sibiu Tribunal, criminal decision no. 126/2009, unpublished.

[15] See Iasi District court, criminal decision of March 31st, 2010, commentary by Andra-Roxana Ilie, *5 Legal Currier* (2010): 280-282.

[16] See Ploiesti Court of Appeals, criminal decision of February 2011, unpublished, in Ilie, *The engagement of criminal liability of corporations*: 119.

law provides a maximum penalty of 10 years' imprisonment or a fine, the special minimum of the fine inflicted on a legal person is of RON 5,000 and the special maximum of the fine is of RON 600,000. In the cases in which, for an offence perpetrated by a natural person, the law provides the life imprisonment or the penalty of more than 10 years' imprisonment, the special minimum of the fine for a legal person is of RON 10,000 and the special maximum of the fine is of RON 900,000.

Up to now, the fines applied to corporations were of RON 20,000 (for crimes regarding copyright), RON 12,000 (for accidental injuries), RON 10.000 (for breaches of the labor law), RON 15,000 (for fraud) and RON 6,000 (for tax dodging). It can be therefore noticed that the judges tend to apply the fines towards the minimum provided by the law. This could represent a solid argument in favor of the idea that the criminal liability of corporation is not meant to be a reason for ruining the activity of corporations, but mostly a way to prevent serious breaches of the law taking into account the preventive role of punishments.

In this respect, it must be reminded that fine can be applied in criminal matters, as well as in civil, administrative, disciplinary, fiscal or procedural disputes. It is interesting to notice that, many times, the regulations which provide fines different than the criminal ones are even more serious than the Criminal Code with respect to the amount of the pecuniary sanction which can be applied to corporations.

For instance, in the field of capital market, the fines go up to 5% of the share capital of corporations, which can obviously exceed the amounts provided by the Criminal Code. Also, the Romanian Competition Law provides for fines up to 10% of the turnover of the corporations.

We do not plead for an exaggerated high level of the criminal fines applicable to corporations. We do not plead either for the ruining of corporations through the application of fines, irrespective of their nature. However, it is questionable whether a legal system can provide that an administrative offence be punished with a fine much higher than the one provided for a criminal offence. For example, according to a recent Report of the Romanian Competition Council[17], a corporation was fined with an amount exceeding more than 74 times the higher general limit provided by the Criminal Code.

There are to possible solutions to this problem. On one side, it would be possible for the legislator to rethink the Competition Law (and other laws) in the sense of reconsidering some offences as crimes (and not administrative offences). Of course, there are various arguments against such solutions, including the possibility that such actions do not have in fact the level of social danger necessary for crimes. Another solution would be the consideration of the turnover of corporations as an element for the individualization of the fine. Such solution exists in several States (for instance, in Poland) and is recommended by the Romanian legal literature[18]. The New Criminal Code provides for this approach, although the fine which can be imposed to corporation is capped to RON 3,000,000.

As per the complementary penalties, they can be applied together with the fine, whenever the judge consider necessary. They are however mandatory whenever the law provides as such (for example, in case of forgery). The service of the complementary penalties shall commence to run from the date on which the conviction sentence remains final.

The complementary penalties are as follows: the legal person's winding-up; the suspension of the legal person's activity for a period of 3 months to one year or the suspension of one of the activities performed by the legal person, in respect of which the offence was perpetrated, for a period of 3 months to 3 years; the closing down of certain working points of the legal person for a period of

[17] See the Report of February 15, 2011, available at www.competition.ro, visited on February 3, 2012.

[18] See Anca Jurma, "Some Proposals *de lege ferenda* regarding the Criminal Liability of the Legal Person", *5 Legal Currier* (2010): 284.

3 months to 3 years; the prohibition to take part in any tender procedure for a period of 1 to 3 years; the posting or dissemination of the conviction decision[19].

The initial decisions given by the Romanian courts against corporations did not provide for any complementary sanction. The further decisions however provided for the posting or dissemination of the conviction decision as well as for the winding-up of a corporation (for fraud and tax dodging)[20]. It is interesting to notice that, when the decision was given (by the first court, by the Court of Appeals and by the High Court), the insolvency procedure was already opened against the corporation and, until the cause was re-judged by the Court of Appeals and the decision remained definitive, the corporation had been already radiated following a civil decision.

There is also a safety measure provided by the Romanian Criminal Code which can be applied to corporations: the seizure of the assets.

In order to apply this measure, the seized goods shall meet one of the following conditions: (a) such goods are obtained by means of the perpetration of a deed provided by the criminal law; (b) such goods have been used, in any manner, for the perpetration of an offence, in case they belong to the perpetrator, or, in case they belong to another person, such person was aware of the purpose for which they have been used. This measure may not be ordered in respect of the offences perpetrated by means of the press; (c) such goods have been produced and adjusted with a view to perpetrating an offence, if they have been used for the said perpetration and if they belong to the perpetrator. In case such goods belong to another person, the seizure is ordered provided that their production and adjustment has been performed by the owner himself/herself or by the perpetrator and with the full awareness of the owner; (d) such goods have been offered with a view to cause the perpetration of an offence or to reward the perpetrator; (e) such goods have been acquired by perpetrating a deed provided by the criminal law, if they are not returned to the aggrieved person and if they do not serve as a remedy for such person; (f) it is prohibited by the law to own such goods. Up to now, there is no decision in this respect given by the Romanian courts.

2. The application of the procedural provisions relevant to criminal trials against corporations by the Romanian Courts

Art. 479^1 of the Criminal Procedure Code states that its provisions are also applicable to offences perpetrated by legal persons, being amended by the special provisions contained in the Chapter referred to the enforcement of the criminal liability of corporations.

As mentioned in a previous study[21], a first problem related to a criminal trial against a corporation is related to the person who can represent the legal person, especially that mostly the representative of the corporation is also the person who perpetrated the offence. Thus, if solely the legal person is held liable, it shall be represented for the fulfillment of the procedural steps by its legal representatives. Second, if for the same deed or related deeds, the criminal proceedings have been initiated against the legal representative of the legal person as well, the latter shall appoint an attorney-in-fact to represent it. In the event that the legal person fails to appoint an attorney-in-fact, such appointment shall be made by the body conducting the criminal proceedings or by the court, from among the legal practitioners in the field of insolvency procedures.

In the file where a Romanian corporation was sentenced to the winding-up, the administrator of the said corporation was also prosecuted for the same facts. For this reason, the corporation was represented in the criminal trial by the sister of the administrator, which is at least questionable from

[19] See Andra Roxana Ilie, „Criminal Penalties Applicable to Legal Persons. Comparative Study regarding France and Romania" (Dissertation for the Master 2, Fundamental Criminal Law, Montpellier 2008); Ioan Lascu, „Penalties Applicable to the Legal Persons in case of Criminal Offences", *3 Law* (2007): 123.

[20] See Ploiesti Court of Appeals, criminal decision of February 2011, unpublished.

[21] See Ilie, „Considerations regarding the Criminal Liability of Corporations – the Romanian Way": 125.

the point of view of the observation of the principles which govern the representation of corporations during the criminal trial.

Another issue concerns the interim measures which can be applied to corporations. The Romanian Criminal Procedure Code provides that during the criminal trial, either the judge or the court may order, for grounded reasons in order to ensure the good and proper development of the criminal trial, one or more of the following measures: the suspension of the legal person's winding-up or liquidation procedure; the suspension of the legal person's merger, division or reduction of the share capital; the prohibition of any specific patrimonial operations that may entail the significant reduction of the patrimonial assets or the legal person's insolvency; the prohibition to execute certain legal instruments, established by the legal body; the prohibition to perform activities of the same nature as those underway or as those that occurred when the offence was perpetrated[22]. There are no known files up to present where such measures have been taken.

The Criminal Procedure Code also provides for the possibility to take precautionary measures against a corporation (the distraint and the garnishment). These precautionary measures may be taken with a view to ensuring the special seizure, the remedy of the damage caused by the offence, as well for securing the service of the sentence represented by a fine. The distraint was already taken against corporations in several cases by the Romanian prosecutors.

Another important issue raised in the current cases refers to the possibility to call a corporation in the criminal trial both as accused and as third party called liable for another person's acts. Until now, there is a file where the court admitted such possibility. Although we can agree that such solution is legal, it must be observed that the same person could not be punished in both qualities for the same act, because this would mean that a corporation is criminally liable both for its own actions and for another person's acts although we are facing the same offence perpetrated.

Conclusions

As a conclusion, from the analysis of all these aspects, we can determine the main problems that the Romanian courts dealt with in the field of the criminal liability of corporations in Romania.

It can be therefore noticed that up to present only limited liability companies were punished by the criminal courts and that, with one exception, only such legal persons are being prosecuted. Also, it must be noticed that the most common crimes perpetrated by corporations are related to employment issues, copyright, corruption, illegal drug trafficking etc. The companies were always convicted together with their administrators for the same crimes.

With respect to the criminal sanctions applied to corporations, it can be concluded that until now courts applied fines oriented towards the minimum provided by the Criminal Code. Complementary sanctions such as the posting or dissemination of the conviction decision and the winding-up began to be applied by the courts.

Regarding the criminal procedural aspects, the most important issues are related to the representation of corporations during the criminal trial and to the precautionary measures which can be taken towards corporations. The distraint is widely used by the prosecutors in the cases against corporations.

All the aspects raised by these decisions show that there is still a long way until this institution shall be fully understood and applied. The decisions offer however the chance to see why it is so important to the consideration of the turnover as a criterion for the individualization of the sanctions applicable to corporations, what should happen when the same corporation is called in the criminal trial both as accused and as person liable for other person's acts, why it should be considered to create new criminal penalties etc.

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THE NEW ROMANIAN CRIMINAL CODE – CHANGES SUGGESTED IN THE GENERAL PART

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Abstract
Through Law no. 286/2009, it was adopted a new Criminal code. The new Criminal code brings more changes both in the General part as well as in the Special part. Through this Criminal code, the Romanian lawgiver mainly pursued: to create a coherent legal framework from the criminal point of view by avoiding the useless overlapping of the norms in force existing in the current Criminal code and in the special laws; to facilitate the quick and unitary enforcement of the criminal legislation in the activity of the judicial organs; to transpose the regulations adopted at the European Union level into the national criminal legislative framework; to harmonize the Romanian criminal law with the systems of the other member states of the European Union. The study proposes to underline the main changes occurred in the General Part of the Criminal code.

Keywords: *Criminal code; Romanian criminal law, offence, punishment, justifying causes, immutability*

I. Introduction

The change of the legislation from the criminal point of view is, as in other domains, an issue that usually appears in the cases in which there are transformations of political, economic, social and cultural nature in the evolution of the society.

In the recitals that accompanied the draft of the new Criminal code, it was showed that the current sentencing regime regulated by the current Criminal code (come into force on January 1st 1969), submitted to some frequent legislative interventions on different institutions, led to a non-unitary enforcement and lack of coherence of the criminal law with repercussions on the efficiency and finality of the justice act[1].

Another argument invoked during the recitals points out to the necessity of placing the sentencing treatment within the normal limits, considering that the practice of the last decade proved that the efficient solution for fighting criminality was not the extreme increase of the punishment limits[2].

Nevertheless, through the new Criminal code, the lawgiver intended the simplification of the incrimination texts, the avoiding of the overlapping between various incriminations, as well as the overlapping of the special norms with the ones of the general part.

Finally, starting from the idea of ensuring the unity in the regulation of the offences, it was considered that it was necessary that some offences stipulated at present in the special criminal laws

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[1] See www.just.ro.

[2] In the recitals, it is stipulated that during 2004-2006, about 80% of the punishments in the process of being enforced through prison punishment for theft and qualified theft were of at most 5 years of imprisonment which indicates that the courts of law did not consider necessary to apply the sanctions to the maximum upper limit stipulated by law (12 years in the case of a simple theft, 15 years, 18 years and 20 years in the case of the qualified theft respectively). On the other hand, the extremely wide range between the minimum limit and the maximum one of the punishment (from 1 to 12 years, from 3 to 15 years, from 4 to 18 years) led to more different solutions in practice with regard to the punishment applied for similar deeds or to greater punishments for infractions with a low injuriousness, which does not ensure the stipulated character of the justice act.

and that had a greater frequency in the judicial practice should be included in the content of the new Criminal code (information offences, road offences, etc.).

According to the recitals, the draft of the new Criminal code pursued the carrying out of the following targets:

- building a coherent legislative framework from the criminal point of view by avoiding the useless overlapping of the norms in force existing in the current Criminal code and in the special laws;
- simplifying the lawful regulations meant to facilitate their quick and unitary enforcement in the activity of the judicial organs;
- ensuring the complying with the exigencies resulting fundamental principals of the criminal law stipulated by the Constitution and by the pacts and treaties regarding the fundamental human rights to which Romania takes part;
- transposing the regulations adopted at the European Union level into the national criminal legislative framework;
- harmonizing the Romanian criminal law with the systems of the other member states of the European Union as a premise of the judicial cooperation from the criminal point of view based on mutual acknowledgment and trust.

Through Law no. 286/2009, the lawgiver adopted the draft of the new Criminal code that would come into force on a date set by thereof enforcement law (probably on March 1st 2013)[3].

Furthermore, we will present the main changes to the new Criminal code considering the provisions of the General part.

II. Analysis of the main changes existing in the General part of the new Criminal code[4]

1. Changes with regard to title I – *Criminal law and its enforcement limits*

Unlike the previous Criminal code, where it was dealt with in a single article, in the new Criminal code, the principle of the incrimination lawfulness and of the criminal law sanctions is „divided" into two articles: **incrimination lawfulness** (art. 1) and **criminal law sanctions** (art. 2). In the recitals, it is mentioned that the lawgiver pursued draw the attention on the consequences resulting from these rules – especially the forbiddance of the retroactive enforcement of the criminal law - both for the lawgiver and for the practitioner.

In art. 1 para. (2) of the new Criminal code, the content of art. 11 of the Criminal code in force appears slightly different. In art. 2 para. (2) and (3), there are the new provisions. According to art. 2 para. (2) of the new Criminal code: „*A punishment can not be applied or an educative measure or a safety measure can not be taken if this is not stipulated by the criminal law on the date when the deed was committed*". According to art. 2 para. (3): „*No punishment can be set and applied outside the general limits thereof*".

In relation to the criminal law enforcement, the lawgiver reversed the order of the two sections of chapter II, placing in the first section the norms regarding the criminal law enforcement in time and in the second one those regarding the criminal law enforcement in space.

The provisions regarding the more favorable criminal law enforcement during the criminal trial were completed with the provision of art. 5 para. (2) regarding the juridical regime of the unconstitutional normative acts (rejected or approved emergency ordinances with amendments),

[3] Law no. 286/2009 regarding the Criminal code was published in the Official Gazette no. 510 on 24.07.2009.

[4] For the analysis of the existing changes in the General part of the new criminal code, see the collective work *Explicații preliminare ale noului Cod penal*, Vol. I-II, coordinator George Antoniu, Universul Juridic Publishing House, Bucharest, 2011.

given that these continue to be applied to the juridical situations that are at the moment influenced by them to the extent they are obviously more favorable, although they cease their activity either entirely or partially.

Regarding the criminal law enforcement in transitory situations, the lawgiver opted for maintaining the compulsoriness rule of the more favorable criminal law incidence (art. 6) and for giving up the facultative enforcement of this law in the case of the definitive punishments, considering that this can not conciliate with the lawfulness principle.

We note here that art. 7 para. (2) of the new Code defines the expression of „*temporary criminal law*", unlike the previous regulation that does not contain such a definition. According to this text, **the temporary criminal law** is the criminal law that stipulates the date of its coming out of force or the enforcement of which is limited through the temporary nature of the situation that imposed its adoption.

Regarding the **territoriality principle of the criminal law**, besides the changes regarding the definitions of the expressions used within art. 8 of the new Criminal code that were posted in the same article, comparative to the technique used in the previous Criminal code that stipulates these definitions within the title reserved to the understanding of some terms and expressions, the lawgiver makes very important explanations.

It is the observations according to which the offence is considered committed on the territory of Romania also when an act of enforcement, instigation or complicity was committed or it even partially produced the result of the offence on this territory or on a ship under Romanian flag or on a ship registered in Romania.

For the incidence of the **personality principle of the criminal law,** it was introduced the **condition of the double incrimination,** but limited to the situation of the low and medium severity offences (at most 10 year prison punishment).

Regarding the **reality principle of the Romanian criminal law**, the lawgiver extended the incidence domain, including any offences committed abroad against the Romanian state, a Romanian citizen or a Romanian legal person.

The text designated for the **universality principle of the criminal law** was completely reformulated, considering that the current regulation has not been enforced in practice although it seems to offer an extremely wide competence to the Romanian juridical organs. The new content of the universality principle limits its enforcement exclusively to the situations when the interference of the Romanian criminal law is imposed in considering some internationally assumed engagements.

Finally, in the new Criminal code, it is regulated a new procedure, that is, the **delivery to an international tribunal**[5].

2. Changes in the field of the offence institution

The new Romanian Criminal code also stipulates a general definition of the offence, but essentially different from the one in the Criminal code in 1969. According to art. 15 para. (1) of the new Criminal code: „*The offence is the deed stipulated by the criminal law committed with guilt, unjustified and imputable to the person that committed it*".

It is noticed that, besides the essential feature of the guilt and the deed stipulation in the criminal law, features that are found in the former definition, it has been added two more, that is: **antijuridicity** (unjustified character) and **imputability** (imputable character).

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[5] For the analysis of the new texts that regulate the application of the criminal law in time and space, see George Antoniu, în *Explicaţii preliminare ale noului Cod penal*, Vol. I, page 21 and the following one. For a comparative approach of Criminal code in 1969 and Criminal code in 2009, see also Ilie Pascu, Petre Buneci, Noul Cod penal Partea generală şi Codul penal Partea generală în vigoare – Prezentare comparativă, Universul Juridic Publishing House, Bucharest, 2010.

The unjustified character of the deed stipulated by the criminal law assumes that this is not allowed by the juridical order, being possible that a deed, although stipulated by the criminal law, should not be illicit because its committing is allowed by a legal norm. The causes that exclude the unjustified character of the deed are called **justifying causes** in the Criminal code. These are: self-defense, state of emergency, consent of the injured person and exercise of a right and carrying out of an obligation. Within the occidental theory and legislations, there is usually a demarcation between the two cause categories that determines the inexistence of the offence, that is: **justifying causes**[6] (based on the right of committing certain deeds called also objective causes of non- responsibility or that remove the unlawfulness or the illicit character of the deed) and **non- imputability causes** (called also non- culpability causes or subjective causes of non- responsibility – based on the lack of guilt).

The imputable character of the deed stipulated by the criminal law is achieved in all the situations when there is not a non- imputability cause. These are: physical constraint, moral constraint, irresponsibility, minor age of the doer, intoxication, error, non- imputable excess and fortuitous case.

The feature of the social danger lacks from the general definition of the offence because it was a useless one and at the same time specific to the Soviet inspiration legislations without connection to the traditions of our criminal law.

With regard to the **deed stipulation in the criminal law**, this assumes the requirement that the committed deed that is to be qualified as offence should correspond precisely to the description that the lawgiver makes in the incrimination norm.

Regarding the **guilt feature,** the lawgiver introduced in art. 16 para. (1) a provision without a correspondent in the Criminal code in force according to which the deed is an offence only if it was committed with the form of guilt required by the criminal law.

Another novelty is the provision of art. 16 para. (5) that defines the **oblique intent** (praeter intentionem) as a form of guilt. According to this norm, it is a case of oblique intent when the deed consisting of a deliberate action or inaction, causes a severe result that is owed to the doer's fault.

Finally, we state that the lawgiver unified the sentencing regime stipulated for the action and inaction committed with the same form of guilt. So, according to art. 16 para. (6), the deed consisting of an action or inaction is an offence when it is intentionally committed. The intentionally committed deed is an offence only if it is precisely stipulated by a law.

In art. 17 of the new Criminal code, the **offence by omission** is regulated as new in our criminal legislation.

According to art. 17 of the new Criminal code, the commissive offence that assumes the producing of a result is considered committed also by omission when:

a) there is a legal or contracting obligation of taking action;

b) the author of the omission, through a previous action or inaction, created a state of jeopardy for the protected social value that eased the producing of the result.

The definition of the **attempt** was revised in the new Criminal code. In para. (1) of art. 32, the new Criminal code defines the attempt as the „*enforcement of the intent of committing the offence*", unlike the Criminal code in 1969 [art. 20 para. (1)], that defines the attempt as the „ *enforcement of the decision of committing the offence*".

Another change regards the cancellation of the provisions of art. 20 para. (2) of the former Criminal code, considering them as useless as long as the grounds of not producing the result in the case of the attempt have no relevance, being of any nature, but independent from the will of the doer in order to engage the criminal liability of this one.

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[6] For more data regarding the justifying causes, see: George Antoniu, *Noul Cod penal*, C.H. Beck Publishing House, Bucharest, 2005, page 145 and the following one; Mariana Narcisa Teodosiu, *Cauzele justificative*, in R.D.P. no. 8/1998, page 109.

Chapter V is properly entitled the „*unity and plurality of offences*", because, along with the norms that regulate the plurality of offences, there are also norms designated to set the juridical regime of two of the forms of the legal offence unity (complex offence and continuing offence).

The legal definition of the continuing offence was modified, being introduced a new condition, that is, the unity of passive subject.

Another change regards the definition of the complex offence where the expression „*as aggravated element or circumstance*" is replaced by the expression „*as constitutive element or as aggravated circumstantial element*", change required especially by the criminal doctrine.

The new Criminal code brought two necessary completions that it included in art. 37 para. (2) and (3). According to art. 37 para. (2), The complex offence is sanctioned with the punishment stipulated by law for that offence and according to art. 37 para. (3), the complex offence committed with oblique intent is sanctioned with the punishment stipulated by law for the consumed complex offence, if only the severer result of the secondary action was produced.

Regarding the main punishment enforced in case of **concurrence of offences**, the lawgiver opted for the absorption system, if life imprisonment was enforced for one of the concurrent offences, to the juridical plurality with an obligatory and fixed addition (of one third of the easy punishments) respectively, if only imprisonment punishments and fines were enforced for the concurrent offences.

As for the punishment of the concurrence, it was introduced a special provision that allows the court to be able to enforce life imprisonment in the case of having been committed more extremely severe deeds even if this one was not set for none of the concurrent offences.

Regarding the **recurrence** institution**,** we identify new elements both with regard to the definition and terms of the recurrence and with regard to the punishment. The temporary character of the recurrence is underlined when defining it. The terms of the recurrence were changed in the sense of increasing their limits.

Regarding the sentencing treatment of the recurrence, this one differs, being regulated the arithmetic addition in the case of post-sentencing recurrence and the increase of the special punishment limits with half in the case of the post- enforcement.

When the second term of the recurrence is made out of a concurrence of offences, it was set an algorithm of punishment enforcement difference from the existing one, enforcing first the provisions regarding the concurrence and then the ones incident in the case of the recurrence, system that is enforced even if only one of the concurrent offences are in a recurrence state, the rest being in intermediary plurality because the capacity of recidivist has to draw the treatment specific to this plurality form. As an exception as in the case of the concurrence of offences, it is stipulated the possibility of enforcing life imprisonment even if the set punishments consist in imprisonment when the number and severity of the committed deeds would justify it.

In Chapter VI, starting from the quality distinction that exists between the **doer** (co- doer) and the other **participants** (the doer directly commits the deed stipulated by the criminal law and the instigators and the accomplices intermediately commit the deed through the doer or co- doers), the new Criminal code stipulates distinctly the doer and the co- doers.

3. Changes with regard to the punishments

Regarding the new regulation of the punishment categories, this starts with the main punishments, continues to the accessory punishments and ends with the complementary punishments.

In the category of the complementary punishments, it was introduced a new punishment consisting in publishing the **final decision**.

In the new Criminal code, the **licence supervision** is no longer regulated in the chapter regarding the main punishments, but in the chapter regarding the punishment individualization, because, in practical terms, the licence supervision is an individualization form of the punishment.

The fine punishment has a new regulation, but also a significantly wider enforcement domain compared to the criminal code in force by increasing the number of the offences and their variants for which the fine can be enforced as sole punishment or as alternative punishment to the imprisonment punishment.

The calculation of the fine is made through the fine day system which, through the determination mechanism of the amount, is estimated that it ensures a better individualization of the punishment both in terms of proportionality expressed in number of fine days and in terms of efficiency by determining the value of a fine day by considering the patrimony obligations of the convict.

Another new element regards the introduction of the possibility of enforcing the **cumulative fine with imprisonment punishment** when the doer pursued to obtain patrimony assets through the committed offense. We believe that through this regulation, the lawgiver made a remarkable progress because the purpose of many offenders is to obtain material advantages.

Starting from the shortcomings of the previous regulation, which stipulates that the bad faith elusion of the convict from paying the fine leads to the replacement of the fine punishment to imprisonment only if the offense for which the sentence was delivered stipulates the fine punishment as an alternative to the imprisonment, the new Criminal code allows the **replacement of fine punishment** with the imprisonment punishment or of the enforcement of the fine punishment by providing community service.

The **accessory penalty** is regulated significantly different from the previous legislation in terms of both enforcement and content, as this accompanies the life imprisonment punishment or the imprisonment punishment.

With regard to the **complementary punishments**, the changes consist in reducing the maximum limit from 10 years to 5 years and in increasing the number of rights that are contained in this punishment. It was introduced in the content of the complementary punishment also a part of the sanctions that is at present in the safety measures, that is, the prohibition of being in certain localities, the expulsion of the foreigners and the prohibition of returning to the family home for a determined period of time, because these have a strong punitive character by their nature and mainly pursue to restrict the freedom of movement and only indirectly, because of this effect, it is achieved the elimination of the danger state and the prevention of committing new offences.

Another change regards the prohibition of exercising some rights, which is possible both besides the imprisonment punishment, regardless of its duration, and besides the fine punishment.

Other changes refer to the starting moment of the complementary punishment enforcement of prohibiting the exercise of some rights; two exceptions from the enforcement rule of this punishment are set after the imprisonment punishment was carried out or considered carried out. It regards the conviction to fine punishment or, if it was ordered the measure of the conditional suspension of the sentence under supervision, the circumstances when the complementary punishment enforcement of prohibiting the exercise of some rights starts from its final decision.

Finally, it was introduced a new punishment, the publication of the final sentence in order to increase the efficiency of the justice act and to provide the moral repair to the victim.

The new Criminal code gives up to mention as individualization criteria the provisions of the general part and special part of the code, the causes that mitigate and aggravate criminal liability respectively, because these lead to the setting of the limits between which the judicial individualization will take place and know the specific regulations.

According to art. 74 para. (1), the setting of the punishment duration or quantum is made based on the **severity of the committed punishment and the offender's injuriousness** which is evaluated according to the following criteria:

a) circumstances and modality of committing the offence, as well as the used means;

b) state of danger created for the protected value;

c) nature and severity of the produced result or of other consequences of the offence;

d) ground of committing the offence and its purpose;
e) nature and frequency of the offences that are criminal records of the offender;
f) conduct after having committed the offence and during the criminal trial;
g) level of education, age, health, family and social status .

As for the **mitigating circumstances**, there are changes that regard the content of the mitigating circumstances and the effects of the mitigating circumstances. Under the aspect of the content, it was removed the circumstance regarding the good conduct behavior before having committed the offence and with regard to the effects, it was rethought their regulation under the aspect of the extent and determination modality of these effects.

The existence of the mitigating circumstances leads to the reduction by a 1/3 of the maximum and minimum special limit of the punishment stipulated by law. The reduction both of the minimum special limit and of the maximum one of the punishment gives the judge a greater consideration freedom in establishing the concrete punishment through the fact that it is no longer forced to lawfully enforce a punishment under the special minimum of the punishment, but it maintains this possibility to the extent the individualization operation leads to such a conclusion. At the same time, by reducing the special limits of the punishments with a fraction (1/3), it is achieved a proportional determination of the mitigating effect considering the abstract degree of danger set by the lawgiver for a certain offence.

Regarding the **content of the mitigating circumstances**, the lawgiver proceeded to a reevaluation of the circumstances that determined the worsening of the sentencing regime.

The aggravating circumstance regarding the committing of the offence due to low reasons was removed, because the committing of the offences is determined in most cases by immoral reasons and the content of this circumstance was never precisely delimited by the doctrine and jurisprudence.

In exchange, it was introduced a new aggravating circumstance consisting in **committing the offence by taking advantage of the obvious vulnerability state** of the injured person due to age, health, infirmity or other causes.

If there are aggravating circumstances, it can be enforced a punishment up to the special maximum. If the special maximum is not enough, in the case of the imprisonment, it can be added an addition of up to 2 years that can not exceed a third of this maximum and in the case of the fine, it can be added an addition of at most a third of the special maximum.

The new Criminal code regulates two institutions that have no correspondent in the previous Criminal code, that is, the giving up to the punishment and the postponing of the punishment enforcement.

The giving up to the punishment enforcement is the right of the court of not enforcing a punishment to a person that has committed an offence, considering the fact that it is enough for that person in order to improve to be enforced a warning because a punishment enforcement would risk to produce rather negative consequences than to contribute to the reeducation of the person in question.

The postponing of the punishment enforcement is the second new institution through which the punishment individualization can be achieved and consists in setting a punishment for a person that committed an offence, but which is not temporary executed if the set punishment is a fine or imprisonment of at most 2 years and the court considers that, based on the personal situation of the offender, the immediate enforcing of a punishment is not necessary, but it is imposed the surveillance of its conduct for a fixed period of 2 years, considering the persona of the offender and the conduct before and after having committed the offence.

The punishment enforcement suspension under supervision is the only individualization measure of the punishment execution of the three ones existing in the previous Criminal code (conditional remission of sentence, conditional remission of sentence under supervision and the punishment execution at the place of work), that was kept by the lawgiver.

The punishment enforcement suspension under supervision was reformed under more aspects that we will present further.

Thus, the carrying out of an unpaid job as community service is a characteristic that regards the punishment execution suspension under supervision because the obligation of carrying out such activity is set in charge of the convict, but only with its consent.

Another new element is that, in the new regulation, the punishment enforcement suspension under supervision does not cause the intervention of the lawful rehabilitation when the supervision term expires, but the rehabilitation will operate according to the common law and the term will derive from the reaching of the supervision term.

Starting from the idea of protecting the offence victims, the producing of the suspension effects is conditioned by the full carrying out of the civil obligations set through sentence, except for the case when the person proves that it had no possibility of carrying them out.

The regulation of the **licence supervision** institution is far different compared to the previous one; its changes regard the granting conditions and the social reintegration process of the convict through the active and qualified involvement of the state through probation councilors.

Under the aspect of the granting conditions, the lawgiver uniformed all the types of licence supervision (women, men, convictions for intentional and third degree offences, minors etc.). Thus, when granting the licence supervision, it is exclusively considered the conduct of the convict during the punishment execution (except for the persons over 60 years), considering that only in this way the conduct of the convict can be more efficiently influenced and shaped that gets an extra motivation knowing that a good behavior gets it closer to the release from prison.

4. Changes with regard to the safety measures

According to the new conception, the safety measures can be ordered including in the presence of a non- imputability cause, but not of a justifying cause. The lawgiver, as we saw, passed a part of the safety measures to the complementary punishments. These are: prohibition of being in certain localities; prohibition of returning to the family home and the expulsion of the foreigners.

The reasoning of such a change regards the fact that such criminal law sanctions become incident in case of committing such deeds stipulated by the criminal law and due to their specific nature, it is necessary the completion of the direct repression expressed through the main punishment with differed secondary repression expressed in these complementary punishments[7].

Another new element is the reformulation of the content of the obligation to medical treatment and hospitalization.

5. Changes with regard to the criminal regime enforced to minors

According to the provisions of the new Criminal code, the only sanctions that can be taken against offending minors are the **educative measures** that can be divided into two categories: deprived and non- deprived of freedom.

The rule is that that the enforcement of the non- deprived of freedom educative measures [art. 116 para. (1)] has a priority because the deprived of freedom educative measures can be taken only in the case of severe offences or of those committed under the form of plurality of offences [art. 116 para.(2)].

The educative measure of the civil formation stage consists in the minor's obligation of taking part to an at most 4- month program in order to help him understand the legal and social consequences to which it exposes in the case of committing offences and in order to make it responsible with regard to its future behavior. The organizing, ensuring of the participation and

[7] See recitals (www.just.ro).

supervision of the minor during the civic formation course are made under the coordination of the probation service without affecting the school or professional program of the minor.

The educative measure of the supervision consists in controlling and guiding the minor within its daily program for a period of time of two to 6 months, under the coordination of the probation service in order to ensure the participation to school classes or job formation classes and the prevention from carrying on some activities or coming into contact with certain persons that could affect the improvement program of this one.

The educative measure of the detention in weekends consists in the minor's obligation of not leaving the home during Saturdays and Sundays for a period of time of 4 to 12 weeks, except for the case that during this period, it has the obligation of taking part to some programs or of carrying on certain activities imposed by the court. The supervision is carried out under the coordination of the probation service.

The educative measure of the daily assistance consists in the minor's obligation of observing a program set by the probation service that contains the timetable and conditions of carrying on the activities, as well as the interdictions set to the minor. The educative measure of the daily assistance is taken for a period of time of 3 to 6 months and the supervision is carried out under the coordination of the probation service.

During the carrying out of the non- deprived of freedom educative measures, the court can impose the minor one or more obligations.

The educative measure of hospitalization in an educative center consists in the hospitalization of the minor in an institution specialized in minor recovery where it will attend a school preparation and job formation program suited for its skills, as well as social reintegration programs.

The educative measure of hospitalization in a detention center consists in the hospitalization of the minor in an institution specialized in minor recovery with a guard and surveillance regime where it will pursue intensive social reintegration programs, as well as school preparation and job formation programs suited for its skills.

6. Criminal liability of the legal person

Regarding the criminal liability of the legal person, it was maintained the principles contained in Law no. 278/2006, such as the direct liability of the legal person (assigned by the Belgian and Dutch law) and the necessity of the existence of a legal personality as premise for engaging the criminal liability of the collective entities.

According to art. 135 of the new Criminal code, the criminal liability of the legal person can be engaged by any natural person that acts under the conditions stipulated by the law and not just by the actions of the organs or thereof representatives.

The engaging of the criminal liability of a legal person is conditioned by the identification of a subjective element that can be different from the one found in the case of the natural person material author at least hypothetically.

Compared to the previous regulation, we note that the lawgiver operated the **restraining of the criminal immunity of the public institution** that carry on an activity that can not be the object of the private domain, this restraining to the offences committed in the carrying on of such activities.

The lawgiver brought changes also with regard to the individualization of the sanctions enforced to the legal person determined by the introduction of the fine day system.

The new Criminal code stipulates a new complementary punishment enforced to the legal person – **placement under supervision** that consists in the designation by the institution of a legal administrator or legal proxy that will supervise the carrying on of the activities that caused the committing of the offence for a period of time of one to 3 years.

7. Changes with regard to causes that eliminate the criminal liability

Title VII of the previous Criminal code was divided into three titles: Title VII "*Causes that eliminate the criminal liability*"; Title VIII "*Causes that eliminate or alter the sentence*" and Title IX "*Causes that eliminate the consequences of the conviction*".

When examining in comparison the provisions regarding the causes that eliminate the criminal liability, we consider that in the new Criminal code, it is mentioned with certain changes the previous provisions. Thus, in the text that regulates the **amnesty** [art. 152 para. (1)], the expression "*eliminates the criminal liability for the committed deed*" is replaced by the expression "*eliminates the criminal liability for the committed offence*";

It is also stipulated the date since when the prescription term of the criminal liability starts in the case of the offence and of the progressive one (since the date of committing the action or inaction and it is calculated based on the punishment corresponding to the definitive result).

8. Changes with regard to the causes that eliminate or alter the sentence

The provisions in this title are similar to the ones in the previous Criminal code, with two distinctions, the exclusion from pardon of the punishments the execution of which is suspended under supervision, except for the case when it is ordered differently through the pardon act and the breaking off of the prescription of the fine punishment execution if the obligation of paying the fine is replaced by the obligation of delivering an unpaid job for the community service.

9. Changes with regard to the causes that eliminate the consequences of the conviction

In this title, it is regulated the two rehabilitation forms: lawful rehabilitation and court rehabilitation.

With regard to the **lawful rehabilitation**, this one operates in the case of the fine punishment, imprisonment punishment that do not exceed 2 years or the imprisonment punishment the execution of which was suspended under supervision if the convict did not commit another offence within 3 years.

On the other hand, **the court rehabilitation terms** were reduced compared to the ones in the Criminal code in force. Thus, according to art. 166, the convict can be rehabilitated by the court, upon request, after reaching the following terms:

a) 4 years in the case of the conviction to an imprisonment punishment greater than 2 years, but that it does not exceed 5 years;

b) 5 years in the case of the conviction to an imprisonment punishment greater than 5 years, but that it does not exceed 10 years;

c) 7 years in the case of the conviction to an imprisonment punishment greater than 10 years or in the case of the life imprisonment punishment commuted or replaced by imprisonment punishment;

d) 10 years in the case of the conviction to life imprisonment punishment considered executed as a result of the pardon, reaching the prescription term of the punishment execution or licence suspension.

The convict deceased before reaching the rehabilitation term can be rehabilitated if the court considers that it deserves this benefit after having evaluated the behavior of the convict up to its death.

10. Changes existing within title X- ***Understanding of some terms or expressions in the criminal law***

Compared to the previous Criminal code, the new Criminal code brings certain amendments and completions. First, we note that some definitions were transferred from this title to others. It regards the expressions: „the territory of Romania", „offence committed on the territory of Romania".

Regarding the meaning of the notion of **crime law**, this was agreed with constitutional regulations in force. According to art. 173, by criminal law, it is understood any provision with criminal character included in organic laws, emergency ordinances or other legal acts which were acting as laws (laws, decrees of the former State Council, law-decrees) by the time of their adoption.

The notion of **public clerk** was reformulated. The new Criminal Code opted for the assimilation of the natural persons that carry out a profession of public interest that requires a special ability of the public authorities and that is subjected to their control (for instance, notaries and judicial executors) to public clerks.

The notion of family member in the new concept absorbs the notion of close relatives, including also persons who established bounds similar to those between spouses or between parents and children on condition of living together.

The content of title X was completed with more definitions that are not found in the old Criminal code and that are used in regulating some offences taken from the special legislation (information system, exploitation of a person and electronic payment instrument).

III. Conclusions

Based on the above analysis, we can notice that the new Criminal code brings numerous changes within the institutions of the General part. Some of the changes operated by the lawgiver are meant to improve certain legal deficiencies that were encountered in practice. For instance, with regard to the causes of inexistence of the infraction (consent of the injured person, exercise of a right or carrying out of an obligation) or with regard to the forms of the legal unity of the offence.

Other changes were brought in order to stop certain controversies existing in the specialty doctrine of in the juridical practice. For example, with regard to the content of some circumstances (low reasons, conduct of the offender, etc.) or of the institution of the deed that does not have the social danger degree of an offence.

On the other hand, we notice that certain changes of the General part of the new Criminal Code reflect a change of the criminal policy of the Romanian state. We note here the sentencing regime of the offense plurality, the general definition of the offense, the criminal law application over the time, sanctions regime or the regime applicable to juvenile offenders, the enforcement of the criminal law in time, the punishment regime or the regime enforced to the minor offenders.

Only time will tell if the General part of the new Criminal code is or is not a step forward from a legislative point of view.

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CRIMINAL LAW PROTECTION OF DATABASE AT A GLANCE

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Abstract
Database protection is provided in Romania by the general law on copyright no. 8/1996. According to the law, it is considered to be a crime making available to the public, by any means, the special rights attributed to database owners or copies thereof. This paper will focus on, one hand, presenting the way database and database related products can be subject to a copyright general protection and, on the other, revealing the special sui generis right attributed to database owners. In such a context, criminal instruments for protecting such rights seem to be quite annoying for the perpetrator, but less effective when it comes to a proper enforcement by the criminal bodies. This paper will therefore try to compare the way guilty actions of the culprit are effectively sanctioned by the criminal instruments provided by the law.And because the Romanian law on copyright does follow at least the letter of the European Directives on copyright and the protection of database, this paper will also search the spirit of the relevant European case-law and its applicability by the Romanian authorities.

Keywords: *Law 8/1996, copyright, database, sui generis right, criminal sanction*

Introduction

The database protection appears to have long been a topic of general debate. Originating from the US copyright vision and sliding towards the European protection, the debate usually focused on trying to find a suitable answer to the way a database is effectively protected.

While the US had a real problem in framing database protection (out)side copyright, on March 11, 1996, the European Union structured database protection and launched a new form of intellectual property protection by passing the database directive no. 96/9/EC[1] (the Database Directive).

According to the aftermath of a well-known US *Feist* case-law[2], the reliance on copyright law as a comprehensive form of database protection has clearly diminished. Before such case-law, the US courts wanted to include database in general copyright protection, showing that, irrespective of their originality, all hard work authorship must be protected by the bias of copyright (the "sweat of the brow" doctrine[3]).

What led to the diminishing of the mere copyright for database was the concept of originality as the basic, yet constitutional for the US, requirement for copyright, even in case of compilations[4].

As a consequence, simple facts are not original. They lack the creativity and they do not stand to copyright protection. *Feist* wanted to make this very clear in the US and provided that copyright protection shall stick to originality.

On the other hand, EU Database Directive moved things forward and provided a *sui generis* form of database protection. Wanting to further solve the concern of protectable copyright fact (or row data), the Database Directive divided the protection into two distinctive elements: (i) database

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[1] Council Directive no. 96/9/EC, O.J. L 77/20 (1996).

[2] *Feist Publications, Inc. v. Rural Tel. Serv. Co*., 499 U.S. 340, 363 (1991).

[3] This doctrine protects factual compilations. As a general rule of this doctrine, labor done in compilation overcomes the requirement of creativity in a work.

[4] W. Matthew Wayman, "*International Database protection: a multilateral treaty solution to the United States' Database Dilemma"*, 37 Santa Clara L. Rev. 427 1996-1997, p. 432.

shall be protected under copyright law to the extent that the selection and arrangement of the data is original, and (ii) database shall be protected by a special *sui generis* right against the unfair extraction of all or a substantial portion of the database's contents.

In fact, the Database Directive has it all. It protects both the original format and unoriginal data within a database.

In this context, Romania fully benefits from the (clear) protection provided by the Database Directive. And because joining the EU in 2007 required some amendments to the internal laws, the Romanian law 8/1996 on copyright and related rights (the Romanian Copyright Law) did copy the "facts" of the Database Directive in a less "original format".

As such, Romania provides a distinctive protection to database on both copyright and special *sui generis* rights, making the best out of such protection, even by pure criminal protection. It goes without saying that "database" refer not only to paper based compilations but also to electronic databases; the latter being a collection of information stored so that they can be selectively searched and the desired information retrieved using a computer[5].

But is such criminal protection of database proper for the economical and/or money needs of the right holders? This paper will try to argue this question presenting both the way database is protected against copyright crimes (I), as well as against criminal infringements to the special *sui generis* rights (II). The criminal liability for database rights infringements becomes important especially in relation with the Romanian efforts to have general copyright protected by all means. Such efforts were visible before Romania joining the EU and were slightly tempered after 2007.

Because database criminal protection in Romania was poorly debated, this paper will try to shortly present the implications of such a criminal protection in this domain.

I) COPYRIGHT PROTECTION FOR DATABASE FORMAT. PROTECTING DERIVATIVE WORKS

This section will firstly define databases and place them in the general concept of copyright (A), showing then the way criminal copyright protection stands for database infringements (B).

A) Placing database in general copyright

As a general rule, all databases consist of two basic elements: the selection and arrangement of data and the data itself[6].

According to the Database Directive, "database" means a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means[7]. The Database Directive does not apply to computer programs used in the making or operation of databases accessible by electronic means[8].

Moreover, as per the Database Directive, "the term <database> should be understood to include literary, artistic, musical or other collections of works or collections of other material such as texts, sound, images, numbers, facts, and data. [I]t should cover collections of independent works, data or other materials which are systematically or methodically arranged and can be individually accessed. [T]his means that a recording or an audiovisual, cinematographic, literary or musical work as such does not fall within the scope of the Directive"[9].

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[5] Terry M. Sanks, *"Database protection: national and international attempts to provide legal protection for databases"*, 25 Fla. U. L. Rev. 991 1997-1998, p. 992.

[6] W. Matthew Wayman, see *supra* note 4, p. 431.

[7] Art. 1 para. 1 of the Database Directive.

[8] *Id*. para. 2.

[9] *Id*. recital point 17.

The above definition appears to be broad enough to provide protection to any sort of compilation. Because there are no limits to the medium of the database, any compilation should be protected under the Database Directive.

On the other hand, the Romanian Copyright Law defines the database (in translation) as a compilation of works, data or other independent elements, protected or not by copyright or related rights arranged in a systematic or methodical way and individually accessible by electronic or other means[10].

At a glance, one could say that the above provision related to database in the Database Directive and the Romanian Copyright Law is similar. In fact, it is identical, making it easier to understand the rationale behind the Romanian legislator's intentions.

As per the provisions of the Romanian Copyright Law, database is expressly a subject to the pure copyright protection. According to the law, all derivative works (compilations) are considered to be protected by copyright but only as it regards the way the material is selected or displayed[11].

As a consequence, all compilation of work is protected in Romania by copyright, provided that the selection and arrangement of data forming the database is original, therefore representing the author's own intellectual creation. Thus, the Romanian copyright retakes once again the general principles laid down by the Database Directive.

On the other hand, the Romanian law provides that it shall not be subject to copyright protection the simple facts and data. Consequently, data is not protected, even though it is included in a compilation or data base.

Protecting database by copyright is therefore possible provided that the database is what the Romanian law on copyright calls *derivative work*. Database will be a derivative work if it is original by the way the data is selected or displayed and it will be legal to create such derivative work if the author (or the right holder) agrees to such a work.

This is why article 13 of the Romanian Copyright Law provides that one of the patrimonial rights of the author is to authorize or to prohibit third parties the making of derivative works[12].

It seems to us important to note that the provisions related to derivative work in the Romanian Copyright Law are at least confusing as it regards the way such (original) work can be made. As mentioned above, derivative works can be made (and once made, will be protected by copyright) only *if they do not prejudice the rights of the authors* of the original (prior) work[13]. Such derivative work will always refer to another original work, because the law expressly requires this.

On the other hand, the same law provides that it is up to the author (or the right holder) to authorize or to prohibit the creation of derivative work. As such, it can result that derivative works can be made only if there is an authorization from the author (or the right holder) of the work based on which the derivative work was performed.

It results from the above that not having the consent of the author of the original work creates a legal presumption that the rights of the latter author were damaged by the simple creation of the derivative work. The law, therefore, cannot imagine a situation in which the database resulted following a compilation of copyrighted data can be made (in such a way that constitutes a new original work) without prejudicing the patrimonial rights of the author by not requesting the latter's consent.

We, do, however imagine such situations which basically refer to any data compilation of artistic work (i.e. movies) duly arranged in a systematic or methodical way and individually accessible by electronic or other means.

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[10] Art. 122[1] para. 1 of Romanian Copyright Law.
[11] *Id.* art. 8 let. b).
[12] *Id.* art. 13 let. i).
[13] Art. 8 of the Romanian Copyright Law.

It is therefore difficult for us to understand why in such an example one would need the consent of the authors of the respective work that was compiled or how are such databases prone to prejudice the right holders if they are, for instance, used in a private environment (i.e. my movie database, creatively organized and arranged), or even made public, as a creatively new work (in all cases, without including the copyrighted content, i.e. the movies themselves).

The relevant legal literature[14] timidly tried to detail the dependence of the prior original work to the derivative work[15]. According to such literature, in case of derivative works, the originality criteria for the derivative work can absolutely be fulfilled only if the dependence of the derivative work to the original work was maximum, meaning that without the original work, the derivative work could not have been created. This is the classic example of literature (the original book) and a booklet about a book (the derivative work).

We do agree that in the above example, the consent of the author for producing the derivative work is essential, since without the original, the derivative would not have existed (as such).

On the contrary, if the original work was just a support to the derivative work meaning a simple impulse to create a (separate and original) work, the latter, even though derivative, will not require the consent of the first original work. This is why we consider that an original and highly creative database about movies in a library, for instance, would not require the consent of every right holder that can, at some point, exist in the library.

Database will also be subject to protection by copyright if the raw data was public and free and was arranged in such a way that is creative and original. There is case law[16] on the subject. The typical example refers to public data available on the internet (i.e. site names on different subjects). If one would compile such data in a format that is by far original, creative, easy to reach, etc, the resulted work will be derivative and will be subject to copyright protection.

The copyright database protection is of utmost importance in respect of the criminal liability as it will be shortly detailed.

B) General criminal database protection

Facing criminal charges for copyright infringement is something not out the blue anymore. The criminal liability for copyright infringement was mainly envisaged back in 2004 by the Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (Directive 2004/48/EC)[17].

According to the Directive 2004/48/EC, "without prejudice to the civil and administrative measures, procedures and remedies laid down by this Directive, *Member States may apply other appropriate sanctions in cases where intellectual property rights have been infringed*[18] (emphasis added)".

And because the same Directive 2004/48/EC observed that infringements of intellectual property rights appear to be increasingly linked to organized crime[19], the only other appropriate sanctions legislators could think of were the criminal ones. Moreover, it was also noticed that the increasing use of the Internet enables pirated products to be distributed instantly around the globe. Approximation of the legislation of the Member States in this field is therefore an essential prerequisite for the proper functioning of the internal market.

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[14] Viorel Roş, Dragoş Bogdan, Octavia Spineanu-Matei, *"Copyright and related rights. Treaty"*, All Beck Publishing, Bucharest, 2005 p. 173.

[15] Yolanda Eminescu, "*Tratat de proprietate industriala*", vol. I, Ed. Academiei, 1982, p. 87.

[16] Cass. Fr. Criminal Section, November 27, 1869 in Viorel Roş, Dragoş Bogdan, Octavia Spineanu-Matei, *see supra*, note 14, p. 184.

[17] O.J. L 157, 30.4.2004.

[18] Art. 16 of the Directive 2004/48/EC.

[19] Recital 9 of the Directive 2004/48/EC.

As a consequence, Member States did regulated (in)appropriate criminal sanctions for intellectual property rights infringements. For the scope of this paper, we will focus only on those criminal sanctions related to copyright and, in particular, to copyright database criminal protection as provided by the Romanian Copyright Law.

At a small glimpse on how the criminal protection of copyrighted database works in Romania, we will notice that, according to the Romanian Copyright Law, it is considered to be a criminal offence[20] and will be punished with imprisonment ranging from one month to two years or with a fine, (with relevance for this paper) any performance of a derivative work, without the authorization or consent of the relevant right holder[21]. Because a database is a derivative work according to the law, the felony will be applicable to such databases.

As detailed above, the relevant right holder has the patrimonial right to authorize or to consent to the making of a derivative work. As such, infringing that particular right of the author, meaning the making of a database based on the original work without the consent of the author, will be considered a criminal offence and will be punished in accordance with the law.

Keeping in mind our examples above, it is, for us, strange how easy the legislator went for a criminal liability with a case-by-case situation, creating only the ground general rule for the liability, without any exception. It would have been however more strange if we would have found relevant case-law in Romania on the particular issue. The reality is that such a criminal copyright liability for third parties creating a database without the consent of the author of the original work is excessive and, if not properly interpreted, can lead to serious misjudging.

What it is protected by criminal instruments is not the creativity of the selection and arrangement of the data, but the mere infringement of one patrimonial right of the author (or the right holder) of an original work. This is why the object of the felony is represented by the general social relations related to the protection of the author's patrimonial rights.

From a technical standpoint, the material object of the felony is the original work itself based on which was illegally created the derivative work. The author of the crime is any person who makes a derivative work based on the original work of the right holder. It goes without saying that, starting 2006, the subject of the crime can also be a moral person – a company. In respect of penalties that can be applied to companies, there are two such categories: the main penalty and complementary penalties. The single main sanction that can be inflicted on companies is the fine[22].

Because there is the money element in all intellectual property construction, imagine that the criminal liability for companies will fully work in our case. The typical felony is that, for example, a limited liability company (LLC) dealing with the editing of translated works does this job without the authorization or consent of the author of the original work (or the right holder).

In this case, the LLC who illegally makes the derivative work can face criminal charges and fines can be inflicted in an amount ranging from RON 2,500 to RON 2,000,000. As a general rule, the amount of the fine for companies is established taking into account the penalties applicable to natural persons.

The felony is conditional on the existence of an original work, irrespective if it was made public. Such an original work will be protected by its simple creation, even if not yet finalized[23].

From an intentional standpoint, the felony can be committed by direct or indirect intention, which means that the culprit must either foresee the result of his action wanting to produce such

[20] For the purpose of this paper, it will be named "criminal offence" or "felony" all what the Romanian Law calls "infracțiune".

[21] Art. 140 let. f) of the Romanian Copyright Law.

[22] A.R. Ilie, "*Considerations regarding the criminal liability of corporations – the Romanian way*", Challenges of the Knowledge Society, Bucharest, April 15-16, 2011, 5th Edition, p. 127.

[23] Ciprian Raul Romițan, *"Intellectual property criminal protection"*, C.H.Beck Publishing, Bucharest, 2006, p. 153.

result by committing the guilty action or, foresees the result of his action and, although he does not wants to commits the action, he accepts the possibility that the result will be produced.

In our case, the illegal making of a derivative work will always be committed by intention, either direct or indirect, meaning that the natural person or the company will always seek to create a derivative work from the original creation of the author, without searching the authorization or consent of the right holder.

As such, the law criminally sanctions the making of a database without the consent of the right holder of the original work. This is a fact under the Romanian Copyright Law. In practice, however, the applicability of such a felony can be subject to serious concerns due to the general wording related to the illegal actions of the culprit.

As anticipated above, we do consider that making a derivative work does not always require the authorization of the original work right holder and it should be more carefully established the most suitable ways to protect creative derivative works, instead of strongly prohibit the general use of related works.

According to the Romanian Copyright Law, *sui generis* rights intend to protect database owners against the unfair extraction of all or a substantial portion of the database's contents. As it will be detailed below, the Romanian legislator wanted to criminally sanction the extraction and/or re-utilization of the database contents made without the owner's consent.

II) A *SUI GENERIS* RIGHT FOR DATABASE PROTECTION

This section will firstly present the meaning of the special *sui generis* right (A) and will secondly try to understand how one can face criminal charges for making available to the public the content of a database (B).

A) The relevance of special protection attributed to database owners

Articles 122^1 to 122^4 of the Romanian Copyright Law provide special *sui generis* right protection of database. The provisions were introduced in 2004 by law no. 285/2004 for the modifying of the Romanian Copyright Law[24]. According to the law, the creator of a database (database owner) is either a natural person or an entity which made a substantial quantity or quality based investment in order to obtain, verify and/or present the content of a database.

As a general rule, the database owner has the patrimonial right to authorize and to prohibit the extraction and/or re-utilization of the whole or of a substantial part, evaluated qualitatively or quantitatively, of the contents of that database.

Up to this point, it is obvious that the special *sui generis* rights do not require any level of creativity attributed to databases. Even if the provisions on the special *sui generis* rights are copied from the Database Directive, neither one of the instruments provide a definition for "qualitatively or quantitatively" investment, nor for "substantial investment".

The "extraction" and "re-utilization" are however defined both by the Database Directive and the Romanian Copyright Law. The "extraction" means the permanent or temporary transfer of all or a substantial part of the contents of a database to another medium by any means or in any form and "re-utilization" means any form of making available to the public all or a substantial part of the contents of a database by the distribution of copies, by renting, by on-line or other forms of transmission[25]. The law also expressly provides what is not considered to be an extraction or re-utilization, and that is the public lending (although not defining the terminology).

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[24] Law. no. 285/2004, published in the Official Gazette no. 587 of June 30, 2004. The law retakes the provisions of the 1996 Database Directive.

[25] Art. 7 point 2 of the Database Directive. Art. 122^2 para. 2 of the Romanian Copyright Law retake the definitions with some minor wording adjustments.

Both the Database Directive and the Romanian Copyright Law duly establish the exceptions to the *sui generis* right.

As such, lawful users of a database which is made available to the public in whatever manner may, without the authorization of its maker, extract or re-utilize a substantial part of its contents: (a) in the case of extraction for private purposes of the contents of a *non-electronic database* (emphasis added); (b) in the case of extraction for the purposes of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved; (c) in the case of extraction or re-utilization for the purposes of public security or an administrative or judicial procedure.

The law allows therefore the extraction for private purposes but only of non-electronic database. Even though "private purposes" are not expressly defined by the Database Directive, we consider that private purposes do refer to the general possibility to make a private copy, without the consent of the right holder, provided by the Directive 2001/29/EC on copyright.

Such private copy is however possible only for non-electronic database, which means that any substantial extraction of the contents of an electronic database, even in private purposes, is fully prohibited by the law. Without going into much detail, it was interpreted by the relevant doctrine that "private use" may refer to the normal family circle, including friends[26].

Such findings are essentials considering that the majority of available databases are electronically created and refer to data made and available on the internet (or some other electronic networks).

On the other hand, European courts have formulated different factors in determining what constitute a substantial investment in the creation of a database which will qualify for a *sui generis* protection. It goes without saying that such factors usually refer to money.

The Database Directive expressly states it that the making of databases requires the investment of considerable human, technical and financial resources[27]. Recital 39 speaks more generally of the financial and professional investment and recital 40 in the Database Directive assures that the investment may consist in the deployment of financial resources and/or the expending of time, effort and energy of the database maker.

Summarizing the provisions in the Database Directive pertaining to the investment, it results that the investment can be material, financial or human. "Financial" means money, "human" means time, effort and energy for the maker and "material" basically represents the buying of materials and equipment necessary for creating the database.

Courts have generally been confronted and interpreted all types of investments which trigger *sui generis* protection of database. For instance, employing a number of persons to collect data was qualified as a human investment[28] and the acquisition of computer equipment has been seen as a material investment[29].

The substantiality of the investment is only indicated by the Database Directive. As such, "as a rule, the compilation of several recordings of musical performances on a CD does not come within the scope of this Directive, both because, as a compilation, it does not meet the conditions for copyright protection and because *it does not represent a substantial enough investment to be eligible under the sui generis right*" (emphasis added)[30].

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[26] P-Y. Gautier, *"Propriété litteraire et artistique"*, Presses Universitaires de France, Paris, 1996; C. Colombet, *"Propriété littéraire et artistique et droits voisins"*, Dalloz, 1997; André Bertrand, *"Droit d'auteur et les droits voisins"*, 2eme édition, Dalloz, Paris, 1999.

[27] Recital 7 of the Database Directive.

[28] See for example, *Union Nationale des Mutualites Socialistes v./ Belpharma Communication*, TPI Bruxelles, 16 March 1999; *British Horseracing Board v./ William Hill*, 2001.

[29] See for example, *British Horseracing Board v./ William Hill, 2001*.

[30] Recitat 19 of the Database Directive.

We therefore tend to react to such a provision by saying that all what it is above such a (minimum) level of investment will have to be considered substantial. As a consequence, if a compilation of musical performances on a CD is, *as a rule*, insubstantial investment, what happens to compilation of data on a server, for example, or a relatively large compilation of movie based data that apparently just fit a DVD? Are such systematic works substantial? In fact, the answer will have to be on a case by case basis answered in court.

In a *Spot* case[31], company Spot explored a cinema based internet site which was used to reveal the programming of theatres in Belgium. In September 2000, Spot concluded with Numedia Channel a contract according to which the latter company monthly purchased the programming of theatres from Spot. The contract was terminated in May 2001.

However, Numedia Channel continued to extract information from cinebel.be, making them available on its own website, allocine.be. As part of the Numedia Channel defense in court was that cinebel.be is not a substantial investment in accordance with the provisions of the Database Directive.

The ECJ established however that in order to argue the insubstantiality of the database investment, it must be taken into consideration not only the prior and preliminary investments for creating the database (even if the expenses were amortized), but also any current expenses necessary to maintain and update a database.

In such a context, think, for instance, any job site that offers a variety of workplace offers. Is such a site a real database which should benefit from a *sui generis* protection provided by the law?

The answer will in fact depend on the way the job finder site was created and if such a database reflects an investment. What happens in practice is that the job finder site usually means a compilation of job announcements gathered on the site by the applications (job offers) sent by employers. The investment in this case is therefore the one associated with the financials and technology for creating the site (i.e. domain name, servers, personnel, etc.).

Because the information in the site goes public, the risk for the creator/ owner of the database will always refer to the general possibility for illegal extraction and / or re-utilization of the database content. Such illegal actions are basically made by so-called aggregators (search engines) which collect the information available on different specialized sites and put it together so as third parties can easily find it.

Even if such a practice can be favorable to end-consumers, the problem raised refers to the (illegal) extraction of the information contained in the database. According to the law, criminal liability is therefore foreseeable.

B) The illegal making available to the public of database content

As a general observation, the Database Directive does not provide a clear guideline for determining if a database qualifies for the *sui generis* right. This is without a doubt applicable for the Romanian Copyright Law dealing with this special right.

It is essential to observe that the Romanian Copyright Law chooses to criminally sanction the infringements to the protectible databases. We find this yet shocking in such a context where European Courts have not found a definitive test for database infringement. We consider this approach a little too drastic to cope with.

According to the Romanian Copyright Law, it is considered to be a crime and it will be punished with imprisonment ranging from one to four years or with a fine, the making available to the public, including by internet or by other computer networks, without the consent of the right holder, of *sui generis* rights *or copies thereof* (emphasis added), irrespective of the medium, so that the public can access them in any place or moment individually selected[32].

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[31] *Spot (cinebel.be) v/ Canal Numedia (allocine.be)*, Bruxelles January 18, 2002.

[32] Art. 139^8 of the Romanian Copyright Law.

Carefully analyzing the *verbum regens* of the above felony, it will be noticed that the crime retake the content of the patrimonial right of the database maker to re-utilize the entirety or the substantial part of a database. As detailed above, the re-utilization of a database content means, in particular, any form of making available to the public the content of a database by distributing copies, renting or making available to the public the content of the database.

According to the ECJ case law, the extraction and re-utilization which affects the totality or a substantial part of the database require without a doubt the authorization of the maker of the database even if the database is partially or totally made available to the public or if the maker of the database authorized third parties to distribute to the public the database[33].

From a criminal law standpoint, the object of the felony is represented by the social relationships assuring the protection of database right holders[34]. Such a protection will obviously be activated if the compilation of data is a database as defined by the Database Directive and the Romanian Copyright Law.

The material object of the felony is represented by the database itself or, as expressly provided by the law, by the copies of the database.

In this way, it is important to note that according to a largely debated Google case law[35], as a general rule, Google automatically index all web pages by the "Googlebot" program and, in addition, creates a copy of every page that it indexed and stores it in a file called "cache" file.

Alongside the results of a search in Google, such results will also include the results of the cached pages. Accessing the cache page will redirect the user to the copy of the webpage made by Google and not to the original webpage. *Field* claimed in front of the court that Google infringed its rights by the fact that user accessed the cache pages and downloaded information thereof.

Without going in to much detail, Google won the *Field* case and the arguments of the court referred to the general "fair use" principle in the US Copyright Act as it regards the copying and distribution of protected works by cache indexing.

Such a "fair use" principle is not however fully applicable as per the provisions of the Romanian Copyright Law. The Romanian law does not contain a general fair use principle to justify the copying (extraction) of the contents of a database. Consequently, according to the letter of the law, it will be a felony any making available to the public of the contents of a database or the copies of such data, without the consent of the right holder.

In this way, it doesn't really matter the scope of usage of the indexed data as long as such data was illegally extracted or re-utilized without the proper consent. However, according to the ECJ case law, they tend to measure the substantiality of the extraction by looking at the data's value or at the infringing activities from a database maker's perspective[36].

Thinking again of our dedicated search engines (aggregators) it was observed in practice that such a search engine infringed an online telephone directory owner's database right, because it provided its users the extracted data without referring them to the original directory[37].

As such, for both the extraction and the re-utilization, their scope lies in the breadth of the definition of substantial part. Only knowing if the extraction and/or re-utilization were substantial can make the action illicit and (probably) request criminal charges for the culprit.

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[33] ECJ, *The British Horseracing Board Ltd and others v/ William Hill Organization Ltd*, para 61.

[34] Constantin Duvac, *"Analysis of the felony provided by art. 139[8] on Law 8/1996"*, RRDPI, 4/2007, p. 45.

[35] Nevada Districtual Court, US, *Blake A. Field v/ Google Inc.*, January 19, 2006.

[36] Xuqiong (Joanna) Wu, *"E.C. Database Directive, Foreign & International Law: Database protection"*, 2002 Berkeley Technology Law Journal & Berkeley Center for Law and Technology, Vol. 17:571, p. 583.

[37] See P. Bernt Hugenholtz, *"The New Database Right: Early Case Law from Europe"* (paper presented at Ninth Annual Conference on International IP Law & Policy, Fordham University School of Law, New York, Apr. 19-20 2001), available on http://www.ivir.nl/publications/hugenholtz/fordham2001.html (visited on January 31st, 2012).

Conclusion

It goes without saying that the Database Directive has primarily set the agenda for national and international database protection. This happened back in 1996 and managed to internally influence the protection granted by the Romanian Copyright Law since 2004.

As a consequence, the Database Directive and the Romanian Copyright Law provide a two-pronged test to determine if a database is eligible for protection[38]. Firstly, the database will qualify for the protection by copyright if it contains information arranged and/or structured in an original, yet systematic way. Secondly, the database will benefit from a special *sui generis* right if was created by a substantial investment.

In both cases, the Romanian criminal protection of database appears to us excessive. Even though there isn't much Romanian criminal case law on the issue, the consequences that may appear by interpreting the provisions of the law are huge and can lead to disproportionate criminal charges.

In a pure internet era, criminal liability attributed to almost any data exchange or "extraction" can cause damages not only to the public data exchange process, but also to the private use of households, those individuals that can, at some time, be original and create their own work, being further protected. The recent debate triggered by the adoption of ACTA provides an argument in this line.

This paper only tried to draw the attention on the practicalities around having database infringements criminally sanctioned. The herein presentation is thus intentionally non-exhaustive. It will take more than a study to help the criminal authorities understand that the special *sui generis* right infringements are naturally related to the rationale of general intellectual property rights: creativity generating money.

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IMPLEMENTING A NATIONAL PREVENTIVE MECHANISM FOR THE PREVENTION OF TORTURE AND OTHER FORMS OF CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT IN PLACES OF DETENTION IN ROMANIA

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Abstract

With the ratification of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) by Law no. 109/2009, Romania has taken a further step in strengthening the preventive monitoring of places of detention by an independent body as a form of preventing and combating torture and other forms of ill-treatment in different places of detention. Consequently, Romania is to establish a National Preventive Mechanism (NPM) for the prevention of torture and other forms of cruel, inhuman or degrading treatment or punishment in places of detention.

The paper will focus on the study of the OPCAT provisions regarding the NPM, aimed at establishing a system of regular visits undertaken by an independent national body to places where people are deprived of their liberty. Due attention will be granted to the existing domestic mechanisms and to the analysis of the legislation of certain European states that already implemented OPCAT.Furthermore, this article will assess the difficulties which the implementation of a NPM in Romania poses, the shortcomings of such an endeavour, with a view to the understanding of the minimum pre-requisites for an effective functioning of such a national body and taking also into consideration the Principles Relating to the Status of National Institutions for the Promotion and Protection of Human Rights (Paris Principles).To close with, the study will attempt to present some recommendations meant to ensure a firm and efficient implementation of the NPM in Romania.

Keywords: *Places of detention, United Nations, Optional Protocol to the Convention against Torture (OPCAT), National Preventive Mechanism (NPM), Romanian legislation, torture and other forms of cruel, inhuman or degrading treatment or punishment.*

Introduction

Acknowledging the fact that the persons deprived of their liberty are in a fragile position, it is the duty of the states and of the international community to ensure the full respect of their fundamental rights. This was the reason for the United Nations to come with the adoption of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)[1], being convinced, according to the Preamble, that further measures are necessary to achieve the purposes of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)[2], strengthening the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment.

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[1] The Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment was adopted on 18 December 2002, entered into force on 22 June 2006 and was ratified by Romania through Law no. 109/2009, published in the *Official Journal of Romania*, Part I, no. 300 of May 7, 2009. For the full text of the OPCAT, see http://www2.ohchr.org/english/law/cat-one.htm, accessed on January 25, 2012.

[2] ***Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was adopted on 10 December 1984, entered into force 26 June 1987 and was ratified by Romania through Law no. 19/1990, published in the*** **Official Journal of Romania,** ***Part I, no. 112 of October 10, 1990.***

The efforts of the United Nations in ensuring protection for the persons deprived of their liberty are continous, just to mention the recent discussions within an open-ended intergovernmental expert group in order to exchange information on best practices, as well as national legislation and existing international law, and on the revision of the existing United Nations standard minimum rules for the treatment of prisoners so that they reflect recent advances in correctional science and best practices, with a view to making recommendations to the Commission on possible next steps.[3]

A presentation of the existing control mechanisms in Romania and a brief analyse of the legislation of certain European states will help us to assess more accurately the current situation in Romania and to observe different models of already implemented national prevention mechanisms, consequently allowing us to look at the whole picture, having all the elements, thus drawing the best fitting solutions in implementing a solid and functional national preventive mechanism in Romania, in full respect with OPCAT requirements.

CONTENT

I. The Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

1. General presentation. Observing that the protection of human rights is of paramount importance and is subject to continous evolution, the United Nations adopted the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* stressing out that further measures are necessary to achieve the purposes of the CAT and to strengthen the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment.

Although Romania ratified the OPCAT in 2009, based on the declaration made in accordance with article 24, paragraph 1, the implementation of the obligations under Part IV, concerning national preventive mechanisms[4] was postponed for three years, thus no NPM was designated in Romania up to this point. The three year period of postponement will expire on 1 August 2012, leaving a tight timeframe to the relevant national stakeholders in order to designate a NPM within the assumed term.[5]

Unlike other optional protocols to human rights treaties, the OPCAT is viewed as an operational treaty rather than a standard-setting instrument.[6] In this sense, it was stated that the OPCAT breaks new ground within the UN human rights system for four main reasons[7], namely: it emphasises prevention; it combines complementary international and national efforts; it emphasises cooperation, not condemnation and it establishes a triangular relationship (between the States Parties,

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[3] ***See the open-ended intergovernmental expert group meeting on the United Nations standard minimum rules for the treatment of prisoners, 31 January - 2 February 2012, Vienna, Austria, as requested by the General Assembly, in operative paragraph 10 of its Resolution 65/230 of 21 December 2010, entitled "*Twelfth United Nations Congress on Crime Prevention and Criminal Justice*", accessed on February 2, 2012, http://www.unodc.org/documents/justice-and-prison-reform/AGMs/General_Assembly_resolution_65-230_E.pdf.***

[4] ***According to article 17 of the OPCAT, each State Party shall maintain, designate or establish, at the latest one year after the entry into force of the present Protocol or of its ratification or accession, one or several independent national preventive mechanisms for the prevention of torture at the domestic level.***

[5] ***According to article 2 of the Order no. 47/2010 of the minister of foreign affairs, published in the* Official Journal of Romania*, Part I, no. 100 of February 15, 2010, the OPCAT entered into force for Romania on August 1, 2009, so the three year period of postponement will expire on August 1, 2012.***

[6] Association for the Prevention of Torture (APT) and the Inter-American Institute for Human Rights (IIHR), *Optional Protocol to the UN Convention against Torture: Implementation Manual*, revised edition, 2010, p.11, accessed January 31, 2012, http://www.apt.ch/index.php?option=com_docman&task=doc_ download&gid=784& Itemid=256&lang=en.

[7] For an in-depth analysis of these reasons, see APT and IIHR, *op. cit.*, p.12 - 14.

the Subcommittee on Prevention and NPMs). In this respect it makes more sense to expose places of detention to public scrutiny and to make the entire system in which police, security and intelligence officials operate more transparent and accountable to external monitoring.[8] More specifically, the fact that detainees are locked away from society also means that society is prevented from knowing the truth about life behind bars. Many detainees feel that society has forgotten them and that nobody is interested in their fate. In fact, most people have never seen a place of detention from inside and are not really interested to know what is going on in closed institutions.[9]

The Optional Protocol aims to protect persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment by preventive non-judicial means, approaching the problem from two sides, as it establishes a system of regular visits undertaken to places where people are deprived of their liberty by an independent international body – the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee against Torture and by national preventive mechanisms for the prevention of torture at the domestic level, due to be created by each Member State.

The main mandate of the *Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee against Torture* shall consist of visits in the places of detention and in making recommendations to States Parties concerning the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment. In order to give assistance to the States and NPMs in fulfilling their obligations under the Optional Protocol, bearing in mind the provisions set out in the OPCAT, the Subcommittee on Prevention issued the Guidelines on national preventive mechanisms[10] aiming to add further clarity as to the expectations of the Subcommittee on Prevention regarding the establishment and operation of NPMs.

The *National Preventive Mechanisms* shall have both functional and personnel independence and shall visit the national places of detention in order to examine regularly the treatment of the persons deprived of their liberty, with a view to strengthening, if necessary, their protection against torture and other cruel, inhuman or degrading treatment or punishment.

Also, they shall have the right to make contacts with the Subcommittee on Prevention, to send it information and to meet with it. It should be stressed out that the Guidelines of the Subcommittee on Prevention emphasize the fact that the NPM should complement rather than replace existing systems of monitoring and its establishment should not preclude the creation or operation of other such complementary systems.

When analysing the implementation of OPCAT, one should observe with particular attention the content of the notions of "*places of detention*" and "*deprivation of liberty*" explained in article 4, since the meaning of them is different from the commom understanding. *Place of detention* shall mean any place under the jurisdiction and control of the member states where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence.

Deprivation of liberty shall mean any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority.

So, it can be clearly outlined that places of detention falling under the provisions of OPCAT are broader, as they include not only the "*classical*" places of detention (penitentiaries, places of

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[8] See Manfred Nowak, *Interim report of the UN Special Rapporteur of the Commission on Human Rights on torture and other cruel, inhuman or degrading treatment or punishment*, A/61/259, 14 August 2006, para.67, accessed January 25, 2012, http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/468/15/PDF/N0646815.pdf?OpenElement.

[9] See Manfred Nowak, op. cit., para. 46.

[10] The *Guidelines on national preventive mechanisms* were adopted by the United Nations' Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on 15–19 November 2010, accessed January 29, 2012, www2.ohchr.org/english/bodies/cat/opcat/docs/SPT_Guidelines_NPM_en.doc.

arrest, detention centers), but any place where a person is or may be deprived of his or her liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or approval, in this category being included, for exemple, psychiatric institutions, centers for the refugees, orphanages and homes for the elderly. Thus the NPMs' visiting mandate has a very wide range, as it comprises the right to visit all places where people are or may be deprived of their liberty. It was however emphasized that the aim of the OPCAT is the prevention and visits are only part of that preventive mandate. It is very important that any NPM looks to the broader picture of prevention under the OPCAT.[11]

2. National Prevention Mechanisms. Further, the paper will focus on analysing the provisions contained in the Optional Protocol regarding the National Prevention Mechanisms. Although the OPCAT does not prescribe a particular structure for the NPMs' it does set out several paraghraphs (articles 17-23) about the mandate and minimum powers the NPMs' must be given by States Parties. In accordance with article 19, NPMs shall be granted minimum the following powers:

"(a) To regularly examine the treatment of the persons deprived of their liberty in places of detention as defined in article 4, with a view to strengthening, if necessary, their protection against torture, cruel, inhuman or degrading treatment or punishment;

(b) To make recommendations to the relevant authorities with the aim of improving the treatment and the conditions of the persons deprived of their liberty and to prevent torture, cruel, inhuman or degrading treatment or punishment, taking into consideration the relevant norms of the United Nations;

(c) To submit proposals and observations concerning existing or draft legislation."

The NPM should have a functional independence and an independence of its personnel, which has to have such capabilities and professional knowledge[12] necessary to achieve the scope of the mechanism.

In fulfilling the requirements of OPCAT, besides the pre-existence of the human resources requirements, the functional and budgetary independence, the experts within the NPM should have, in accordance to the provisions of article 20 of the OPCAT, access to all information concerning the number of persons deprived of their liberty in places of detention, the number of places and their location; access to all information referring to the treatment of those persons as well as their conditions of detention; access to all places of detention and their installations and facilities. Also, they must have the opportunity to interview, in private, the persons deprived of their liberty without witnesses, either personally or with a translator if deemed necessary, as well as with any other person who can supply relevant information.[13]

3. The notion of "torture". As to the notion of *torture* in the sense of the United Nations' Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[14], the

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[11] Rachel Murray, Malcolm Evans, Elina Steinerte, Antenor Hallo de Wolf, *Summary and Recommendations* from the Conference *OPCAT in the OSCE region: What it means and how to make it work?,* held on 25-26 November 2008 in Prague, University of Bristol, 2009, p.5, accessed February 1, 2012, http://www.bris.ac.uk/law/research/centres-themes/opcat/opcatdocs/prague2008/proceedingspraguenovember2008.pdf.

[12] *E.g.:* prior experience in visiting places of detention, membership in certain professions relevant to the scope of the mechanism (lawyers, doctors, psychologists, psychiatrists, social workers etc.), moral authority and respect within the society.

[13] As a consequence of this provision, article 21 of OPCAT underlines the fact that no authority or official shall order, apply, permit or tolerate any sanction against any person or organization for having communicated to the national preventive mechanism any information, whether true or false and no such person or organization shall be otherwise prejudiced in any way.

[14] According to article 1 para.1 from the CAT, the term *"torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a*

accepted approach under international law has been to avoid drawing up an exhaustive list of acts that could be considered to amount to torture because of concerns that such a list may prove too limited in its scope and, thus, may fail to adequately respond to developments in technology and values within societies.[15] Also, the lack of a definition of "*other forms of ill-treatment*" from the text of the Convention is useful as it ensures that other types of abuse that may fail to meet the strict definition of torture as a crime, but that nevertheless cause suffering to individuals, are also absolutely prohibited.[16]

It can be observed that this definition has a four-part test: the intentional infliction; of severe pain or suffering weather physical or mental; for any purpose including, for example, to obtain information, inflict punishement or intimidate him or a third person; by a public official or person acting in an official capacity.[17] To strengthen the prohibition of torture, article 2 from the CAT[18] states the absolute prohibition of torture. Thus it can not be subject of defences, statute of limitations or amnesty and efforts by some States to justify torture and ill-treatment as measures to protect public safety or avert emergencies can not be recognized.

Evaluating the distinction made between torture and other cruel, inhuman or degrading treatment or punishment, the thorough analysis of the *travaux préparatoires* of articles 1 and 16 of CAT as well as a systematic interpretation of both provisions in light of the practice of the Committee against Torture leads one to conclude that the decisive criteria for distinguishing torture from *[cruel, inhuman or degrading treatment]* may best be understood to be the purpose of the conduct and the powerlessness of the victim, rather than the intensity of the pain or suffering inflicted, as argued by the European Court of Human Rights and many scholars.[19]

One common element of the definitions of torture and other forms of ill-treatment under the Convention against Torture is that all must involve a public official or someone acting in an official capacity. However, for the purposes of the CAT, cruel, inhuman or degrading treatment may "*not amount to torture*" either because it does not have the same purposes as torture, or because it is not intentional, or perhaps because the pain and suffering is not "*severe*" within the meaning of article 1.[20]

Indeed, the definition of torture in the United Nations' Convention is reflected also to the purpose of the actions, which is in opposition to the provisions of the article 3 from the European Convention for the Protection of Human Rights and Fundamental Freedoms[21], refined through the

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public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

[15] APT and IIHR, *op. cit.*, p.27.

[16] APT and IIHR, *op. cit.*, p.28.

[17] Jim Murdoch, *The treatment of prisoners. European standards*, Council of Europe Publishing, Strasbourg, 2004, p.118.

[18] According to article 2 para.2 from the CAT, *no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.* Moreover, according to article 16 from the CAT, *each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity*.

[19] Manfred Nowak, *Civil and political rights, including the questions of torture and detention. Torture and other cruel, inhuman or degrading treatment. Report of the Special Rapporteur on the question of torture, Manfred Nowak*, E/CN.4/2006/6, 23 December 2005, p.13, para.39, accessed February 1, 2012, http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/168/09/PDF/G0516809.pdf?OpenElement.

[20] Association for the Prevention of Torture (APT) and the Center for Justice and International Law (CEJIL), *Torture in International Law. A guide to jurisprudence*, 2008, p.12, accessed February 1, 2012, http://www.apt.ch/index.php?option=com_docman&task=doc_download&gid=326&Itemid=260&lang=en.

[21] Convention for the Protection of Human Rights and Fundamental Freedoms, adopted on November 4, 1950, as amended by Protocol no. 11, together with Protocols no. 1, 4, 6, 7, 12 and 13 were ratified by Romania through Law no. 30/1994, published in the *Official Journal of Romania*, Part I, no. 135 of May 31, 1994.

European Court of Human Rights case-law, stating that "*no one shall be subjected to torture or to inhuman or degrading treatment or punishment*", as the European aproach proceeds upon degrees of severity of the suffering caused in setting up a distinction between torture and inhuman or degrading treatment or punishment.

II. Presentation of the national legislation regarding the current Inspection Mechanisms in Romania

1. Mechanisms of inspection under the authority of the Minister of Justice and the National Administration of Penitentiaries. According to the provisions of articles 21 and 33 from the Government Decision no. 652/2009[22], the control competences of the Ministry of Justice are exercised by the Directorate of Internal Control[23] placed under the direct coordination of the minister of justice. The Directorate can carry out preventive and reactive visits, *ex officio* or as a reaction to a direct complaint and, while not having a special focus, it includes the analysis of torture or ill treatment of the persons deprived of their liberty placed in the penitentiaries under the authority of the National Administration of Penitentiaries. The recommendations given by the Directorate as a result to such visits are binding to all penitentiaries throughout the country.

The internal inspection mechanism within the National Administration of Penitentiaries is the Directorate for the Inspection of Penitentiaries[24], placed directly under the General Director. The Directorate has competence to control all 45 penitentiaries with a total number of approximately 30,600 inmates and its main tasks are: conducting general inspections, which have various purposes such as inspecting safety, health and financial aspects as well as the rights of the detainees, *ad hoc* controls, as a reaction to a complaint, usually to inspect only on a particular aspect, concerning the complaint received and exercising thematic controls concerning an aspect decided upon by the National Administration of Penitentiaries.

The personnel of the Directorate for the Inspection of Penitentiaries has access to all facilities, information and documents regarding the place of inspection, it can hold interviews with the detainees in private and is not subject to restrictions from the administration of the penitentiaries. After each visit the Directorate issues a note with its findings, recommendations and a deadline for the penitentiary to implement the recommendations.

2. Mechanisms of inspection under the authority of the Ministry of Administration and Interior and the General Inspectorate of the Police. The internal control mechanism within the Ministry of Administration and Interior is the Directorate of Internal Control[25], directly subordinated to the minister of administration and interior, having competence to all the structures within or subordinated to the Ministry.

The Directorate for Internal Control within the General Inspectorate of Romanian Police has the competence to visit and control all 54 police detention facilities. It specializes in organizing and

[22] Government Decision no. 652/2009 regarding the organisation and functioning of the Ministry of Justice was published in the *Official Journal of Romania*, Part I, no. 443 of June 29, 2009. Consolidated text as of December 8, 2011.

[23] See articles 74 – 76 from the Order no. 120/C/2011 of the minister of justice on approving the Regulation for organization of the Ministry of Justice, published in the *Official Journal of Romania*, Part I, no. 116 of February 16, 2011. Consolidated text as of October 6, 2011.

[24] See articles 46 – 54 from the Order no. 2003/C/2008 of the minister of justice on approving the Regulation for organization of the National Administration of Penitentiaries, published in the *Official Journal of Romania*, Part I, no. 603 of August 13, 2004. Consolidated text as of January 5, 2009.

[25] Order no. 118/2011 of the minister of administration and interior regarding the organization and execution of internal controls within the Ministry of Administration and Interior, published in the *Official Journal of Romania*, Part I, no. 443 of June 24, 2011.

carrying out inspections, checking petitions, preventing and countering infringement of law within the personnel of the General Inspectorate of Romanian Police and subordinated units.

3. Mechanisms of inspection under the authority of the Ministry of Labour, Family and Social Protection and under the public local administration. The internal control mechanism within the Ministry of Labour, Family and Social Protection is the Directorate of Internal Control.[26]

The protection of children that are placed in institution where they are not allowed to leave at will is ensured both on a central and local level. The main institution of the central public administration having competences in the protection of the children rights is the National Authority for the Protection of the Rights of the Child, subordinated to the Ministry of Labour, Family and Social Protection. It is the responsibility of the public local administration authorities to guarantee the rights of children within their territorial range.

4. Mechanisms of inspection under the authority of the Ministry of Health. In Romania there are approximately 37 psychiatric hospitals, 4 of which being psychiatric hospitals for safety measures, where patients are not free to leave at will due to the danger state they may pose to themselves or to others.

According to the provisions of the Government Decision no. 144/2010[27], the Directorate for Control functioning within the ministry inspects the hospitals in order to renew their licensing. If deficits are found, binding recommendations are made and a time frame for improvements is given.

Also, regarding the mental health institutions, according to the provisions of the Government Decision no. 1424/2009[28], the National Centre for Mental Health, a subordinated structure to the Minister of Health, deals with various issues regarding the management of mental health institutions and the medical treatment of the patients, carrying out preventive and reactive inspections, as it monitorises and evaluates the mental health services.

The preventive visits of these 2 mechanisms usually have the purpose of inspecting a broad range of issues and specifically to check the compliance with the medical and professional standards.

5. Conclusions on the existing mechanisms under the executive branch.

Despite the fact that all the above presented mechanisms functioning under the executive branch can carry out reactive or even preventive visits and can hold interviews in private with the persons deprived of their liberty, having access to all facilities and relevant persons and documents when visiting a place of detention, they lack the human and logistic resources in order to visit a relevant number of places of detention falling under their competence and, being subordinated to the executive branch, they lack functional and budgetary independence. Consequently, the relevant conditions needed to effectively and objectively examine the treatment of detainees and the conditions of detention, as required by OPCAT, are not present. Nevertheless, the executive mechanisms can function as useful partners for the future NPM, as they have a broad expertise regarding the administration and management of places of detention and could be able to implement recommendations of the NPM in an appropriate manner.[29]

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[26] Government Decision no. 11/2009 regarding the organisation and functioning of the Ministry of Labour, Family and Social Protection was published in the Official Journal of Romania, Part I, no. 41 of January 23, 2009. Consolidated text as of August 23, 2011.

[27] Government Decision no. 144/2010 regarding the organisation and functioning of the Ministry of Health was published in the *Official Journal of Romania*, Part I, no. 139 of March 2, 2010. Consolidated text as of January 11, 2012.

[28] Government Decision no. 1424/2009 regarding the organisation and functioning of the National Centre for Mental Health was published in the *Official Journal of Romania*, Part I, no. 842 of December 7, 2009.

[29] Moritz Birk, Ulrike Kirchgaesser, Julia Kozma, *Final Report on the possible solutions for the establishment of a National Preventive Mechanism in Romania,* p.8**,** accessed January 31, 2012, http://www.just.ro/LinkClick.aspx?fileticket=M%2B4HHbNMs10%3D&tabid=690.

6. Delegated Judges. The new legal framework in the field of execution of criminal penalties, namely Law no. 275/2006[30], envisages a modern development of the Romanian prison system, as a delegated judge on the execution of prison penalties was introduced, thus the execution of these penalties being carried out under the surveillance, control and authority of this judge, ensuring the lawfulness of the execution.

Delegated judges are not part of the penitentiary administration, as they mentained their status of judge of the Romanian court system. Thus, they are independent from the executive branch and only subordinated to the judicial branch. According to article 15 para.(2) from the Government Decision no. 1897/2006[31], they are competent to carry out current, occasional, unexpected, thematic and specialised inspections and controls *ex officio* or based complaints. The delegated judges have the right to access all relevant facilities within the penitentiary and hold interviews in private with any detainee or staff member.

In conclusion, the delegated judges, although independent in exercising their competences, do not carry out preventive visits, but only react to the complaints filed by inmates and aiming to prevent ill-treatment of these persons, do not have the necessary expertise, logistics or budgetary independence to realise a full evaluation of a place of detention in order to prevent torture and other ill-treatements, not to mention the fact that their offices are placed on the premises of the penitentiary, thus their independence and credibility can be undermined.

7. Ombudsman. *Avocatul Poporului* (the Romanian Ombudsman) was established in 1991 through the Constitution, as an independent and autonomous public authority, with its own budget and having the purpose of defending the individuals' rights and freedoms in their relationship with the public authorities. The Ombudsman tries to unblock the conflicts between citizens and public administration, conflicts emerging, especially, from bureaucracy, as this was and still is a heavy disease of the state administration.[32] It shall exercise his powers *ex officio* or at the request of persons infringed in their rights and freedoms, within the limits established by law, including the possibility to visit public places of detention, but not private ones.

Avocatul Poporului is organised by Law no. 35/1997[33], has its headquarters in Bucharest and 14 regional offices. According to these legal provisions, the domain of justice, police and penitentiaries falls under its competence. Consequently, the authorities of places of detention must provide anyone who is under arrest or detention, the right to address the Ombudsman concerning a violation of his/her rights and freedoms, except for the legal restraints.

Although he is empowered to deploy preventive visits, from the public reports it can be seen that it rarely does so; of two surveys in 2009, one focused on the rights of detainees in a penitentiary and the other on child and youth protection and the right to health care according to human rights standards in a children placement centre.

The Advocate of the People shall report before the two Parliament Chambers, annually or at the request thereof. The reports may contain recommendations on legislation or measures of any

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[30] Law no. 275/2006 on enforcement of penalties and of measures ordered by the judicial bodies during the criminal proceedings was published in the *Official Journal of Romania*, Part I, no. 627 of July 20, 2006. Consolidated text as of May 22, 2010.

[31] Government Decision no. 1897/2006 for the approval of the Regulation of application of the Law no. 275/2006 on enforcement of penalties and of measures ordered by the judicial bodies during the criminal proceedings was published in the *Official Journal of Romania*, Part I, no. 24 of January 16, 2007. Consolidated text as of December 4, 2010.

[32] Ioan Muraru in Mihai Constantinescu, Antonie Iorgovan, Ioan Muraru, Elena Simina Tănăsescu, *Constituţia României revizuită – comentarii şi explicaţii (Romanian Constitution revized – comments and explanations)*, All Beck Publishing House, Bucharest, 2004, p.116.

[33] Law no. 35/1997 on the organisation and functioning of the Institution of the Advocate of the People was re-published in the *Official Journal of Romania*, Part I, no. 844 of September 15, 2004. Consolidated text as of January 16, 2011.

other nature for the defence of the citizens' rights and freedoms. The recommendations cannot be subject to parliamentary or judicial control.

Sumarising, the Ombudsman usually visits places of detention upon a complaint and it does not have the necessary human or financial resources to systematically carry out preventive visits as required by OPCAT. In spite of these shortcomings, the Ombudsman is, unlike the other mechanisms analysed, a truly independent institution.

8. Non-Governmental Organisations. In Romania there are several non-governmental organizations which carry out an intensive activity in monitoring places of detention (*e.g.* Association for the Defense of Human Rights in Romania - the Helsinki Committee, Romanian Group for the Defence of Human Rights, Centre for Legal Resources).

According to the provisions of the Law no. 275/2006, the representatives of the non-governmental organisations that carry out activities in the field of protection of human rights may visit the penitentiaries in the subordination of the National Administration of Penitentiaries or places of arrest in the subordination of the General Inspectorate of the Police and may contact the inmates, with the agreement of the general director of the National Administration of Penitentiaries or of the warden of the place of arrest. The meetings among the representatives of the non-governmental organisations and the persons deprived of their liberty are confidential, with visual surveillance.

The representatives of the non-governmental organisations performing visits need an annual general approval by the Romanian authorities for the visits. In addition, the approval is verified by the respective prison or police unit before each visit.

Regarding the psychiatric hospitals, the non-governmental organisations have an annual protocol signed with the Ministry of Health, by which representatives of these organisations can visit such hospitals, having access to all the facilities within the institution. Also, interviews with the patients are conducted in private.

Although non-governmental organisations are fully independent from the State, not receving any funding of any sorts for the monitoring visits and carry out preventive visits in the "*classical*" places of detention, they do not have the capacity neither the resources necessary to carry out systematic visits to all places of detention throughout the country, lacking, also the multidisciplinary expertise and the legal provisions to ensure that they can issue recommendations to the visited institutions.

In conclusion, while in Romania a comprehensive system of monitoring of places of detention already exists, the current inspection mechanisms display significant shortcomings in view of independent preventive monitoring[34], none of these mechanisms being in compliance with the Paris Principles[35] and with the minimum requirements of OPCAT in order to be appointed as the National Prevention Mechanism.

III. Short analyse of the implementation of the National Preventive Mechanism in certain European Union states.

1. The Czech Republic ratified the Optional Protocol in 2006 and, subsequently, the Act on the Public Defender of Rights (Ombudsman) was ammended in order to implement the OPCAT. The law came into effect as of 1 January 2006. From this date on, the Public Defender of Rights (*Veřejný ochránce práv*) acts as a NPM, as it has independence both functionally and institutionally.

Being appointed as a NPM, the Defender was obligated to undertake systematic, comprehensive and preventive visits in places of detention, with the objective of strengthening the protection of these persons against torture or cruel, inhuman and degrading treatment or punishment

[34] Moritz Birk, Ulrike Kirchgaesser, Julia Kozma, *op. cit.*, p.7.

[35] The Principles relating to the Status of National Institutions (*The Paris Principles*) were adopted on 20 December 1993, accessed January 26, 2012, http://www2.ohchr.org/english/law/parisprinciples.htm.

and other maltreatment.[36] Places of detention falling under the mandate of the Defender are: facilities performing custody, imprisonment, protective or institutional education, or protective treatment or preventive detention; other places where persons restricted in their freedom by public authority are or may be confined, especially police cells, facilities for the detention of foreigners and asylum facilities and places where persons restricted in their freedom are or may be confined as a result of dependence on the care provided, especially social service facilities and other facilities providing similar care, healthcare facilities and facilities providing social/legal protection of children[37], regardless if they are state or private. Thus the Defender's competence is not limited to the places of detention where persons are deprived of their liberty *de jure,* as a result of a direct interference of a public authority, being included, also, places of detention where the freedom of a person is restricted *de facto,* giving the dependance of that particular person on institutional care.

Ombudsman´s staff empowered to carry out visits consists of a special department of 12 lawyers and other *ad hoc* experts, such as doctors, psychologists, psychiatrists. Visits of one to three days are carried out according to a prepared plan for a specific period, each visit being finalized with a report. If it considers necessary, the team can make recommendations or proposals for remedial measures, adressed to the director of the visited place of detention.[38] Recommendations following the visits may vary, in the case of remand prisons, from the necessity to give a preventive inspection to people taken into custody by a doctor on the same day they are admitted, to the possibility for the inmates to combine their own underwear with prison-issue clothing or, in the absence of work opportunities, to the recommendation that prison administration should offer defendants as wide a range of leisure-time activities as possible.[39]

2. In ***France*** the General Inspector of Places of Deprivation of Liberty (*Contrôleur général des lieux de privation de liberté*) was set up as the NPM, through Law no. 2007-1545 of 30 October.

The General Inspector in charge to control all the places where people are deprived of liberty is independent, cannot receive instructions from any authority and cannot be prosecuted for his opinions or for the actions he carries out in his functions, and has the power to check that all the fundamental rights of people in the places of detention are respected. So, the aim of the institution is not only to prevent torture and any other inhuman and degrading treatment in custodial establishments but rather to ensure the full respect of all the fundamental rights of persons deprived of liberty. Consequently, the *Contrôleur général* has three main tasks: to make sure that rights which are inherent in human dignity are enforced; to make sure that a good balance is established between fundamental rights enforcement of people who are deprived of freedom and observations on public order and security and to prevent any violation of their fundamental rights.[40]

The core of the NPM in France is formed of 12 full time appointed "*contrôleurs*" and 9 part time "*contrôleurs*". In the performance of their tasks, the inspectors are under the exclusive authority of the General Inspector.[41] Also, the *Contrôleur général* and all his team are compelled to

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[36] Section 1 para.3 from the *Act no. 349/1999 on the Public Defender of Rights*.

[37] Section 1 para.4 from the *Act no. 349/1999 on the Public Defender of Rights.*

[38] See Filip Glotzmann and Petra Zdrazilova – *Presentation on the National Preventive Mechanism in the Czech Republic*, Conference *OPCAT in the OSCE region: What it means and how to make it work?,* held on 25-26 November 2008 in Prague, accessed January 25, 2012, http://www.bristol.ac.uk/law/research/centres-themes/opcat/opcatdocs/prague2008/presentationglotzmann.pdf.

[39] For an in-depth analisys, see Public Defender of Rights Report on Visits to Remand Prisons, 2010, p.2, accessed January 25, 2012, http://www.ochrance.cz/fileadmin/user_ upload/ENGLISH/2010_ vazebni_veznice_ ENG.pdf.

[40] **Central tasks of the *Contrôleur général des lieux de privation de liberté*: taking care of the respect of fundamental rights, accessed January 29, 2012, http://www.cglpl.fr/en/the-tasks-of-the-controleur-general-des-lieux-de-privation-de-liberte/.**

[41] Article 4 para.(3) from Law no. 2007-1545 of 30 October establishing a *Contrôleur général des lieux de privation de liberté*. Consolidated text as of 31 March 2011, accessed January 25, 2012, http://www.cglpl.fr/wp-content/uploads/2009/04/Loi_CGLPL_EUK-v.pdf.

professional secrecy, ensurying that no information allowing persons subject to the inspection to be identified is included in the documents published under the authority of the *Contrôleur général* or in his public statements.[42]

Based on article 8 from Law no. 2007-1545, the *Contrôleur général* can visit more than 5,000 custodial establishments, such as: prisons, psychiatric hospitals, hospitals where people stay without their consent, police custody cells, places of custody or customs detention, centers for detention of foreigners, court cells, administrative detention centres and facilities, waiting zones, secure educational centres and vehicles which are used to transport people deprived of freedom, where people are kept in custody.

There is an exception provided by the law regarding the visiting powers of the NPM: the authorities responsible for a place of detention may, for serious, compelling reasons connected with national defence, public security, natural catastrophes or serious disturbance within the visited facility, object to the visit, with a due justification for the objection and with the information of the NPM when the exceptional circumstances come to an end.

In the specialist literature it was said that, according to a model of classical action for the control of independent places of deprivation of liberty, the *Contrôleur général* may issue opinions and recommendations.[43]

The broad activity of this institution aims to highlight the good practices, on the one hand and to make recommendations when the fundamental rights of the persons deprived of their liberty are not fully respected, on the other hand.

Although an activity report in 2011 was not yet published, the opinions and recommendations given by the General Inspector are available. For example, the General Inspector issued an opinion on telephone usage in the places of detention, specifically prisons and detention centers[44], as the right for such a person to use the telephone is one of the ways to recognize his or her right to family life and to defend itself. The opinion tells, amongst other problems, about the respect of private and family life, in this sense, the abandonment of the installation of telephones in activity rooms or collective rooms being required. Also, it is desired to install telephone boots in order to protect the privacy of the inmates' conversations from the other inmates, several reccomendations already being made by the General Inspector in this sense. Further, it states that there is no possibility for the spouses or parteners, both of them being deprived of their liberty, to contact one another via telephone, despite the fact that they have the right to maintain the bonds of the family life.

3. The Federal Republic of Germany signed OPCAT on 20 September 2006 and it entered into force for Germany on 3 January 2009. The rights and responsibilities of the German NPM are defined in the Law of 26 August 2008 as well as in the Administrative Order of 20 November 2008, for the federal component and the State Treaty of 25 June 2009, for the Länder component.

Because of the Germany's federal structure, the NPM comprises two institutions: a Federal Agency for the Prevention of Torture for the Federation's jurisdiction, with competences over detention facilities operated by the Federal Armed Forces, Federal Police and the German Customs Administration and a Joint Länder Commission for the jurisdiction of the Länder with competences over the majority of the places of detention, namely: police, judicial, detention facilities in psychiatric clinics, establishments of custody pending deportation, nursing homes, youth welfare establishments.

The Agency and the Commission work together, they have the same material and personnel resources, and, most importantly, they are independent, not being subordinated to any federal or state

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[42] Article 5 from Law no. 2007-1545.

[43] Jean-Paul Céré, *Le système pénitentiaire français* in *Les systèmes pénitentiaires dans le monde*, sous la direction de Jean-Paul Céré, Carlos Eduardo A. Japiassù, 2nd edition, Dalloz Publishing House, Paris, 2011, p. 183.

[44] Opinion of of the *Contrôleur général des lieux de privation de liberté* from 10 January 2011, regarding the telephone use in places of detention, published in the *Official Journal* of 23 January 2011, accessed February 1, 2012,http://www.legifrance.gouv.fr/jopdf/common/jo_pdf.jsp?numJO=0&dateJO=20110123&numTexte=25&pageDebut=&pageFin=.

ministry.[45] They both have to report annually to the federal and state governments and to the federal and state parliaments.

Regarding the Composition of the German NPM, both components of the German NPM are headed by honorary members.[46] In consequence, no salary or professional fee is allocated to them. Only travel expenses and daily allowances are paid.

There is no explicit selection procedure prescribed, the candidates being selected and proposed by the Federal Ministry of Justice and the Länder ministries of justice.

The NPM may be complemented by experts who could accompany the team during inspection visits. These experts might as well belong to a non-guvernmental organisation, but then they would act in their function as associated experts to the Mechanism.

The role of the Federal Agency's and of the Joint Commission of the Länder is to carry out regular or *ad hoc* visits to places of detention, identify problems and make recommendations to the relevant authorities. The German law has not reiterated the OPCAT provisions regarding the NPM right to submit proposals and observations to existing or draft legislation.

The Administrative Order and the State Treaty explicitly offer the Mechanism the right to enter any place of detention, with or without notification, access to any kind of information and the right to conduct confidential interviews with any person in the detention facility, but there is no special procedure provided to enforce access to places of detention. Regarding the places of detention, the German legislation does not explicitly name all relevant institutions that fall under the application of OPCAT. But the commentary to the Federal Law of 26 August 2008 mentions the following places as encompassed by article 4 of OPCAT: police stations, prisons (including remand prisons), closed units of psychiatric hospitals, centres for asylum seekers and persons awaiting deportation, international airport transit zones, police stations, youth welfare centres, secluded juvenile shelters, geriatric and nursing homes[47].

As to the NPM created in Germany, there can be raised serious suspicions about the efficiency and the conformity of this mechanism with the OPCAT. In this sense, the Committee against Torture is concerned about the lack of sufficient staff and financial and technical resources provided to the National Agency for the Prevention of Torture, comprised of the Federal Agency for the Prevention of Torture and the Joint Commission of the Länder, owing to which places of detention can be currently visited only once in four years, preventing the adequate fulfilment of the Agency's monitoring mandate and about the fact that the Joint Commission of the Länder had to announce, in some instances, its intention to visit the places of detention to the respective authorities in advance in order to gain access.[48]

4. Slovenia ratified the Optional Protocol in 2007 and, subsequently designated the Ombudsman as National Preventive Mechanism, which can give its agreement for the participation at the visits to the representatives of the non-guvernmental organizations registered in Slovenia or of organizations that have obtained the status of humanitarian organizations in Slovenia (the so-called Ombudsman plus' model).

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[45] According to article 4 of the Administrative Order of 20 November 2008 and article 4, para.1 of the State Treaty of 25 June 2009, accessed February 2, 2012, http://www.antifolterstelle.de/fileadmin/dateiablage/Dokumente/Presse/Organisationserlass_OPCAT_01.pdf.
http://www.antifolterstelle.de/fileadmin/dateiablage/Dokumente/Presse/Staatsvertrag_Laenderkommission.pdf.

[46] According to article 4 of the Administrative Order of 20 November 2008 and article 4, para.1 of the State Treaty of 25 June 2009.

[47] See the Printed paper of the Bundestag no. 16/8249, commentary to Article 4 OPCAT, 2008, p. 27, accessed February 2, 2012, http://dip21.bundestag.de/dip21/btd/16/082/1608249.pdf.

[48] See the Committee against Torture, the Forty-seventh session, *Consideration of reports submitted by States parties under article 19 of the Convention. Concluding observations of the Committee against Torture. Germany*, 2011, p.3-4, para.13, accessed February 1, 2012, http://www2.ohchr.org/english/bodies/cat/docs/CAT.C.DEU.5_en.pdf.

As set out by the OPCAT and taken over by the Slovenian law, the scope of the visits and of the Mechanism itself is not to criticize, but to assist. A visit by an NPM should be based on cooperation rather than on confrontation. The Ombudsman visited the first place of detention as a NPM on 19 March 2008[49].

The Slovenian law recognizes the importance of the financial independence of the mechanism, which is indispensable in order to achieve its functional independence as required by the OPCAT. The source and nature of funding is specified in the law and the budget for the Ombudsman and the NPM is based on the proposal of the Ombudsman. The staff and premises are shared by the Ombudsman and its NPM unit.

The mandate of NPM is mainly to carry out visits[50] (programmed, *ad hoc* or follow-up visits) at the detention places in order to examine the situation of persons deprived of their liberty, both in relation to the treatment of detainees and the conditions of detention. Its mandate and recommendations cover very different aspects of factual and legal nature such as living and material conditions, health-care services, social conditions, procedural guaranties, behavior and training of the staff etc. According to the Slovenian law, within the meaning of place of detention can fall police detention units, prisons for remand and sentenced prisoners, means of transport for the transfer of prisoners, re-education centers for juveniles or young offenders centers for illegal immigrants, homes for asylum seekers with closed units, border police facilities and transit zones at international ports and airports, psychiatric hospitals where patients in the criminal or civil context are hospitalized against their will, closed wards of social care institutions, including homes for the elderly, special social care institutions where residents with learning difficulties, physically or mentally retarded residents are accommodated. Members of a delegation can move inside the place of detention without any restriction and they have access to any facility or space within the premises of a place of detention.

The visits result in a report containing an assessment of the facts found and, if necessary, some concrete recommendations to improve the situation, which are not obligatory neither legally binding. If there is an urgent need to improve the treatment of persons deprived of their liberty, the delegation can make immediate observations

5. In ***Poland,*** the competences of the National Preventive Mechanism are entrusted to the Ombudsman (Commissioner for Civil Rights Protection), an independent body established since 1987. The Constitution ensures the independence of the Commissioner from the executive branch and the Ombudsman Act provides that the right to appoint the Commissioner belongs to the Lower House of the Parliament (*Sejm*). The Parliament also holds the right to dismiss the Commissioner, only in the event of the Commissioner resignation, permanent inability to fulfill his or her duties or betrayal of the oath of the office.[51]

At present, the tasks of the NPM are carried out by four dedicated teams in the Office of the Commissioner for Civil Rights Protection: Team for Penal Executive Law; Team for Public Administration Issues, Healthcare, Protection of Aliens Rights; Team for Rights of Soldiers and Public Officers; Team for Labour Law and Social Insurance. Also, two staff members in each of the Commissioner offices in the country were assigned to permanent cooperation with the Mechanism.

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[49] *About the National Preventive Mechanism of the Republic of Slovenia*, p.2, accessed February 1, http://www.varuh-rs.si/fileadmin/user_upload/pdf/DPM/ABOUT-NPM-SLO.pdf.

[50] In 2010, the Mechanism performed 44 visits in prisons, remand centers, police stations, asylumsm aliens centers, psychiatric institutions, special social care institutions, retirement homes and juvenile facilities, as mentioned in the *Report on the National Preventive Mechanism under the Optional Protocol to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on the year 2010*, p.7, accessed February 2, 2012, http://www.varuh-rs.si/fileadmin/user_upload/pdf/DPM/DrzavniPreventivniM-2010-web2.pdf.

[51] Articles 3.1 and 7.1 of the Act of 15 July 1987 on the Human Rights Defender (Ombudsman Act) accessed February 2, 2012, http://www.rpo.gov.pl/index.php?md=7512&s=3.

Depending on the type of place of detention visited, the visiting groups may be completed with external professionals, such as physicians, psychologists, psychiatrists or addiction treatment specialists.

The objectives of the NPM are: to regularly examine the treatment of the persons deprived of their liberty in places of detention, with a view to strengthening, if necessary, their protection against torture and other cruel, inhuman or degrading treatment or punishment; to make recommendations to the relevant authorities with the aim of improving the treatment and the conditions of the persons deprived of their liberty and to prevent torture and other cruel, inhuman or degrading treatment or punishment taking into consideration the relevant norms of the United Nations; to submit proposals and observations concerning existing or draft legislation and to raise awareness of the society on the issues of preventing torture and on the relevant norms concerning the treatment of people deprived of their liberty.[52]

The NPM carries out visits in institutions such as: prisons, custody suits, juvenile detention centers, juvenile refugees, juvenile reform schools, youth sociotherapy centers, spaces within Police organizational units designed for persons apprehended or brought in to sober, emergency centers for children, detoxification centers, social care facilities, psychiatric institutions, guarded facilities for foreigners, deportation custody facilities, and military disciplinary custodies. There are about 1826 institutions in Poland that can be identified as places of detention, according to the definition provided by. In 2010 the National Preventive Mechanism carried out 80 visits to 79 to such places of detention.[53]

After each visit a report is prepared within two – three weeks, with an attached opinion by a psychologist, psychiatrist or other external expert. Annual reports are also published and disseminated, in conformity to the requirements of the OPCAT.

IV. Implementing a National Preventive Mechanism for the prevention of torture and other forms of cruel, inhuman or degrading treatment or punishment in places of detention in Romania. Challenges regarding the implementation.

1. ***When evaluating the shortcomings regarding the implementing the National Preventive Mechanism in Romania***, it should be emphasized that this mechanism must not replace the national monitoring systems already in place. Moreover, the OPCAT does not interdict the States to designate an existing institution as a NPM, if this institution fulfills both the requirements set out in OPCAT and in the *Paris Principles*.

It should be stressed out that no specific form is prescribed in the Optional Protocol as to the implementation of a NPM in domestic legislation. When analysing the different European NMPs already in place, some models can be outlined:

- designating one of the existing monitoring bodies (e.g. Ombudsman in Czech Republic or Poland)

- Ombudsman plus' models (e.g. Slovenia), where the NPM mandate is carried out by the Ombudsman office and non-guvernmental organisations. Involving civil society organisations may also help to legitimise both an NPM mandate and its credibility as an institution, not least because civil society organisations are often structurally independent of the government.[54]

- new visiting body (e.g. France and Germany).

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[52] See *The role of the National Preventive Mechanism and its activities in practice* in Report of the Human Rights Defender on the activities of the National Preventive Mechanism in Poland in 2009. Bulletin of the Human Rights Defender No.5, Sources, Warsaw, 2010, p.98, accessed February 2, 2012, http://www.rpo.gov.pl/pliki/12821222200.pdf.

[53] *Report of the Human Rights Defender on the activities of the National Preventive Mechanism in Poland in 2010,* Warsaw, 2011, p.13, accessed February 2, 2012, http://www.rpo.gov.pl/pliki/13125459170.pdf.

[54] APT and IIHR, *op. cit.*, p.215.

In order to reach a conclusion regarding the designation of a NPM, several aspects must be taken into consideration:

a) *The institutional framework*, namely: the necessary number of members and employees of the mechanism; how can one become a member, the minimum professional requirements and what are the neccesary professions that have to be present in the mechanism; costs needed to set up the mechanism; the necessary budget as to ensure its proper functioning.

b) *Jurisdiction*: what types of institutions will be controlled; how is regulated the access to all facilities subject to inspection; access to classified information; what is the subject of the controlling visits; the procedure to be followed when acess is prohibited for the experts.

c) *Composition of the visiting team*: the criteria needed to choose the members for the visiting team; the number of persons taking part in a visit; the participation of other experts to the visits, together with the permanent members of the NPM.

d) *Working method*: announced and unannounced visits; planned or *ad hoc* visits; the estimated number of controls per year, duration, frequency and the criteria needed to select the places of detention that will be visited; the right to obtain information and conduct interviews in private with the persons deprived of their liberty.

e) *Consequences of the visits*: best practices; the possibility to make recommendations; whether or not subsequent visits can or must be carried out in order to verify whether or not the recommendations were implemented; the documents prepared as a result of the visit and publication of such documents; the publishing of an annual report toghether with the communicated position of the authorities and with the recommendations issued as a result of the visits.

In evaluating the conditions needed to be respected when implementing the provisions of Part IV of the Optional Protocol, one has to look at the Guidelines on national preventive mechanisms issued by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. In the area of basic principles[55], it must be noted that the future NPM should be established at constitutional or legislative level, fully respecting the provisions of the OPCAT as to the mandate and powers of the mechanism. Also, the future mechanism must have complete financial and operational autonomy when carrying out its functions, thus permitting the effective operation of the institution.

The NPM should have the right to visit all places of detention as analysed above in Section I of the paper and the state authorities should cooperate with the Mechanism in order to ensure the proper implementation of the recommendations issued, as mentioned in article 22 of OPCAT, with a view to strengthening the protection of the persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment.

In the Guidelines, the Subcommittee on Prevention stressed out the possibility for the experts within the NMP to conduct private interviews with those deprived of liberty, the right to carry out visits in the manner and with the frequency that the NPM itself decides, including unannounced visits at all times to all places of deprivation of liberty. Also, the NPM must be able to make proposals or observations on any existing or draft policy or legislation relevant to its mandate.[56]

In accordance to article 23 of OPCAT, the State should publish and widely disseminate the Annual Reports of the NPM.

When pursuing a functional and independent national mechanism, some principles must be observed as to the NPM itself and its members. Firstly, the NPM should carry out all aspects of its mandate in a manner which avoids actual or perceived conflicts of interest and any confidential information acquired in the course of its work should be protected and, in accordance with the proivisions of article 21 of OPCAT, no personal data shall be published without the express consent

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[55] *Guidelines on national preventive mechanisms*, *op. cit.*, para.5-15.

[56] See Basic issues regarding the operation of an NPM in *Guidelines on national preventive mechanisms*, *op. cit.*, para.24-40.

of the person concerned. Moreover, the NPM should plan its work and its use of resources in such a way as to ensure that places of deprivation of liberty are visited in a manner and with sufficient frequency to make an effective contribution to the prevention torture and other cruel, inhuman or degrading treatment or punishment. When appropriate, the visit reports or the annual reports should contain recommendations addressed to the relevant authorities.

The liason with other NPMs and with the Subcommittee on Prevention is of great importance in ensuring a proper functioning of the Mechanism, by sharing the experience in reaching the aim set out in the Optional Protocol, eventually, with the adoption of a set of good practices available to all national mechanisms.

It should be stressed out that all the aspects mentioned above must be fulfilled by the NPM, disregarding if it will be a new institution or the competences of an already existing institution will be enlarged (the Ombudsman in the case of Romania).

In the process of designating an institution as NPM, due attention must be given to the background, capabilities and professional knowledge of the personnel, necessary to enable it to properly fulfill its mandate. This should include, *inter alia*, relevant legal and health-care expertise. In other words, members of the NPM should collectively have the expertise and experience necessary for its effective functioning.[57]

Today, when evaluating the implementation of a NPM in Romania, one should bear in mind the economic resources as well as the human resources needed to achieve a functional implementation from the two possible solutions: new body or enlarging the competences of the Ombudsman. In this sense, it goes without saying that the designation of an existing body is the most economic solution, both as to the budgetary impact and as to the human resources and logistic effort.

In establishing a proper support for setting up an efficient National Preventive Mechanism, the Ministry of Justice of Romania coordinated a twinning project[58], in which were involved all the stakeholders from Romania, representatives of the non-guvernmental organisations and experts from Austria, Czech Republic, France, Germany, Poland and Slovenia, with the sole purpose of assisting the Romanian Government in implementing its obligations under the Optional Protocol and establishing a National Preventive Mechanism for the prevention of torture and other forms of cruel, inhuman or degrading treatment or punishment in places of detention.

In evaluating the possibilities mentioned above (designation of an existing visiting body or creating a new visiting body), there can be found both advantages and disadvantages on the part of either one of these solutions[59]:

a. Establishment of a new body as a NPM in Romania. Arguments and criticism. In the current economic circumstances, not only in Romania, but in all Europe, a new institution will be met with great reluctance especially when the national policy regarding the budgetary expenses is aiming to reduce bureaucratic structures and public expenses. Also, this new established NPM would have to be granted legal guarantees of independence at legislative level. Establishing a new body is not however without its own particular challenges. A new body will need time to demonstrate its independence and establish its legitimacy and credibility.[60] Also, it will have to ensure a tight trusty relation with all the public authorities in order to provide the NPM with the support necessary to exercise its powers, as it is the case with the Ombudsman.

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[57] *Guidelines on national preventive mechanisms*, *op. cit.*, para.17-20.

[58] For the findings in this Twinning project, see Moritz Birk, Ulrike Kirchgaesser, Julia Kozma, *Final Report on the possible solutions for the establishment of a National Preventive Mechanism in Romania*.

[59] For an in-depth analisys of these solutions, see Moritz Birk, Ulrike Kirchgaesser, Julia Kozma, *op. cit.*, p.36–40.

[60] Debra Long, *Report on the current state of play and possible solutions to assist the process of designating or establishing a National Preventive Mechanism in Romania*, Human Rights Implementation Centre, University of Bristol, August 2011, p.19, accessed February 1, 2012, http://www.bristol.ac.uk/law/research/centres-themes/hric/hricdocs/romaniavist.doc.

On the other hand, it was said that the establishment of a new body presents the opportunity to properly implement all requirements of OPCAT learning form the potential shortcomings of the existing institutions such as the Ombudsman office.

b. Designation of the Ombudsman office as NPM in Romania. Arguments and criticism. The Ombudsman, under the current conditions mentioned above in Romania, is most suitable to be the proper institution for taking over monitoring of human rights due to its previous expertise and experience in dealing with complaints of human rights violations. Moreover, the designation of the Ombudsman as NPM will ensure the much needed speediness and cost effectiveness of the implementation process, bearing in mind the fact that it will be able to use the existing structures. Also, the cut-costing policy will be evidentiated as the 14 regional offices of the Ombudsman can be used for the infrastructure and logistic support for the mechanism.

This institution has a strong legal basis in the Romanian Constitution and is explicitly provided with autonomy and independence from any public authority, with a separate budget at its disposal, thus complying with the criteria of independence purported by OPCAT and *the Paris Principles*.

The designation of the Ombudsman as a NPM must be substantiated by enlarging its structure with an additional number of positions in order to recrute experts in this field and its budget will be supplemented, thus ensuaring its proper functioning.[61]

It cannot be disputed that valuable *synergies* between the current functions of the Ombudsman and the preventive mandate of a NPM could develop if the NPM was installed within the existing Ombudsman's structures.

Of course, one could argue that when integrating the NPM into the Ombudsman, it risks taking over any of its potential problems and shortcomings in terms of competences, independence, composition and overall effectiveness.

2. As to ***the possible solutions***, after analysing all the requirements of the OPCAT, the Guidelines set out by the Subcommittee on Prevention and the advantages and disadvantages when designating a NPM in Romania, the optimal solution in implementing the OPCAT in the national legislation could be the designation of the Ombudsman office as NPM, in opposition to the creation of a new body. In this sense, it is necessary to ammend the Law no. 35/1997 on the organisation and functioning of the Institution of the Advocate of the People. Of course, the designation of the NPM has to be endorsed by an open and transparent process that involves besides the Ombudsman itself, all the stakeholders and the representatives of the civil society.

This designation is likely to strengthen the role of Ombudsman in defending rights and freedoms of individuals in their relations with public authorities in the context of a very broad definition of places of detention, which includes not only traditional detention centers (penitentiaries, hospital-penitentieries, penitentiaries for the minors, detention centers), but also other places that require careful consideration of the rights of persons deprived of their liberty *de jure* or *de facto* (e.g. psychiatric hospitals, elderly homes, children's homes, refugee centers, centers for foreigners etc.).

The designation of Ombudsman offices as NPM (as it was done in countries like the Czech Republic, Slovenia or Poland) is understandable as it has been observed that Ombudsman offices normally enjoy considerable guarantees of independence and their mandate is often grounded in the national constitution.[62]

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[61] According to the Government Decision no. 5/2002 regarding the organisation and functioning of the Ombudsman office, republished in the *Official Journal of Romania*, Part I, no. 758 of October 27, 2011, the maximum numbers of the persons working within the Ombudsman can not excede 99.

[62] Elina Steinerte, Institutions of Ombudspersons as National Preventive Mechanisms: Some Preliminary Observations, presentation at the Opening Plenary of the Conference OPCAT in the OSCE region: What it means and how to make it work?, held on 25-26 November 2008 in Prague, University of Bristol, 2009, p.1, accessed February 1, 2012, http://www.bris.ac.uk/law/research/centres-themes/opcat/opcatdocs/prague2008/presentationsteinerte1.pdf.

In ensuring its financial independence, the NPM must have its budgetary independence. Of course, the experts should recive an adequate honorarium and training on human rights monitoring in places of detention, possibly with the consultation of international experts, ensuring a highly qualified personnel for the visits.

When designating the Ombudsman as NPM, a different structure within the Ombudsman institution must be created, comprising in a Pool of Experts (acting as the core of the NPM) and administrative staff, in full respect to the Subcommittee on Prevention Guidelines stating that where the body designated as the NPM performs other functions in addition to those under the Optional Protocol, its NPM functions should be located within a separate unit or department, with its own staff and budget. The Commission of Experts will have a tripartite composition:

- experts working within the NPM (weather they are currently working with the Ombudsman office or they will be recruted in the future)
- representatives of non-guvernmental organizations with relevant experience in this area;
- representatives of institutions involved.

This solution will ensure a balance of the NPM core, as the representatives of the institutions involved and of the non-guvernmental organizations will bring the much needed know-how both from the point of view of the state authorities and of the civil society.

Also, the law on implementing the national mechanism should specify in what manner the experts are choosen (an objective, open competition, announced in the media and over the internet, organized through a highly transparent process by a selection commission, the minimum requirements regarding the necessary qualification, the professional expertise in one of the required disciplines, the minimum working years of experience, the experience in human rights, the prior experience in monitoring places of detention, the good reputation, the absence of a criminal record, being desirable). The experts will have different backgrounds necessary to fulfill the NPM mandate: lawyers, medical doctors, psychologists, psychiatrists, social workers and others.

The NPM personnel shall have such privileges and immunities as they are necessary for the independent exercise of their functions. Also, the State should not order, apply, permit or tolerate any sanction, reprisal or other disability to be suffered by any person or organisation for having communicated with the NPM or for having provided the NPM with any information, irrespective of its accuracy, and no such person or organisation should be prejudiced in any way.[63]

The experts will have to be independent in exercising their competences, appointed in office by the Ombudsman for a determinated mandate. Also, besides the permanent experts, short-term experts should be incorporated in the mechanism, which will participate to the visits when the permanent experts do not posess the necessary qualification, are not able to participate themselves or when it is more economical to engage in the visiting team a local short-term expert.

The experts will have the right to visit all places of detention as defined by OPCAT, will have access to all the buldings, facilities and installations of such venues. They will have the right to enter such place immediately. If they are prevented from entering the premises, the law must provide for a speedy procedure, permitting the experts to address to the superior authority and to inform the Subcommittee on Prevention. If the denial still persists, the NPM can take an action in court against the act of the authority by which the access of the visiting team is denied. The denial of acces can arise only in strictly limited situations, when there is a clear and immediate danger for the national safety, public health or there is a disaster risk.

The experts will have the right to make both announced and unannounced visits, planned or *ad hoc*. In planning the visits, experts will analyse the types of places of detention falling under its competence of the NPM, their number, the geographical disposal, the complaints received from the persons deprived of their liberty, prior reports of the mechanism, a certain vulnerability of some

[63] *Guidelines on national preventive mechanisms*, *op. cit.*, para.27.

venues etc. The visiting team can, if the situation arises, take along interpreters, payed from its own budget.

The visiting team will have the right to conduct private interviews with all persons, in particular with inmates. Also, the visited institutions are obliged to forward to the experts all the information or data requested.

The experts will draw up a report in short time, preferably 30 days or, as soon as possible, for urgent matters, when the situation requires immediate remedy, describing the visit and underlining any recommendations needed to be made. Of course, the administration responsible for the visited place can respond to the content of the report, stating their opinion. The state institution will have to respect and implement the reccommendations, the NPM having to engage in a close dialog with the stakeholders in order to ensure the proper implementation of these acts. A procedure is to be set up if a certain institution refuses to comply with the recommendations. If this situation arises, the NPM should have the possibility to address to the superior authorities, to inform about this fact the Subcommittee on Prevention and to make public the refusal.

Given the nature of its work, it is almost inevitable that a NPM will face challenges such as a reluctance within bureaucracies to change structures and practices, a lack of resources to implement recommendations etc., and sometimes negative public opinion.[64] In this sense, it is of paramount importance for the functioning of the NPM that its members will engage, open and sustain all channels of communication with the places of detention, superior authorities, non-guvernmental organizations and civil society as a whole, thus ensuring a permanent dialogue which will facilitate a rapid implementation of the recommendations.

Also, the NPM will adopt an annual activity report which will be published on the internet page of the institution and will be disseminated to all the stakeholders. The annual report will be communicated to the Subcommittee on Prevention as well.

Conclusions

With the implementation of Part IV of the Optional Protocol concerning the establishement of national preventive mechanisms a step forward will be taken in preserving the rights of the persons deprived of their liberty in order to prevent torture and other cruel, inhuman and degrading treatment or punishment.

The creation of national preventive mechanisms will aim to ensure a strong bond with all the relevant stakeholders, with the places of detention and with the civil society, as the mechanism has a preventive purpose.

As to the implementation of the OPCAT provisions in Romania, the optimal solution could be the enlargement of the competences of the Ombudsman, endorsed by open and extensive consultation with all the actors involved in order to assess the difficulties which the implementation poses, the shortcomings of such an endeavour, with a view to the understanding of the minimum pre-requisites for an effective functioning of such a national body, thus reaching a common position and ensuring the full respect of the Optional Protocol requirements, the *Paris Principles* and the Guidelines elaborated by the Subcommittee on Prevention.

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WAIVER OF PENALTY IN THE NEW PENAL CODE

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Abstract
This paper is an attempt to expose the novelty brought by the new Penal Code in relation to both prior criminal law and also with the international law. Thus, one of the most debated articles of the new Penal Code is "giving up penalty" - art. 80-82, which has no counter part in our international law. In this context, the "gain" of this new provision is challenged / contract due to the possible subjective nature of the courts. Relevant in this regard is the fact that deprivation of liberty in the prison environment is a special situation, with strong resonances in the living environment of the defendant, both during detention and afterwards released. Moreover, giving up penalty, is one of the measures individualizing sentences and also a way to deplete its possible negative influences subsumed to the rehabilitation process held in prisons, even with the efforts made by the administration of the detention. Specifically, the "waiver of penalty" intends to alert the authors of criminal deeds with reduced gravity on their obligations regarding future conduct.

Keywords: *waiver of penalty, international law, penalty, criminal deeds, Penal Code*

Conceptual

Based on European and world trends in criminal law, the changes to the Criminal Code with focus both on penalty legislative measures and the integration of offenders should be carefully considered.

This paper aims an exposing of the effects of novelty items wanting to be applied in the Romanian penal law by revealing its positive and negative trends.

Thus, to achieve this purpose was used a brief presentation of the concept of "penalty waiver" thus presenting the advantages and disadvantages by studying the theory and practice of applying alternatives to prison detention in countries abroad and in Romania.

Legislative developments, especially the Penal Code in force and the new Criminal Code adopted by Law nr.286/2009 emerged behind the research on alternatives to detention legislation in Romania.

Imprisonment in the penitentiary environment is a special situation , with strong resonances in its life environment , both during detention and afterwards released. Emotional frustration and information , lack of communication , eternal interest in personal and material always leaves no moral solutions to everyday problems.

Despite efforts by the administration of the detention , assist reorganizations often negative personal values and decreased responsiveness to rehabilitation process carried out in prison , motivated by the fact that the rules by which prisoners conduct their activities and interpersonal relationships sometimes betrayssystem of " nerves " lower reporting for better or worse in terms of personal, low morality[1].

In this context, a custodial sentence is a measure of state coercion - means the exclusive jurisdiction of the State to establish and enforce, through its competent organs, as guardian of the amounts recognized in the company , its reaction to the coercive committing the harmful act.

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[1] Mircea BORŞ, *Efecte ale pedepselor privative de libertate asupra coeziunii familiei*, www.edituratrinitas.ro.

Editing new European Prison Rules and requirements ever higher and burning of society have led to law 275 \ 2006 published in Official Gazette number 627 of July 20, 2006 and entered into force 90 days after publicatio .

We must not forget that deprivation of liberty , as a preventive measure or criminal penalty provided for by Law 275 of 2006 is a complex measure that raises a whole series of problems.

In addition to many personal issues of detainees extremely difficult, as are those of: isolation, waiving the normal way of life, temporary removal of the family and society, the reduction of certain rights, complying with a program of health problems , employment and other needs - the execution of the sentence and require considerable effort from the competent bodies of the state to provide observation, guidance and supervision throughout the period of detention.

Good to know

Criminal penalty is a measure of restraint - which suggested that punishment is a reaction to the coercive and binding deed of crime affecting the amounts recognized or accepted in society.

It is also a means of correction and rehabilitation - to sentence the change offender behavior , his belief in the future not to commit such acts , and the cultivation of respect for the values it protected by law .

According to Penal Code punishment goals are to restore social justice , correction and prevention convict committed by convicted , but also by others , the new offenses.

However , the exercise of sentenced persons shall not be limited only within the limits and conditions established by law and the Constitution.

Fundamental rights and freedoms of man and citizen is not only a reality but also an objective of all human activities , that of course the democratic and progressive. Hence due attention is given almost everywhere in today's world , theoretical and practical issues concerning human rights , fundamental freedoms and respect the protection of the human person.

The issue of human rights and fundamental freedoms and constitutional rights of citizens is regulated internally and is also subject to the rules of public international law.

The main international instruments on human rights with a universal character were adopted after the Second World War under the United Nations. These acts must permeate the entire building international legal human rights .They influence national legislation of the Member in this area , their provisions being international standards of human rights.

United Nations Charter was adopted in order to create conditions necessary to maintain international peace and security, justice and respect obligations under international treaties. In achieving these goals, reaffirms faith in fundamental human rights, the dignity and worth of human person, in the equal rights of men and women and of nations large and small.

Noteworthy that the legal, defense and security system addressed by a national and also supranational perspective don't fit in the immutable, petrified and inflexible understanding paradigm. These values, denoted conceptual and in act, have an historic example, are undergoing processing, depending on the challenges which we must respond and expectations to be fulfilled.

Most research focused on the "penalty waiver" concept have addressed to it without analysing and presenting the need / opportunity for acquisition / integration in our legislation. Currently, the measure creates a series of disputes among the population, being interpreted as a "legal loophole" for a certain category of people. Against this background it is appropriate to provide a "full menu" of the new law.

Waiver of penalty is a measure of individualising the penalty as foreseen in art. 80-82, subsumed under section 3 of the new Criminal Code. Waiver of penalty represents the court's recognized right to permanently waive the establishment and enforcement of a sentence for a person found guilty of a crime, for pointing that, in view of the offense, the person and its conduct previously and after the commission of the offense, is sufficient to apply a warning because the establishment, implementation or enforcement of a sentence is likely to produce more harm than help

the recovery of the defendant. Meanwhile, judges may defer to a sentence of less than two years imprisonment, or a fine.

Thus, conditional sentence consists in determining a sentence for a person found guilty of an offense and temporary postponement of its implementation when the specific penalty is a set fine or imprisonment not exceeding two years.

The court also will consider the convicted person and his prior offense attitude. However, the Criminal Code draft hasn't kept criteria for granting release which created differences between men and women or between offenders convicted for crimes committed with intent or negligence. The new Penal Code keeps into account, however, the conduct of the convict, if he made progress towards reintegration into society and if the court is convinced that no longer represents a social danger.

Waiver of penalty may be considered a form of forgiveness. It exists in German, French , English, or Chinese law.[2]

The German law:

The mechanism to waive a penalty allows the Court to forgo the imposition when the consequences of action taken when the author are not so severe, and the applying of a penalty wouldn't be appropriate, provided that the penalty doesn't exceed one year (Article 60 of the Criminal Code).

The French law:

In correctional or contraventional manners (without exception), the court, after declaring the accused guilty, and, where appropriate, the confiscation of dangerous or harmful objects (Article 132-58 of the Criminal Code)[3], may:

· Whether discharge penalty on the defendant

· Whether to postpone its decision

These measures (introduced in 1975) can be used regardless of the criminal record of the author and seriousness of the offense.

Exemption from punishment is granted where:

· It appears that defendant rehabilitation is underway

· The damage is repaired

· Problems resulting from the infringement ceased

Moreover, the penalty waive may be:

· Whether straightforward (in this case, we talk about a true "judicial pardon" there is no penalty but a simple declaration of guilt).

· Be subject (the judge imposes a trial delay. If the conditions are met according to the deadline, the exemption is pure and simple).

The postponement of sentence consists to fixing a series of criteria by the judge which the offender is forced to perform in a certain period of time.

After this period (one year after the decision to postpone), where conditions have been met (offender reclassification, termination issues, compensation), the judge will decide exemption from punishment, and otherwise, will apply punishment of the offender (unless it prefers to postpone again the judgment). The accused should be present at the meeting to postpone the punishment.

Are distinguished as follows:

· Simple postponement

· Delay in implementing the test

· Postponement of notes

[2] http://www.scj.ro/coduri.asp.

[3]http://www.legifrance.gouv.fr/affichCode.do;jsessionid=F7BB5224F210B3390CD7F35141F11A17.tpdjo16v_1?idSectionTA=LEGISCTA000006181749&cidTexte=LEGITEXT000006070719&dateTexte=20120130.

The court may defer the penalty,also by putting the defendant in a trial period not exceeding one year.

This is one of the innovations of the Criminal Code of 1992. His regime is determined by points 132-66 to 132-69. In cases provided by law (or regulations), the court seeking suspension of conviction may order the offender to comply with one or more requirements covered by these laws or regulations.

Deferred at order can only occur once and can be ordered even in absentia (132-68). During the suspention meeting, if the requirements were met within the time (one year after the decision to postpone), the court may relieve guilt or punishment, or impose the penalties provided by law or regulation. If the requirements have been implemented with delay, the judge disposes of penalty (if any) and decides penalties provided by law or regulation.

The British law:

Exemption from penalty may be granted:

• If the sentence is not fixed by law,

• and if the judge believes that a penalty would be inappropriate in terms of:

- Circumstances
- The nature of the offense
- Personality of the perpetrator

Sentencing judge may adjourn the proceedings to enable it to assess the behavior of the offender, whose guilt has been declared to determine punishment (ie, compensation for damages). Postponement may not exceed 6 months.

The soviet law

The "social danger" element played a key role in defining the offense. If it does not exist or have disappeared between the time of the offense and the trial date, an exemption from punishment is possible.

The chinese Law

Exemption may be granted only for minor offenses, provided the offender to demonstrate laudable behavior.

In case of exemption from punishment, the offender:

• may be penalized,

• may be required to make a statement of repentance,

• may be required to repair the damage.

It is also subject to administrative sanctions.

The Belgian law

Waiver of penalty was introduced in 2000 in the Belgian law by Article 21b of the Code of Criminal Procedure. However, it is not possible if reasonable time is exceeded when sentencing offenders. The judge may convict an offender with a minimum legal sentence or settle with a declaration of guilt.

How was the new article seen by the Romanians?

In Romania "Members of the Criminal Code Comission have failed, neither in the second day of debate, to decide about the article that allows the court to waive the penalty, some believing that in the originator's version, almost every criminal can escape.[4]"

In this regard, on the individualization of punishment, the court establishes the right to discharge, which consists in decisive renunciation to establish and implement a punishment for the offender, to the extent that it represents an offense with reduced seriousness, and in relation to an individual offender, the conduct previously to the offense, the efforts to eliminate or mitigate the

[4] http://www.mondonews.ro/Comisia-de-Cod-Penal-in-dezacord-fata-de-renuntarea-la-aplicarea-pedepsei+id-8295.html.

consequences of crime, and his chances of referral, it is considered that the penalty would be inappropriate because of the consequences that would have on his person.

If a discharge of penalty is decided, the court will apply the offender a warning stating that it will not attract any disqualification, prohibition or incapacity for the offender. Waiver of penalty will not be operable if the deed is the legal punishment of imprisonment exceeding three years or if the offender was more willing to waive the penalty in the last two years preceding the date of the offense for which is judged.

How does the penalty discharge work?

Simply, by manifestating a judicial clemency. It can also sometimes speak about a judicial penalty discharge, but sanctions exceptions may apply in respect of a person only after the declaration of guilt.

Regarding the introduction of several new Criminal Code penalties alternative to imprisonment, this represents a new vision as a result of European regulatory sources, affirmation and implementation of these types of sentences in the Community measures have social and economic benefits resulting their strong application, but also because they meet the need of diversification penalties, enforcement and their individualized and more effective defense of society.

Waiver of penalty is one of the measures of individualization of punishment and is a court recognized the right to permanently abandon the establishment and enforcement of a sentence for a person found guilty of a crime, for resocialization that, given the gravity of the offense , the individual offender and conduct before and after consideration by the commission of the offense, is sufficient to apply a warning, because the establishment, implementation or enforcement of a sentence is considered inappropriate because of the consequences that would have on his person.

Giving reason to punishment in modern society is the existence of criminal acts that have a reduced gravity , which may be exempt from imposition of a sentence , is sufficient finding their offender warning about future conduct.

Waiver of penalty is only an expression of will of the court, the law setting conditions on the individual offender or the maximum penalty for that special can apply to art. 181 Penal Code. before taking into account only the actual degree of social danger, demonstrated by the manner and means of committing the offense, the purpose, the circumstances surrounding the crime committed, the result produced or which could have produced. We note that these criteria related to the seriousness of the offense were assessed by the court, to the concrete conditions established by law text, the art. 80 para. (2) Penal Code.

On the other hand the relationship between international and domestic law of a country of importance both theoretically and practically .Over time various theories have been developed on the relationship between international law and internal law of States.

They have adapted or changed policy and legislation based on the theory that they considered it as having won. All development doctrine is meant to answer some practical questions, indicating the behavior to be followed by state internally , the legal system and especially in the field of justice, and domestic, international relations changing[5].

How does it work?

As the name suggests, the penalty discharge consists in giving a person's permission not to serve his sentence. But to do this, a number of conditions must be met. First, one must be guilty.

Then, exemption from punishment may be imposed only for crimes or misdemeanors. It will be granted if three conditions are met. First, it is necessary to be granted the reclassification of the convicted person.

[5] Thomas Buergenthal şi Renate Weber, *Dreptul internaţional al drepturilor omului*, Editura ALL, 1996, pag.216.

It also requires that the damage is fully repaired and then, the disruption resulting from the offense to be stopped. Exemption from punishment will prevent the imposition of additional or complementary penalty. But is likely to be security measures.

Although these conditions are fulfilled, penalty waiver is not granted automatically. This measure favorable particularly to the convicted person it is not possible, however, than in correctional or administrative cases. Therefore it is not applicable in criminal cases.

This measure is more favorable because the judge can decide whether that sentence will not be mentioned in the criminal record. So, with maximum leniency from the judge, the defendant won't serve his sentence, nor have recorded convictions.

Being recognized as responsible, the offender that was discharged of punishment shall bear court costs. And this exemption of judicial punishment is, of course, different from the exemption from punishment, which is legal in nature. So, not created confusion: Waiving penalty is a judicial act, while the exemption from punishment is prescribed by law.

Three examples of application of the statutory provision in question even in the realm of France:

Case Study 1

Michaël Youn (French comedian) was sentenced by the Paris court for insultind and assaulting two police officers, but was not disciplined. A decision "satisfactory" in accordance with the words of his lawyer, Marc-Henri Debusschere[6]. The prosecutor requested a suspended sentence of imprisonment for six months and fined 2,000 euros against the actor.

Alliance (the second union of peacekeeping forces), said in a statement that it "can not be stunned by this decision." "Regarding the attacks against police officers, there is only one answer: the application of the law," he adds. "Every citizen should be subject to the same rules and it seems unbearable to see there are different rules depending on social status," said the union.

Case Study 2

A man of 31 years suffering from multiple sclerosis, which cultivated cannabis at home to relieve pain, was sentenced, but released from punishment by the criminal court in Strasbourg, urging prosecution itself "kind law enforcement ."" In this case, we need to show the humanity, "even if the offense is serious, said the criminal investigation, Gilles Delorme[7].

The young man, who moves with difficulty due to illness, said that he was surprised by the "unexpected". decision. "I thought I would be given a suspended sentence, or at least a fine, although I have no money," he told AFP. The accused was arrested in June 2011 and placed for 24 hours in police custody after being terminated because of cannabis leaves, from his personal plantation, were visible from the street.

He explained so it cultivated inside his home since 2004, forty plants whose flowers are consumed in the form of cakes. "If I could, I would miss it: it is necessary to hide the taste of cannabis to be better Honey" "I tried to limit intake, otherwise my body gets used and reduce the analgesic effect," said him.

During the meeting, he presented a certificate issued by a Swiss physician attesting to consumption of cannabis to alleviate pain and improve motility. For his lawyer, Francis Trapp, "The therapeutic aspect was clear," which led the court to take "an exceptional decision."

Case Study 3

Magistrates Court in Charleville-Mezieres took recently a decision noticed to press due to the unusual. A man aged 45 years was arrested for DWI (EAEC), characterized by the presence in

[6] http://next.liberation.fr/cinema/01012327043-michael-youn-coupable-mais-dispense-de-peine.

[7] http://www.leparisien.fr/strasbourg-67000/il-cultivait-du-cannabis-therapeutique-dispense-de-peine-03-10-2011-1637764.php.

exhaled air of about 1 mg of alcohol per liter.[8] Prosecuted for driving under the influence of alcohol and abuse of police agent (acts punishable by imprisonment even without the existence of injury), he faces up to three years in prison, three years license suspension and a fine of € 45,000.

At trial, the defense raised that argument in defense that the defendant was held the degreading detention conditions, calling on the court, because it has the necessary powers (under Article 456 of the Criminal Procedure Code), to go and see what occurs.

And the court has not questioned the words. It estimated that the defendant suffered a "traumatic experience" and "has already paid dearly (..) crimes are not at a level of serious crime." "If cells are kept in custody where the poor are outrageous, if those indicted are retained here for long periods without being provided with minimal personal hygiene (...), it clearly and objectively, and unworthy degrading treatment ". Accordingly, the court issued an exemption from punishment.

Material conditions of detention, as terrible, were included. They can not serve as legal basis for waiving the penalty.

Consequences to be drawn from this is more radical: inhuman, degrading and unworthy are forbidden in France and throughout Europe (section 3 of the European Convention on Human Rights). This prohibition applies primarily by the state: the sovereignty and dignity.

But in this case, the court requires that the person in breach to be harmed regarding freedom (jail), rights (prohibition of driving), assets (fine and costs), for violations. But for this, the state itself violated the law that it also approved. He promised in November 1950 that no person shall be subject to inhuman and degrading treatment, and 60 years later, continues to do so yet. It requires that any violators are punished, and requires that it be applied that maxim to himself.

In our case, the legal punishment of offenders is illegal. So, the criminal convictions would be illegal. The judge must refuse. Specifically through a cancellation procedure. The difference is real: no declaration of guilt, free of charge (€ 90), no mention of criminal record, and in particular no loss of penalty points (6 points in this case).

Conclusions

Detention means the loss of many basic human rights, including the loss of free movement, loss of right to enjoy family, social relationships limit the disqualification to work for themselves or run a business.

We can also mention limiting personal privacy, passing through many humiliating experiences such as intimate body search and imposing other people urinating in front of the test drugs, violence and loss of self respect. And many years before the effects of detention will be felt by social stigma that will limit access in many areas of labor market and will create difficulties in obtaining credit or insurance.

Detention is a serious punishment by social exclusion and clearly marks the distinction between those convicted and others. Inmates often feel offended that they were imprisoned or feel they have been treated too harshly than others. And they spend all day acompaniaşi other condemned colleagues who have similar feelings. They begin to believe they were wronged and tend to forget those who suffered because of their criminal acts.

The relationship between victim and criminal justice underlying concept of reintegration , but unfortunately prisons creates an environment where victims tend to be forgotten .The third factor underlying the RPP suggests that the prison should promote a policy that would contribute to the awareness of crime is criminals effects on those involved.

[8] http://www.maitre-eolas.fr/post/2010/02/18/Un-homme-dispens%C3%A9-de-peine-en-raison-des-conditions-indignes-de-sa-garde-%C3%A0-vue.

However, conditions of detention that violate human rights can not be justified by lack of resources. This lack of resources was and remains the biggest problem facing the whole of Romania, not only the prison system struggling with a lack of material resources. Lack of resources is the main reason that invokes when authorities asked the weaknesses in the system. Thus such a provision would be completely incompatible with the reality of prisons.

It can be said that the law 275/2006 contains provisions that are found in most European prison systems of industrialized countries , having many things to complain , there will be no need for urgent proposals.

The notion of right and wrong, virtue and vice, command and permission, merit and guilt, praise and reproach, remorse and moral satisfaction and assume responsibility proportions require action or free will. If man is not free laws and regulations, advice, prayers and supplications, rewards and punishments have no purpose. These terms do not necessarily imply freedom as check and certainly where there is no freedom as we throw in jail the prisoner.

Freedom is constrained by concession fight for freedom .Not restrict freedom but amplification is the most direct route to solving human problems.

Basic issues of deprivation of liberty and freedom as a human condition which provokes strictly necessary other issues of punishment, intimidation , rehabilitation , factors facilitated the emergence of all of detention. Prison itself is the biggest issue basically whereas there was a lot of problems.

It is not known whether imprisonment is an effective remedy in the treatment of crime. Support and pressure for performance and change comes from many directions: from the government which must meet international standards, from the public wanting information on the safety of prison and quality of recovery activities to be performed with detainees from some stakeholders in collaboration with prisons that human rights non-governmental organizations, with universities and scientific research, with all those interested in the issue of prison global social, psychological, educational, moral and legal.

Finally, why should the court defer pronunciation of the sentence after the other organs of state have documented the defendant or the offense?

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GENERAL PRINCIPLES OF EU (CRIMINAL) LAW: LEGALITY, EQUALITY, NON-DISCRIMINATION, SPECIALTY AND NE BIS IN IDEM IN THE FIELD OF THE EUROPEAN ARREST WARRANT

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Abstract
This article deals with the case law of the Court of Justice of the European Union in the field of the European arrest warrant, critically analysing the principles invoked in several decisions validating the European legislation in the field: legality, equality and non-discrimination, specialty, ne bis in idem. The author concludes that an area of freedom, security and justice could be built on these principles, but further harmonisation of legislation needs to be realised to avoid a "journey to the unknown" for European citizens in respect to legislation of other member states of the EU.

1. Introduction

In the EU context, there are a certain number of principles which permeate the system as a whole and with which any individual piece of legislation needs to be in conformity. Some of these principles are formally higher law in that they are explicit in the treaties (such as the principle of non-discrimination on grounds of nationality). Others can only indirectly be linked to the treaties and are rather explicable on the grounds that no European judge could imagine giving effect to a legal system which does not respect them (the so called 'general principles of EU law').[1]

The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order. The European arrest warrant is based on the implementation by the Member States of the principle of mutual recognition.[2] This principle was recognised by the Tampere European Council as the "cornerstone of judicial cooperation in both civil and criminal matters". It entails quasi-automatic recognition and execution of judicial decisions among Member States, as if the executing judicial authority was implementing a national judicial order.

Mutual recognition is a guiding principle in the field of the European arrest warrant, but it is not the only principle governing this field. Several other principles were taken into account when analysing the legislation and its practical implementation in the Member States. In the case law of the Court of Justice of the European Union (hereinafter ECJ), particular attention was given to legality, equality and non-discrimination, specialty, as well as the ne bis in idem principle and to compliance of the legislation in this field with these principles.

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[1] Maria Fletcher, Robin Loof, Bill Gilmore, EU Criminal Law and Justice, Edward Elgar Publishing Limited (2008), p. 13.

[2] Annachiara Atti, La decisione quadro 2002/584/GAI sul mandato d'arresto europeo: la Corte di giustizia "disolve" I dubbi sulla doppia incriminazione, Dirrito pubblico comparato ed europeo (2007), n.3, p.114.

2. The Legality Principle

According to Article 2(2) of the Framework Decision,[3] double-criminality should not be verified for a list of 32 serious offences, when those offences are punished in the issuing State by a custodial sentence or a detention order for a maximum period of at least three years. Since each of those offences have not been defined in the Framework Decision and since the wording adopted for them can be considered quite vague (e.g. "computer-related crime"), Member States may have adopted different definitions in their legal systems.[4]

These provisions triggered a complaint before the ECJ for lack of compliance of the Framework Decision on the European arrest warrant with the legality principle.[5] According to the complainant, the list of more than 30 offences in respect of which the traditional condition of double criminality is henceforth abandoned is so vague and imprecise that it breaches, or at the very least is capable of breaching, the principle of legality in criminal matters. The offences set out in that list are not accompanied by their legal definition but constitute very vaguely defined categories of undesirable conduct. A person deprived of his liberty on foot of a European arrest warrant without verification of double criminality does not benefit from the guarantee that criminal legislation must satisfy conditions as to precision, clarity and predictability allowing each person to know, at the time when an act is committed, whether that act does or does not constitute an offence, by contrast to those who are deprived of their liberty otherwise than pursuant to a European arrest warrant.

The ECJ dismissed the complaint in succinct argumentation, which is presented in the following paragraphs.

The ECJ stated that the Union is founded on the principle of the rule of law and it respects fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and as they result from the constitutional provisions common to the Member States, as general principles of Community law. It follows that the institutions are subject to review of the conformity of their acts with the Treaties and the general principles of law, just like the Member States when they implement the law of the Union[6]. It is common ground that those principles include the principle of the legality of criminal offences and penalties and the principle of equality and non-discrimination, which are also reaffirmed respectively in Articles 49, 20 and 21 of the Charter of Fundamental Rights of the European Union[7].

The principle of the legality of criminal offences and penalties (*nullum crimen, nulla poena sine lege*), which is one of the general legal principles underlying the constitutional traditions common to the Member States, has also been enshrined in various international treaties, in particular in Article 7(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[8] This principle implies that legislation must define clearly offences and the penalties which they attract.

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[3] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, published in JO L 190 from 18 July 2002, p. 1-20.

[4] For a thorough analysis of the double-criminality rule, see Stefano Manacorda, L'exception a la double incrimination dans le mandate d'arrêt européen et le principe légalité, Cahiers de droit européen (2007), vol.43, n.1/2, p.149-177.

[5] Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633.

[6] See, inter alia, Case C-354/04 P *Gestoras Pro Amnistía and Others* v *Council* [2007] ECR I-5179, paragraph 51, and Case C-355/04 P *Segi and Others* v *Council* [2007] ECR I-6157, paragraph 51.

[7] Proclaimed in Nice on 7 December 2000 (OJ 2000 C 364, p. 1).

[8] See in this regard, inter alia, Joined Cases C-74/95 and C-129/95 *X* [1996] ECR I-6609, paragraph 25, and Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraphs 215 to 219.

That condition is met in the case where the individual concerned is in a position, on the basis of the wording of the relevant provision and with the help of the interpretative assistance given by the courts, to know which acts or omissions will make him criminally liable.[9]

In accordance with Article 2(2) of the Framework Decision, the offences listed in that provision give rise to surrender pursuant to a European arrest warrant, without verification of the double criminality of the act, 'if they are punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years and as they are defined by the law of the issuing Member State'. Consequently, even if the Member States reproduce word-for-word the list of the categories of offences set out in Article 2(2) of the Framework Decision for the purposes of its implementation, the actual definition of those offences and the penalties applicable are those which follow from the law of 'the issuing Member State'.

The Framework Decision does not seek to harmonise the criminal offences in question in respect of their constituent elements or of the penalties which they attract. Accordingly, while Article 2(2) of the Framework Decision dispenses with verification of double criminality for the categories of offences mentioned therein, the definition of those offences and of the penalties applicable continue to be matters determined by the law of the issuing Member State, which, as is, moreover, stated in Article 1(3) of the Framework Decision, must respect fundamental rights and fundamental legal principles as enshrined in the Treaties, and, consequently, the principle of the legality of criminal offences and penalties. It follows that, in so far as it dispenses with verification of the requirement of double criminality in respect of the offences listed in that provision, Article 2(2) of the Framework Decision is not invalid on the ground that it infringes the principle of the legality of criminal offences and penalties.[10]

I cannot prevent myself to notice that the ECJ transferred the legality issue from European to national level based on two presumptions: firstly, that there is no harmonisation obligation for the European institutions in respect to the European arrest warrant, and secondly, that Member States must respect fundamental rights and fundamental legal principles as enshrined in the Treaties. While this argumentation is solving the problem of judicial co-operation in criminal matters and preserves the legality of the legislation on the European arrest warrant, it does not solve the problem of the European citizens,[11] which should benefit from an Area of Freedom, Security and Justice where they are able to move freely, but with 27 different set of legislation in the field of Criminal law, each legislation with its own definitions in respect to offences which can give rise to an European arrest warrant. That is a real journey to the unknown, as citizens in other Member States are not in the position to know how other national systems have developed.[12]

So, at least one aspect of the legality principle (*lex certa*), was not addressed or solved by the ECJ and can be solved only through harmonisation of legislation. In order for citizens to know the exact requirements of criminal offences in a field which can give rise to surrender on the basis of a European arrest warrant, harmonisation of legislation is needed if the double-criminality rule is waived for a certain category of offences.

3. The Principle of Equality and Non-discrimination

In the same case mentioned above, the complainant argued that the principle of equality and non-discrimination is infringed by the Framework Decision inasmuch as, for offences other than

[9] See, inter alia, European Court of Human Rights judgment of 22 June 2000 in *Coëme and Others* v *Belgium*, Reports 2000-VII, § 145.

[10] Advocaten voor de Wereld, supra, note 5, paragraphs 44-54.

[11] For a somewhat different opinion, see Nial Fennelly, The European Arrest Warrant: Recent Developments, ERA-Forum: scripta iuris europaei (2007), vol.8, n.4, p.534.

[12] Valsamis Mitsilegas, *EU Criminal Law*, Hart Publishing (2009), p. 124.

those covered by Article 2(2) thereof, surrender may be made subject to the condition that the facts in respect of which the European arrest warrant was issued constitute an offence under the law of the Member State of execution. That is, for certain categories of offences listed in Article 2(2) the double-criminality rule is waived, while for all other criminal offences there is a condition that the conduct must be incriminated in both Member States. That distinction, according to the complainant, is not objectively justified. The removal of verification of double criminality is all the more open to question as no detailed definition of the facts in respect of which surrender is requested features in the Framework Decision. The system established by the latter gives rise to an unjustified difference in treatment between individuals depending on whether the facts alleged to constitute the offence occurred in the Member State of execution or outside that State. Those individuals will thus be judged differently with regard to the deprivation of their liberty without any justification for that difference.

In response, the ECJ emphasised that the principle of equality and non-discrimination requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified.[13]

With regard, first, to the choice of the 32 categories of offences listed in Article 2(2) of the Framework Decision, the Council was able to form the view, on the basis of the principle of mutual recognition and in the light of the high degree of trust and solidarity between the Member States, that, whether by reason of their inherent nature or by reason of the punishment incurred of a maximum of at least three years, the categories of offences in question feature among those the seriousness of which in terms of adversely affecting public order and public safety justifies dispensing with the verification of double criminality. Consequently, even if one were to assume that the situation of persons suspected of having committed offences featuring on the list set out in Article 2(2) of the Framework Decision or convicted of having committed such offences is comparable to the situation of persons suspected of having committed, or convicted of having committed, offences other than those listed in that provision, the distinction is, in any event, objectively justified.

With regard, second, to the fact that the lack of precision in the definition of the categories of offences in question risks giving rise to disparate implementation of the Framework Decision within the various national legal orders, suffice it to point out that it is not the objective of the Framework Decision to harmonise the substantive criminal law of the Member States and that nothing in the Treaties which were indicated as forming the legal basis of the Framework Decision, makes the application of the European arrest warrant conditional on harmonisation of the criminal laws of the Member States within the area of the offences in question.[14]

The Court concluded that, in so far as it dispenses with verification of double criminality in respect of the offences listed therein, Article 2(2) of the Framework Decision is not invalid inasmuch as it does not breach the principle of equality and non-discrimination.[15]

I tend to agree with the Court's reasoning as regards the objectively justified difference between the categories of offences for which double-criminality is not required and other categories of offences, where this condition is imposed for surrender of the requested person. The offences provided for in Article 2(2) of the Framework Decision are serious ones and there is no national legislative system in the European Union which does not incriminate every category as a criminal offence. However, even if there is no obligation of harmonisation in respect to those offences, different rules in different Member States can lead to different treatment of comparable situations and consequently a breach of the non-discrimination principle. That is why, even if not mandatory,

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[13] See, in particular, Case C-248/04 *Koninklijke Coöperatie Cosun* [2006] ECR I- 10211, paragraph 72 and the case-law there cited.

[14] See by way of analogy, inter alia, Joined Cases C-187/01 and C-385/01 *Gözütok and Brügge* [2003] ECR I-1345, paragraph 32, and Case C-467/04 *Gasparini and Others* [2006] ECR I-9199, paragraph 29.

[15] Advocaten voor de Wereld, supra, note 5, paragraphs 55-60.

harmonisation of legislation in this field must occur in order to comply with fundamental rights and fundamental legal principles as enshrined in the Treaties.

4. The Specialty Principle

Article 27(2) of the Framework Decision on the European arrest warrant lays down the specialty rule, according to which a person who has been surrendered may not be prosecuted, sentenced or otherwise deprived of liberty for an offence committed prior to his or her surrender other than that for which he or she was surrendered. That rule is linked to the sovereignty of the executing Member State and confers on the person requested the right not to be prosecuted, sentenced or otherwise deprived of liberty except for the offence for which he or she was surrendered. The Member States may waive the application of the specialty rule, which is subject, moreover, to a number of exceptions, laid down in Article 27(3).

In this context, a case was brought before the ECJ where, in the main proceedings, the indictment relates to the importation of hashish whereas the arrest warrants refer to the importation of amphetamines. However, the offence concerned is still punishable by imprisonment for a maximum period of at least three years and comes under the rubric 'illegal trafficking in narcotic drugs' in Article 2(2) of the Framework Decision.[16]

By its first question, the referring court asks, essentially, what the decisive criteria are which would enable it to determine whether the person surrendered is being prosecuted for an 'offence other' than that for which he was surrendered within the meaning of Article 27(2) of the Framework Decision, making it necessary to apply the consent procedure laid down in Article 27(3)(g) and 27(4).

The ECJ answered that in order to decide on surrender of the person requested for the purposes of prosecution of an offence defined by the national law applicable in the issuing Member State, the judicial authority of the executing Member State, acting on the basis of Article 2 of the Framework Decision, will examine the description of the offence in the European arrest warrant. That description must contain information on the nature and legal classification of the offence, a description of the circumstances in which the offence was committed, including the time, place and degree of participation in the offence by the requested person, and the prescribed scale of penalties for the offence. The surrender request is based on information which reflects the state of investigations at the time of issue of the European arrest warrant. It is therefore possible that, in the course of the proceedings, the description of the offence no longer corresponds in all respects to the original description. The evidence which has been gathered can lead to a clarification or even a modification of the constituent elements of the offence which initially justified the issue of the European arrest warrant.

In order to assess, in the light of the consent requirement, whether it is possible to infer from a procedural document an 'offence other' than that referred to in the European arrest warrant, the description of the offence in the European arrest warrant must be compared with that in the later procedural document. To require the consent of the executing Member State for every modification of the description of the offence would go beyond what is implied by the specialty rule and interfere with the objective of speeding up and simplifying judicial cooperation of the kind referred to in the Framework Decision between the Member States.

In order to establish whether what is at issue is an 'offence other' than that for which the person was surrendered, it is necessary to ascertain whether the constituent elements of the offence, according to the legal description given by the issuing State, are those for which the person was surrendered and whether there is a sufficient correspondence between the information given in the arrest warrant and that contained in the later procedural document.

[16] Case C-388/08 PPU *Leymann and Pustovarov* [2008] ECR I-8983.

Modifications concerning the time or place of the offence are allowed, in so far as they derive from evidence gathered in the course of the proceedings conducted in the issuing State concerning the conduct described in the arrest warrant, do not alter the nature of the offence and do not lead to grounds for non-execution under Articles 3 and 4 of the Framework Decision.[17]

By its second question, the referring court asks essentially whether a modification of the description of the offence, concerning only the kind of narcotics in question and not changing the legal classification of the offence, is such as to define an 'offence other' than that for which the person was surrendered. The ECJ answered that a modification of the description of the offence concerning the kind of narcotics concerned is not such, of itself, as to define an 'offence other' than that for which the person was surrendered within the meaning of Article 27(2) of the Framework Decision.

By its third question, the referring court asks, essentially, how the exception to the specialty rule in Article 27(3)(c) of the Framework Decision must be interpreted, taking into account the consent procedure laid down in Article 27(4) of the Framework Decision. It asks in particular whether those provisions permit a person to be prosecuted and sentenced for an 'offence other' than that for which he was surrendered, requiring the consent of the executing Member State, before that consent has been received, in so far as his liberty is not restricted. It also asks whether the fact that the person concerned is, in addition, detained on the basis of other charges providing a lawful basis for his detention affects the possibility of prosecuting and sentencing him for that 'other offence'.

The Court answered that if the proceedings result in the finding that there has been an 'offence other' than that for which the person was surrendered, that offence cannot be prosecuted without consent having been obtained, unless the exceptions provided for in Article 27(3)(a) to (f) of the Framework Decision apply. The exception in Article 27(3)(c) of the Framework Decision concerns a situation in which the criminal proceedings do not give rise to the application of a measure restricting personal liberty. It follows that, in the case of that exception, a person can be prosecuted and sentenced for an 'offence other' than that for which he was surrendered, which gives rise to a penalty or measure involving the deprivation of liberty, without recourse being necessary to the consent procedure, provided that no measure restricting liberty is applied during the criminal proceedings. If however, after judgment has been given, that person is sentenced to a penalty or a measure restricting liberty, consent is required in order to enable that penalty to be executed. Article 27(3)(c) of the Framework Decision does not, however, preclude a measure restricting liberty from being imposed on the person surrendered before consent has been obtained, where that restriction is lawful on the basis of other charges which appear in the European arrest warrant.[18]

5. The 'Ne Bis in Idem' Principle

The 'ne bis in idem' principle raises a lot of questions as regards judicial co-operation in criminal matters in the European Union. I do not intend to present here an extended overview of the principle, as this has been done elsewhere.[19] I will analyse here only one case of significance for the European arrest warrant, which establishes the connection between the 'ne bis in idem' principle contained in the Framework Decision and the same principle provided for in the Convention implementing the Schengen Agreements (hereinafter CISA).[20]

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[17] *Leymann and Pustovarov*, supra, note 16, paragraphs 41-59.

[18] See *Leymann and Pustovarov*, supra, note 16, paragraphs 64-75.

[19] **Norel Neagu, The "*ne bis in idem*" principle in the case-law of the European Court of Justice (I). The 'idem' issue, Lex Et Scientia 2011, vol.XVIII, n.2, p.34-54. for an extended analysis of the 'ne bis in idem' principle, see Bas van Bockel, The Ne Bis in Idem Principle in EU Law, Kluwer Law International (2010).**

[20] The *Schengen acquis* comprises all the acts which were adopted in the framework of the Schengen cooperation till the incorporation of the rules governing the Schengen cooperation into the EU framework by the Treaty of Amsterdam. Accordingly, it is composed of: (1) the Schengen Agreement, signed on 14 June 1985, between

The 'ne bis in idem' principle constitutes a ground for mandatory refusal of the European arrest warrant. According to Article 3(2) of the Framework Decision, the judicial authority of the Member State of execution (hereinafter "executing judicial authority") shall refuse to execute the European arrest warrant if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State.

In the case raised before the ECJ concerning the 'ne bis in idem' principle in the framework of the European arrest warrant, the referring court seeks to ascertain, in substance, whether the concept of the 'same acts' in Article 3(2) is an autonomous concept of European Union law, or if that concept were to be analysed only in the light of the law of the issuing Member State or of that of the executing Member State.[21].

Were the notion of 'same acts' in Article 3(2) of the Framework Decision to be regarded as an autonomous concept of European Union law, the referring court asks by its second question whether, contrary to German and Italian law as interpreted by the supreme courts of those Member States, that provision of the Framework Decision would require – in order for criminal proceedings to be instituted against a person on the basis of an indictment broader than that in respect of which final judgment has already been given concerning an individual act – the investigators to have been unaware, when the charges which led to that final judgment were first laid, of the existence of other individual offences and of an offence relating to participation in a criminal organisation, which was specifically not the case so far as the investigating authorities in Italy were concerned.

The ECJ answered that the principle of mutual recognition, which underpins the Framework Decision, means that, in accordance with Article 1(2) of the Framework Decision, the Member States are in principle obliged to act upon a European arrest warrant.[22] The Member States may refuse to execute such a warrant only in the cases of mandatory non-execution laid down in Article 3 of the Framework Decision or in the cases listed in Article 4 thereof.[23]

Belgium, France, Germany, Luxembourg, and the Netherlands on the gradual abolition of checks at their common borders; (2) the Schengen Convention, signed on 19 June 1990, between Belgium, France, Germany, Luxembourg, and the Netherlands, implementing the 1985 Agreement (CISA) with related Final Acts and declarations; (3) the Accession Protocols and Agreements to the 1985 Agreement and the 1990 implementing Convention with Italy (signed in Paris on 27 November 1990), Spain and Portugal (signed in Bonn on 25 June 1991), Greece (signed in Madrid on 6 November 1992), Austria (signed in Brussels on 28 April 1995) as well as Denmark, Finland and Sweden (signed in Luxembourg on 19 December 1996), with related Final Acts and declarations; (4) decisions and declarations of the Schengen Executive Committee which was the administrative body of the Schengen cooperation and generally mandated by the CISA "to ensure that this Convention [CISA] is implemented correctly"; (5) further implementing acts and decisions taken by subgroups to which respective powers were conferred by the Executive Committee. The latter two Paragraphs regarding the Schengen acquis refer to further decisions and declarations, which were made in order to implement the 1990 Implementing Convention itself. The Schengen acquis was published in the Official Journal L 239 of 22 September 2000. In order to reconcile the overlap between the Schengen cooperation and Justice and Home Affairs cooperation as introduced by the 1992 Maastricht Treaty, the Member States decided to integrate the Schengen acquis into the legal framework of the European Union. This was achieved in 1997 by means of a Protocol attached to the Treaty of Amsterdam. The Council allocated each provision or measure taken to date under the Schengen cooperation to the corresponding legal basis in the EC Treaty and EU Treaty as amended by the Treaty of Amsterdam (COUNCIL DECISION of 20 May 1999 determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the Schengen acquis, 1999/436/EC, L 176/17, 10.7.1999). As a further result of the incorporation, the Schengen acquis is binding on and applicable in the new Member States from the date of accession onwards (Article 3 Act of Accession, OJ L 236 of 23 September 2003, p. 33).

[21] Case 261/09 *Mantello* ECR [2010] I-0000.

[22] *Leymann and Pustovarov*, supra, note 16, paragraph 51.

[23] See, to that effect, *Leymann and Pustarov*, supra, note 16, paragraph 51.

In that regard, the concept of 'same acts' in Article 3(2) of the Framework Decision cannot be left to the discretion of the judicial authorities of each Member State on the basis of their national law. It follows from the need for uniform application of European Union law that, since that provision makes no reference to the law of the Member States with regard to that concept, the latter must be given an autonomous and uniform interpretation throughout the European Union.[24]

It is therefore an autonomous concept of European Union law which, as such, may be the subject of a reference for a preliminary ruling by any court before which a relevant action has been brought, under the conditions laid down in Title VII of Protocol No 36 to the Treaty on the Functioning of the European Union on transitional provisions. The concept of the 'same acts' also appears in Article 54 of the CISA. In that context, the concept has been interpreted as referring only to the nature of the acts, encompassing a set of concrete circumstances which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected.[25]

In view of the shared objective of Article 54 of the CISA and Article 3(2) of the Framework Decision, which is to ensure that a person is not prosecuted or tried more than once in respect of the same acts, **it must be accepted that an interpretation of that concept given in the context of the CISA is equally valid for the purposes of the Framework Decision** (emphasis added).

Where it is brought to the attention of the executing judicial authority that the 'same acts' as those which are referred to in the European arrest warrant which is the subject of proceedings before it have been the subject of a final judgment in another Member State, that authority must, in accordance with Article 3(2) of the Framework Decision, refuse to execute that arrest warrant, provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State.

Taking all the foregoing considerations into account, the answer to be given to the referring court is that, for the purposes of the issue and execution of a European arrest warrant, the concept of 'same acts' in Article 3(2) of the Framework Decision constitutes an autonomous concept of European Union law. In circumstances such as those at issue in the main proceedings where, in response to a request for information within the meaning of Article 15(2) of that Framework Decision made by the executing judicial authority, the issuing judicial authority, applying its national law and in compliance with the requirements deriving from the concept of 'same acts' as enshrined in Article 3(2) of the Framework Decision, expressly stated that the earlier judgment delivered under its legal system did not constitute a final judgment covering the acts referred to in the arrest warrant issued by it and therefore did not preclude the criminal proceedings referred to in that arrest warrant, the executing judicial authority has no reason to apply, in connection with such a judgment, the ground for mandatory non-execution provided for in Article 3(2) of the Framework Decision.[26]

6. Conclusion

Further clarification was given by the ECJ when analysing case law in the field of European arrest warrant in the light of principles of EU (criminal) law. One of the most important decisions of the ECJ related to uniform interpretation of the 'ne bis in idem' principle in the fields of CISA and European arrest warrant, bringing into the area of the latter all the case law relevant to the former. However, further harmonisation is needed in the field of criminal offences giving rise to a European arrest warrant in order to fully comply with the principles of legality, equality and non-discrimination.

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[24] See, by analogy, Case C-66/08 *Koszlowski* [2008] ECR I-6041, paragraphs 41 and 42.

[25] See Case C-436/04 *Van Esbroeck* [2006] ECR I-2333, paragraphs 27, 32 and 36, and Case C-150/05 *Van Straaten* [2006] ECR I-9327, paragraphs 41, 47 and 48.

[26] *Mantello*, supra, note 21, paragraphs 33-51.

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THE LOWER LIMIT OF THE RIGHT TO LIFE OF THE PERSON IN THE LIGHT OF THE NEW CRIMINAL CODE

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Abstract

The right to life is one of the fundamental human rights both nationally and internationally, being provided and guaranteed by a series of legal acts. In the Romanian law, the right to life of the person as guaranteed by the article 22 paragraph (1) of the Constitution is also protected by criminal law. In judicial practice in this matter there was an important and interesting issue regarding the limits of the right to life of people or accurately determining the starting and ending of a person's life. On this aspect, there were several points of view in the law literature, each grounded on its own way. In the current criminal law, the two aspects that I have mentioned above are linked, on the one hand, for instance to the issue of the legal classification of the fetal injury during birth until the cut of the umbilical cord and, on the other hand, to the thesis of tissue and organs for transplantation. The new Criminal Code is inspired by the European legislation. In relation to the criminal offences against the person it brings news to us by introducing a new offence, namely fetal injury, referred to in the article 202. Analyzing the legal content of this offence it is impossible not to call into question the situation of the lower limit of the right to life of the person.

Keywords: *right, life, person, offence, limit.*

Introduction

1.The study deals with a very interesting criminal law issue relative to the right to life of the person in terms of its lower limit benefiting by legal protection.

2. In the criminal law literature many points of view have appeared over time regarding the starting point of life and hence the start of criminal protection of the individual right to life. The present study makes their analysis and, as a novelty, brings to the foreground the New Criminal Code provisions.

3. The study has a logical structure and the starting point of the analysis is represented by the provisions of the national and international legal acts in the protection of the right to life area.

Ab initio there have been analysed the provisions of the Romanian Constitution and those of the Universal Declaration of Human Rights and of the International Pact on Civil and Political Rights. Then there have been presented some opinions existing in the doctrine regarding the matter that is being studied. Finally, the new Criminal Code provisions are being analyzed in relation to the person's right to life, making reference to the Civil Code and the Decree no. 31/1954 regarding the physical and legal persons.

4. Based on points of view expressed in the criminal law literature over the years, the study brings to the foreground some opinions related to the individual right to life from the perspective of the New Criminal Code provisions.

1. The Purpose of Criminal Law

Although the New Criminal Code[1], in the general part, does no longer contain an article devoted to defining the aim of the criminal law[2], however we can say that criminal law protects by its

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[1] Represented by the Law no. 286/2009, published in the Official Gazette no. 510 of the 24th of July 2009.

[2] The article 1 of the Criminal Code in force provides that „criminal law protects against crime Romania, the sovereignty, the independence, the unity and the indivisibility of the state, individual rights and freedoms, property and the entire rule of law". In the explanatory memorandum of the New Criminal Code, published on the website

own means a number of constitutional values, including those inherent to the person. It is about life, physical integrity, health, personal freedom and sexual freedom and its integrity.

In this study we will focus on analysing one of the values listed above, that of a person's life because we want to make some clarifications regarding the lower limit of the right to life.

In the article 22 paragraph (1) of the Constitution[3] it is provided that „the right to life and the right to physical and mental integrity of the person are guaranteed". These rights are also protected by the means of criminal law.

The special part of the Criminal Code in force contains Title II, entitled „Offences against the person", title which comprises four chapters, as follows: chapter I, „Crimes against life, physical integrity and health", chapter II, „Crimes against personal freedom", chapter III, „Sexual offences", and chapter IV, „Crimes against dignity". This last chapter contained articles 205 to 207, relative to offences of insult and slander and the verity proof, items which were repealed by law[4].

In the special part of the New Criminal Code, Title I is dedicated to the description of crimes against the person and contains nine chapters, as follows: chapter I, „Crimes against life", chapter II, „Crimes against physical integrity or health", chapter III, „Crimes committed against a family member", chapter IV, „Attacks on the fetus", chapter V, „Crimes against the persons in danger requiring assistance", chapter VI, „Crimes against personal freedom", chapter VII, „Trafficking and exploitation of vulnerable persons", chapter VIII, „Crimes against sexual freedom and integrity" and chapter IX, „Crimes that affect home and private life".

2. The Concept of „the Right to Life" and that of „Person"

The analysis of the limits of the right to life as guaranteed by the Constitution and protected by the rules of criminal law cannot be achieved by separating the two concepts, namely „the right to life" and „the person".

Although the international documents provide the protection of the right to life of the person, none of them gives the definition of the terms. The same situation can be found in our legislation.

In the article 1 of the Universal Declaration of Human Rights[5] it is provided that „all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience…". Then, in the article 3 of the same document it is stated that „any human being has the right to life…".

In the absence of legal definitions of „life" or „the right to life" in the criminal literature and the judicial practice, there has emerged an issue that has received different solutions depending on the steps of evolution the society has crossed, that of the legal limits of the person's right to life.

3. The Legal Limits of the Right to Life. Opinions Existing Prior the Adoption of the Law no. 286/2009 and Points of View Expressed after this Moment

By „the legal limits of the person's right to life we understand the starting point of life, id est the lower limit, and the ending of life, id est the upper limit.

The Criminal Code in force, as well as the New Criminal Code, contains in a specific title the offences against the person. These incriminations protect the life, the physical integrity and the health

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http://www.cdep.ro/proiecte/2009/300/00/4/em304.pdf (last accessed on the 4th of August 2009), it is stated that, having as a model the European criminal codes, in a democracy there is no longer place to define the aim of criminal law.

[3] Published in the Official Gazette no. 767 of the 31st of October 2003.

[4] It concerns the Decision no. 8 of the 18th of October 2010, issued by the High Court of Cassation and Justice, in the United Sections on appeal in the interest of law, published in the Official Gazette no. 416 of the 14th of June 2011, it reads that „the criminal rules contained in the article 205 to 207 of the Criminal Code regarding the insult, the slander and the verity proof, repealed by the provisions of the article I, section 56 of the Law no. 278/2006, provisions declared unconstitutional by the Decision no. 62 of the 18th of January 2007 of the Constitutional Court, are not in force".

[5] Adopted by the United Nation General Assembly on the 10th of December 1948 as it is stated on the website http://www.onuinfo.ro/documente_fundamentale/declaratia_drepturilor_omului/ (last accessed on the 10th of December 2011).

of the person since that person is born until its death occurs in a natural way, and also freedom and sexual life.

Regarding the relevant moment marking the beginning of criminal protection[6] of the life of a person, there are two points of view in current doctrine.

In the first opinion[7], the lower limit of the right to life is the moment of the beginning of the birth process. According to the second opinion[8], the majority in theory, the lower limit of the right to life is represented by the cutting of the umbilical cord, when the birth process is complete and when the fetus becomes a child.

Given the New Criminal Code provisions dealing with the criminalization of acts affecting individuals, certain aspects are new and have a particular interest.

First, in Title I of the special part of the New Criminal Code, relative to the offences against the person, a chapter entitled „attacks on the fetus" is found, which consists of two crimes, namely the crime of interruption of pregnancy, provided in the article 201, and the offence of injury to the fetus as provided in the article 202.

The offence referred to in the article 201 New Criminal Code[9] has a counterpart in the Criminal Code in force in the article 185, that of the crime of illegal performing abortion.

The offence referred to in the article 202 N.C.C. has no counterpart in the Criminal Code in force and it has Spanish influence[10].

In the Criminal Code in force it is found the term „person", although undefined, but not that of „fetus". We state this because the above-mentioned legal act includes „crimes against the person", the crime of murder is defined as „killing a person" and so on. There is made no reference about „the fetus".

In the analysis of the crime of illegal performing of the abortion, provided in the article 185 Criminal Code in force, the experts[11] have ruled on its complexity, stating that the legal subject of the crime is the set of social values that appear and develop in order to protect the mother and the conceiving product, that *spes homini* (life expectancy).

The New Criminal Code contains the notion of „fetus" but without giving any definition to it. According to medical science „fetus" means the conceiving product from the end of the eighth week of pregnancy until birth[12]. The offspring will bear this name until the end of pregnancy, id est until the cutting of the umbilical cord and the total separation of the mother's body, gaining the status of child.

In recent criminal doctrine[13], given the absence of a definition of the „fetus" in the Criminal Code, it has been stated that the „fetus" means „the product of conception in the period between the conception and the moment of birth".

Regarding the crime of injury to the fetus, referred to in the article 202 N.C.C., in the explanatory memorandum of the New Criminal Code it is indicated that it serves to cover the legal void relative to the ensuring of protection of the person between the moment of beginning of the birth

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[6] George Antoniu, „Criminal Protection of Human Life", Criminal Law Journal no. 1/2002 (2002), 13.

[7] Titus Popescu, „Defining the Person in the Criminal Code", Criminal Law Journal no. 3/1998 (1998), 40.

[8] Octavian Loghin and Tudorel Toader quoted by Popescu, „Defining the Person", 13; Antoniu, „Criminal Protection", 13.

[9] Next N.C.C.

[10] In the explanatory memorandum to the New Criminal Code it is stated that the source of inspiration for writing the text were the provisions of articles 157 and 158 of the Spanish Criminal Code as it is stated on the website http://www.cdep.ro/proiecte/2009/300/00/4/em304.pdf (last accessed on the 4th of August 2009).

[11] Vasile Dobrinoiu, „The Interruption of Pregnancy in the Characterization of the Crime of Abortion", Romanian Journal of Law no. 2/1970 (1970), 111.

[12] The definition is found in Webster's New World Medical Dictionary, third edition, as it is stated on the website http://www.medterms.com/script/main/art.asp?articlekey=3424 (last accessed on the 10th of December 2011).

[13] Petre Dungan, Tiberiu Medeanu and Viorel Paşca, *Handbook of Criminal Law. Special Part,* volume I, (Bucharest: Legal Publishing House, 2010), 120.

process, at which point we cannot discuss about abortion as a crime because it is no longer possible to be committed due to its conditions, and the moment of ending of the birth process which means that from that point on we can talk about a person that can be a passive subject, a victim of one of the crimes provided in the previous chapters[14] of Title I. This idea is also supported by the very formulation of paragraphs (1) and (2) of the article 202 N.C.C. Thus, in the article 202 paragraph (1) N.C.C. it is provided as follows: „fetal injury during birth, which prevented the installation of extrauterine life, is punishable (…)". And the paragraph (2) of the same article stipulates that „the harm of the fetus during birth, causing the child an injury afterwards, is punishable (…)".

A new element is the paragraph (3) of the article 202 N.C.C. which provides that „the harm of the fetus during pregnancy, which subsequently caused the child an injury, is punishable (…)".

On expressions „during pregnancy" and „during birth", which are found in the article 202 N.C.C., the recent criminal doctrine[15] offered some highly detailed and well documented explanations related to their meaning. Thus, having as arguments forensic knowledge on the four phases of the uterine changes in the birth process, it has been stated that „during pregnancy" means the phase zero and the phase one of birth, that period of time after conception and up to 36-38 weeks, in the last days of gestation taking place the preparation of the uterus for the installation of labour.

The same authors state that „during birth" characterises „the first two stages of labour of the second phase of birth, from its beginning until the expulsion of the fetus".

Analyzing the law so far, one can say that the offence of injury of the fetus is a complex one. The legal object of this crime is complex, as represented by all social relationships emerging and developing in relation to protecting the right to life and the physical integrity of the fetus, on the one hand, and to protecting the physical integrity of the pregnant woman, on the other hand. We say this because if the legislator had wanted to protect mainly the mother's rights he would have introduced this crime in the chapter regarding the crimes against the life, the physical integrity or the health of the person. The phrase „during pregnancy", which is found in the article 202 paragraph (3) N.C.C., leads us to analyze life and the right to life of the person in a double perspective. We will talk about the right to life in the womb and the right to life outside the womb after birth.

The installation of the extrauterine life has as a criteria of recognizing the occurrence of pulmonary respiration with macro and microscopic changes characteristic at this level[16].

We state that the life within the womb occurs at conception, but it enjoys the protection of criminal law only since the embryo becomes a fetus that is in the eighth week of pregnancy.

It is interesting to note, however, that during pregnancy the harm of the fetus by the pregnant woman is not punished as well as the pregnant woman is not punished if she alone interrupts her pregnancy. Such acts are still criminal but those persons shall not be subject to a penalty. Given the consistency of the legislator, we conclude that whenever the right to life of the fetus is in contrast to the pregnant woman's right to dispose of her body, the law is in favor of the latter, but only if the pregnant woman acts alone and voluntary.

4. Proposals for future regulations

Given the above, it will be better for the future that the age of pregnancy to be reduced from 14 weeks to 8 weeks in characterizing the crime of interruption of pregnancy provided in the article 201 N.C.C.

Moreover, in the spirit of better understanding the legal text, we also propose to modify for the future the provisions of the New Criminal Code by inserting therein a definition of the „fetus".

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[14] The explanatory memorandum of the New Criminal Code, published on the website http://www.cdep.ro/proiecte/2009/300/00/4/em304.pdf (last accessed on the 4th of August 2009).

[15] Vasile Dobrinoiu and Norel Neagu, *Criminal Law. Special Part. Theory and Practice,* (Bucharest: Legal Universe Publishing House, 2011), 84-85.

[16] Dan Dermengian et al. quoted by Antoniu, „Criminal Protection", 14.

Knowing that the right to life is inherent to the person[17], can we conclude that the fetus acquires the status of a person, in the light of the New Criminal Code as it happens in civil law?

In the article 1 of the Decree no. 31/1954[18] it is stated that „the civil rights of the individuals are recognized in order to satisfy personal interests and education, according to the public interest and the rules of law for a socialist coexistence". And in the article 7 of the same legal document it is stipulated that „the ability for a person to hold rights begins from birth and ends when that person dies. Children's rights are recognized from conception but only if they are born alive".

Moreover, we find the article 36 in the Civil Code[19], entitled „the rights of conceived children", which reads as follows: „children's rights are recognized from conception but only if they are born alive". Although a fetus becomes a child only after cutting the umbilical cord, thus starting his life outside the womb, however, we find in the civil law the expression „conceived child" when the fetus has an interest for his rights to be protected.

Although the criminal law does not confer protection of the right to life from conception, we can still say that the fetus is a becoming person. According to the legal terms dictionary[20], a „person" is a human being who is able to be recognized as a subject of law or holder of rights and obligations. An additional argument is the insertion of chapter IV „Attacks on the fetus", in the Title I of the New Criminal Code, next to the chapters devoted to the description of crimes committed towards family members, towards those in danger requiring assistance and next to the offences related to trafficking and exploitation of vulnerable persons. Family members, those at risk and vulnerable people are persons, no doubt. Then why would not a fetus be one?

Because the right to life is inherent to the person, we can say that its lower limit is not marked either by the triggering of the birth process, either by the cutting of the umbilical cord, but by the moment the embryo becomes a fetus, with the condition that he must be born alive, even if not viable.

Conclusions

1. Analyzing the national and international documents which provide the guarantee and protection of individual's right to life, I noticed and pointed out the absence of legal definitions for the terms used in this documents, namely „person" and „fetus". For this reason, I have proposed for the future, to modify these regulations by inserting the definition of these terms so everyone can better understand their aim and in order to end the controversy existing in the criminal literature.

Given the definition of the „fetus" and analyzing the legal content of the offence of interrupting of pregnancy, provided in the article 201 N.C.C., I have proposed lowering the limit to which abortion is not an offense from 14 weeks to 8 weeks, adding, of course, other arguments for the purpose of supporting this point of view.

Another interesting aspect throughout the study is the presentation of some opinions relative to the lower limit of the right to life of the person, id est the time at which the life of the person benefits of criminal protection.

2. This study adds to the already existing papers regarding this issue in the criminal literature with a new point of view.

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[17] The article 6 paragraph (1) of the International Pact on Civil and Political Rights, adopted by the United Nations General Assembly on the 16th of December 1966, provides that „the right to life is inherent to the human being. This right shall be protected by the law. No one shall be deprived of his life in an arbitrary manner as it is stated on the website http://www.dri.gov.ro/documents/pactul_cu_privire_la_drepturile_civile_si_politice.pdf (last accessed on the 24th of December 2011).

[18] Regarding natural and legal persons, published in the Official Gazette no. 8 of the 30th of January 1954.

[19] Represented by the Law no. 287/2009, republished in the Official Gazette no. 505 of the 15th of july 2011, and entered into force at the 1st of October 2011.

[20] As it is stated on the website http://e-juridic.manager.ro/dictionar-juridic/persoana/3214.html (last accessed on the 9th of December 2011).

3. The dynamics of criminal protection of the individual right to life is directly proportional to the way this right benefits of legal recognition being provided both in national and international documents. We should always analyze the changes in this field.

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THE REFLECTION OF ARTICLE 7 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN THE ROMANIAN CRIMINAL LEGISLATION

ION RISTEA*

Abstract

This study highlights the principle of the legality of incrimination and penalty, as well as the principle of the retroactivity of the more lenient criminal law, as stipulated in Art. 7 of the European Convention on Human Rights. In order to clarify and highlight these principles, some cases of the practice of the Convention on Human Rights are presented. Furthermore, the material shows the way these fundamental principles are reflected in the Romanian legislation, namely the Constitution of Romania, the Criminal Code in force and the stipulations of the new Criminal Code. Understanding these principles at an European normative level and in the Romanian penal legislation, in order to apply them correctly in jurisdictional activity, is of particular importance in the current period of reform and adaption of the Romanian Criminal Legislation.

Keywords:*The principle of the legalty of incrimination and penalty; the principle of the retroactivity of the more lenient criminal law; the European Convention on Human Rights; The Constitution of Romania; The Romanian Criminal Code.*

Introduction

The European Convention on Human Rights, signed in Rome on 4 November 1950, entered into force on 3 September 1953 (ratified by Romania by Law No 30/1994) is the most important document drafted by the Council of Europe (founded in 1949 which gradually enlarged after 1980, having nowadays 47 Member States) for the protection and development of human rights and fundamental freedoms.

The Convention states a series of principles of humanistic inspiration, in order to create a legal framework appropriate for the development of human personality and its protection against abuses from authorities.

These principles have a decisive influence over the legislation of the European countries, Member States of the Council of Europe (Romania was accepted will full rights in the Council of Europe on 4 November 1993) laying efforts to modify their civil administrative, family, labor and criminal legislation in relation to these humanistic principles fully in accordance with the actual stage of the evolution of social relations.

This process of harmonizing national legislation with the principles of the Convention also takes place in Romania.

Thus, starting with the Constitution (in force since 1991), which stated many of the European Convention's principles; all important normative acts are inspired from the solutions stated by

the Convention. Also in the criminal doctrine were published studies dedicated to the European Convention[1].

Content of the paper:

1. The European Convention states the principle of the legality of incrimination and punishment, as well as the principle of the retroactivity of the more favorable criminal law.

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[1] G.Antoniu, *Implicaţii asupra legii criminale române a Convenţiei Europene a Drepturilor Omului* in „Studii de drept românesc" Review, Volume 4 (37), 1992, no. 1, p. 5-13.

According to Art 7 Para 1 "no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier criminalty be imposed than the one that was applicable at the time the criminal offence was committed".

Para 2 of the same article states that "this article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations".

2. The European Court of Justice's jurisprudence clarified and shaped these provisions.

Thus, in the case *Welch v United Kingdom*, the European Court, noting that the Ordinance of 1986 stated as criminalty the measure of special seizure (resulting from the provisions of the mentioned Ordinance, according to which it is presumed that the assets gathered by a person convicted for drug trafficking for 6 years, are the product of the offence, outside the case where the defendant could prove otherwise; from the fact that it is seized not only the effective profit, but the entire product of the drug trafficking; from the fact that the judge has discretionary power regarding the sum of money that are seized, considering also the degree of guilt of the defendant when this sum, as well as the fact that it is stated the possibility of imprisonment as a mean of paying the money), has decided that in these conditions, special seizure has a repressive feature and must be applied only by respecting the principle of retroactivity of the more favorable criminal law.

In the mentioned case, these measures, though it were not a more favorable solution, were taken by the British court, though it were not stated by the law at the moment of the offence, offering them a retroactive feature and thus violating Art 7 of the Convention[2].

In the case *V. v Estonia* the plaintiff was convicted for fiscal offences committed during 1993-1995. The court established that it was about a continuous offence and applied the new Criminal Code entered into force in January 2005. Before the entrance into force of the new provisions, the offence committed by the plaintiff was considered to be offence only if the person had previously received an administrative sanction for a tax evasion, which was not the case here. By the new provisions in the area of tax evasion, the condition of a previous administrative sanction was removed.

The court stated that the plaintiff was also sanctioned for the offences committed previous of the entrance into force of the new criminal provisions, as elements of a continuous offence. However, the court decided that at the moment of the offence it could not fall under the incidence of the criminal law, because one the conditions of the offence – the existence of a previous administrative sanction for tax evasion – was not met. As a consequence, the Court decided that the Estonian courts retroactively applied a criminal law violating Art 7[3].

In another case, *G v France*, the European Court stated that the offences were integrated according to the law, which was more favorable than the law in force at the moment of the offence (the new law states a correctional punishment with more reduced limits than the previous law), the court has correctly applied this law, thus Art 7 of the Convention was not violated[4].

In the case *S.W. v Great Britain*, the Court considered that the existence of a new interpretation of the British courts more unfavorable for the offender (in the meaning that the husband could be considered as the rapist of his spouse), unlike the interpretation existing at the moment of the offence (at that moment the jurisprudence considered that the husband is not liable for the rape against his spouse, because by marriage she accepted sexual intercourse with her spouse, in any circumstances) is not a violation of Art 7. The Court argues that at the moment of the offence there were debates expressing different advised opinions regarding the consent of the wife for all

[2] Romanian Criminal Law Review, II, 1995, No. 2, p. 157.

[3] http://sim.law.uu.nl/sim/caselaw/Hof.nsf/2422ec00f1ace923c1256681002b47f1/5f67e53e55417bc441256c6a005b6945?OpenDocument.

[4] Romanian Criminal Law Review, III, 1997, p. 149-150.

intercourse with her husband during marriage. This evolution of the interpretation began before the offence was committed by the offender, thus Art 7 of the Convention was not violated. In Court's opinion, the idea of the lack of immunity for the husband in case of the rape of his wife is consistent not only with the nature of marriage in a civilized state, but also with the basic principles of the Convention, which promotes the idea of dignity and human freedom[5].

3. The Romanian legislation comprises provisions which largely correspond to the exigencies imposed by the European Convention. Thus, the principle of non-retroactivity of the criminal law, except the more favorable law, is also stated by the Romanian Constitution, in its Art 15 Para 2 stating that "the law shall only act for the future, except for the more favorable criminal or administrative law".

From the comparison of the Convention with the Romanian Constitution we can state, as a first notice, that the exception regarding the application of the more favorable criminal law is wider in the Constitution than in the Convention. Thus, while the European Convention prohibits only the application of a more severe punishment than the one existing at the moment of the offence, the Constitution refers in general to the more favorable criminal law, with the possibility of including in this concept not only the more favorable criminal law in relation to the moment of the offence, but also the more favorable law in relation to the moment of the execution of the penalty.

The wording stated in the Constitution is the base for the Romanian criminal law, which states among the principle of non-retroactivity of the criminal law (Art 11 of the Criminal Code), but also the principle of the more favorable criminal law, both in relation with the moment of the perpetration of the offence (Art 13 Criminal Code), as well as in relation with the execution of the penalty (Art 14-15 Criminal Code). As emphasized by the literature, Art 14 and 15 expand the principle of the more favorable law, the new more favorable law being applied also after the conviction decision remains final to the complete service of a penalty of imprisonment[6].

Second of all, it can be noticed that the European Convention refers to the more serious penalty which cannot be retroactive, which *per a contrario* means that only the more favourable penalty can be retroactive and not other criminal penalties, such as educational or safety measures. In accordance with these provisions, the Romanian law in force states that only provisions regarding the penalty can be retroactive if are more favourable for the defendant, while the provisions stating safety or educational measures are always retroactive, regardless if are more favourable or more serious (Art 12 Para 2 Criminal Code).

Regarding the economy of the Convention, the quoted text though it refers to penalty, considers all criminal sanctions, concept including the penalties, as well as safety and educational measures. It could be incomprehensible that a law stating a bigger fine does not apply retroactively, while the provision of safety or educational measures, sometimes custodial to always be retroactive. The theoretical justification referring to the fact that these measures are for protection, being preventive and not repressive, in the interest of society and of the offender, seems to be overcome by the fact that these measures can represent serious restrictions of freedom, which would not justify the retroactivity of such provisions, limitations which the Convention is aiming to combat. It seems rational the solution that the principle of the more favorable law be applied, in the case of succession of criminal laws, and regarding the safety and educational measures, especially when represent serious limitations of freedom.

Also to this interpretation leads the Romanian Constitution, excluding from retroactivity the more serious criminal law and not a certain criminal provision stating a more serious penalty. In this way the Constitution expands the interdiction of retroactivity for all criminal provisions (including

[5] Romanian Criminal Law Review, III, 1996, p. 137.

[6] V.Dongoroz et al. *Explicaţii teoretice ale Codului penal român*, Volume I, Romanian Academy's Publishing-house, Bucharest, 1969, p. 89-90.

those regarding the safety and educational measures), which would aggravate the situation of the offender[7].

Therefore, for accordance with the Convention, the new Criminal Code, which in Art 1 states the principle of the legality of incrimination (*nullum crimen sine lege*), in Art establishes the principle of the legality of criminal sanctions (*nullum poena sine lege*), explicitly referring to all criminal sanctions, namely penalties, safety and educational measures.

Regarding this aspect, it is also interesting the experience of the German legislation. Thus, Art 2 Para 6 of the Criminal Code, though it states that safety or educational measures are applied in relation with the law in force at the moment when the conviction decision remains final, it is shown that "the law does not provide otherwise" leaving the legislator with the possibility that, case by case, in relation to the gravity of the safety or educational measures, to admit or not their retroactive application. As a result, some serious safety measures, such as the admission into a medical-educatory institute, as well as the prohibition to exercise a certain profession were removed from the possibility of retroactivity[8].

Another observation aims Art 7 Para 2 of the European Convention, stating the possibility that certain incriminating norms established according to the general law principles and recognized by the civilized states, to be efficient even if the national law does not state them. Therefore, there is the possibility of a decision and application of a penalty for a person, as a consequence of an offence stated by international conventions, regardless if, according to the national legislation, the offence was never stated or was decriminalized or the national legislation would state a more favorable provision.

Usually, international offences (*delicta de juris gentium*), though established by international treaties and conventions are operative if the states incriminate these offences in their national legislation and sanction them in an appropriate way[9]. Such incriminations refer to offences against peace and mankind, international terrorism, piracy, slave commerce, drug trafficking, counterfeiting, dissemination of pornographic materials, women and children commerce etc.

To the extent to which the offences incriminated by international conventions are also states as offences in the national legislations, which is the situation of most the offences incriminated by treaties, are also applied the rules of non-retroactivity and the application of the more favorable law. The issue rising is what happens with the offences which at the moment of their perpetration were not incriminated by the national law; they could subsequently be judged only based on their incrimination in the Convention to which that certain state has not yet adhered to or, even if it has adhered to, has not respected the obligation to incriminate the mentioned offences in the national legislation?

The above question received a positive answer even since the Second World War, by the statute of the Nuremberg and Tokyo courts, considering that the principle "*nullum crimen sine lege*" must be related both to the national and international law, position established also in the Universal Declaration of Human Rights adopted by the United Nations General Assembly on 10 December 1948 (Art II Para 2). Hence, the offences incriminated by international conventions should attract the criminal liability of natural persons, regardless of the national provisions[10].

4. The Romanian criminal law in force offers a framework appropriate for solving cases similar to those submitted to the European Court in this area.

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[7] G.Antoniu et al. „*Reforma legislației penale*", Romanian Academy's Publishing-house, Bucharest, 2003, p. 203.

[8] Hans Heinrich Jescheck, *Lehrbuch des Strafrechts, Allgemeiner Teil*, 3rd Edition, Berlin, Duncker und Humblot, 1978, p.110.

[9] Grigore Geamănu, *Dreptul internațional contemporan*, Didactic and Pedagogic Publishing-house, Bucharest, 1965, p.826.

[10] George Antoniu, (coord), *Reforma legislației penale*, Romanian Academy Publishing-house, Bucharest, 2003, p.304.

Thus, according to Art 11 Para 1 of the Criminal Code, safety measures (also the special seizure) have the purpose to remove a danger and to foresee the perpetration of the offences stated by the criminal law. This means that safety measures have a special regime, stated by Art 113 and following of the Criminal Code, only if they preserve this feature as preventive measure designed to remove a danger from the perpetrator[11]. To the extent to which a safety measures receives a repressive feature, it becomes a penalty and is subjected to the regime of penalties (it cannot be retroactively applied unless it represents a more favorable provision).

In the case decided by the European Court, the safety measure of special seizure by receiving a repressive feature, was correctly considered as penalty and subjected to the principle of non-retroactivity of the criminal law (if it is more favorable).

Regarding the offence on the incrimination of rape during marriage, the Romanian jurisprudence and doctrine maintained the opinion that the husband cannot be considered as the active subject of the rape of his wife, because when she consented to the marriage, she also consented to intercourse with her husband during marriage. The husband would be held liable only for injuries caused to his wife during intercourse[12].

The arguments brought by the European Court emphasized the important mutations which took place in the way of interpreting the relationship of the spouses in relation to the basic principles of the European Convention, have determined changes in the Romanian criminal legislation and doctrine (see the modification of Art 197 of the Criminal Code by the Government Emergency Injunction No 89/2001[13], modified and approved by Law No 61/2002[14]).

Conclusions

The analysis of Art 7 of the European Convention on Human Rights obviously emphasizes the fact that the Romanian criminal legislation is in accordance with its exigencies. The examples used in this study of the Romanian Constitution, of the criminal law in force, of the new Criminal Code and of the Romanian jurisprudence and doctrine illustrate the compatibility between the Romanian legislation and the European Convention. This statement justifies the necessity of entering into force, as soon as possible, of the new Criminal Code and of the new Criminal Procedure Code, already approved by the Parliament by Law No 286/2009 and Law No 135/2010.

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[12] V.Dongoroz et al., „*Explicații teoretice ale Codului penal român*", Volume 3, Romanian Academy Pulishing-house, Bucharest, 1971, p.351-352.

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- European Convention of Human Rights
- Romanian Constitution
- Romanian Criminal Law in force
- The new Romanian Criminal Code

FINANCIAL CRIME IN THE ROMANIAN BANKING SYSTEM

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Abstract
The crime in the financial and banking system, through the disasters it produces, damages and large amount of victims, generates the largest economy damages, both national and international level. This phenomenon occurs and is manifested in a specific environment, the economy and finances one, takes different forms and operates with appropriate techniques. Most of the times, the banking system from Romania, has been used for personal grounds, which leads to serious damage of the Romanian economy. Insufficiently matured economic or imperfect judicial environments are only some of the factors that led to the commission of crimes in this area. Also, this type of crime has been determined, among other things, by the economic status, the social structure or the stage of development of the society.

Keywords: *banking and financial crime, corruption, banking fraud.*

Introduction

Financial – economic crime, also known as the white collar crime, generates great damages to the international economy. Nevertheless, the transgerssors who do crimes in this field are regarded by the society as people who found a way to avoid the coercitive action of the state, consisting in the increasing taxes and impositions. Therefore, these individuals are not considered criminals, although the criminal law makes no distinction; on the contrary, they are treated with respect, are considered businessmen, persons who don't deserve to be held liable for the fact that they found solutions, illegal even, to elude the financial legislation of the state where they conduct their business.

The phenomenon of the economic- financial crime takes place and manifests in a specific environment, of economy and finances, which can display a large diversity of organisational forms, which are in a permanent transformation, and offer a large gama of possibilities of actions, doubled by the correspondent techniques.

The victims of this phenomenom are the citizens, but, somettimes, are also the business parteners, governamental institutions, the business sector and the banking and financial environment.

The indirect victims are the citizens, those who, as a consequence of the embezzlements, frauds and illegal misappropriation, and of the unauthorized management buy – outs, are seeing their level of life diminished, the medical assistance compromised, the acces to education and information blocked by the illegal downsizing of the social fonds destined to fulfill these objectives.

The criminality in the business sector has as a result, by the great proportion of damages and number of victims, an obvious inbalance of the whole society, with direct impact on the climate of public order and national security[1].

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[1] C. Voicu, G. Ungureanu, A. Voicu, *Globalisation and bancking – financial criminality,* Juridical Universe Publishing House, Bucharest, 2005, p. 440.

The long term consequences of this type of criminality are not yet wholy taken into consideration, and in an economy in transition, like the one Romania has experienced, in which the financial and fiscal legislation has had a difficult birth and an even more difficult ageing process, the main consequence was the apparition of the carton – billionaires class, on the background of the pauperisation of the rest of the population.

After 1989 the foreign banking organisations have become available also for romanians, and these institutions offered not only a more evolved and competitive frame for the evolution of business, but also the means of creating an appereance of legality for some illegal activities. The same banking organisations have become also the place where the money coming from criminal activities conducted on romanian territory have found their destination.

From this point of view, the year of 1989 was the moment of the beginning of the great financial and banking criminality in Romania, when the romanian banking system has become concurential and private.

However, the possibilities offered by the sheer existence of this banking system, and also the possibilities given by the unlimited acces to external banking systems were not known but by a group of individuals which was very small in comparison to the rest of the population.

Among these few initiates there were persons who brought their contribution to the growth and evolution of the romanian banking system and who knew to blend their personal interest with the social one, but there were also those initiates who used the system only for their personal interest, in most cases producing great prejudices to the romanian economy.

The bankrupcy of banks such as Dacia Felix, Credit Bank, Bankcoop, Banca Albina, Bancorex and others ment not only the lost of the personal economies for thousands of romanians, but also the impairment of public trust in national banking system. Yet, the earnest effect of these bankrupy was that o great part of the forfeiture were directly or indirectly absorbed by the national economy, which therefore became weaker and more instable.

The infractionality in the financial – banking environment

A. Causes and factors which determine the perpetration of crimes in this sector. The greatest desasters who took place in the world of finances and banks have had as a generator factor, the immense potential this backround can have in the purpose of obtaining a meaningful material gain[2]. The huge profits that can be gained by malevolent use of the banking system determined the apparition of a new type of criminal – dangerous and versatyle – who exercised his illegal inclinations in a social environment characterised by the following factors:

▪ an economic backround insufficiently aged, marked by the easiness with which new economic agents and new financial institutions can appear, offering promissing perspectives, in many cases accompanied by a matching advertising.

In the absence of an established tradition in this field, the system becomes vulnerable due to the fact that the possible intruders like these, who look for an illegal purpose, are tracked down too late. Unfortunatelly, the economic environment existing in Romania in that period of time made possible the action of such organisations who had as only purpose fast enrichment, regardless of means, of a limited number of persons, others then the deponents.

▪ the faulty judiciary environment offers the ideal terrain for the initiation and finalisation of such illegal business, ended in colossal damages. The judicial system is either defective, either constantly behind the pace of business evolution, which is a dynamic environment, with his own laws and economically motivated.

In most cases, the legislative discrepancies are the ones speculated, but, equally dangerous is the abbundance of bills, allways changing, which rends the development of a correct economic activity almost impossible, even when one wants to act in good faith.

[2] Ibidem.

▪ the corrupt political environment is, undoubtedly, the factor who is the base of the economic chaos.

Individuals who took their business to the limit of the law or even broke it, and who gained enormous profits, afforded to buy themselves key positons in politics, which granted them immunity and also an increasing power.

Politicians such these initiated and advocated unhealthy legislative initiatives, poisoned the economic environment and developped an underground world who bolstered their position, but weakened the economic national power in the process.

▪ the utterly deficient external and internal control is another factor that encourages and amplifies the frauds in baks and financial organisations.

The lack of experience, the faulty knowledge of laws, the absence of any motivation, reproched to the organisations empowered with control powers, contributed to the creation of an instable and vulnerable environment, in which the potential factors could manifest themsefves freely.

▪ the defective management of a banking institution cand easily bring upon illegal activities, either from inside the bank as well as the outside of it.

The desire of gaining immense and immediate profits cam generate wrong managerial decisions, with untterly grave consequences.

One of the realities of the period we go through at this moment is the growth of the diversity and dimension of criminality on a global level, and especially on the level of bank criminality. It is obvious that, today, the banking criminality has extended to a wider area, takes new forms, some of which are more sophisticated and unknown untill now, such forms being in fact the product of the actions of criminal groups organised by true specialists[3].

The analisys of the dimensions and forms of the ways of manifestation of the economic – financial crime in Romania of the last 20 or 30 years brings to light the fact that this phenomenom was caused by the state of the economic, social and politic environment, by the social structure, the level of economic development and the levelof social stability. The changes that took place in these fields influenced the content and ways of manifestation of economic and financial crime. There have appeared new forms of delinquence, after the year of 1990 being revealed even a veritable agression towards the state property, materialised in embezzlement and thefts of huge proportions, a real industry of smugglers, a rioting outbreak of pyramidal games, the plunder of the most important banks, of the public finances and the dezastruous colaps of some investments fonds.

Taking advantage of the fact that the legislation regarding the banking activity was not brought to the realities of the day, (the bills were drafted in the seventies), untill 1990 the banks bolstered their positions and intruded in the romanian economy by backing up the private sector, and therefore consolidating their positions by offering a large number of credits, to which they tolled big comissions and interests.

The financial and banking world extended the roots of its power so well and so deep in all the state structures due, mainly, directly to the power of banking and financial institutions, organised and handled according to a strict set of rules etablished by specific laws, regulations and procedures.

Thus, we find ourselves in a spec that is so well guarded, that sometimes seems impenetrable, and so sophisticated, that only the strict professional initiative can change the internal regulations and law provisions, which, often through a appearent confuse enunciation, grants the system "imperviousness" against any instrument of assay and control[4].

B. Banking fraud. The term of banking fraud refers to the illegal acts that affect banks, financial services (loands, investments), and that concern instruments of payment, checks, promissory notes, notes of hand[5].

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[3] Ibidem.

[4] G. Ungureanu, A. Boroi, *Introduction in applied crime*, Juridical Universe Publishing House, Bucharest, 2004, p. 51.

[5] C. Voicu , *Business criminality*, M-I Publishing House, Bucharest, 1997, p. 21.

Accordind to the Explanatory Dictionary of the Romanian Language, fraud means deceit, that act of bad – faith usually comitted in order to gain a material profit from damaging the goods or interests of another person, which is, finally, a sort of theft.

Referring to fraud as a way of deceiving the bank, the term means the summ of the illegal actions and manouvers done by the bankers through the banking entity which is therefore directly damaged by the interloper transfer of some souces of money in the direct benefit of the bankers or other persons[6].

The fraud wave of the banking system started in the USA and extended in Germania, Austria, United Kingdom and Netherlands, in fact comprehended the enttire european community, and the analists forecasted a significant growth of crimes in the financial field.

Organised crime has targeted with predilection financial and banking activities and stock exchange, generating international crime events.

This wave of frauds added in also Romania, which was in a period of transition towards the free market economy, and experiencing an utterly alarming evolution.

Most of these crimes involve the granting ofbanking loans with no guarantees whatsoever or based on false documents, the use of banking deposits fraudulently, the favouring of a few private economic agents in the detriment of state organisations, illegal transfers of money between banking accounts, the essuing of false paying documents with no real coverageacts of abuse and corruption in regards the activity of awarding of loans, the omission of paying the instalments and interests deriving from loans, or the omission of taking the legal measures against some economic agents who broke the financial legislation in this field.

The banking criminality has two components:

- crimes comitted by persons outside the bank, the bank being the victim of the fradulent manouvers.

- crimes comitted by persons inside the banks, by the stuff, with or without the aid of some individuals from outside.

There are some notorious cases - Credit Bank, Dacia Felix, Bancoop, The Fond of Private Property IV– Muntenia, BCR –Timişoara, Ion Țiriac Bank–Brăila, BRD, in which individuals with leading responsabilities, sometimes with the aid of experimented outside elements, began illegal banking operations, by astute means, in order to avoid being caught, produces great damages, by the appropriation of fonds that summ up billions of lei[7].

The beginning of the fight against corruption is indeed a signal that society, at least at decisional level, has noted one of the essential problems that stand at the base of the growth of financial – banking frauds, seldom rising to prejudices of hundreds and thousands of billions.

Irregularities were done also to cover up the huge proportions frauds that resulted mainly from the omission of repatriation of foreign currencies generated by activities of export conducted by the economic agents, the banks faultering in allerting the judicial organisations of the ones who did not complied with the obligation of giving the "collected foreign currencies "[8].

Crime has special aspects in the field of non – traditional banking organisations. Some notoriety was gained between 1991 and 1994 by intra – aid organisations such as Caritas and Megacaritas, a genuine madness of multiplied gaines, and after their collapse the foundation of another, more sophisticated, serious and generous system was put: the investments fonds which began their activity in the absence of any form of control. The increase of non –banking organisations (assurance companies, pension fonds, investment fons, stock exchange), caused a powerfull back stroke to the banks by attracting large sums of money from the public in the exchange of a number of attractive clauuses.

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[6] C. Voicu, F. Sandu, I. Dascălu, *Fraud in the financial – banking and the capital market system*, 3 Publishing House, Bucharest, 1998, p. 112.

[7] T. Amza, *Criminal conotations and new riscs to the public order*, Lumina Lex Publishing House, Bucharest, 2000, p.

[8] F. Sandu, *Smuggling and organised crime*, National Publishing House, Bucharest, 1997, p. 87.

In this period the romanian banking system was used also for the laundring of dirty money which obtained through smuggling and embezzlement, illegal transfers over the borders of large sums of dollars for which there were no justifications, and the hiding of the money coming from ersonal illegal operations under the coverage of the principle of secrecy of operations[9].

The reform of romanian banking system began in 1991 by the creation of two level system, in which the National Bank looses its trait of commercial bank (by the detachment of the Romanian Commercial Bank) and this way the field openes to new categories of banking operators. Since 1990 untill now, despite some syncopes of some banks, negalively received by the public, the romanian banking system is obviously more stable and more well brought under regulation in comparison to the rest of the economy.

C. Underground banking systems. **The system *hawalla***. Twelve years ago, at the 58 th Interpol General Gathering, in december 1989, were discussed the systems of illegal international financial transactions. This type of underground banking systems exist for a long time, probably before the apparition of banking systems in the nowadays sense and it appears that they have the origins in Orient.

The underground banking system implies, in essence, the transfer, with no tracks left, of large sums of money in various zones of the globe, by avoiding the legal banking procedures, especially in those country which do not have regulations regarding custom control.

The motives of using this system are diverse, from the sending of small sums of money to relatives in poor countries, to the fiscal fraud and financing the great criminality: political and religious terrorism, arms and drug trafficking, etc.

The name under which this system is known varies from zone to zone: "chop shop" in chinese, "chiti", "hundi" or "hawalla" on the indian sub – continent and "stash house" in Lattin America. "Chop" and "chiti" are the names of an important document that keeps place for receipt and also note of hand.

"Hawalla" is a word in the "urdu" dialect and means trust in hindu.

The trust between parteners is the key stone in underground transactions, without which the whole structure collapses. This trust is obtained by any means, firstly through violence, that determines the partener to accept the rules of the game.[10]

On the global level, this type of cases are considered extremelly complicated, with a low procent of solving.

Imigrants which usually, but not allways, come from pauper countries, use a vast number of small magasines, restaurants, internet – caffes and bakeries to send money in the natal countries, as a way of helping. But these stores could be used to laundry money too, and for money transactions ment to sustain terrorism, wars and great criminality.

Since the events of 11 sepptember, the occidental goverments realised that the risc that transfer agencies might well financed terrorism.[11]

Brief conclusions

Banking and financial crime is a phenomenon that has implications not only in banking but in all areas of activity and, by the consequences it produces, affects the entire economy of a state. In fact, the main purpose of this type of crime is just obtaining the economic power.

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[9] I. Dascălu, *The off shore financial centers*, Argument Publishing House, Bucharest, 2001, p. 4 - 6.

[10] Emilian Stancu, *Treaty of Criminalistics*, 3 rd Edition, Juridical Universe Publishing House, Bucharest, 2004, p. 590.

[11] *Almost all on Hawalla, the circuit of black Money,* in National Courrier, year 11, nr. 4650, Monday, 05.06.2006.

Although several measures were taken, even modalities to combat this phenomenon have diversified and adapted new ways to commit these crimes, some of them very sophisticated; we here refer to those informative means which enable the performance of some banking transactions in just few seconds; banking and financial crime has increased. Some illegal acts are committed not only by blackmail and corruption, and by threats and violence, which considerably increased the danger to them.

Even if the causes, types of financial crime in the Romanian banking system and adverse effects of them are well known, as shown in the above mentioned, then the question arises which prevents us from easily combat the phenomenon and to draw people severely criminally liable consequently guilty and restore the previous situation in the economy minimize negative effects.

The answer, we unfortunately believe, is simple and primarily aimed the incapacity of the criminal repression authorities to identify in real time the indications for committing financial - banking crimes, incapacity generated by objective factors, such as lack of bank obligations to report items showing these hints and opacity of these institutions who plays erroneously the bank secrecy but also subjective factors such as lack of reputed specialists in the field which should be employed among the judicial bodies.

Taking in account a very simple social economic reality, namely that in the budget system, which includes training criminal authorities, salaries are not likely to encourage the highest recruitment specialists, people working in the field being urged on, in most cases, only by passion.

Last but not least, extremely cumbersome judicial proceedings marked by extremely complex financial and banking expertise by legal experts paid from the budget with amounts ranging between 200 and 5,000 EUR, in conditions in which, the defendants are accused of creating damages that far exceed the million hundreds of Euros, are elements of nature to severely delay the criminal proceedings but effective drawing success chance of the guilty to criminal liability and recovering damages.

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OBSTRUCTION OF THE EXERCISE OF ELECTORAL RIGHTS

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Abstract
Throughout the present study, we analyze the crime of obstruction of the exercise of electoral rights, as it is presented in the New Criminal Code, in comparison with the current regulation within the specific election laws. Taking into consideration the fact that the election crimes have been inserted as a separate title (section) in the New Criminal Code, we need to highlight the vision of the legislator regarding these crimes. Furthermore, this study consists of a synthetic analysis of the constitutive elements of the mentioned crime, as reconfigured in the form provided by art.385 of the New Criminal Code. We consider that examining this crime is a necessity, because of the lack of Court decisions in this area of practice - probably due to the gaps in the legislation preceding the Criminal Code that is to be enforced in the near future.

Keywords: *elections, constitutional rights, obstruction, civil and political rights, democratic competition*

1. Introductory Considerations

Equality and freedom, as the fundamental principles of the life in any society, need a political and legal correspondent of an institutional type, namely the Fundamental Law, which lays down the principles imposed by the democratic game, allowing the affirmation and the achievement of sovereignty as an exercise conducted through representative bodies.

Elections are, traditionally, the democratic process by which the people, as the holder of national sovereignty, exercise their right to elect and to designate their representative bodies, entrusting them with powers of utmost importance. This operation mechanism of the Establishment is driven by the decisional component of the people, consisting of the constituency, whose free expression of the right to vote legitimates and enforces the power of the state and the state authorities as such.

Political pluralism is in the Romanian society the central pillar of democracy, representing a condition and a guarantee for constitutional democracy. Political parties established by law "contribute the maintaining and the free expression of the political will of citizens".

Under these circumstances, the membership in one political party or another and the supporting of any party's ideology through direct involvement in the political life are fundamental rights of the citizens enshrined in and safeguarded by the Fundamental Law.

As the electorate is the one deciding on the governing and the governed and on the political party alternation to power, its political will ought to be clear and free and restricted only by the rules of democracy and political pluralism, all manifested as a legal corollary designed in such a way as to prevent any sideslips with unpredictable consequences.

Over the time, the defense of the political and the civil rights of citizens has been a constant concern of democratic regimes. During the interwar period, namely in 1936, the Criminal Code was adopted, known as the Criminal Code Charles II, which, under Title II, suggestively headed "Crimes Against the Exercise of Political and Citizens' Rights", was listing a series of offenses against such rights. Although some of these offenses were also incriminated by the electoral laws of the time (The Romanian Election Law of 27 March 1926, Article 122), the lawmakers considered it as an imperious necessity to criminalize them under the Criminal Code as well, as a further warranty for the safeguarding of the political rights of the citizens. In fact, the purpose of this criminalization was

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to "protect the citizens in the exercise of these rights and freedoms and to punish those attempting to prevent the free exercise thereof."

The coming to power of the communist dictatorship regime was a new stage, which, judging in terms of the legal safeguarding of such rights, represented a major setback. In spite of these rights being enshrined in the Fundamental Law of 1965, they could not actually be safeguarded due to the dictatorial politics of the ruling party.

After December 1989, the establishment of the political parties and the revival of political pluralism and the parliamentary system called for the need to put in place a legal framework designed to defend the citizens' political rights, which materialized by incorporation in the election laws of specific provisions to criminalize the acts of violating the rights under our consideration.

Nowadays, nearly two decades from the county's return to democracy, the lawmaker has considered it necessary, acting in line with the modern trend towards crime codification system upgrading, to incorporate in the new Criminal Code an additional title, Title IX, covering election crimes. As a matter of fact, we believe that by placing election crimes under Title IX, right before Title X "*National Security Offenses",* Title XI – "*Crimes Against the Fighting Capacity of Armed Forces",* and Title XII – "*Crimes of Genocide, Crimes Against Humanity and War Crimes",* the lawmaker has not only wished to stress out the high importance of the social values being safeguarded, which are a mix of public and private interests, in a context where this revised structure of the new Criminal Code is a common trait found in most European codes, but also to reflect the shape and the dynamics of the regulation, in keeping with the established order of incriminating, firstly, the offenses against individual interests and, secondly, the offenses harming the collective interest.

Obviously, election crimes have a complex generic judicial object, which comprises, on the one hand, the social relations dealing with the building of and compliance with the general organizational framework required for the safe running of the election process and the supervision of the democratic process of election of the public bodies, a process which must be governed by the rules of fairness and correctness in order that it may legitimize the results of the electorate vote. On the other hand, all of the criminalization in the New Criminal Code aim at respecting the exercise of the fundamental political rights (right to elect and be elected), which are protecting the individual, as a social relation, seen in relation to his or her appurtenance to the Romanian state.

2. Notion and Legal Content

According to the provisions of article 385 paragraph (1) of the new Criminal Code, *prevention by any means of the free exercise of the right to elect or to be elected shall be punished with imprisonment from 6 months to up to 3 years.* Also, pursuant to paragraph (2) of the same article, *attack by any means against the election place shall be punished with imprisonment from 2 to up to 7 years and the prohibition to exercise certain rights.*

Article 385 of the New Criminal Code has no counterpart in the previous Criminal Code, being, in fact, taken over from Article 52 and Article 58 of Law no. 35/2008 on the election of the Chamber of Deputies and of the Senate[1] and from Article 22 and Article 22^6 of the Law no. 33/2007 on the organization and the running of elections to the European Parliament[2], as well as from Article 107 and Article 111 of Law no. 67/2004 on the election of local public administrations[3] and Article

[1] Published in the Official Journal of Romania, Part I, no. 196, of March 13 2008, as further amended by the GEO no. 66/2008 and GEO no. 97/2008.

[2] Published in the Official Journal of Romania, Part I, no. 28, of January 16 2007, as further amended by the GEO no. 1/2007. GEO no. 8/2007. GEO no. 84/2007, GEO no. 11/2009 and GEO no. 55/2009.

[3] Published in the Official Journal of Romania, Part I, no. 271, of March 29 2004, republished in the Official Journal of Romania, Part I, no. 333, of May 17 2007, as further amended by Law no. 131/2005, GEO no. 20/2008, Law no. 35/2008, GEO no. 32/2008 and Law no.129/2011.

263 of Law no. 370/2004 on the election of the President of Romania[4]. Compared to the previous regulations, the content of Article 385 of the New Criminal Code brings together and summarizes the provisions of the normative acts dealing with the organization and the running of the different types of electoral processes in Romania. Thus, the article is virtually reiterating identically the crimes criminalized under Article 26^3 of Law no. 370/2004, whose scope of application, however, has been extended to include the types of elections referred to in the previous body of laws, by repealing all the relevant articles from the aforementioned special laws.

The offense of preventing the exercise of electoral rights is regulated in Article 385 of the Criminal Code, in both its standard and its aggravated forms. The standard type of such offense is referred to in Article 385 paragraph (1) of the Criminal Code and covers the prevention by any means of the free exercise of the right to elect or be elected. The aggravated form of this crime deals with the attack by any means against the place of election (polling station) [Article 385 (2) of the Criminal Code].

3. Analysis of Constituent Elements

3.1. Pre-existing Conditions

The special legal object consists mainly of the social relations related to the creation of and ongoing compliance with the general organizational framework for the fully safe running of the electoral process, as well as of the social relations dealing with the respect for the exercise of the fundamental political rights of the individual (the right to elect and to be elected).

This bundle of social relationships that are safeguarded by criminalization of the offense against these rights is primarily outlined by the provisions of the Fundamental Law of Romania, Title II, Chapter II – *Fundamental Rights and Freedoms* and in particular by Article 36 – *Right to Elect*[5], Article 37 - *Right to Be Elected*[6] and Article 38 - *Right to be elected to the European Parliament*[7]. The respect for the election rights of the Romanian citizens is in fact in full agreement with the international regulations and with the provisions of Article 3 of the First Additional Protocol to the European Convention on Human Rights, as well as with the provision of Article 25 of the International Covenant on Civil and Political Rights, consecrating the right to vote and to be elected at by organization of free elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors[8].

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[4] Published in the Official Journal of Romania, Part I, no. 887, of September 29 2004, as further amended by GEO no. 77/2004 and GEO no 95/2009.

[5] Pursuant to Article 36 of the Fundamental Law of Romania: "(1) Every citizen having turned eighteen up to or on the election day shall have the right to vote. (2) The mentally debilitated or mentally alienated persons placed under interdiction as well as the persons disenfranchised by a final decision of the court cannot vote."

[6] Pursuant to Article 37 of the Fundamental Law of Romania: "(1) Eligibility to be elected is granted to all citizens having the right to vote, who meet the requirements in Article 16 (3), unless they are forbidden to join a political party, in accordance with Article 40 (3). (2) Candidates are required to have turned, up to or on the election day, at least twenty-three years of age in order to be elected to the Chamber of Deputies or members of local public administration bodies, at least thirty-three years of age in order to be elected to the Senate, and at least thirty-five years of age in order to be elected to the office of President of Romania.

[7] After Romania's accession to the European Union, Romanian citizens shall have the right to elect and be elected to the European Parliament.

[8] For a detailed analysis of the terms "elections" "electoral process" "right to elect" and "right to be elected" see **I. Muraru, E.-S. Tănăsescu, A. Muraru, K. Benke, M.-C. Eremia, Gh. Iancu, C.-L. Popescu, Şt. Deaconu** – Elections and Constituency – Ed. All Beck, Bucharest, 2005, pp 1-15; **I. Deleanu** – Institutions and Constitutional Procedures – Romanian Law and Comparative Law – Ed. C.H. Beck, Bucharest, 2006, pp 66-68, pp 135-183, pp 489-490 and pp 572-583.

Note should ne made here that the legal status of the organization and conduct of elections in Romania is determined by the provisions of the election laws, namely by Law no. 35/2008 on the election of the Chamber of Deputies and of the Senate, Law no. 33/2007 on the organization and conduct of elections to the European Parliament, Law no. 67/2004 on the election of local public administrations, and Law no. 370/2004 on the election of the President of Romania.

The material object. A crime is usually devoid of material object to the extent to which the social values safeguarded by the standard type of the offense criminalized are abstract values and are not expressed by a material entity[9]. In its aggravated form however, we believe that the material object consists of the place of election (the building as such where the polling station is located, the various items inside the polling station etc.). However, where the crime also affects the bodily integrity of individuals inside the polling station, this does not become the material object of this crime but of another distinct crime, i.e. the crime against the bodily integrity or the health of the individual, in relation to which the offense referred to in paragraph (1) or paragraph (2) of Article 385 of the Criminal Code will be deemed as a concurrent crime.

The active subject. The active subject of the crimes covered by Article 385 of the Criminal Code can be any individual who meets the general conditions of the active subject of the crime. However, there are frequent cases when the active subject holds a certain official position: president or the members of the electoral bureau of a polling station; security officer in charge with public order and peace within the polling area; a member or a supporter of a particular party, faction or political alliance.

Criminal participation may occur in all its forms, in either of the forms of crime subject to criminalization.

The passive subject. The main passive subject is the state by its central and local administrations or its specialized bodies (The Permanent Electoral Authority) in charge with the organization and the running of the various types of elections in Romania.

Secondly, the passive subject is, on the one hand, the citizen who meets the requirements of the law allowing his or her to exercise his or her right to vote, and, on the other hand, the person / political party / political or electoral alliance that runs for the election.

According to the provisions of the Fundamental Law specified above and to those laid down by the election laws, to be a part of the constituency a person is required to meet the following legal requirements: to be a Romanian citizen, to have turned 18 years old before or on the day of election, not to be mentally impaired or alienated and not to be placed under a ban or disenfranchised by a final decision of the court.

On the other hand, the passive subject and the individual who is lawfully entitled to be elected may also be any citizen enjoying the right to elect, who resides in Romania, unless he or she is forbidden to join political parties under Article 40 (3) of the Fundamental Law of Romania. Also, depending on the public function or office the citizen intends to candidate for, he or she must also meet further conditions set out by the Fundamental Law and by the election laws, as appropriate. For example, under paragraph (2) of Article 37 of the Fundamental Law "*candidates must have turned, up to or on the election day, at least twenty-three in order to be elected to the Chamber of Deputies or the bodies of local public administration, at least thirty-three in order to be elected to the Senate, and at least thirty-five in order to be elected to the office of President of Romania*."

3.2. The Objective Dimension

The material element of the crime referred to under paragraph (1) of Article 385 of the Criminal Code is the prevention by any means of the free exercise of the right to elect or be elected. According to the definition given by the legislator, the action of the active subject may be exercised

[9] **I. Pascu** – Criminal Law, General Part – Ed. Hamangiu, Bucharest 2007, p. 157.

by both an action and an inaction and can take two forms: in the first sentence the offender prevents the elector from exercising his or her electoral choice, and the second sentence refers to the act of preventing a citizen or a political party or a political/an electoral alliance, that meets all the conditions established by law to run for elections, from obtaining the vote / votes of the constituency.

It is worth highlighting here that, although these forms of exercising the material element appear as alternative, the exercise of either form would normally involve the exercise of the other form as well, given the fact that prevention of the elector from manifesting an option may indirectly imply the prevention of any of the competitors to take advantage of that vote, and vice versa.

Preventing the free exercise of the right to elect or be elected can take the form of an action, such as, for example, the unreasonable prohibition of access of the elector to the polling station, the unlawful rejection of the candidature file of an eligible candidate etc., or the form of an inaction, such as, for example, refusal to give an elector the ballot ticket to be filled in.

Prevention action may be exercised, according to the legislator, "by any means", an expression which may involve both an act of physical obstruction, and one of a mental nature, such as solicitation or exertion of moral pressures on the passive subject. On the other hand, the action related to the material element may be performed either directly by the active subject or through other people (an order given to the security officer in charge with surveillance of the election place to forbid access onto the premises of certain persons or the blocking of the entry). However, where the action of the offender involves the use of any means that are typically associated with other crimes, such as unlawful deprivation of liberty, threat, blackmail, physical abuse, forgery etc., then the crime referred to in Article 385 (1) is concurrent with that particular offense (multiple offenses), where appropriate.

In its aggravated form, the material element of such crime involves the attacking by any means of the polling station. This manner of committing a crime is always and exclusively by way of action, as defined by the expression *verbum regens*, which describes an aggression against the election station. We believe that the wording "election station" refers to the building where the polling station is located and any items as may be found on the premises, in which case the action corresponding to the material element is not directly against the persons inside or in the immediate vicinity of the election station.

However, where the assault affects (also) one/several individuals, then we will be dealing with a case of multiple crimes consisting of the offense referred to in Article 385 (2) of the Criminal Code and a crime against the life, the bodily integrity or the health of an individual, respectively, as the case may be.

The main and immediate consequence of this offense is the generation of a hazardous situation, which endangers the exercise of the fundamental political rights of the citizens, while secondarily endangering the proper organization and conduct of the election process.

The causal link results from the materiality of the act (*ex re*), i.e. preventing the exercise of political rights by any means, which would suffice in itself to endanger the safeguarded values.

3.3. The Subjective Dimension

The form of guilt is usually the direct purport; however, indirect intent may also be considered a form of guilt depending on whether the active subject has sought to actually prevent the exercise of political rights or has only agreed with such a possibility.

The motive and the purpose, though not specifically determined, may also be relevant in determining the form of guilt with which the crime was committed, all the more that crimes of this type are in most cases caused by dissatisfaction with some of the candidates in the elections or are purporting at favoring some candidates in the detriment of others.

4. Forms and Means

This crime is susceptible of all the forms of the offense purported. Thus, while **the acts preparatory to the commission of the crime,** though possible, are not criminalized, the **attempt** is criminalized under Article 393 of the Criminal Code. For example, the attempt to commit an electoral crime occurs in the following case: after the voting and the return of the vote stamp, the elector is asked by a member of the election bureau to leave the section without signing the electoral list, thereby purporting to invalidate the elector's vote, although the elector refuses to follow the order and proceeds to the signing of the electoral list.

Consummation of the crime takes place upon the successful prevention of the exercise of the right to elect or be elected or in the case of an attack against the polling station.

5. Penalties

Preventing the exercise of electoral rights, in the standard form, is punished with imprisonment from 6 months to up to 3 years.

In its aggravated version referred to in paragraph (2), i.e. in the case of attack (assault) by any means against the polling station, is punished with imprisonment from 2 to 7 years and the prohibition of exercising certain rights.

Under Article 33 of the Criminal Code, attempt is applied the punishment prescribed by law for crime consumed but reduced to half.

Conclusions

As the legislator states in the Recitals to the new Criminal Code, it was considered preferable to regroup electoral crimes under a separate title of the Criminal Code, in order to give this text of law a greater stability, while also eliminating the overlaps currently existing in the regulation. Indeed, under the various incriminations contained by the election laws in force, although the offenses criminalized by the various laws are to a large extent similar, some correlation gaps and discrepancies have nevertheless pervaded into the regulation, which are totally unreasonable. Therefore we believe that in this case, too, alike in the case of other provisions of the New Criminal Code, the law has returned to the interwar legislator's mindset, with the systematization and the restructuring of these crimes involving also a more just individualization and enforcement of the legal texts in this matter.

Consequently, in the context of this new regulation, we believe that the process of establishment, investigation and punishment of the crimes contemplated herein may take place in conditions that are more favorable than in the past. Moreover, the absence, for various reasons, of previous judicial practice should not obstruct the application in the future of this text of law, taking into account the multitude of electoral processes taking place in Romania after the country's accession the European Union in 2007.

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EUTHANASIA STIPULATED BY ROMANIAN CRIMINAL LAW, MITIGATING CIRCUMSTANCES VS. OFFENCE

MONICA POCORA*

Abstract
This paper aims to be a scientific approach to the issue of euthanasia, bringing into the debate current and future controversies raised by euthanasia, as a result of the introduction into the Romanian penal law of the criminal offence of homicide by request of the victim. The study represents an approach to moral, religious, constitutional, civil, criminal procedure debates and last but not least to criminal debates regarding the legalization of the euthanasia, as the most difficult task lies with the criminal law.

Keywords*: life, death, assisted suicide, human rights, criminal sanction.*

Introduction

Between the protected rights by the Romanian Criminal law, there is the privilege of life of one fellow. Therefore, the title of this theme is recommended matters looking for protection of this privilege, as well as the situations appeared by a severe illness of one person. I've discussed about euthanasia, the etymology, those three familiar and well-known meanings, as well as appearing controversy regarding to this notion. This subject was concluded through conclusions and suggestions. The suggestions are reporting about the euthanasia. It should be express scheduled of Romanian penal law and considered offences of attempt for human being; or, the euthanasia should be extenuating circumstances of manslaughter when this is imposed by medicine reasons.

Some authors, based on the idea that suicide is a right of every individual claimed that anyone can send another person the right to take life. Last century was born a trend called "right of death" and that advertising for each individual the right to ask to be saved from death throes. This design is dedicated to any legislation, the legislators showing an understandable caution in allowing suppression of life at the request of a person no matter how motivated would be such a solution. For the first killing on request data been settled by German Penal Code which provide that person's request must be "explicit and serious" to be considered. Also, the Hungarian Criminal Code of 1980, regulate the killing on request, provided the existence of a "motivated and serious request." The same condition an advertisement and the Swiss Penal Code in 1916 in the sense of "urgent and serious request." In this category is included the German Penal Code of 1939, which regulate the agreed murder only if the request came from a man seriously ill or injured. Italian Penal Code is stipulated by Art. 579 provision for mitigating the penalty to "murder one who consents." The act was considered an offense on the person.

The main elements of novelty existing in the current criminal legislative reform are rendered by the repositioning of the values that the criminal law protects. Thus, the legislator aims to protect the most important social value, i.e. the person, fact that reflects the fundamental interests of the individual or of the society; this is justified by the fact that the person is, above all, subject to different types of assault into the daily life. Before being incriminated, these offences suppose an assessment of the danger they present. This assessment is made taking into consideration the interests of the society and not those of each individual. Thus, it is possible for a person whose honor has been insulted not to give importance to the offence committed against him/her or, even to judge it as favorable by comparison with a personal code of assessment, such as the biblical precepts. Then, the

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notion of "important" in terms of the social value system is different from a historical stage to another and from one country to another.

The people's perception concerning the euthanasia is marked especially by the existing precepts in connection with the notions of "*life*" and "*death*".

Often, it has been demonstrated that the theological vision can provide the sciences of law, sociology, medicine, with the correct premises, so that any person can claim a fundamental right of his/her own. Seen as a divine gift, life is the supreme value of man on Earth, as it is the support of the other values that express it and that impose it ahead them. In accordance with the fact that each human being belongs to the same human race, the right to life is shown to be the fundamental expression of the human existence. As a consequence, the *Christian religion* believes that nobody is allowed to attempt to take his/her peer's life or his/her own life, as life is a divine gift. This view is joined by both *Buddhist and Jewish religions*, in the sense that euthanasia, irrespective of its form, should be banned. It was also considered that, if all international conventions on human rights were not premised upon the theological vision on human life and upon the right to life, then, they would risk turning man into a social individual, subject to arbitrary, loose, and unprincipled laws.

Equally, religion considers that we must respect each other, as well as we must respect the other's wishes concerning the end of their life. Regarding this latter aspect, the following question can be raised: why doesn't religion allow the last dying wish of a moribund person, namely that someone puts an end to the moribund person's suffering? In the attempt to provide an answer, we consider that the intrinsic value of that human being is a priority, in disfavor of his/her will.

Legal beliefs

Within this paper, case study and observation method were those that allowed the debate of some of the most controversial issues related to euthanasia, the judicial practice serving as the empirical basis for drawing up conclusions.

Numerous studies approaching the issue of euthanasia have been published, but socio-human realities constantly stir debate and controversy about the assisted suicide. Euthanasia was practiced in ancient times, because it was considered that life should not be preserved at all costs. Later, in countries such as Switzerland, the Netherlands, Australia, the USA, euthanasia was legally practiced[1].

Some authors, starting from the idea that the suicide is a right of every individual, have upheld the idea that anyone can transfer to another person the right to take his/her life. Thus, authors such as K. Binding and A. Hoche pleaded since 1920 for the legalization of euthanasia[2], in the sense that they attempted to prove that legalizing euthanasia was not inhumane, whereas compelling the patient to die in agony was, when there existed the possibility to get rid of the ordeal by accelerating the patient's death. Then, the establishment of a special commission was proposed, commission that had to be composed of physicians and lawyers who had to decide upon the desperate condition of the patient.

The human, creating himself, acquired thought and feeling that, although seem to be independent, have been limited by the restrictions and prescriptions imposed by society. In this sense, in the relation individual- society, the concept of society reflects certain dominant fundamental rules and principles or systems of values that characterize social life.

A new path was opened for humanity, with multiple contradictory aspects in which the interests of science will inevitably collide with the ones of ethics, Christian morality and political interests of the states. The former president of the United States of America, Bill Clinton said: "We have to accept the serious ethical and moral issued raise by this extraordinary revolution". Same as the former American president, the British premier Tony Blair underlined that "humanity has the

[1] *http://www.rnw.nl/english/dossier/Euthanasia*. (2010, June 26).

[2] O'Mathúna, Dónal P. *Human dignity in the Nazi era: implications for contemporary bioethics.* Germany: BMC Medical Ethics, 2006.

duty to use the new valuable information in a responsible manner and for the benefit of the entire humanity[3].

The objective causes and especially the social ones determine the different human behavior and manners of actions so that the social restrictions acquire a mandatory normative aspect.

The general argument resulting from the relations of the individual with the society consists in the fact that society develops in a positive manner because, within the complex process of education, the individual integrates in the normative and evolutional structure of society[4].

Other authors have equally considered that homicide by request should not be treated in a different way than absurd murder, they being unable to accept the idea of a right to suicide. We can mention here the Spanish Penal Code, the French, the Belgian, the Canadian ones and also the Criminal Code of Luxembourg. Nevertheless, these very laws that regulate the possibility of consented homicide do not allow for it to remain unpunished. The homicide upon the patient's request was for the first time stipulated by the German Criminal Code which provided that the victim's request had to be "explicit and serious" in order to be taken into consideration. In order to exemplify this aspect of the need of the existence of a "serious and motivated request" made by the victim, we may cite the Hungarian Criminal Code, the Swiss Penal Code, and the Italian Criminal Code. Among the law systems devoted to not punishing the homicide by request, we could mention the Russian legislation.

The human body cannot represent an object of law and the human, assimilated to the physical person, cannot be but a subject of law and not an object of law[5]. In this context, the human body, complete and viable, in the actual conception of doctrine and jurisprudence, cannot be sold or donated because it would mean the reestablishment of slavery and transformation of the person in an object of patrimony rights, while the elements of the human body can, in exceptional cases, make the object of acts of dispositions, in the extent allowed by law, because they are not a person in the judicial sense of the word.

In the interwar Germany, it was even introduced a bill in Parliament, that stipulated that the one who wanted his/her own death had the possibility to address the court in order to obtain that. The court, on the basis of a medical assessment, could certify the thoroughness of the demand and could authorize a physician to put an end to the patient's life in a certain way. Subsequently, that bill was censored

The jurisprudence is not unitary either in solving victim consented homicide trials; most courts continue to consider these acts as murder. In some European countries, as well as in some of the American states, acquittal verdicts of defendants who committed acts of murder out of mercy or upon request were nevertheless pronounced. For example, the case of Dr. Herman Sander which used his medical profession in the USA (Eillott C.,Quinn F. 2000). He was charged with the first-degree homicide of a cancer patient, a woman whose end was inevitable and who was terribly suffering, because the administration of painkillers did not have any effect at that stage of her disease. The doctor put an end to her suffering by injecting air into her veins.

Euthanasia in Romania – Past, present and future

Romanian legislation has adopted a resolute position with regard to punishing murder, even if it was euthanasia. The Romanian Criminal Code of 1936 incriminated distinctly the murder of a person if committed as a result of a tenacious, repeated and constant plea of the victim or if committed out of mercy in order to put an end to the agony of an incurable patient (article 468, paragraph 1)[6].

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[3] Avram, A., *Revolutia genetica*, Jurnalul Cotidianul, 2000.

[4] Tanasescu, I. et al. (2000). *Tratat elementar de drept penal si criminologie.* Craiova: Sitech.

[5] Friedman, Y. (2008). *Building Biotechnology: Business, Regulations, Patents, Law, Politics, Science.* Logoss press.

[6] Dongoroz V.,colab. *„Noul Cod penal şi Codul penal anterior".* Bucureşti: Editura Politică, 1969.

Initially, three meanings of euthanasia were accepted. Euthanasia was seen: as the suppression of physically or mentally disabled people's life, as the reduction of the final ordeal nevertheless without causing death, and as the acceleration of the death of people who do not have any chance of recovery. As one can see, the first two meanings are no longer justifiable in the meaning of criminal law, as there is no social group that dares to make use of them anymore, the reduction of the patient's ordeal without causing his/her death being now considered as a fundamental responsibility of the medical personnel[7].

The individual behavior becomes more the result of learning rather than heredity so that, if under the aspect of the reaction pattern to external stimulations, it does not seem to have a special signification, regarding the creation of a behavioral prototype of a crowd, or society, it represents the basic rule according to which its members act relatively stable and constant. Within the human behavioral structure, both biological and educational elements are included. The behavioral phenomenon, structuring actions and individual reactions as a manner of human interaction, is protected under the aspect of dignity and identity of the human being[8].

The Romanian legislation that is in effect does not allow murder upon request or by consent, considering that in this case only a judicial extenuating circumstance could be considered in favor of the author. Unlike that, the New Criminal Code begins with Title I "Crimes against the person", Chapter I "Crimes against life", the article 90 stipulating the "Homicide by request of the victim". According to this legislative stipulation, *"murder carried out at the explicit, serious, conscious and constant request of a victim suffering from an incurable disease or from a medically certified serious disability causing him/her permanent and unbearable suffering, shall be punished by imprisonment from 1 to 5 years".*

In terms of the criminal procedure law, starting from the limits of the penalty stipulated for the crime of homicide by victim's request, it may be presumed that the culprit can meet the circumstances of conditional suspension of sentence, so that he/she does not actually execute the penalty the court mete out to him/her, according to the stipulations of the article 81 of the Criminal Procedure Code. In Romania, the Latin principle of "*volenti et consentienti non fit injuria"* ("to a willing person, no injury is done" or "no injury is done to a person who consents") excluded the possibility of punishing the person who took the life of a victim upon his/her own request.

The Romanian criminal legislation stipulates, within the framework of homicide, the criminal offence of causing or aiding suicide, provided that the suicide had taken place. The penalty included both in the present law and in the New Criminal Code, is, for the simple version - imprisonment up to 7 years, and if *the victim is devoid of discernment*, the penalty is imprisonment of up to 10 years. Thus, a first question that could be raised would be whether in the case of euthanasia it is always presumed the fact that the victim has discernment. Could this situation be mistaken for causing or aiding suicide? We state that, because there may be an identity between the victim and the form of guilt in what concerns the author, namely the intention. The main distinction, though, consists in the penalty applied. As a consequence, maybe the suicide attempt should also be incriminated.

Moreover, the correct placement and assessment of euthanasia within the criminal law is relevant also in terms of civil law, namely in the matter of succession. Thus, were the euthanasia beyond the scope of any criminal penalty, any descendant looking for enriching his/her patrimony by means of legacy might claim this situation, easily arguing that the deceased has expressly requested the suppression of his sufferings.

The jurists have opposed to the accreditation of the right of the individual to dispose of their own body, motivating the fact that this type of recognition would lead to the self degradation of humans. The interdiction to commercialize the human body or parts of it is expressly provisioned by

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[7] Pocora, M. „Probleme legate de protectia dreptului la viata la inceput de mileniu III." *Conferinta Internationala "Integrarea Europeana-Realitati si Pespective".* Galati: Analele Universitatii Danubius, 2007.

[8] Cosmovici, A. (1996). *Psihologie generala.* Iasi: Polirom.

the French law on bioethics as well as in the European Convention on human rights and Biomedicine adopted by the Council of Europe. Modern biotechnology has indicated that it can become one of the possible motors of the development of society in the third millennium, being compared with revolutionary methods that have changed human society forever such as the Great Industrial Revolution, the discovery of the atomic bomb or spatial research, promises a considerable medical progress and a possible improvement of the human condition but at the same time, has the potential to create unwanted or unpredictable problems with an impact that can be profound on the right to life, corporal integrity and health of individuals, human dignity but also on the structure of society as we know it now[9]. In its wider sense, the concept of "biotechnology" refers to the technologies using living organisms (virus, bacteria, animal or vegetal cells coming from simple or complex organisms) or their sub cellular components purified in order to obtain useful stocks of commercial products, in order to improve the characteristics of plants, animals or humans or to create microorganisms for specific purposes[10].

Conclusions

Life is a "gift" that we receive only once and we must make everything humanly possible to enjoy this miracle. The *right to life* is an *inalienable human right* and it is beyond any individual's attempt to dispose of it; nevertheless, one should not omit the distinction between *living* and *being alive*, the latter situation being only a purely biological phenomenon. It would be a mistake for us to consider the lives of moribund people as being worthless and to draw the conclusion that it would be better for them to die.

Not punishing the murder committed upon the request of the victim is also to be blamed, because it could lead to serious abuses, including the danger that under the guise of seeming acts of charity one could try to get rid of temperamental children or of the elderly who don't suffer of any disease but who are in the care of others. Moreover, there is the opinion that, the fact of invoking an incurable state would render the use of scientific progress difficult and, in these cases the victim's consent could hardly be acknowledged as being freely expressed. Therefore, we completely agree with the punishment of the murder upon the victim's request, but not as a standalone crime, because the limits of the imprisonment penalty are reduced, but as extenuating circumstances of the crime of homicide, because the limits of its penalty are increased.

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THE CONCEPT OF PATRIMONY AND COMMON ASPECTS OF OFFENCES AGAINST PATRIMONY REGULATED BY THE CRIMINAL LAW

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Abstract
This study aims to analyze in detail the concept of patrimony and then, will identify the common aspects of all offences against patrimony regulated by the actually Criminal Law. We presented elements of meaning of "patrimony" term, stipulated both by Criminal Law and Civil Law, under this point of view, it can be observed that incriminating the offences against patrimony, the Criminal Law takes into account the illicit action of offender and not the juridical position of victim. Continuing the conceptual analyze of "patrimony", we highlight although the Constitutional provisions. As regarding the common aspects of offences against patrimony, we presented a classification of these crimes, based on identity of material element, as well as result of some foreign criminal legislation (for example, the Italian Criminal Law, French Criminal Law).

Keywords*: patrimony protection, offence, comparative law*

Introduction

According to New Civil Code, any natural or legal person is a heritage owner which includes all rights and duties that can be measured in money belonging to it (Art. 31).

In case of division or offended the rights transfer and duties of an patrimony to other within the same property, is made under prescribed legal conditions and without prejudice the creditors rights on other property.

In terms of doctrine, "patrimony" term means a notion framed precisely of private law: all rights and duties valued in money of a person had an important utility[1] in major areas, such as inheritable transmissions.

Similarly, the property is regarded as an ensemble of assets, somehow separate by owner that can acquire, administer, but whenever he can sale it.

Generally, the property is a legal universality, an ensemble of individual subjective rights who may be converted in money and can be transmitted[2].

In terms of criminal law, "patrimony" term has a different meaning as in civil law. In terms of civil law, the patrimony means all rights and duties of an individual that can have an economical value, that can be measured in money or in other words, all current and future rights and duties of a person[3].

In this regard it can be noted that sanctioning facts affecting the property, criminal law considers illegal actions of perpetrator and not the legal position of victim. This means that offender has to justify he had the right to commit an illicit in relation with prosecution bodies, if he is owner or a simple legal holder of stolen, appropriated or destroyed asset, by committed crime[4].

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Therefore, criminal law considered that in order to protect the patrimony and its rights. There is no doubt that an asset is keeps the facts situation established and known to those concerned, anyone could claim to have a right on that good and it can effectively exploit. If asset has lost the facts situation (for example, has been appropriated, removed, concealed, destroyed, stolen, etc.), any right capitalization regarding it becomes unenforceable This is the reason why criminal law punishes even the owner if its action helps to changing the facts situation of its asset in detriment of legitimate interests of others (for example, damages offences provided by Art. 217, par. 2-4 Penal Code, or theft sanctioned by Art. 208 par. 3 Penal Code.).

Therefore, the change by illegally means of entities economic situation are crimes provided in Title III of the Criminal Code. Another specificity of this category of crime is under global "crimes against property" name, are hide two important categories of assets likely to be protected by criminalizing acts against property, in relation to various forms of ownership.

Delimitation of basic forms of ownership, subject to criminal protection is stipulated even by constitutional rules; art. 136 par. 1, Constitution provides: "Property is public or private" which means that in our society are not developed other forms of ownership than those listed by Constitution.

As regard the specific objects belonging to one or other forms of property, constitutional norms using differential technique, they are not mentioned directly in categories of assets that belong to private property but only those which form public property. Knowing these types of assets indirectly, we realize the area of assets belonging to private property. In this category will include all assets which not form the public domain. Art. 136 par. 3 by Constitution is stipulates the exclusive assets belonging to public property: riches of public interest of the subsoil, air space, waters with hydropower of national interest, beaches, territorial sea, natural resources of economic area continental shelf area, and other assets established by law. Therefore, in addition to assets expressly provided in the text above can be included the category of assets belonging to public property. So for example, by Law no. 18/1991 on the land as by Law no. 243/2002 on OUG no. 243 of 2002 approving GEO no. 105 din 2001 on the state border of Romania, are listed and other goods.

These laws broaden the assets listed by Constitution through adding other assets which form exclusively public property, as is done by art. 5 Law no. 18/1991, on land as well as art. 7 par. (1) of GEO no. 105/2001 approved by Law no. 243/2002, which refers to the strip border protection and by art. 10 par. (2) on premises of border crossing points.

Another method of broadening the sphere of assets belonging to public property that call these special laws is to indicate the criteria by which it can determine the asset belonging to public property. Art. 5 par.1 of Law no. 18/1991 is states that land which by its nature is used or has a public interest and Art. 4 last par. stipulates that land "affected to a public utility"[5] belong to the public property.

Thus, the nature assets of their by public utilities are the main criteria stipulated by laws referred to delimit assets exclusively belonging to public property. These goods under the Constitution and the law could be found in an autonomous administration, either a public institution or in a company detention that he was hired. If the special law provides otherwise, rental or lease may be made to a company with majority state, or any other company. Public property feature is that it is inalienable, that goods from this class should stay in a public property field. This does not mean it is not possible the movement, a certain transfer of such assets. As noted above even the Constitution in Art. 136 par. 4 provides under law, asset of public property can be managed by autonomous administrations, public institutions or may be leased or rented, also they can be put into free using to public institutions. According to criminal law in force, public property is not differentiated protected likely previously. This means that, within the legal sanction, judges should consider the quality of these assets and treat more harshly those affecting public property.

[5] *Dec. pen.,* . nr. 84-1995 (C. de Apel Piteşti, 2/1996).

Unlike assets of public property that we can identify easily and directly on basis of constitutional norms and special laws, assets of private property is identified indirectly and all other goods non included in public property had this character. Does not matter if these assets are in possession of a individual or legal persons. Also does not matter if they are state property or a private person. As a result, private property can have both state and citizens and legal entities, such as companies. Assets of autonomous administration (other those belonging to public property and gave them for administration) are not state owned, but private property of state. As well as a company assets within state holds majority social capital (except for assets belonging to public property and assigned as concession or rent).

Common aspects of offences against patrimony regulated by the Criminal Code

Patrimony protection is provided mainly by other branches of law (civil law, administrative, labor, etc.) criminal law has just a subsidiary role. It acts only if others ways are ineffective (non-criminal means), but if criminal law is incident and is the most energetic and effective defense of property[6].

For all these reasons, actually the legal framework governing the crimes against patrimony by Romanian Penal Code in force is found in Title III of the Special Part, which has even this name - "Crimes against patrimony". It is a title with no subdivisions, even the doctrine proposed such groups of crimes.

Thus, in relation to specific of each actions which represent the material element of offense, it is proposed a classification of crimes against patrimony in three main categories: *circumvention acts* (theft, robbery, piracy and concealment), *actions made by fraud* (breach of trust, fraudulent management, fraud, embezzlement and appropriation of found asset), and *arbitrariness acts* (destruction and disturbance of possession)[7].

In some foreign criminal law, crimes against patrimony know a certain systematization or classification[8]. Thus, Italian criminal law distinguishes crimes against patrimony as based on violence against the person or things, or based on fraud. French criminal law divided offenses against patrimony in two main categories namely: fraudulent appropriation of property (theft, fraud, funds abduction) and other property attacks (concealment, destruction, degradation, aggression against treatment system of computer data).

1. Legal generic object of offenses against patrimony is patrimony as *social value and ensemble of social relationships* which are born, develops and grows in relation to namely social value, especially in terms of real rights concerning to property, including the obligation of maintain the initial legal status of assets as part of that patrimony[9].

Some crimes such as robbery had a *complex legal subject* because as *primarily* is affected the social value, named patrimony, *and secondary* the social value represented by life, health, physical integrity or individual freedom.

Material object of crime in general is thing on which moves the material element of offense[10]. Regarding the crimes against patrimony, the material object is represented by mobile or immobile assets against was directed the criminal activity. Some offenses can only had a mobile asset (the crime of theft, robbery, breach of trust, embezzlement or appropriation of found asset), while in others it may be an immobile asset (destruction in any variants or possession disturbance).

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[6] Pascu, I., Gorunescu, M. *Drept penal, partea specială.* Bucureşti: Editura Hamangiu, 2008.
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The perpetrator of most crimes against patrimony can be *any person who carried out general conditions of criminal responsibility*[11], if law not provides a special quality for it.

Some of Title offenses are proper in sense of requires a special skill to perpetrator - for example, embezzlement for which law establishes a special quality of perpetrator - the official administrator.

Criminal participation is possible of all crime against patrimony. If the offense requires a special qualification of perpetrator, for joint author existence is required all participants carried out this qualification. When condition is not fulfilled, the joint author is not possible and the simple participant is considered only an accomplice to crime. It is possible the *improper participation* when deliberate intervention of instigator or accomplice, the author has acted without fault or by negligence.

Some of crimes against patrimony had been characterized particularly by specialty doctrine. It is breach of trust crime that states it can be committed by joint author only if the mobile asset was entrusted to offenders. In case of the fraudulent administration only when offenders were required to manage or preserve assets in common.

Victim of offenses against patrimony can be any individual or legal person, as appropriate, and the state when assets against was directed criminal activity is an object exclusive of public property. It is possible that in certain cases to be a secondary victim, represented by individual or legal person that owns the asset, or who have certain rights on asset unable to turn account such as garnishment creditor or beneficent owner.

In case of complex crimes: robbery and piracy, given the objective particularities of these crimes, there is a mainly passive subject victim, whose patrimony has been harmed by violence, but there may be a secondary victim, namely, the individual that supports violence exercised by defendant, even if it was not injured in his patrimonial rights[12].

The most common crimes against patrimony are not found special conditions of place and time for crime existence. In case of theft or robbery, specific requirements regarding location and time during committed offense can be only aggravation circumstances of offense.

The problems occured by offences against property can not be considered exhausted, and a new research is adequate owing to problems complexity, observed in connection about them.

Inclusively the structure of title including incriminations created in order to protect individual property, is subject to controversy. Although the New Criminal Code is intended to be an improvement of actually Criminal law, we believe that some incrimination text has an ambigous content. Thus, we can see that breach of trust offence by creditors frauding is supposed invocation of fictitious documents (by material element), which can mean either an offences concourse (if we talk about a false document), or a complex offence. In relation of these matters, we believe that penalty is too low (imprisonment not exceeding 3 years or fine). The *fraud* in the New Criminal Code is maintained only the first paragraph and aggravated according to, is punished more severely, respectively, the fraud committed by using false names or qualities, or other fraudulent means. As the same time, are repealed par.3-5, which refers to inducing or maintaining a person in error upon the execution or signing an agreement, issuing a check on a credit institution or a person, well knowing for its exploitation are no enough supply, both the fraud with extremely grave consequences.

2. Integrant content

Material element of objective side of crimes against patrimony can be either an *action,* or in most cases, an *inaction.* From the legal content of these crimes, it appears that some offenses had a single material element as an action (theft), other as alternative actions (embezzlement, destruction,

[11] Bulai,C., Bulai, B. *Manual de drept penal.* Bucureşti: Editura Universul Juridic, 2007.
[12] Mitrache, C., Mitrache, C. *Drept penal, Partea generală.* Bucureşti : Editura Universul Juridic, 2006.

concealment) or cumulative (robbery, piracy), and in other situations, alternative action or inaction (acquiring found asset).

The result socially dangerous is production of damage to patrimony of individual or legal private or public legal entity. In the case of complex crimes - robbery or piracy, other social values are affected which attracted and adjacent results. If some offences produce very serious consequences (in sense of Art. 146 Penal Code.), it will be retained as aggravated content of offense.

Causative relation between material element and immediate result often provides from materiality of committed offense, while in other cases it must proved by evidence.

The form of guilt found in subjective side of most crimes against patrimony is usually direct or indirect intention. In case of aggravated forms of robbery or piracy the guilt form is superannuated intention. Just a crime against patrimony can be committed by negligence – destruction by negligence.

3. Forms, means and sanctions

a) **Preparatory acts** are not usually sanctioned they may have a criminal value, of complicity acts if were committed by other person than author and were used it to commit the crime. There are exceptions to this rule provided by art. 209 par. (5) Penal Code which provides as an attempt to perform certain acts (referred expressly by law) which can be used to commit qualified theft under provisions of Art. 209 par. (3) of Penal Code.

b) **Attempt,** possible for most crimes of this category (except destruction by negligence - art. 219 Penal Code), is sanctioned under provisions of Art. 222 of Penal Code.

c) **Crimes consumption** against patrimony occurs when the execution of intentional action is totally done, causing specific and dangerous consequence of these crimes.

c) **If** references **crimes** are committed in continuous form (for example, theft of electricity) or continued, will exist the exhaustion phase, when the extension acts were stopped or was committed the last action (inaction) of continued crime.

Crimes against patrimony, in order to an extension of generic social danger, can be punished alternative with imprisonment, in lower limits, and the fine penalty, or with imprisonment sanction until to maximum special limit of 25 years.

For some offenses in aggravated variants, it provides additional punishment of certain rights prohibition (qualified theft, robbery, piracy, fraud, embezzlement, qualified destruction).

If conditions of art. 118 C. of Penal Code will be fulfilled, it can be take into account the special seizure as a safety measure.

Conclusions

In criminal law the concept of patrimony in relation to crimes committed against it, may have a narrower meaning and refers to assets not as universal, but individual, likely to be acquired by the offender through any fraudulent means or to be destroyed, damaged, concealed or fraudulently managed, etc. An offense would never be committed against property as a universality of assets because will always exist regardless of assets number or value and even if the subject does not have any debts; no one can be deprived of heritage but up of one or few assets that form its patrimony. Therefore, is more adequate to name these crimes, as offences assets belong to a property (patrimonial) than crimes against property as whole.

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THE CONVENTIONS ADOPTED WITHIN THE EUROPEAN UNION WITH REGARD TO THE INTERNATIONAL LEGAL ASSISTANCE IN CRIMINAL MATTERS

VICTORIA CRISTIEAN[*]

Abstract
The study of the legal and penal mechanism by which European Union Member States jointly act for preventing and combating certain categories of crimes, includes the analysis of conventions regarding legal assistance that Member States undertake to grant each other the catching and prosecution of people who commit crimes on their territory, either violating the domestic criminal law or the international criminal law represented by international conventions that require signatory states to incriminate or punish certain categories of crimes, against which they pledged to fight together. Conventions adopted at European Union level concerning international legal assistance in criminal matters, give legal expression to the most complex and most effective form of cooperation between States in the fight against crime, establishing brand new ways of international legal assistance in criminal matters.The importance of the Conventions regarding legal assistance in criminal matters result from the fact that they ensure the correct application of European criminal law relating to combating the worst types of crimes, making possible criminal liability and conviction of various crimes, with the help of other member states of the European conventions.

Keywords: *convention, extradition, international legal assistance in criminal matters, international cooperation, European Union.*

Introduction

Taking into consideration the importance of the international legal assistance in criminal matters - as a main form of cooperation among the European states in the fight against criminality, and as a means to ascertain the unity of the member states with regard to such an important target - a series of Conventions have been adopted by the European Union, Conventions meant to regulate the modalities through which the international legal assistance can be assured. The adopted Conventions complete the European penal legislation by providing the signatory states the ways toward a mutual assitance meant to apply the respective Convetions to the fight against the international criminality.

This paper aims to identify the conventions adopted within the European Union with regard to the international legal assistance in criminal matters.

The study of the legal and penal mechanism by which European Union Member States jointly act for preventing and combating certain categories of crimes, includes the analysis of conventions regarding legal assistance that Member States undertake to grant each other the catching and prosecution of people who commit crimes on their territory, either violating the domestic criminal law or the international criminal law represented by international conventions that require signatory states to incriminate or punish certain categories of crimes, against which they pledged to fight together.

In order to apply this principle of cooperation and, implicitly, of the international legal assistance in criminal matters, several international Conventions have been issued as meant to fight against the transnational criminality:

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- the first category of such international documents is the one concerned with the Conventions issued under the aegis of the European Council (a category to be enlarged upon in the present paper);
- another category refers to the Community Conventions that have a larger area of appliance and which hint to the cooperation among the member states with regard to the penal international juridical assistance (they will be spoken about and enlarged upon in the present paper);

Consequently, within the European Union there was and still is a permanent preoccupation for issuing Conventions and documents regarding the penal juridical assistance, among which: the Convention on penal juridical assistance among the member states of the European Union; the Convention on extradition among the member states of the European Union; the Convention on the simplified extradition procedure among the member states of the European Union; the European extradition arrest warrant.

1. The Convention on the simplified extradition procedure among the member states of the European Union

This Convention was issued in the basis of art K 3 of the Treaty on the European Union and later settled in Brussels by the Bill of the Council on March 10, 1995 with a view to simplifying the extradition procedure and of meliorating the penal judiciary cooperation among the member states of the European Union.

The member states of the European Union - considering it necessary to facilitate the appliance - on December 13, 1957 - of the European Convention on extradition by simplifying and improving the extradition procedure, have passed a Bill concerning the simplified extradition procedure among the member states of the European Union on the ground of the following aspects:

- the necessity to simplify the extradition procedure in compatibility with the fundamental principles of their internal law, and with the principles of the European Union on defending man's rights and his fundamental liberties, as well;
- the fact that in a large number of extradition procedures, the person under discussion has no objection for her/ his being extradited;
- improving the criminal juridical cooperaation among the member states with regard to both pursue and sentence the person under discussion;
- the importance of extradition within the judiciary cooperation to the carrying on of these targets;
- the necessity to drastically reduce the period necessary for the extradition or for the imprisonment which are prior to the extradition proper.
- the provisions of the European Convention with regard to extradition continue to be appliable to all the aspects that are not regulated by this Convention.

The Convention is a flexible juridical frame, in as muh as the stipulated procedure is appliable to all the cases of the agreemnt of the competent authority of the required State and of its consideration concerning legality and opportuneness[1]. Besides, from the very first article, the aim of the Convention is clearly underlined: to facilitate the application - among the member states of the European Union - of the European Convention with regard to extradition by compliting its dispositions without being altered by the more favourable dispositions mentioned alongside with mutual or multilateral agreements in force among the member states[2].

The basic principle of the Convention lies in the obligation of handing over the pursued person; the member states commit themselves to hand over the pursued persons with view to their

[1] Ioan Hurdubaie, European Judiciary Cooperation. Penal Conventional Frame (Bucharest: Ministry of Administration and Interior Printing House, 2003), 151.

[2] See art 1 paragraph 1 and 2 of the Convention on the Simplified Extradition Procedure among the Member States of the European Union.

being extradited in the basis of their own accord and in the basis of the agreement of the requested state, both situations being under the conditions of the provisions of the present Convention - the way of obtaining and registering the pursued person is stipulated by art 7.

In at least ten days since the extradition decision was communicated, the person shall be handed over; otherwise he/she shall be let free on the territory of the requested country.

In case the pursued person agrees with his/her extradition, at the end of the ten-days period stipulated by the Convention in art 8, the requested state can act into two ways: to either apply the simplified extradition procedure, in case a second new official extradition claim from the requesting state was issued, or this procedure can be applied even if such a request apperead in between[3].

When no request regarding a preventive custody was issued and when the agreement was given after the receival of such an extradition request, the required state can resort to the simplified procedure as provided by the present Convention[4].

2. The Convention on extradition among the member states of the European Union

The discussions around title VI of the Treaty on the Europen Union with regard to various serious forms of criminality very clearly revealed that, when speaking about extradition, it is only by a definite and firm intervention in the very essence of the problem that might lead to a significant melioration of the more important penal procedures, as for instance, those referring to terrorist actions or to organized criminality[5].

On this given basis it was possible to elaborate those articles from the Convention reffering to the double incrimination, political transgressions, extradition of the nationals or referring to problems concerned with the rule on specialty (more inisted upon than upon other really important provisions); all these turn this new instrument into a real innovation in the domain of extradition, in perfect agreement with the general will of the European Union to adapt the whole ensamble of judiciry cooperation from within the penal domain to the present and future needs and requirements"[6].

When referring to the extradition of the nationals, the European Convention, concluded between all member states of the European Union, provides that extradition cannot be refused on the ground that the extradited person might be a national of the requested state. There were numerous reserves in connection with this Convention and, thus the applicability area was visibly reduced.

The Convention provides modern dipositions, as for instance those stipulating that then of a conspiracy or an association of transgressors appears, the requesting state cannot refuse extradition only because its own legislation does not include the item according to which the same behaviour is not consired to be an infringement of the law.

The role of this Convention[7] is mentioned in art 1: to complete the provisions of the European Convention of 1957 on Extradition, the Convention of 1977 meant to repress terrorism, the Convention of 1990 meant to apply the 1985 Schengen Agreement and, on the other side, to facilitate their being applied by the member states of the European Union, without influencing other mutual or multilateral extradition agreements stipulating a more favourable juridical regim in the domain.

3. The European extradition arrest warrant

The European extradition warrant was the object of a draft-resolution within the Council of the European Union (no 2002/584/JAI) of June 13, 2002, with a view to create a more rapid and

[3] Hurdubaie, European Judiciary Cooperation, 153.

[4] See art A 12 paragraph. 2 of the Convention on the Simplified Extradition Procedure among the European States.

[5] Convention relative a l' extradition entre les Etats membres de l'Union Europeenne, Rapport explicatif, Journal officiel no. C 191 of 23 June, 1997.

[6] Hurdubaie, European Judiciary Cooperation, 155.

[7] The Convention referring to the extradition from among the member states of theEuropean Union was adopopted on September 27, 1996 in Brussels.

simpler extradition procedure. It was thus emphasised that "in the future the formal extradition procedure might be abolished from among the membe states for those persons who avoid law after the last erdict was given, and replaced by a simple transfer of these persons, in conformity with art 6 of the Treaty of the European Union"[8].

Unlike the formal extradition procedure, the European arrest warrant is a procedure applied at the judiciary level only (among judges); in such a case the political instances shall no longer interfere.The arrest warrant establishes fixed and compulsory conditions for the development of the procedure, asks for the usage of a unique form and restricts the refusal motivations to a minimum, as ennumerated in the draft-resolution.

The adoption of the draft-resolution with regard to the Europeran arrest warrant - although it was an accepted objective since the Tampere European Council (Octomber 15-16, 1999) - could not be carried on if the tragic events of September 11, 2001 had not happened in the States. Such a tragic event had to happen for the member states of the European Union realized the necessity of adopting a simplified mechanism through which the persons avoiding the law should have to be committed to the courts of law; this mechanism is, at the same time, an extremely efficient means of fight against terrorism and against other serious forms of transnational criminality.

The assaults of July 7, 2005 in London, once again, demonstrated the efficiency of this handing over system, when the persons suspected of terrorism were handed over to the British authorities by the Spanish authorities in only three days, while a normal extradition procedure from Spain elsewhere lasts for more than one year, sometimes [9].

The European arrerst warrant is applied by all the member states of the European Union provided, on one side, of the transposition of the draft-resolution to their own national law, and on the other side, because of the declarations given by the respective states in conformity with art 32 of the draft-resolution. Article 32 leaves it up to the member states' decision the choice of the information according to which the European arrerst warrant shall be applied, on the condition that this decision shall be taken no later than August 7, 2002[10].

The novelty and originality of the European arrest warrant lies in the fact that it is used all through the area of the European Union[11].

Taking into consideration the suggested objective - that of avoiding or reducing formalism which can turn the extradition procedure into a burdensome procedure - the new handing over system - in the basis of a European arrest warrant - eliminates the administrative stage; in this way cooperation in the domain of handing over of the persons who avoid the criminal pursuit, judgment and execution of the penalties are almost exclusively solved between the competent judiciary authorities of the member states of the European Union; the central authorities can, at least, support the competent judiciary authorities of the member states of the European Union or assume the role of transmitting authorities[12].

The European arrest warrant aims to replace the present system of extradition by imposing each and every national judiciary authority (executive authority) to recognize, ipso facto, and by

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[8] Commission of the European Communities, Proposal for a Concil Framework Decision on the European arest warrant an the surrender procedures between the Members States, COM (2001) 522 final (JOCE no. C 322 E, 27.11.2001), point 4.1.

[9] Florin Răzvan Radu. "The Main Juridical Instruments of the European Union in Extrradition and Handing over the Transgressors", The Law 9 (2007): 148.

[10] France, for example, opted on November 1,1993. Consequently, A European execution warrant cannot be executed in the case the incriminated deeds have been committed before November 1, 1993.

[11] M.Platha. "European arrest; revolution in extradition", Journal'crime, Criminal Law and Criminal Justice (2003): 193.

[12] Florin Răzvan Radu. "Law no 302/2004 referring to the international penal judiciary cooperation – an important step forward to Romania's integration within an area of liberty, security and justice of the European Union and a definite answer against the new attacks of the transboundary criminality", The Law 2 (2005): 14.

means of least controls, the request of remitting a person as it was expressed by the judiciary authority of another member state (issuing authority). Still, the member states are free to apply and conclude bilateral agreements able to better simplify the handing over procedures[13].

As a matter of fact, the mechanism of a European arrest warrant refers to the forced handing over of a person from one member state to another (replacing the traditional extradition procedure) and becomes a horizontal system able to substitute all other types of extradition, by extention, through a mutual recognition in front of the court that shall be automatically executed all over the European Union[14].

This system of the European arrest warrant shall replace the present traditional systems of extradition, as imposed by the exigencies of a mutual area of liberty, security and justice, where the national frontiers lose in importance.

The importance of the draft-resolution regarding the European arrest warrant derives from the very new elements brought about by the procedure of handing over the transgressors, due to a mutual agreement between the member states, through the simplification and operativity with which the judiciary cooperation is achieved within the European Union.

As provided by the very preamble of this draft-resolution, the European arrest warrant is considered to be the first concrete measure in the domain of penal law able to implement the principle of the mutual recognition.

In art 1, paragraph 1 the draft-resolution gives the definition of the European arrest warrant: a judiciary resolution issued by the competent judiciary authority of a member state of the European Union with a view to arresting and handing over to another state of the European Union a requested person as to be criminally prosecuted, judged or forced to complete a punishment or a prison sentence.

In conformity with the provisions of the draft-resolution, the specialized literature[15] mentions that "the European arrest warrant is a juduciary decision issued by competent judiciary authorities of a European Union member state with a view to arrest and hand over to another state of the European Union a requested person as to be penally prosecuted, judged or forced to complete a punishment or a prison sentence".

Consequently, the European arrest warrant is a judiciary resolution that replaces the extradition request and the whole afferent documentation for such a request. It is, practically, said[16] that the European arrest warrant transferred the extradition procedure from the polititicians to the judiciary authorities. Taking into account the aim of this transfer or the limitation of formalism able to turn the extradition procedure into a burdensome procedure, the new system of handing over - in the basis of a European arrest warrant - avoids the administrative stage; the cooperation in the domain of handing over the persons avoiding the penal prosecution and the completion of a sentence are almost exclusively accomplished by the competent judiciary authorities of the member states of the Europen Union; thus, the central authorities might support the competent judiciary authorities or take over the role of transmitting or receiving authorities.

The European arrest warrant contributes to the improvement of the international judiciary cooperation and to the reducibility of the barriers connected with the national sovereignty, and so, the handing over of suspects or convicts to another member state is nothing but a judiciary decision"[17].

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[13] Ioan Hurdubaie, Instruments of the International Cooperation in the Domain of Turning to a Good Account the Forensic Means of Probation (Bucharest: Era Printing House, 2007), 146.

[14] G. Stroe. "The European Arrest Warrant", The Romanian Law, in the conditions of the post-adherence to the European Union, vol. V, Institute for Juridical Researches (Buchrest: Dacoromână TDC Printing House, 2007) 281.

[15] D.Mercan, "European Arrest Warrant. Procedure of Execution", Penal Law Review 3 (2007): 70.

[16] J.Komarek, European Constitutionalism and European Arrest Warrant: Contrapunctual Principles in Disharmony (New York University School of Law, 2005).

[17] Al. Boroi and I. Rusu, Penal International Judiciary Cooperation (Bucharest: C.H. Beck, Printing House, 2008), 303.

Such a draft-resolution fixes the rules in whose bases a member state executes a European arrest warrant on its own territory although the warant was issued by a judiciary authority of another European member state. The "European arrest warrant" it defined in art 3 and is a request issued toward a judiciary authority of a member state in order to support, pursue, arrest, detain and hand over any person who is the object of a sentence or of a judiciary decision as mentioned in art 2 of the draft-resolution.

The European arrest warrant can be issued in conformity with art 2:

a. to execute certain final judicial decisions uttered in criminal proceedings and certain decisions issued *in absentia* that involve the loss of liberty or a surety measure of about 4 months in the issuing state;

b. to apply other judiciary executory decisions uttered during the criminal prosecutions which involve loss of liberty or is the object of a transgression that necessitates a surety measure of a maximum 12 months period in the issuing state.

In conformity with the new system, then when a person belonging to a certain state avoids, depending om each separate case, the penal prosecution, judgment or execution of the penalty on the territory of that member state, the respective competent judiciary authority (known as the issuing authority) issues a European arrest warrant of at least 1 year, in the basis of a final loss of liberty sentence, or a preventive detention which is sent to execution to the competent judiciary authority of the member state on whose territory the respective person lives (known as executing judiciary authority, under the note that the handing over conditions respect the European arrest warrant and that the handing over rules are similar to those of the "classical" extradition system)[18].

The draft-resolution provides in chapter 2 the procedural modalities meant to assure a good application of its dispositions and, in chapter 3 both the arrest and detention of the prosecuted person are analysed.

Chapter 4 - made up of two articles - regulates those situations in which the handing over of the arrested person can be refused after having analysed the principle of reinsertion, integration and video-conference.

Chapter 5 deals with solving particular cases and the two articles of chapter 6 deal with the relationship with other juridical international instruments.

Yet, an important difference from the classic system cannot be overlooked when speaking about the conditions referring to the nature of the deed: the new system sets up certain exceptions from the rule of the double incrimination and so, in certain very serious infringments - mentioned in art 2 in the list that is open to be completed by the Council (among which: participation in a criminal organization, terrorism, traffic of flesh, illicit traffic of narcotics, etc) - the handing over is executed without checking the existance of a double incrimnation[19].

One of the most important progresses registered by the draft-resolution is the generelization concerning the handing over of the national which eliminates the refusal of the handing over because of the citizenship of the respective person[20].

In agreement with art 43 of July 1, between the member states there will be no orders in connection with the following juridical instruments:

- The Extradition European Convention of December 13, 1957, its additional protocol of October 15, 1975, the second additional protocol of March 17, 1978 and the European Convention for reprimanding terrorism of January 27, 1977 with regard to extradition;

[18] Radu, "Law no 302/2004", 14.

[19] Radu , ""Law no 302/2004", 14.

[20] Two member states - Portugal and Slovenia - anticipated these difficulties and succeeeded in overcoming them before the draft-resolution was transposed. Later, France revised her Constitution by a law on March 2003.

- The Agreement between the member states of the European Community referring to the simplification and modernization of the modalitiles of transmitting the extradition requests of May 26, 1989;
- The Convention of March 10, 1995 referring to the simplified extradition procedure between the member states of the European Union;
- The Convention of September 27, 1996 referring to extradition between the member states of the European Union.

The dispositions of the draaft-resolution will not influence certain bilateral or multilateral agreements providing simplified procedures.

The last chapters of the draft-resolution contain a series of provisions meant to assure the practical appliance of the draft-resolution, as well as other general and final dispositions.

The European arrest warrant is considered to be a genuine revolution in as far as the extradition and the handing over of persons avoidin the criminal prosecution, judgment and execution of sentence.

The first European arrest warrant was in force was in January 2004, on the territory of the European Union, against a Swedish citizen who was arrested - in the basis of the warrant - in Spain and extradited to the Swedish authorities.

The most important cases in which the European arrest warrants were successfully applied were those regarding the terrorist assaults in Madrid, on March 11, 2004, when the Spanish instances issued European arrest warrants on the names of certain suspects. In 2005 the judiciary authorities from within the European Union issued 6,500 European arrest warrants, and the statistics indicate that in the same year 1,700 pursued persons were localized and identified in the basis of the warrants[21].

At the same time, the European arrest warrant enabled an extremely quick transfer from Italy of Mr Hamdi Issac, of one the presumed authors of the London attacks, on July 21, 2005.

According to an estimation made by the Commission in 2005, the impact of the warrant - since it entered in force on January 1, 2004 - was considered to be positive from the point of view of depolitization, efficiency and the quickness of the handing over. In spite of the initial delay in transposition, the European arrest warrant was operational all through the European Union and in the majority of the cases. The handing over of a person by a member state used to last almost 13-43 days there, where previously, an extradition lasted more than 9 months[22]. According to the same estimation report of the Commission of February 23, 2005, 2,603 arrest warrants were isssued, 653 persons were arrested and 104 were transferred until September 2004.

In agreemnet with the 2005 statistics transmitted to the Council by the member states[23], out of the 6,900 European arrest warrants, France issued 1914, being of the top of the list. Poland is on tthe second place with 1448 issued warrants, followed by Spain wit 519 warrants. As for the countries that receive most of the European arrest warrants, England if on the top of the list followed by Spain, France and Netherlands

In spite of a useful common statistics of the member states for 2006, the information transmitted by the member states acknowledges a generalization of the use of the European arrest warrant and the efficiency of this procedure.

So, in 2006[24] out of the 5,832 European arrest warrants 1,456 persons of 14 member states were handed over. Out of the handed over persons more than a half - more precisely 51% were

[21] C. Drăghici and C.E. Stefan, "Theroretical and Practical Aspects Referring to the Execution of the European Arrest Warrant", "The Law" 10 (2007): 218.

[22] Hurdubaie, Instruments of the International Cooperation,148.

[23] Document 9005/5/06 REV % of January 18, 2007.

[24] Only the data communicated by the member states until July 9, 2007 were taken into account.

handed over in the basis of their own consent[25]. This survey, resulted from the application of the European arrest warrant, seems to be sastisfactory yet, they are to be interpreted from the point of view of the difficulties of transposition faced by numerous member states.

4. The Convention on criminal legal assistance among the member states of the European Union

Trying to meliorate the criminal legal assistance among the memeber states of the European Union and starting from the general interest that these states shall assure its functioning in a more efficient, more rapid and more compatible manner as to go hand in hand with the fundamental principles of their internal laws and with the respect for the individual' rights and for the principles of the European Convention on the safeguarding of men's rights and of his fundamental liberties - signed in Rome on November 4, 1950 - through the Brussels Council Bill of May 29, 2000 - the Convention on criminal legal assistance among the member states of the European Union was issued in conformity with art 34 of the Treaty on the European Union[26].

The Convention on criminal legal assistance among the member states of the European Union is the main juridical instrument, in the domain, to be applied among the member states of the European Union as it contains provisions that enable these procedural documents to be sent by mail; at the same time it regulates the modern ways of assistance as examination, video-conference, under cover investigations, supervised handing-overs, telecommunication interceptions.

The provisions of the Convention on criminal legal assistance among the member states of the European Union are meant to assure a more efficient, rapid and more complete judiciary assistance among the states of the Union in their fight against criminality[27].

In conformity with the provisions of art 26, the Convention is applied within the European Union as it was in the case of Island and Norway.

As for France, the Convention on May 29, 2000 is applied to the metropolitan area as well as to overseas departments, but not to overseas territories. In the case of United Kingdom of Great Britain and Northen Ireland, the Convention will be applied for Gibraltar at the same moment it enetered in force for the United Kingdom. For the Anglo-Normand Isles and for the Man Isle, the entering into force of the Convention shall be accompanied by a written notification to the Council and by a unanimous decision from the part of the United Kingdom.

Provided some possible declarations the Netherlands might express, the Convention shall also be applied to her whole territory as to all her overseas dominions.

The Convention entered into force for a part of the member states on August 23, 2005, as it was only then that the clause of the 8 ratifications was fulfilled. The Convention enetred into force in Romania on December 1, 2007 and is applied in relation with the other member states that subscribed to it up to now[28].

This Convention is made up of 30 articles divided into 5 titles and creates - in the basis of the Convention of the Council of Europe of April 20, 1959 - the legal framework for a criminal legal assistance to be fulfilled. Its aim is to complete the provisions of the European Convention on criminal legal assistance and of its additional protocol (1978), the Convention on the application of the Schengen agreement and of the Treaty on extradition and criminal legal assistance concluded

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[25] See te second estimation report refrring to the stage of the transposition of the European arrest warrant draft-resolution and the handing over procedures from among the member states, of July 11, 2007, Brussels.

[26] Pavel Abraham and Ioan Hurdubaie, Penal European Conventions (Bucharest: National Printing House, 2001), 58.

[27] See "Guide for Judges and Prosecutors for the Application of the Union Main Juridical Instruments Regarding the Penal Judiciary Cooperation."– Report no. 137620 of November 28 ,2007, issued by Ministry of Justice, International Law and Traties Department.

[28] Austria, Belgium, Bulgaria, Cyprus, Check Republic, Germany, Danemark, Estonia, Spain, France, Great Britain, Hungary, Lithuania, Latvia, Holland/ the Netherlands, Portugal, Poland, Sweden, Finland, Slovenia, Slovakia.

between Belgium, Luxembourg and the Netherlands in 1962 and amended by the 1974 Protocol, as well as the facilitation of turning into practice of their provisions with regard with the member states of the Europen Union.

The Convention on criminal legal assistance among the member states of the European Union will not influence the application of certain more advantageous provisions included in the bilateral or multilateral agreements between the member states, as provided by art 26(4) of the European Convention regarding the criminal legal assistance, the measures taken in the domain of the of mutual assistance in penal cases agreed upon in the basis of the uniform legistaltion or of a special system providing the mutual use of assistance measures in their respective territories[29].

With a view to harmonize the provisions of the Convention with the provisions of the European Convention on Man's Rights, in art 3 it was inserted a provision according to which the legal assistance is also granted in the procedures debating deeds which are punished by neither the natioanl law of the requested member state nor by the national law of the requesting member state, nor by the both of them and considered to be offences to the regulations controlled by administrative authorities whose decisions may lead to appeal to a competent jurisdiction specialized in criminal matters.

All requests for judiciary assistance and all spontaneous exchanges of information/ data are made in written or in any possible way that can be considered to be written, as for the recipient member state be able to check its genuineness; in emergencies, these requests are intermediated by the International Criminal Police Organization or by any other competent bodied, as stipulated by the Treaty on the European Union.

Title II of the Convention regulates the special forms of judiciray assistance among the member states of the European Union, forms that - for some of them - although new in the domain prove to be efficient in the fight against international criminality. These special forms are: restitution of objects, temporary transfer of detained persons for being trained, hearing witnesses and experts by means of video-conferences, supervised handing-overs, joint investigation teams, private investigations.

Intercepting communications - better said the way this operation is done - is stipulated by title III of the Convention and stipulates: the competent authority able to order the interception of communications, the content of the interception request, interception of telecommunications on the national territory through informers, interception of telecommunications without any technical assistance of another member state and conclusion of certain bilateral agreements.

Article 23 is the very IV -th title of the Convention and regulates the protection of the personal data.

The Convention ends with the final provisions comprised in the V-th title and refers to declarations regarding competent authorities commissioned with the application of the Convention; these declarations that can be issued by the member states when notifying the carrying on of the constitutional procedures concerning ratification, reserves, territorial application, adherence of new member states, entering in force for Island and Norway, as well as the person in charge with the Treaty.

The Convention is also completed by the declaration of the Council with regard to art 10 paragraph 9, by the Declaration of the United Kingdom with regard to art 20 and by the official statement of the secretary general of the Council of the European Union in virtue of art 30, paragraph 2 of the Convention, settled by the Council in conformity with art 34 of the Treaty of the European Union regarding the criminal legal assistance among the member states of the European Union.

The provisions of the Convention were completed with the additional Protocol of October 16, 2001, that came into force on October 5, 2005. Nowadays it is applicable among Austria, Belgium, Danmark, Finland, Latvia, Lithuania, France, Holland/ the Netherlands, Slovenia, Spain, Sweden and

[29] Al. Boroi and I.Rusu, Penal, 408-409.

Hungary. For the rest of countries belonging to the European Union the Protocol will come into force in conformity with the notifications made by these states and that shall be analysed, after being posted on the site of European Union.

The essential objective of the Protocol is to include in the text of the Convention the commitment of the participating states to exchange the most complete and detailed bank information/ data. The request can refer to the identification of the bank accounts opened on the name of a natural or legal person (art 1), the decription of the bank transactions for a given period of time (art 2) and the control over the bank transactions for a certain period of time (art 3)[30].

Conclusions

The brief analysis this paper tried to present with regard to the most important Conventions - international instruments in the domain of the international legal assistance in criminal matters - invites to a general analysis of the progresses recorded in the domain, in Europe.

The importance of the Conventions regarding the criminal legal assistance resorts from the fact that it assures a correct application of the European criminal legislation in connection with the fight against the most serious categories of offences, making it possible for their authors to criminally be incriminated and even convicted for their deeds, by the help of the other states members of the European Conventions. Consequently, the adoption of these Conventions by the European Union, which mainly stand for the European Law in force, plays an essential role in creating a new system of laws.

Conventions isued over time were an expression of cooperation among States, born out of their desire to successfully face the international criminality, by both finding the most flexible means of intensifying international cooperation and by strengthening the legal assistance among states.Unfortunately, a significant part of the international documents, issued in order to repress violence within relations among states, were not ratified, depriving them of any legal authority.

The theme chosen and presented all through this paper, proves the necessity of materializing a regional system meant - by the efforts of all states - to help the prevention and removing of certain serious deeds committed in Europe in the latest decades.

Another measure under consideration, is that of tthe necessity of diversifying the instruments meant to achieve the international criminal legal assistance. In this respect there appears the propsal that the EU shall adopt new forms of international criminal legal assistance - since they are the result of the changes occurred in the evolution of society; therefore the nowadaysq trend is directed towards the increase and generalization of the above metioned forms of assitance.

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THE DEVELOPMENT OF THE REGULATIONS ON GENDER BASED VIOLENCE IN ROMANIA AND SPAIN

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Abstract
In this article, I will present the evolution of the regulation of gender based violence in Romania and Spain. This new theme is one of actuality, due to the situations that frequently happen in our social life. Both Romania and Spain have a high level of gender based violence, even if nowadays in our country are few statistics on this matter. But also, both countries now enjoy good legislations, which have been developed in the last 10 years.

Keywords: *gender based violence, evolution, crime, family, legal protection*

Introduction

The present study aims to present the evolution of the regulation of gender based family violence, by comparison between Romania and Spain in the last decades. It is a general analysis of the phenomenon, without emphasizing a certain aspect of this large area.

The importance of this approach lies in the very existence of the phenomenon.

Though it is widely spread and with an ancient existence, in Romania the number of official statistics on gender based violence is nearly inexistent. In our country, family violence has "generously cohabited" with our ignorance and the acceptation of the great majority of population. Based on the principle that "*beating is torn of heaven*" it often had serious forms of violence, representing only means of an inhuman expression of frustrations, dissatisfaction and lack of personal control. This is why the ignorance of this phenomenon lasted until, taken out to the surface, it managed to generate a mass effect which subsequently determined various legislative projects, in total agreement with different European and international regulations. In Romania there is a law[1] which directly regulates gender based violence and other ones which are indirectly linked to the first one[2]. Also, in accordance with these special regulations comes the new Criminal Code of 2009, which specifically states the protection of family against any form of violence, especially domestic violence.

By comparison, in Spain, the development of the legislation went hand in hand with the expansion of various statistics in all autonomous communities, and national ones. Moreover, for the Iberian state the initiation of some staggering statistics on the existence and expansion of this phenomenon lead to new regulations or, in other words, to special regulations in this area, being an additional reason for these statistics to develop and to lead to new regulations.

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[1] We are talking about Law No 217/2003 on the preventing and fighting against family violence, published in the Official Gazette No 367/29.05.2003, modified by Government Emergency Ordinance No 95/2003, published in the Official Gazette No 13/8.01.2004.

[2] We can consider among these *Law No 211/2004 with regard to certain steps to secure the protection of crime victims*, published in the Official Gazette No 505/4.06.2004; *Law No 272/2004 on the protection and promotion of the rights of the child*, published in the Official Gazette No 557/23.06.2004; *Law No 202/2002 on equal opportunities between women and men* republished in the Official Gazette No 150/1.03.2007; *Law No 47/2006 on social assistance* published in the Official Gazette No 239/16.03.2006.

Regarding the scientific-juridical analysis of family violence, in Romania we have found several psychological, epistemological debates, but few pure juridical debates, based on the law and on jurisprudence.

In exchange, in Spain there are many juridical studies, presenting the phenomenon under all its possible aspects: historical, phenomenological, juridical, sociological etc.

To start the debate of this subject, we must state that nowadays, at the European and international level, as well as in Spain, is made the differentiation between family violence and gender based violence. Thus, family violence comprises all forms of violence within the family (physical, psychical or sexual committed with intention) against women, men, children, elder persons or against any close relative[3], while gender based violence, as defined in Spain, represents violence as the result of discrimination, inequality and of domination of men over women, exercised against the latter one by her actual or ex concubine (*the notion also includes the quality as husband*), or by the person to whom the women was or is in an affective relationship, even if they do not share a household together[4]. Therefore, our study will refer to family violence to analyze the Romanian penal framework, and both to family violence and to gender based violence to compare the Romanian[5] and Spanish situations.

This is why we strongly consider that such a comparative analysis will enrich our juridical area with new perspectives on this phenomenon.

I. International awareness of the problem – a few legislative landmarks

The awareness of the existence of a problem on family violence occurred at an international and European level at the end of the 1970s, so that in the next decade there were elaborated a series of judicial documents aiming the protection of women against domestic violence. Thus, on 26 March 1985 the Council of Europe drafted its first Recommendation R (85)4 on violence in the family[6]. Internationally, the General Assembly of the United Nations on its plenary meeting adopted Resolution 40/36 of 29 November 1985 on domestic violence[7] and Resolution 44/82 of 8 December 1989 proclaiming 1994 as International Year of the Family[8]. Another special interest for knowledge and combat of this phenomenon was expressed by the Recommendations of the World Conference of the UN held in Nairobi on 15-16 June 1985, by the Recommendations on family violence drafted by a group of experts reunited in Vienna on 8-12 December 1985 or by the Resolution 46/8 March 1993 of the Commission on Human Rights incriminating violence and violation of human rights, especially referring to women[9]. This first decade of positive reactions was followed by numerous international measures which, with the spreading of the phenomenon, aimed and determined an important involvement of the world states.

United Nations continued the campaign against domestic violence, so by Resolution 48/109/20 December 1993 of the General Assembly was concluded that the most familiar situations of family violence are[10]: Physical, *sexual and psychological violence occurring in the family,*

[3] According to Art 2 and 3 of Law No 217/2003.

[4] According to Art 1 of the preliminary title of the Spanish Law 1/28 December 2004 on the measures for protection against gender based violence, published in the *Boletín Oficial del Estado* (the official Spanish state bulletin) No 313/29 December 2004 and republished with modifications in B.O.E. No 87/12 April 2005.

[5] Such statement is necessary because, after the entrance into force of Law No 1/2004 also the autonomous communities have adopted their own regulations as a completion of the national law. Due to the fact that the analysis of such subject is extremely comprehensive, it cannot be the subject of our study, but remaining opened to a subsequent debate.

[6] See the official Council of Europe website http://www.coe.int/lportal/web/coe-portal.

[7] See the official UN website http://www.un.org.

[8] Ibid.

[9] Ortansa Brezeanu, Aura Constantinescu, *Violenţa domestică. Reflecţii* in the Romanian Penal Law Review No 2/2007, p. 68.

[10] According to Art 2 of the UN Resolution 48/109/1993, available on its official website.

including battering, sexual abuse of children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation.

Likewise, after the recommendation of 1985, the Council of Europe drafted until 2008 no less than 11 recommendations and resolutions, as well as a declaration of the Parliamentary Assembly in Vienna concerning this matter[11]. The purpose of these regulations is to offer a definition of family violence and to identify the common European feature regarding the civil or penal norms and procedures which are applicable. Also, in the past few years, were made several differences between general regulations on domestic violence and those on gender based violence, namely those which regard the violence against women in a family or sentimental framework. For instance, in the last decade, the majority of the recommendations made by the Council of Europe emphasize the violence against women, leaving aside the genera framework of the domestic violence. We most note that lat April the European Parliament debated on the incrimination of violence against women, which will be stated in a future directive. But the development of the subject on violence against women, as part of the domestic violence, must be framed in the larger area of discrimination. In the case *Opuz v Turkey* (2009) the European Court of Human Rights showed that violence against women is considered a form of discrimination which violated the European Convention on Human Rights. The situation of this type of violence, as form of discrimination, is not fully clarified and supported by enough criminal texts, but especially by criminal procedural law texts, which should be supported by financial measures. This is why the debate is still open, including for new legislative projects.

II. The evolution of the regulation in Romania

a. Stage I. General and special regulations of the Criminal Code. In Romania, family violence has been considered as a negative social phenomenon with a great delay, the first positive reactions from the legislator coming in 2000. One of the reasons of such a delay can be that in the former communist states, when *any social institution had to be integrated in the public space and subjected to exterior exigencies. On the other hand, in the communist regime, family violence was not even officially recognized as a social issue*[12], despite its existence.

Until the modifications of the Criminal Code in 2000, the protection of family was made in a general framework[13], by incriminating the offence of first degree murder against the spouse or a close relative (Art 175 Para 1 Let c) or of particularly serious murder against a pregnant murder (Art 176 Para 1 Let e). Beside these regulations, violence causing bodily harm or heath of the victim, usually woman and child, was stated by Art 180-182[14] or Art 305-306[15] of the Criminal Code. Also,

[11] These recommendations and resolutions of the Council of Europe are: Recommendation R(85)11 on the position of the victim in the framework of criminal law and procedure, Recommendation R(87)21 on assistance to victims and the prevention of victimization, Recommendation R(90)2 on social measures concerning violence within the family, Recommendation R(91)9 on emergency measures in family matters, Recommendation R(98)1 on family mediation, Declarations and Resolutions adopted by the 3rd European Ministerial Conference on equality between men and women, organized by the Council of Europe (Rome, 1993), Recommendation R(2000)11 on the action against trafficking in human beings for the purpose of sexual exploitation, Recommendation R(2002)5 on the protection of women against violence, Recommendation R (2004)1681 on the Campaign to combat domestic violence against women in Europe, Resolution 1512(2006) "Parliaments united in combating domestic violence against women", Recommendation 1759(2006) "Parliaments united in combating domestic violence against women", Resolution R(2007)1582 of the Council of Europe "Parliaments united in combating domestic violence against women".

[12] Olivian Mastacan, *Violenţa în familia. Aspecte teoretice şi practice*, Valahia University Press, Târgovişte, 2005, p.3.

[13] Ortansa Brezeanu, Aura Constantinescu, *op. cit.*, pp. 75-76.

[14] According to these articles are incriminated as offences *hitting or other forms of violence* (Art 180), *bodily harm* (Art 181) and *serious bodily harm* (Art 182).

[15] Art 305 incriminates deserting of family and Art 306 incriminates ill treatments applied to minors.

until 2002, marital rape was not considered as a form of family violence, not being sanctioned[16]. Because the latter situations, except the offence of *ill treatment applied to minors*, the offences for which criminal action is initiated upon prior complaint from the injured person, the police not being able to take action, despite all kind of complaints, the violence against women and children continued unimpeded, without the state being able to interfere in an efficient way.

As it was shown above, after the adhesion of Romania to the Council of Europe[17], as well as for the future adhesion to the European area, in 2000 there were taken the first steps for the special incrimination of family violence. We can state that in 2000 were also taken the first steps for the recognition of this phenomenon as a social danger big enough as to the offences of family violence to be considered as aggravated forms of some already existing offences.

The first legislative text which brought to the attention family violence was Law No. 197/13 November 2000 which modified and completed some dispositions of the Penal Code[18]. This law modified Art 180-181 of the Penal Code, the two offences becoming aggravated when the subjects are family members. According to Art 149^1 of the Penal Code, "family member" means the spouse or the close relative, as defined by Art 149, if living and sharing a household with the perpetrator. The terms *living* and *sharing a household* were not explained by the legislator. The doctrine has appreciated that *living* refers to certain permanence in the common coexistence relationships, while the term *sharing a household* is complementary to the first and refers to the engagement of family members in the administration of their common life. The two aspects – living and sharing a household – has to be simultaneous. Just living without sharing a household, as only sharing a household without living with the perpetrator, do not fulfil the conditions of the legislative text (for instance, a close relative caring for an apartment while the owner is on vacation)[19]. From the definition of the "family member" term, results that in the Penal Code, only the offences occurring in a home are sanctioned as forms of family violence, representing a higher social danger than the other forms of family violence (we hereby refer to the offences incriminated by Art 180-181 of the Penal Code). We shall see the inconsistency resulted from the existence of two parallel regulations on family violence, with the entrance into force of Law No. 217/2003. We must add the fact that the appreciation of the "family member" statute is made in relation to the moment of the offence[20].

Returning to the regulation resulted from the modification of Art 180-181 of the Penal Code, the protection of family relationships is made in the same framework, when the hitting or other forms of violence occur against a family member (Art 180 Para 1^1 of the Penal Code), when hitting or acts of violence that caused an injury needing medical care of up to 20 days (Art 180 Para 2^2 of the Penal Code) and when acts causing to corporal integrity or health needing medical care of up to 60 days (21 to 60 days, including) – *simple* bodily harm – Art 181 Para 1^1 of the Criminal Code. Procedurally, the text of the two offences, as modified by Law No. 197/2000, states that if the offence is committed against a family member the criminal action is initiated *ex officio*[21]; in other words, it can be initiated both upon prior complaint from the injured person, as well as ex officio, in the ways stated by the Penal Procedure Code, according to its Art 221 and following. In both cases, even if usually the prior complaint is joined to the involvement of the parties, for violence against

[16] Regarding the incrimination of marital rape and until the modification of Art 197 Para 2 of the Penal Code, see the comments of Valerian Cioclei, *Drept penal. Partea specială. Infracţiuni contra vieţii*, C.H. Beck Publishing-house, Bucharest, 2009, pp. 243-245.

[17] The adhesion took place in 1993.

[18] Law 197/2000 amending the Penal Code was published in the Official Gazette No 568/15 November 2000

[19] Lavinia Mihaela Vlădilă, Olivian Mastacan, *Drept penal. Parte generală*, Universul Juridic Publishing-house, Bucharest, 2011, p.187.

[20] Laura Maria Crăciunean, *Violenţa în Familie. Circumstanţă agravantă*, Romanian Penal Law Review No. 4/2005, p.52.

[21] According to Art 180 Para 3 and Art 181 Para 2 of the Penal Code.

family members – despite the fact that the criminal action was initiated ex officio, the legislator allows the reconciliation of the parties[22].

But the modifications brought by Law No 197/2000 did not stop here. In addition to these judicial instruments protecting against family violence, the above-mentioned law added to the general part o the Penal Code another aggravated circumstance, applicable for all offences for which it was not previous stated as aggravating form or as element of other offences[23], namely *the offence of violence against family members* (Art 75 Para 1 Let b), Thesis II). The law does not define the term of *violence* which incorporated it in this aggravating circumstance, but in our and other doctrinaires' opinion[24] it can be interpreted as representing any form of violence, from hitting causing bodily harm to hitting needing medical care from 1 up to 60 days, or which causing the results stated by Art 182 Para 2 of the Penal Code, namely loss of a sense or of an organ, cessation of their functioning, a permanent physical or mental disability, mutilation, abortion or jeopardy on the person's life.

We also must note that the law for the modification of the Penal Code has not stated the same aggravating circumstance for the offence of serious bodily harm, limiting only to the two offences stated by Art 180 and 181. This can only be an unfortunate inconsistency. However, if the serious bodily harm occurs, in any of its forms (typical or aggravated), against a family member we consider as applicable the already analyzed aggravated circumstance, stated by Art 75 Para 1 Let b) of the Thesis II of the Penal Code. Nevertheless, in the Romanian penal system, the effects of an aggravated circumstance are not mandatory for the court, being optional[25]. This introduces an unjustified different regime, between the protection of family relationships against soft and serious violence – where the perpetration of such violence determines the aggravation of the offence and the application of a higher penalty, towards the serious bodily harm, where the perpetration against a family member shall optional determine an increase of the penalty, by applying Art 78 corroborated with Art 75 Let b) of the Criminal Code.

Another novelty inserted by Law No 197/2000 has a penal and a criminal procedure feature. It refers to the introduction of a new security measure, namely the "prohibition to return to the family home for a determinate period"[26]. In terms of criminal procedure, the new security measure is the only mean to keep the perpetrator away from its victim. The measure is insufficient and inefficient. Moreover, the fact that we never met a sentence to valorise this measure should "ring a bell" for the legislator. On one hand, this measure can only be invoked by the court when the decision of conviction is issued, which means that during prosecution and trial the victim, in lack of alternatives for a home, should have to bear the manifestations of the perpetrator at her address. The fear for even more serious violence, constant threats can determine the victim to stop the penal trial, thus the "*reconciliation of the parties*" shall be the best solution for powerless victims.

On the other hand, the court shall use the measure only if the defendant shall be convicted to at least one year of imprisonment. Such decisions of conviction shall rarely be used for the offence of hitting and other violence[27]. And this is not all. Another condition imposed by the law, states that the victim should request the use of this security measure. Previous commentaries regarding the fear of the victim for even serious violence and constant threats, shall determine her to not request this measure to the court. We showed in a different article that, based on its active role, the court should ask the victim if intends to request the application of this measure. The emotion, lack of judicial

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[22] According to Art 180 Para 4 and Art 181 Para 3 of the Penal Code.

[23] As the case of the offences stated by Art 180-181 or Art 197 of the Penal Code.

[24] Laura Maria Crăciunean, *op.cit.*, p.52.

[25] According to Art 78 of the Penal Code: "*In case of aggravating circumstances, one may apply a penalty up to the special maximum*".

[26] The new security measure is stated by Art 112 Let g) and Art 118^1 of the Penal Code.

[27] Art 180 Para 1^1 states the punishment by imprisonment from 6 months to one year, and Art 180 Para 2^1 states the punishment by imprisonment from one to 2 years.

knowledge, if the victim is not assisted by a lawyer, shall determine the court to have a minimum moral and judicial support for the victim[28].

The inefficiency of the regulation is incremented also by the *serious danger* for which this criminal sanction can be applied. In other words, leaving to the court's appreciation, as if all the other conditions would not be enough to restrain the framework of its application, the legislator states that the danger for the victim to be very serious. The legislator considers that "soft" violence does not impose such measure. So, the victim should be supporting more violence, without reacting, because the state is not able to protect her until she ends up in a hospital with three broken ribs, full of bruises, unconscious or almost dead?! Therefore, how long should the victim endure violence, for the court to apply a security measure? Such rhetorical questions judicially aim the core of the issue. Several states have stated in their penal legislation the situation of family violence and gender based violence, have stated penal and criminal procedure means for the victim to enjoy security and to detach herself from a humiliating situation. Such measures, which we have encountered in a project for a legislative modification, sustained by deputies from all the parliamentarian parties – considered to be a valorous initiative, are the *restraining order* and the *interdiction order*, with the possibility to invoke temporary measures, even by the prosecutor in the stage of criminal prosecution.

Finally, without debating too long this issue, which is not the object of our analysis, we must add, that along with other authors[29], we consider that this security measure can be invoked not only for the offence of hitting and other violence – *the law being vague* – but for all types of offences committed in family imply violence or physically or bodily harm the victim.

A final modification inserted by Law No 197/2000 regarded the abolition of Art 197 Para 5 incriminating rape. According to this paragraph, the active subject of the rape was unpunished if he would marry his victim. Several doctrinaires rose against such provision[30], which was the result of the Middle Age's legislation. First of all immoral, such provision offered more chances of getting away with the offence for this person who had no respect for women – *who usually are the passive subject of this type of offence*.

After one year, Government Emergency Injunction No 89/2001[31] completed the framework of family violence with the special incrimination of rape between family members, especially between spouses[32]. Many renowned authors consider as auspicious the explanation of such incrimination, except the fact that such incrimination received an aggravated form, pleading for its simple form. Some authors (*Matei Basarab and colab., op.cit*) consider that the simple form is more appropriate for the incrimination of rape, adding the possibility of reconciliation of the parties. A similar solution – *to the proposal to separately incriminate the rape between spouses, but with the possibility for reconciliation of the parties or the withdrawal of the prior complaint* – is accepted by other doctrinaires, such as Ilie Măgureanu and Alexandru Ionaş, who appreciate as unusual the situation of the spouse, who, *disagreeing the right of the other spouse to intimate life*, must not be considered as inferior towards other persons with who the victim does not have a family relationship[33]. From our

[28] Lavinia Mihaela Vlădilă, Olivian Mastacan, *op.cit*, p.189.

[29] Ilie Pascu, *Interdicţia de a reveni în locuinţa familiei*, in the Romanian Penal Law Review No 4/2002, pp.44-45.

[30] Valerian Cioclei, *op.cit,* p. 248. Ortansa Brezeanu, Aura Constantinescu, *op.cit,* p.76.

[31] Government Emergency Injunction No 89/2001 amending the Penal Code's offences on sexual life, published in the Official Gazette No 338/26 June 2001, was approved with amendments by Law 61/2002, published in the Official Gazette No 65/30 January 2002.

[32] Matei Basarab, Viorel Paşca, Gheorghiţă Mateuţ, Tiberiu Medeanu, Constantin Butiuc, Mircea Bădilă, Radu Bodea, Petre Dungan, Valentin Mirtişan, Ramiro Mancaş and Cristian Miheş, *Codul penal comentat. Partea specială, vol. II,* Hamangiu Publishing-house, Bucharest, 2009, p.281; Valerian Cioclei, *op.cit,* pp.243-244; Alexandru Boroi, *Drept penal. Partea specială*¸ C.H. Beck Publishing-house, Bucharest, 2006, p.166.

[33] Alexandru Ionaş, Ilie Măgureanu, *Noul Cod penal comentat*¸ Romprint Publishing-house, Braşov, 2004, pp.170-171; the paper considers the new Penal Code of 2004, but the authors' commentaries are still valid in the actual context.

perspective, though we totally agree with the incrimination of rape between spouses and between family members, we consider that the aggravated form was preferred by the legislator in the context of the separate incrimination of family violence. From our point of view, even if we could agree with the possibility of the offender to reconcile with his victim, or the victim to withdraw her complaint, we consider that in the context of gender based violence, that the aggravated form must be kept. From a person who promises to protect his spouse, to support her in her difficult moments, it is legally expected to act in the same manner regarding their intimate life. Therefore, the failure to respect the sentimental value of the relationship between the parties must be sanctioned with a more serious penalty but in the normal situation of a rape between unknown persons.

b. Stage two. The regulation of the special law. These were the general regulations in the matter of domestic violence until 2003. There have been made considerable progresses after Law number 217/2003 regarding the domestic violence entered into force. Firstly, the novelty that this law brings up is the one regarding the definition of the concept of "domestic violence". Another new aspect refers to foundation of some bodies in order to support the victims of the domestic violence. But, because we were at the beginning concerning the regulation on this matter, we have noticed a few discordances between this law and the provisions of the penal Code. On the other hand, by comparison with other states, the present regulation of the law and of the penal Code can be substantially improved.

The concept of "domestic violence" is defined for the first time within Law 217/2003 concerning its prevention and fighting against it. According to Art 2 of this law, the domestic violence refers to "…*any physical or verbal action which is deliberately committed by a family member against other member of the same family and that it causes a physical suffering, a mental distress, a sexual suffering or a material prejudice*". In our opinion, these are some forms of violence which are directly committed by family members ones against the others. Besides this form, the law institutes an assimilated form of violence and that is "*the preventing of woman from the exercise of her fundamental rights and freedoms*"[34].

The application frame of the law firstly refers to family members, notion that involves the husband/wife and also the close relatives as this term is defined by Art 149 of the Penal Code: the ascendants, the descendants, brothers, sisters and their children and also the persons that became such relatives by adoption. According to the penal law, in the category of close relatives also enter the natural relatives, on the supposition of adoption[35]. As Art 3 Para 1 Let b) does not make any difference; we consider that the special law provisions enforce to them too. It can be noticed that Art 3 Para 1 Let b) "*does not impose anymore the condition that the close relatives should live or they should run the house together with the doer*", thus the term of family member of the special law is larger than the one of the actual Penal Code.

The persons that have established relationships which are similar to those which exist between spouses (the concubines) or between parents and children also belong to this category, these relations have to be proved by the social investigation[36].

Thus, Art 2 generally defines the forms of violence within we include the physical violence, the mental distress, the sexual violence and the material or moral dependence. At the same time, Art 1 Para 2 of the same normative act clearly states the offences which are considered as forms of domestic violence. Thus, amongst the offences which harm the family life are those mentioned in articles: 175, 176, 179-183, 189-191, 193, 194, 197, 198, 202, 205, 206, 211, 305-307, 309, 314-316, 318 and other similar offences provided by the penal Code and also the provisions of Law number

[34] According to Art 2 Para 2 of Law 217/2003.
[35] According to Art 149 Para 2 of the Penal Code.
[36] According to Art 4 of Law 217/2003.

47/2006 concerning the national system of social assistance[37]. We notice that two important regulations on this matter haven't been included in the category of legal texts that state offences which are related to the domestic violence: Art 177 regarding infanticide, Art 203 concerning incest and Art 203[1] concerning sexual harassment. Also, the definition of "family violence" includes only the offences committed with intention, but not those committed out of negligence, as the case of Art 178 – homicide out of negligence or Art 184 – bodily harm by negligence, both stated by the Penal Code, opposite to the opinion expressed by some authors, who include bodily harm by negligence in the category of domestic violence[38].

The law encourages non-governmental organizations to support the assistance programs offered to the victims of the domestic violence[39].

The law has initially instituted a body – *The National Agency for the Family Protection* which had a role in controlling the domestic violence and it also had the obligation to draw up annual reports concerning the evolution of this phenomenon and the measures that were taken in this respect. Because of the difficult financial situation, by Law number 329/05.11.2009 regarding the reorganization of some public authorities and institutions, the rationalization of the public expenses, the support of the business medium and the observance of the frame-agreements with the European Commission and with the International Monetary Fund, the National Agency for Family Protection was dissolved and it has been fused with the National Authority for the Protection of Child Rights, thus it resulted a new body with legal personality – The National Authority for the Protection of Family and Child Rights (ANPFDC). At the same time, all the provisions regarding the role, the objectives and the attributions of ANFP stated in Law 217/2003 were repealed. Then, the Decision of the Government No. 1385/18.11.2009 concerning the setting up, the organization and the functioning of the National Authority for the Protection of Family and Child Rights it was approved; this decision provides only minimal attributions for ANPFDC regarding this matter.

In order to sustain the activity of ANPFDC, the law disposed the formation of a body of social experts that are named *family assistants*; they have to deal with the cases of domestic violence and they have general attributions as: they identify and they keep a list with the families where there are conflicts which can cause violence, they develop activities in order to prevent the domestic violence; they find non-violent solutions by keeping contact with the respective persons, they can request the help of some natural or legal persons in order to solve the situations that generate violence in the family and they also can monitories the observance of the rights that belong to the persons that are forced by the circumstances to appeal to these public shelters[40].

Another institution that was inserted in order to solve the domestic violence cases is the mediation. The mediation can develop only at the interested person's request. The proceeding develops by the agency of the family council or it can be developed by authorized mediators. The attempt to mediate the situation does not impede the development of the criminal proceeding or the enforcement of the actual law provisions[41].

In order to help the victims of the domestic violence, the law has instituted the so-called *shelters* which are bodies with or without legal personality. Their principal role is that to ensure the protection, the housing, the care and the counselling of the victims of domestic violence that have to resort to this social assistance service[42]. Besides these shelters, the law has disposed the setting up of *recovery centres* that beside housing and care, they firstly ensure their rehabilitation and their social

[37] The text of Law 217/2003 refers to the provisions of the Law 705/2001, but this law was abrogated by Law 47/2006 which was published in the Official Gazette of Romania No 239/16 March 2006, thus we can consider the text as implicitly repealed.

[38] Ortansa Brezeanu, Aura Constantinescu, *op. cit.*, p.75.

[39] Ortansa Brezeanu, Aura Constantinescu, *op. cit.*, p.76. According to Art 7 Para 3 of Law 217/2003.

[40] According to Art 13 Para 1 of Law 217/2003 as it has been modified.

[41] According to Art 19 and 20 Para 1 and 2 of the Law 217/2003 as it was modified.

[42] According to Art 23 and 24 of Law 217/2003 as it was modified.

reintegration. The law didn't forget the aggressors; for them it has disposed the organization of some *assistance centres* which are created as bodies with or without legal personality which ensure, in a residential or semi-residential regime, their rehabilitation, their social reintegration, educational measures, counselling and family mediation measures. For them, the measures of family counselling are completed with those of specific treatments, for example: psychiatric treatment, addiction treatment which is developed within medical structures with which there have been drawn up conventions. No matter the situation, the victims' or the aggressors' assistance and internment in the centres mentioned before can be made only having their consent. For the minor, the agreement is given by the non-aggressor parent or by the legal representative[43].

From the procedural point of view, the law states that the security precautions provided by art. 113 and 114 and also the one provided by art. 118^1 can be taken by the court with a provisory character not only during the criminal prosecution but also during the trial[44]. In our opinion, this stipulation seems to be very interesting. Concerning the safety precaution that refers to the interdiction to come back to the family residence, it has to be noticed that the special law departs from the general one, which is the penal Code. This derogation enforces only during the criminal prosecution and during the first stage of trial, when the court analyses the situation and it disposes that the measures taken with a temporary character should cease or they should become definitive, according to the legal text which enforces to them. The provisory measures are disposed by findings which are only submitted to recourse in a term of 3 days which runs from the pronouncing for the present persons and it runs from the communication for those who were absent.

Although Law 217/2003 regarding the domestic violence brought some improvements by comparison with the previous situation, it is not deprived of criticism. Unfortunately, in Romania there is not a restriction or an interdiction order which would give a real protection to the victims of domestic violence, as it exists in other European legislations. As we have already commented, the victims of domestic violence have to live with the aggressor even if they initiate a juridical approach. In our country, the family violent actions for the most frequent situations (Art 180 and 181 of the Penal Code) are not prosecuted *ex officio* or as a consequence of the denunciation of any person who has information about these actions, as it happens in the majority of the European states, thus, the reconciliation of the parties absolves the doer from criminal liability. The measure provided by the Penal Code in Art 118^1 can be taken after the aggressor is convicted to imprisonment for at least one year and if he represents a serious danger for the other family members. The decision of conviction of the aggressor is the only measure for protection of the victim. Consequently, the actual measures cannot avoid the imminent danger in the case of domestic violence. Besides, there are no measures of protection with a preventive character that could eliminate the danger and prevent the offences stated in the category of domestic violence; detention and remand are subjected to some restrictive conditions and thus, inapplicable in most cases of domestic violence.

c. Stage three. The new Penal Code, adopted in 2009, but did not came into force[45], inserts new important modifications in the system of penal protection of the family.

Thus, to speak about family violence we must, first of all, define the notion of *family* or *family member*. According to the new provisions of Art 177, family member includes: (1, a) *ascendants and descendants, brothers and sisters, their children, as well as persons who gained this statute through adoption, according to the law* (until here the text is identical with Art 149 Para 1 of the actual Penal Code); (1, b) *the spouse* (here it is added the hypothesis stated by Art 149^1 Thesis I of the actual Penal Code); (1, c) *persons who have established relationships similar to those between spouses or between parents and children, if they share a household* (it is a new text for harmonizing

[43] According to Art 25-25^1 of Law 217/2003 as it has been modified.
[44] According to Art 26-28 of Law 217/2003 as it was modified.
[45] The new Penal Code was stated by Law 286/2009, published in the Official Gazette No 510/24 July 2007.

the Penal Code and Law 217/2003, in accordance also with other European codes, especially with its source of inspiration, the Spanish Penal Code – Art 173 Para 2[46]. The introduction of concubines in the legal content of the notion of family member, it is justified by the existence of a large number of couples who live in a free union, there is no legal reason the deny their protection similar to that offered to married couples[47]); (2) the provisions in the criminal law with regard to close relatives, within the limits of the previous paragraph letter a), shall apply in case of adoption with full effects, both for the adopted person, as well as for his/her descendants and with regard to the natural relatives (text identical to Art 149 Para 2 Thesis I of the actual Penal Code; the text was adapted and harmonized with the actual provisions on adoption, which no longer differentiate between full adoption and restrictive adoption for more than 15 years).

Another significant modification regards the regime of the penalties. The security measure of the *prohibition to return to the family home for a determinate period* was eliminated, among other security measures – as previously shown it was inoperable anyway. But the new Penal Code replaces it by introducing as elements of the complementary penalty the prohibition of certain rights in the following situations:

- The right to communicate with the victim or her family[48];
- The right to come near the house, workplace, school or other places where the victim unfolds social activities, in the conditions established by the law[49].

Though the Penal Code does not associate these two situations with domestic or gender based violence, we note that they are very close to the content of the restriction and interdiction order.

These two rights can be prohibited for 1 to 5 years, are expressly applied by the court when the law states it, and optional when the court decides for a fine or for imprisonment and when, given the nature and gravity of the offence, the circumstances and the offender consider the penalty as necessary[50]. As well as in the situation of the *prohibition to return to the family home for a determinate period*, in this situation the efficiency of the penalty *versus* domestic or gender based violence can be questioned as long as it remains the single way of protecting the victims of such offences. This is because the penalty is executed, partially like in the actual regime, after the decision for conviction or fine or imprisonment suspended under supervision has remained definitive, and in case of imprisonment by execution after it was executed or when it is considered to be executed[51]. Hence, the measure cannot be decided during criminal trial, so that the victim's life, medical condition or freedom shall be subjected to higher risks.

In the area of aggravating circumstances, the new Penal Code introduces some modifications that affect the situation of domestic and gender based violence. Art 77 of the new Penal Code no longer states as aggravating circumstance the perpetration of an offence by violence against family members, maybe because the new Code dedicates an entire chapter to this matter, without considering the situation of other offences which, according to Art 1 Para 2 of the Law 217/2003 represent domestic violence (such as the lack of liberty, rape etc). The impossibility to state one or

[46] According to this text of the Spanish Penal Code, which represents an aggravated form of the offence of *torture and other offences against moral integrity*, it is considered as passive subject the *concubine or the person to whom the aggressor was or still is involved in an affective relationship, even if the no longer share a household, descendants, ascendants, natural or adopted siblings, or other related persons of the victim or of the person with who the aggressor shares a household, minors, incapable persons, who lived with the aggressor or who are subjected to the active subject by a relation of power, guardianship, care or protection, or any person who is involved in any type of relationship assuming his integration in a household, as well as against persons, who as a result of a particular type of vulnerability, are under the care of a public or private centre.*

[47] The exposure for reasons at the new Penal Code.

[48] The situation is stated by Art 66 Para 1 Let n) Thesis I of the new Penal Code.

[49] The situation is stated by Art 66 Para 1 Let o) Thesis I of the new Penal Code.

[50] According to Art 67 Para 1 of the new Criminal Code.

[51] According to Art 68 Para 1 Let a) - c) of the new Penal Code.

more aggravating circumstances, as a consequence of the abolition of Art 75 Para 2 of the actual Code – *motivated by the aggravation of the criminal liability by violating the principle of predictability* – the only possibility to aggravate the criminal liability in case of gender based violence is represented by Art 77 Para 1 Let h) (stated by the actual Code in Art 75 Para 1 Let c)) the commission of the offence as a form of gender based discrimination, and in the case of the other forms of domestic violence by applying Art 77 Para 1 Let h), or by using the new introduced aggravating circumstance regarding *the commission of the offence by taking advantage of the victim's vulnerability due to her age* (in the case of minors and elder persons), *health condition* (sick persons), *disability or other causes*.

The special part was enriched with a new chapter[52] dedicated to domestic violence and including two offences. The first offence is stated by Art 199 and it is called "*Family violence*". The offence has two means of perpetration and refers to, because it borrows the content of other criminal offences, and subordinating its content to the norms from which it has borrowed that content.

The first mean, settled by Art 199 Para 1 *consists of the offences stated by Art 188* – murder, *Art 189* – first degree murder, *Art 193* – hitting and other violence, *Art 194* – bodily injury and *Art 195* – hitting or injuries causing death. The second paragraph refers to the possibility that for the offence stated by Art 193, the criminal action to be initiated *ex officio*, making possible the reconciliation of the parties, by comparison with the text of this offence where the criminal action is initiated only upon prior complaint of the victim[53]. But, in addition, though the previous paragraph does not state that family violence includes the offence of bodily harm out of negligence, stated by Art 196, Para 2 refers to the fact that in the situation of this offence if committed by and against a family member the criminal action can be also initiated *ex officio*. It is just a simple omission? The amended text no longer corresponds with Law 217/2003, stating that family violence is represented *only by offences committed with intention*. So, we must understand that bodily harm out of negligence is not domestic violence, but though, talking about the protection of family members, it is possible that criminal action to be initiated ex officio, even if the offence is committed out of negligence.

Returning to the content itself of this offence, it is noticed that the new Penal Code has eliminated all those texts – aggravating circumstances of murder, hitting and other violence and bodily injury from the actual code and inserted them in a new text, called *family violence*.

Thus, it appears a new inconsistency with Art 1 Para 2 of the Law 217/2003 which defines domestic violence not only from the perspective of the offences assuming a direct physical violence committed with intention, but also other offences harming the rights of a person, such as rape, privation of freedom, robbery, referring only to those offences regarding the spouse-victim of gender based violence, but not for the case of other family victims.

So, what is the logic conclusion in this case? A first hypothesis, starting from the principle of *specialia generalibus derogant*, would be of the application of the special law to the detriment of the Penal Code; the new text is subsequent to this special law, so that the legislator intended to modify the special law by this new provision?! If we use such interpretation, we would deprive Art 1 Para 2 of the Law 217/2003 of its judicial effects and also the definition given by this law to family violence. It only remains of this law the organizational provisions on the assistance of victims and the possibilities for involvement of local authorities and of specialized organisms created by law or non-governmental organizations with the aim to combat this phenomenon. But this would not be much towards the majority of the Western and European penal texts, which develop the situation and do

[52] We are talking about Chapter III – *Offences committed against a family member*, from Title I – *Offences against persons.*

[53] According to Art 193 Para 3 of the new Penal Code.

not restrain it to a minimum physical violence. Thus, Romania would fail in respecting its international and European obligations, to which it has subscribed[54].

Finally, for the dysfunctions between the two texts that would settle family violence, in the case of entering into force of the new Penal Code, we might add that the second text named by the Penal Code as form of family violence is *the killing or harming of the newborn by the mother*, offence stated by Art 200[55]. Art 200 Para 1 is the new version of infanticide with significant modifications. But, as we previously mentioned, Law 217/2003 states infanticide as form of domestic violence. It is true that nowadays infanticide originates in a medical disorder suffered by the mother after giving birth, while in the new text, the disorder considers all possibilities, *without differentiating on its nature*. Extending the reasons of the disorder, in the new context, infanticide as well as harming the newborn, occurred in the same conditions as those stated in the first paragraph, comprises the situations of family violence, but regarding the minor, given his impossibility to defend himself and his early age.

Finally, the last changes in the area of family violence are those regarding offences against sexual freedom and integrity. The new text of rape[56] no longer states the aggravating circumstance on the perpetration of the offence by and against a family member, stated now by Art 197 Para 2 Let b[1]). In exchange, it has partially incorporated provisions regarding incest, thus eliminating the debates on the existence of plurality of offences between rape and incest, and leaving without core the provisions of the appeal for the law resulted from the decision of the High Court of Cassation and Justice No 17/2008 point 2[57]. The same aggravating circumstance is also found in the case of a new offence – Sexual aggressions – Art 219 Para 2 Let b) of the new Penal Code.

As a conclusion, we can state that both the current, as well as the new provisions on family violence of the Penal Code, especially gender based violence, which is in our special interest for the moment, does not enjoy the most comprehensive, coordinated and clear regulations. Moreover, though many recent European texts explicitly refers to violence against women, and in Spain the regulations have reached the protection of this type of violence, as a gender based violence, the Romanian texts are still clumsy and without efficiency.

III. The evolution of the Spanish legislation

The protection order may contain also penal law measures, as well as civil law protection measures. The latter ones can be taken only upon the request of the victim (as previously shown, the protection order containing penal measures can be issued *ex officio* by the judge), of her legal representative or of the prosecutor, but only if minor children or incapable persons are concerned, if the measures were not already taken by a civil court. The civil law protection measures consist of a decision attributing the exclusive use of the common housing of two persons to the protected person, the establishment of the regime of custody, visits, communication and residence with children, as well as the regime of offering food to them. The civil law protection measures are taken for

[54] For instance, it would not respect the European Convention on Human Rights or Recommendation R(2002)5 on the protection of women against violence, Recommendation R(2004)1681 – Campaign to combat domestic violence against women in Europe, Resolution 1512(2006) "Parliaments united in combating domestic violence against women", Recommendation 1759(2006) "Parliaments united in combating domestic violence against women", Resolution R(2007)1582 of the Council of Europe "Parliaments united in combating domestic violence against women".

[55] According to Art 200 of the new Penal Code, *killing or harming the newborn by the mother* consists of: (1) *The killing of a newborn infant, committed immediately after birth, but no later than 24 hours, by the mother who is in a state of confusion, shall be punished by imprisonment from 1 to 5 years*; (2) *If the offences stated by Art 193-195 are committed against the newborn infant immediately after birth, but no later than 24 hours, by the mother who is in a state of confusion, the special limits of the penalty are from 1 month to 3 years.*

[56] See Art 218 Para 3 Let b) of the new Penal Code.

[57] See the official High Court of Cassation and Justice's website www.scj.ro.

maximum 30 days. The protection order shall be communicated to the parties and to the public authorities competent in insuring the protection, security, social assistance, juridical, health, physiological measures or any other kind of measures. Also, the protection order shall imply permanent information of the victim on the situation of the defendant, on the status of the adopted protection measures, as well as on the detention of the offender, if necessary. We also considered as very interesting the establishment and existence of a Central Register for the Protection of Victims against Violence (*Registro Central para la Protección de las Víctimas de Violencia Doméstica*) where are registered all the protection orders, representing a mirror of the national situation of domestic violence and also a type of record dedicated to this phenomenon.

Finally, one of the last measures adopted by the Spanish legislator to prevent and stop domestic violence and to protect its victims is the Organic Law 1/28 December 2004 on the measures for protection against gender based violence, called Integral Law, as a consequence of the stated measures.

It is for the first time when Spain evolves from generally debating domestic violence to specifically debating gender based violence, the last name not very popular among the Romanian jurists. Besides the entrance the European and international view of the gender based violence was made in the early 1990, but mostly after 2000[58]. For María Luisa Maqueda the domestic and gender based violence are different from the perspective of the victims: for the first, it is the family, and for the second it is the woman, even if she recognizes the majority of cases of gender based violence occur within the family[59].

In the preamble of the Integral Law, it is shown that this form of violence is no longer just an aspect of the private sector, but it represents a problem of the entire society, *manifesting itself as the most brutal symbol of inequality in society*[60]. This law, *the violence that woman are forced to suffer within the extended family stops to be an "invisible offence", generating a collective rejection and an obvious social alarm.*

Let us see how this law defines gender based violence, which are its leading principles and its main novelties inserted in the penal system.

According to Art 1, gender based violence represents all types of violence resulted from the discrimination, inequality and domination exerted by the man against women, violence exercised by her ex or actual concubine (*the term also includes the quality of husband*), or by the man with whom the woman is involved in a relationship, even if they no longer share a household. According to professor Luis Arroyo Zapatero the extension of the term "family" as to include fathers, sons, brothers, uncles by alliance of the husband or concubine, minors or incapable persons that shared a household with the victim, the persons who are within the family framework by any relationship, as well as guardians or tutors in centers for vulnerable persons is an exaggeration of the law, despite the fact that he supported the idea of differentiation between domestic and gender based violence, including in the parliamentary sessions that debated the full text of the law[61].

Regarding the equality between men and women promoted by the Integral Law, María Elósequi Itxaso considers that it has a wide meaning, taking into account not the possible rights in politics, economy or the social area, but also the conditions for their full exercise. It is actually equality, according to the author, which starts from the differences specific to the gender that

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[58] María Luisa Maqueda, *LA VIOLENCIA DE GÉNERO - Entre el concepto jurídico y la realidad social*, in the Spanish Penal Sciences and Criminology Review nr. 08-02 (2006), p. 02:2.

[59] *Ibid*, p.02:4.

[60] See also in this regard the opinion of María Luisa Maqueda, *op.cit*, p.02:2.

[61] Luis Arroyo Zapatero, *op. cit.*, p. 202. For his presence in the Parliament see the Congress official website (Spanish Chamber of Deputies) www.congreso.es/publicaciones/ on 19 July and 7-9 September 2004.

integrates them, without imposing to the woman the man model[62]. The author shows that the guiding principles for the public authorities in applying this law shall be: equal treatment (*it is prohibited any direct or indirect discrimination based on sex, regardless of its manifestation mean*), equal opportunities (*all public authorities shall adopt measures that will guarantee the effective exercise, for women and men, of their political, civil, economic, social or cultural rights*), respecting differences and diversity (*all public authorities shall apply the law by respecting the differences and diversity between men and women*), integration of the gender based perspective (*all public authorities shall integrate the gender based perspective, in the meaning of considering different situations, conditions, aspirations and needs of women and men, aiming to eliminate all inequalities and to promote equality in all the stages of policies and actions: planning, execution and evaluation*), positive action, elimination of stereotypes based on sex[63].

Besides these principles applicable for public authorities, Art 2 of the law states certain guiding principles, among which we emphasize: equipping public authorities with efficient instruments in fighting against gender based violence and assisting its victims in an educational, health care and publicity environment, the creation of an emergency information social service for victims of gender based violence, providing an economic support for female victims of this phenomenon, the creation of an administrative guardianship of the state that will impose public policies to support the victims, strengthening the penal framework, offering the possibility for civil entities, associations and organizations to act against gender based violence, ensuring the transversality of the means of support etc[64].

From the penal perspective, the novelties inserted by the Integral Law refer to the enlargement of the framework of offences – as misdemeanors – of domestic violence, which determines higher penalties, temporary imprisonment, the obligation of adopting the superior limitation of a penalty (it shall be punished by imprisonment from 3 months to 3 years) if the offence is committed by gun or other dangerous instruments threat, in front of minors, in the common domicile or in the victim's domicile or by trespassing either the temporary separation order, the adoption of the security measure of separating the offender from the victim, and the adoption of the plurality of offences between the offence against moral integrity and the offence of ill treatments[65].

Essentially, the evolution of the Spanish legislation with its latter modifications was appreciated as positive, revealing many situations, but also succeeding to protect all the victims terrorized by violence or who could have been dead by now.

Conclusions

Searching for documentation for a wider study on domestic and gender based violence, from which this article represents only a part, I found a book of a Spanish author Miguel Lorente Acosta – *Mi marido me pega lo normal – Agresión a la mujer: realidades y mitos* (*Mi husband constantly beats me – Agresion against women: reality and myth*). Noticing the title I could not stop remembering all the *girls' talk* that I have heard in my childhood when a friend of my family got married. Such lines as: "*You have a good husband, he does not beat you, does not drink, what more do you want?*" were natural in those times (in the vision of communist or non-communist mentalities). The debates on women who were beaten by their husbands or indirect realities, lived by other people, were frequent, about two-three decades ago.

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[62] María Elósequi Itxaso, *Los principios rectores de la Ley orgánica contra la violencia de género*, in Pilar Rivas Vallejo, Guillermo Barrios Baudor coord., *Violencia de género – perspectiva multidisciplinar y práctica forense*, Thomson Aranzadi Publishing-house, Pamplona, 2007, p. 121.

[63] *Ibid*., pp.121-123.

[64] María Ibáñez Solaz, *Catálogo de principios rectores y derechos previstos en la Ley no.1/2004*, in Pilar Rivas Vallejo, Guillermo Barrios Baudor coord., *op. cit.*, pp. 132-133.

[65] Luis Arroyo Zapatero, *op. cit.*, pp. 202-203.

We also live painful realities nowadays, within families were women, with a disturbing majority, a little support from a system that starts functioning, manage to survive a severe beating. But after the system offers them and their children shelter and food for one-two-three months, all these women will return in the same violent and dangerous environment due to their financial and household dependence and, why not, their habit of supporting years of beatings.

So, is Romania ready for a special legislation on gender based violence or it shall be the exception? Are Romanian women aware as the Spanish women that a life under terror is not a life of love, but just a life of vices? Are these women aware that they deserve an infinitely better life and if they choose not to hurt the men that beat them by submitting a complaint against them, they could choose to divorce as fast as possible? Shall the Romanian legislation support them, which by comparison with the Spanish one must be improved with measures to be adopted at the beginning of the penal trial, not only at its ending?

This is just a pleading for life and for a mean of stating that the Romanian legislation on domestic and gender based violence must be change in order to effectively support all the women who suffer in silence and ignorance…

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HISTORICAL INCRIMINATION OF FACTS AGAINST PATRIMONY

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Abstract
The aim of this study arises from the importance recognized to patrimony as a social value of all evolution stages of society. Assuming that all antisocial acts which affects patrimony were always sanctioned, I tried to illustrate their incrimination since slave and feudal period, the oldest Romanian law, also the regulations of modern criminal law systems. Also, I've presented the disposals of Criminal Codes since 1864 (inspired almost from French Criminal Law and Prussian Criminal Law) and nowadays, also some decisions in matter of Constitutional Court. Thus, the study becomes important even through comparative aspects setted of by evolutive way of incrimination of facts against patrimony.

***Keywords**: historical, evolution, offences, patrimony, incrimination*

Introduction

Given the patrimony importance, recognized as a social value at all evolution stages of society, the acts against society which affects patrimony were always punished, those with highest seriousness are even included under criminal law[1].

During slavery, were harshly punished the theft, robbery, plunder, other acts which affect property were less known, such as *fraud,* breach of trust, fraudulent management, which were considered as civil offenses.

During feudal period is gradually extending the criminal repression, including all facts which may affect patrimony. Usually, unimportant theft is punishable by flaying, but the third theft was punished by death penalty *(tres furtileus)*. If the theft is serious it could apply this penalty since from the first theft. This harsh of punish shows the frequency and severity of crimes. Against such acts, the mastery was forced to refer to the most inhuman punishment.

Modern criminal law systems, although removed some of exaggerations above, have maintained a fairly severe regime for certain forms of criminal activity against property. Also, is extended during incrimination framework other specific facts of economic relations by modern society.

Chronological disposals

In old Romanian law are founded regulations most detailed relating to these crimes. Thus, *Pravilele lui Vasile Lupu* (Vasile Lupu Precepts) - "Carte pentru învăţături" (Book for teaching) since 1646 - and Matei Basarab - "Îndreptarea legii" (Law correction) of 1652 - *Codicele penale ale lui Alexandru Sturdza în Moldova* (*Criminal Codex of Alexander Sturdza in Moldova)* - 1862 - and Barbu Ştirbei -1850 - in Muntenia (Wallachia), contained provisions relating to offenses against property.

Romanian Criminal Romanian Penal Code of 1864, although mostly copied by French Criminal Code, contained in chapters on "Crimes and offences against property" numerous incrimination inspired by Prussian Criminal Code (art. 306-380) relating to heritage protection in order to ensure by severe means its protection.

The Criminal Code of 1864, offenses against patrimony were included some crimes that were only indirectly related to heritage protection.

Romanian criminal code from 1936 called "The new Criminal Code Charles II" came into force on January 1, 1937 included this matter in Book II, Title XIV entitled "Crimes and offences

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[1] Vizitiu, Gh. *Delapidarea.* Bucureşti: Editura Lumina Lex, 2001.

against property" - art. 524-573; systematized in five chapters as follows: Chapter I - Theft, Chapter II - Robbery and Piracy, Chapter III- Offences against property through reckless confidence, Chapter IV - Abroad displace, abolition of border signs, damage and other disorders of property, Chapter V - Game, lottery, speculation against public economy.

As it shown, the Criminal Code of 1936 restricted in its natural limits, all crimes against property, grouping them according to the legal object.

Art. 553 of Criminal Code "Charles II", included in Title XIV "Crimes and offences against property," Section VII, the cheating by check, whose forms of executing acts were inspired by art. 84 pt. 2 din of Law no. 59/1934 on check.

Both during the Criminal Code since 1864 and Code since 1936, were in force certain crimes against property, which were provided in special laws, such as Military Justice Code, the Commercial Code, Forest Code, etc..

During the period 1944-1989, naturally were produced some important changes in legislative terms. In this context, was adopted Decree no.192/1950 which content the definition of *"public"* term and therefore the *"common property"*[2]. Through this normative act was introduced in Title XIV of Criminal Code of 1936 a new Chapter called "Some offenses against public property", which later was brought changes, especially in punishment aggravation. This decree marked the moment of first appearance of a discriminatory protection, as it was considered "private" or "public".

Criminal Code of 1968 took this concept of differential protection of heritage, which is why, in Title III of its Special Part were provided crimes against private property, and in Title IV, offenses against public or civic property. This structure stood until 1996, until the Law no. 140/1996 was adopted. Thus, were brought substantial changes to the Criminal penal code in force.

Need to adopt this legislation act was claimed by many problems complaining by practice in relation to Criminal Code in force.

Constitutional disposals

As regarding the heritage protection the general regime of property established by Art. 44 (was Art. 42 before its republish since 2003) of Romanian Constitution of 1991 is different from that before 1989, and the differentiate protection of heritage according to its titular was not in compliance with new constitutional provisions.

Art. 44 of Constitution provide that "The property right and claims against State are guaranteed. The content and limitations of these rights are established by law. Private property is guaranteed and protected **equally by law,** regardless of its owner. Foreign citizens and stateless persons may acquire private property of land only in terms resulting from Romania's accession to the European Union and other international treaties which Romania is part, on the basis of reciprocity, as provided by organic law and legal inheritance. Nobody can be expropriated except the public utility, established according to law, with fair and prior compensation. Are prohibited the nationalization or any other measures of forcible transfer of public ownership of property by social, ethnic, religious, political affiliation or other discriminatory features. For projects of general interest, the public authority can use the subsoil of any real estate under obligation of owner for damage brought to soil, plantations and construction, and for other damages imputable to authorities. Right of property compels to duties observance relating to environmental protection and ensuring good neighborliness, as well as other duties that under law or custom, are accrued to owner. The property acquired legally assets could not be confiscated. Legality of acquiring is presumptive. The assets fated used or resulted from offenses or contraventions can be confiscated only in accordance with law.

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[2] Nistoreanu, Gh., Dobrinoiu, V., colectiv . *Drept penal, Partea specială.* Bucureşti: Editura Europa Nova, 1997.

Organizing and functioning Rules . 156 (2 february 2005).

Also, Romanian Constitution includes other rules with a principle value relating to property. Art. 136 par. 2 of Constitution indicates fundamental forms of property, namely, public and private, also are shown they which belongs assets as part of each property form, so public property belongs to state and administrative - territorial units.

Starting from these new constitutional principles, the Romanian courts practice is often stipulated that provisions of Title IV of Romanian Penal Code Special Part are unconstitutional.

Constitutional Court decisions

The most important of the Constitutional Court decisions rendered in this matter is Decision no. 1/1993 of the Constitutional Court Plenum[3] on Criminal Code provisions relating to public property in context of constitutional provisions on property.

In this case, the Constitutional Court was informed by Courts with unconstitutionality exception invoked during processes which having as object the property damage stipulated by Art. 145 of Criminal Code and whole Title of Criminal Code on offenses against public property.

The main legal issue invoked during these exceptions was to determine if the "public property" term used by the Criminal Code is consistent with Constitution of 1991 and, depending on the response, if the differentiate treatment of criminal justice is justified, both to crimes against private and public property.

Constitutional Court Plenum took into account the same court decisions which have admitted the exceptions raises in namely folders, finding that Criminal Code provisions on sanction of offenses against public property were partially repealed according to art. 150 par. (1) of Constitution and therefore these will be applied only on assets provided by art. 136 par. (4) of Constitution, which form the exclusive object of public property. Are expressly indicated by Decisions no. 9, 10, 12, 13, 16, 17 and no. 18/1993, against the General Prosecutor made appealed.

One of two reasons invoked is starting from affirmation that Criminal Code provisions relating to public property are unconstitutional and are not being repealed by Constitution, because the "property" term of the Criminal Code has a content too extended than the notion of "patrimony". The notion of "public property" is assimilated by the patrimony of Civil law, including all real rights, all patrimonial rights and all obligations on entities likely to be evaluated economically. Moreover, it is argued on appeal, the Criminal Code offenses are not named crimes against patrimony, but crimes against property, similar to the Criminal Code of 1936 which relating to crimes against property. Moreover, it was shown, the current Criminal Code does not contravene the Constitution because it not denies the existence of two types of property (public and private) and do not provides other property forms than those mentioned by Constitution.

On appeal, the Constitutional Court has decided to admit in part all appeals declared, admits unconstitutionality exceptions on Art. 223, 224, 229 par. 1 of Criminal Code, but in the last text, only for provision intended the damage against public property and was establish a deadline, on 30 November 1993 for giving to Parliament the possibility of modifying the Criminal Code mentioned above Also, it was shown if until deadline is not adopted the provision modifications of Art. 223, 224, 229 par. 1, from 1 December 1993 will produce effects until their repeal. Until the adoption of amendments by Parliament, but not after 30 November 1993, the listed provisions will be applied. In the same decision is noted "If after entry into force of Constitution of 1991 could not retain the meaning of "public property" term, being contrary to Art. 41 par. (2) (actually, Art. 44), of Constitution, but there is no legal basis to identify the public property with public patrimony, means that legal provisions of Criminal Code relating to public property and appealed to the Court are unconstitutional and therefore, entirely repealed. Thus, the legislator intervention is obligatory ".

Dissenting opinion made in connection with this appeal decision has supported maintaining of solutions gave to the first trial and was found unconstitutional the establishment of a new term in

[3] *Decision.* 232 (Constitutional Court, 27 septembrie 1993).

future within the Court's decision will become enforceable and until then, the above mentioned texts of the Criminal Code to be apply, although they were repealed.

Also, in another appeal, which is the object of file no. 11 C/1993 of Constitutional Court, the judges has decided the trial delay because claims files and intention of majority judges to remove from legal interpretation given by Decision no 38 since July 7 1993, situation which was regulated by art. 26 par. (2) of Organization and functioning Rule of Constitutional Court. Through same conclusion was decided to appeal the Constitutional Court Plenum[4].

Therefore, the Constitutional Court Plenum was convened to give a uniform interpretation of Criminal Code constitutionality provisions regarding to crimes against public property.

The Plenum, examining cases brought to the Court, the constitutional and legal decisions pronounced by judges of Constitutional Court in cases concerning unconstitutionality exceptions, held the following:

1. In order to solve the unconstitutionality exceptions of certain provisions of Criminal Code, panels of Constitutional Court judges gave legal different interpretations in identical legal situations.

2. Pronunciation of conflicting decisions would be contrary to idea of constitutional justice and courts would be unable to achieve consistent interpretation and unitary application of Criminal Code provisions on crimes against property.

3. Organization and functioning rules of Constitutional Court requires the Court judges to comply the Court's interpretation with majority votes of judges.

4. The Court Plenum is asked to decide: a) if provisions of Criminal Code relating to offenses against public property are constitutional, b) if Constitutional Court Decision, definitely, is obligatory and binding and enforceable since date of publication in Official Gazette or Court may establish another term in future from which will produce effects and possible, a condition.

Regarding the first issue, the Plenum of Constitutional Court considered that "public property" term will not be confused with "patrimony" notion, and although is not nominated by Constitution, it does not appear as unconstitutional, as long as means a general interest of society, is related to public safely and it refers to public property. In the past, the public property was been protected by Law for patrimony protection, published in Official Gazette no. 75/31.03.1937, more efficient than private property of individuals, in sense that urgency procedure was applicable to obvious crimes and extended liability to persons who have not taken prevent measures of public property damage. It has to be noted at that time there is no similar constitutional text art. 41 par. (2) (namely, Art. 44) of current Constitution.

Therefore, it appears natural that offences against public property to be punishable as crimes against public patrimony. Not "public property" category is problematic category relating to criminal treatment, but its sphere and therefore, the criminal liability dimensions and limits.

Court held that private property is equally protected by law, regardless of titular (Art. 41 par. (2) of Constitution – namely Art. 44). Thus, any extension of public property category to private patrimony if wants to be against this provision, is unconstitutional.

Special protection given to general interests is not only a matter of criminal policy, but also constitutionality, if this extension would create a legal regime which contravene to disposals of Art. 41 (44) of Constitution.

Regarding the property it is in addition to any interpretation that actually constitutional disposals establish two forms of property, public and private property. According to Art. 135 par. (3), public property belongs to state or administrative-territorial units. Par. (4) indicate assets that are exclusively object of public property, indicating that other assets established by law can be included in this category.

[4] *Organizing and functioning Rules* . 156 (2 february 2005).

Therefore, except assets of art. 135 par. (4) and throughout laws which declare it public property, others are private property and private property have both state and citizens and legal entities such as companies.

As a characteristic of public property is inalienable, and under law, assets - public property can be managed by autonomous administrations, public institutions or may be leased or rented.

According to art. 42 par. (2) –current paragraph 44, private property is equally protected by law, regardless of titular, without difference if the owner is state, company or citizen.

It should be highlighted that assets of autonomous administrations and companies are not state owned, but private property, even if state have the most social capital the companies.

Art. 5 of Law no. 15/1990 state that "autonomous administration is the owner of its property assets. Art. 20 par. 2. In exercising ownership, the autonomous administration is possessed, used and disposed independently of its property assets... " of this law provides that "assets belongs to company property are its patrimony...". Art. 35 of Law no. 31/1990, states that "assets constituted as contribution to society become its property."

From those shown, it is clear that autonomous administrations and companies assets are private and not public property. Private property is equally protected, regardless of ownership (state, legal person or individual), according to art. 41 par. (2) (actual 44) of Constitution .

As such, thefts of private property - even if it belongs to state - could not be qualified theft of "public property", these terms will apply only for public property defined by art. 135 par. (4) of Constitution.

General Prosecutor, in his appeal, argued that should continue to apply provisions of Art. 145 of Penal Code, which defines public property as follows: “public” term means all about state organizations, public organizations or any organizations which conduct a useful social activity and which operate according to law".

It is observed that concept of public property, in sense that was defined in previous legal practice includes not only assets of state organizations, but even those which conduct socially useful activity. Were included even assets of tenant associations and companies, with motivation to develop a social and useful activity.

To Art. 41 (actual 44) and Art. 135 of Constitution, the public property term could not be understood as such, it should be reported only to assets which forming the exclusively object of public property.

Complete elimination of special criminal protection, more rigorous of assets which forming the object of public property violates the constitutional provisions, because these goods are inalienable. Lack of protective measures increased of public ownership it was appreciated that have deeply damaging effects. Therefore, the provisions relating to preferential protection of public property must be understood in light of Constitution, to apply to assets which forming the exclusively object of public property.

Regarding the second issue, related to setting the deadline of 30 November 1993 to give to Parliament the possibility of provisions modifying of Criminal Code, which is contrary to art. 41 par. (2) current Art. 44 of Constitution , with mention that, if until settled deadline are not produced specified changes, starting from December 1, 1993 will produce effects of their repeal, and until the adoption of amendments by Parliament, but not after 1 December 1993, namely provisions will be applied - Plenum of Constitutional Court was considered that such solution take into account its constitutional foundation. Furthermore, it was considered that solution is contradictory. Because the Criminal Code provisions on criminal liability in cases concerning public property are declared inconsistent with Constitution, their implementation, for another period, is obviously contrary with their repeal.

First, it should be noted that no legal text do not give to Constitutional Court the right to dispose to Parliament for modifying certain legal texts, because this would be contrary the principle of state powers separation. Second, it is incomprehensible that certain legal texts of legislation are

repealed since the entry into force of Constitution - December 8, 1991, and, on the other hand, to declare their application until 30 November 1993. Once a legal text has been repealed, any judicial authority could not extend its existence.

The proposed solution is not based on Constitution into force. When Constitution, by Art. 123 par. (1), states that justice is administered in the name of law is take into account the law in force and a law is and will remain in force through the legislature volition. Justice could not be achieved by a law whose express repeal was achieved by a constitutional text, which was officially established by Constitutional Court. In this case, the Court's constitutional role is to ascertain the Criminal Code provisions have been repealed and therefore to dispose them applicability or enforceability. Court could not interfere to Parliament. No doubt that public authorities with power in legislate create must be involved, but this involvement is a problem that only they decide, under Constitutional rules. Involvement of Constitutional Court in legislate sphere (except provisions of Art. 144 pts. a), b) and h) of Constitution) and criminal policy beyond its competence, being an interference of other state authorities. This is a deviation from law principle in order of manner competence the laws are strictly interpreted. Constitutional Court would arrogate abusive the duty to prolong effects of repealed legislation, by violating competence rules and the balance of power resulting from constitutional provisions.

Due to Parliament is supreme representative authority of people and the sole legislative authority of country, Constitutional Court could not compel him to a certain activity, however important is the problem contained by a decision.

In this case, there are criminal provisions relating to jail sentences, the effects of such solutions are unpredictable, and could create legal and moral irreparable situations by applying a criminal law repealed.

When Constitution allowed the authorities to establish themselves entry into force of a law after a certain period, she made it explicit. Thus, according to art. 15 par. (2), law produces effect only for future, and according to art. 78, law shall enter into force on its publication in Official Gazette (three days after that date, in according to amendment made in 2003) or to date provided in its text.

Taking into account all these allegations, the Plenum of Constitutional Court has established the following:

1. The provisions of Criminal Code relating to offenses against public property are partially repealed in accordance to art. 150 par. (1) of Constitution and therefore they are able to apply only on assets provided by art. 135 par. (4) of Constitution, which form the exclusive object of public property.

2. Decisions of Constitutional Court ruled on resolution of unconstitutionality exceptions become enforceable once they are final, under observing of constitutional and legal rules on its publication and disclosure, not being able to set a further time from which to apply.

Regarding the effects of constitutional decisions, they are regulated by art. 147 of Constitution. Under this text, the provisions of laws and ordinances in force, and those of regulations found as being unconstitutional, stops their legal juridical effect after45 days since decision publication of Constitutional Court if, in the meantime, the Parliament or Government, not agree with unconstitutional provisions of Constitution. During this period, provisions found as unconstitutional are suspended under law. Under these conditions, the declaration of unconstitutionality, from the moment of its publication in Official Gazette[5], creates an obligation only for Parliament or Government, as appropriate, to intervene in order to remedy this situation without through these concrete cases the Constitutional Court, which has no a role of positive legislative and could not

[5] Constantinescu, M., Amzulescu, M. *Drept contencios constituţional.* Bucureşti: Editura Fundaţiei România de Mâine, 2005.

propose for modifying texts a form in accordance with Constitution, to intervene on namely act or provision[6].

Since its publication in Official Gazette, the Constitutional Court decisions of unconstitutionality admission of legal provisions are mandatory, final and irrevocable, being universally valid and produce effects *erga* omnes[7] and could not be challenged during internal law system either directly or indirectly. Constitutional Court decisions are not appealable.

In this context, it can be stated that provisions found as unconstitutional are legally suspended since publication of Constitutional Court decision in Official Gazette, following that, within 45 days the Parliament or Government to agree these provisions to Constitution. Otherwise, the provisions will not produce the legal effect[8].

Decision of Constitutional Court Plenum, was accompanied by a different opinion. The opinion signatories are not agreed with opinion of judge majority, expressed by interpretation decision above, as following reasons:

1. The criminal term of "public property" has a unitary character, defining the object of a special criminal protection. Between content and extension degree of this notion is an indissoluble connection, so the modifying of some element of content could not lead to change of concept itself.

Therefore, restricting the notion of public property only to assets which forming public property is a modification of this notion, not only for extension degree but also in terms of content. Thus, many aspects stipulated by art. 145 of Criminal Code remain without object.

Since the notion of public property is regulated by law, its changing means law changing, which is exclusive competence of Parliament, "the sole legislative authority of country, according to art. 58 par. (1) of Constitution - the current paragraph 61. Therefore, Constitutional Court, interpreting the concept of public property will be applied only to assets forming the object of public property, has substituted to legislature criminal repression regulating.

The only solution to avoid this substitution is finding the Criminal Code relating provisions regarding to public property are abolished entirely, while the notion of public property through its effects on private property protection, is contrary to art. 41 par. (2)– of Constitution - the current Article 44. This does not mean extending the effects of repeal, but is the consequence of the unitary character of public property notion, mentioned above, which makes impossible to distinguish the effects covered by art. 41 par. (2) of Constitution - the current Article 44. 2 - by other effects without changes the notion of public property.

Supporting that application of public property notion to assets which forming exclusively the object of public property are based on inalienable character of these assets, enshrined by Art. 135 par. (5) of Constitution - the current paragraph 136. 5, are not justified. This provision has only significance to prohibit sale of assets and does not imply automatically more severe criminal repression. Nothing can stop the legislature to establish such repression for public property assets in whole, or only for some categories, but as following interpretation, the Court will not be able to establish such juridical regime. Also, the legislature can establish a different repression for certain categories of private assets, without making distinguish between their affiliation to state or other subjects. Therefore, the difference between public and private property, based on interpretation decision, is irrelevant in order to constitutionality of criminal repression regime, generally.

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[6] Selejan- Guțan, B. *Excepția de neconstituționalitate.* București: Editura All Beck, 2005.

[7] Vida, I. *Legistică formală – Introducere în tehnica şi procedura legislativă, Ediția a III-a.* Bucureşti: Editura Lumina Lex, 2006.

[8] Stancu, E. *Efectele deciziilor Curții Constituționale.* Revista critică de drept şi de filosofia dreptului, vol. 2, , Bucureşti: Editura Cartea universitară, 2005.

Conclusions

We choose to present detailed arguments during this approach in order to understand why was imposed such a normative act, to state the existing situation regarding to Criminal Code rules, which had as purpose, public property protection. Moreover, the doctrine states this need, considering that different stipulation of "crimes against public property or private" and "crimes against public patrimony" was unjustified, while "the pair offences" (as their name) had different structures and contents. The only difference consists in patrimony affected and sanction regime, more severe than last.

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CRIMINAL PROTECTION OF PRIVATE LIFE

RADU SLĂVOIU*

Abstract
This study is meant, first of all, to analyze the incriminations that the new Romanian Criminal Code sets for the protection of a person's private life as a social value of maximum significance both for the human being and for any democratic society as a whole.There are two criminal offences treated in this study that are not to be found in the current criminal legislation: violation of private life and criminal trespassing of a legal person's property. Likewise, the study will bring forth the novelties and the differences regarding the offences of criminal trespassing of a natural person's property, disclosure of professional secret, violation of secret correspondence, illegal access to computerized system and illegal interception of electronic data transfer – acts that when, directly or indirectly, committed can cause harm to the intimacy of a person's life.As an expression of the interdisciplinary nature of this subject, the study also sets out, as a subsidiary aspect, an evaluation of the circumstances under which the new criminal proceeding legislation allows public authorities to interfere with an individual's private life. Thus, the emphasis is on the analysis of the circumstances under which special surveillance and investigation techniques can be used as evidence proceedings regulated by the new Romanian Criminal Procedure Code.

***Keywords**: New Criminal Code, the protection/violation of private life, harassment, professional office, means of interception of communications*

Introduction.

I. General aspects. Modern society includes, among the individual's most important values, his private life, whilst both international and national legislation being more and more preoccupied with the protection of this fundamental right of human being.

The Universal Declaration of Human Rights stipulates under Article 12, that „No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, or to the attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks." Likewise, the International Covenant on Civil and Political Rights provides, in Article 17, „1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, neither to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks." Article 8 of the European Convention of Human Rights shows that "1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or offence, for the protection of health or morals, or for the protection of the rights and freedoms of others." The American Convention of Human Rights expresses in a similar manner under Article 11, 2-3: "2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation. 3. Everyone has the right to the protection of the law against such interference or attacks."

Transposing the international regulations onto national level, Article s 26-28 from the Constitution of Romania establish, as fundamental rights, intimate life, family and private life, home inviolability and the secret of correspondence.

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As none of these terms enjoy a legal definition, it was the duty of doctrine and jurisprudence to establish their meaning and content.

In Western juridical literature, private life was, practically, understood as a secret sphere of the individual's life, where the access of third parties[1] is not allowed. Respect for private life implies the guarantee of a person's physical and moral integrity, the protection of his personal or social identity, of his sexuality, of private places[2], as well as the protection of reputation and the prevention of disclosure of confidential information[3]. A person can consider as being part of his private life any aspect that may be associated with his health, moral, religious or philosophical believes, his sentimental and family life, his friendships[4]. It was also noted that private life includes the individual's right to intimate, personal life, his right to social private life and the right to a healthy environment[5].

Striving to find meanings as precise as possible for the concept of "private life", it was noticed that, Romanian doctrine[6] makes a distinction between the texts of the European Convention and those of the Romanian Constitution, the latter using a concept that the first is avoiding, namely intimate life. It has been noted that intimate life is only a part of private life, which, first of all, contains the right to solitude, that is the individual's right to be with himself, to seclude from the others, to keep the secret of his own thoughts, plans and desires, to be left alone with his ideas and aspirations, but also with his behavior through which he intends to express his personality, unhindered by any outside interference. Secondly, intimate life also implies contacts with other persons "in the presence of whom the subject feels like being only with himself", to whom he can express his deepest thoughts; the contacts with these persons can be oral, when the interlocutors are present, but also through letters, telegrams, telephone conversations when absent.

On its turn, private life is considered to be made of the right to intimate life, with all the above mentioned elements included to which we also add a sphere of the subject's business and professional contacts are also added. Thus, we consider that private life represents a particular area of personal thoughts and acts, of communications and conversations that are not suppressed, a personal inviolable space where the individual can express his inner personality; but it also includes intimate or professional contacts with the others.

When approaching the issue of the protection of private life from its values' point of view, another author[7] notices that the risks associated to this fundamental right regard the violation of the person's solitude, interference into his personal matters, disclosure of personal information – which entails a harm on the individual's image in society – using the name or image of a person for the benefit of the one who uses them, creating IT systems of personal data.

The jurisprudence of the European Court of Human Rights has proven to be an essential source in establishing the constituent elements of private life, although, several times[8], the European

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[1] See J. Carbonnier, *Droit civil*, tome I, *Les personnes. Personnalité, incapacités, personnes morales*, Presses Universitaires de France, Paris, 2000, pg.156.

[2] See R. Clayton, H. Tomlinson, *The Law of Human Rights*, Oxford University Press, 2001, par.12.85-12.94.

[3] See P. van Dijk, F. van Hoof, A. van Rijn, L. Zwack, *Theory and practice of the European Convention on Human Rights*, 4th edition, Intersentia, Antwerpen-Oxford, 2006, pg.665.

[4] See G. Cohen-Jonathan, *Respect for private and family life*, in R.St.J. Macdonald, F. Matscher, H. Petzold, *The European System for the Protection of Human Rights*, Dordrecht: Nijhoff, 1993, pg.405 and the followings.

[5] See Fr. Sudre, *Dreptul european şi internaţional al drepturilor omului*, Polirom PH, 2006, pg.315; C. Bîrsan, *Convenţia europeană a drepturilor omului. Comentariu pe articol*e, vol. I, *Drepturi şi libertăţi*, All Beck PH, Bucureşti, 2005, pg. 600.

[6] See E. Tanislav, *Ocrotirea penală a dreptului la intimitate*, Revista de Drept penal nr.3/1998, pg.42-53.

[7] See V. Stati, *Ocrotirea penală a dreptului la viaţă privată în Republica Moldova*, Revista de Drept penal nr.3/2006, pg.146-157.

[8] See: ECHR, judgement of 6 February 2001 case of Bensaid versus The United Kingdom; ECHR, judgement of 29 April 2002 case of Pretty versus The United Kingdom; ECHR, judgement of 20 March 2007, case of Tysiac versus Poland.

court considered that it is not possible and neither necessary to give an exhaustive definition to the concept, because its content changes according to various factors (for instance: the period of time it refers to, the society in which the individual spends his life). The Court considers that private life can not be limited only to the inner circle where a person lives his life the way he wants and from which he excludes the exterior world, but, to a certain extent, it also includes the individual's right to build relations with his fellow men, thus there is no major reason for eliminating professional or business activities. In other words, there are areas of interaction between a person and the others, even in a public environment, which can be included in the concept of private life[9]; similarly, data of public nature referring to an individual can also be considered as part of private life, in case they are collected and systematically stored in the records of public authorities[10]. Likewise, the right to respect for private life also comprises the right to its confidentiality[11], the right to the individual's physical and moral integrity[12], including sexual life, the right to information regarding his own or his parents' identity[13], the right to rest in his own house[14], the right to one's own image[15], the right to act in a certain manner[16].

There is an interrelation between private life and the inviolability of correspondence, meaning the right of one person to communicate his thoughts using any means[17] – verbal, letters, telegrams, fax, telex, pager, phone, e-mail, SMS, and MMS – without being known by third parties or censored. CEDH jurisprudence presents a wide range of cases on this matter[18]. The protection of the individual's correspondence is so strong that the Court considered a breach of Article 8 of the Convention when the authorities taped the telephone conversations in which the subject allegedly instigated to murder[19] or the case when the subject admitted he was dealing in drugs[20].

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[9] See: ECHR, judgement of 25 June 1997 case of Halford versus The United Kingdom; ECHR, judgement of 25 October 2007 case of van Vondel versus Olandei.

[10] See: ECHR, judgement of 27 October 2009 case of Haralambie versus Romania.

[11] See: ECHR, judgement of 29 March 2000 case of Rotaru versus Romania; ECHR, judgement of 6 June 2006 case of Segersted-Wiberg and others versus Suediei.

[12] See: ECHR, judgement of 16 June 2005 case of Storck versus Germany.

[13] See: ECHR, judgement of 13 February 2003 case of Odièvre versus France.

[14] See: ECHR, judgement of 7 August 2003 case of Hatton versus The United Kingdom.

[15] See: ECHR, judgement of 28 January 2003 case of Peck versus The United Kingdom; ECHR, judgement of 17 July 2003 case of Perry versus The United Kingdom; ECHR, judgement of 24 June 2004 case of von Hannover versus Germany; ECHR, judgement of 11 January 2005 case of Sciacca versus Italy; ECHR, judgement of 24 February 2009 case of Toma versus Romania.

[16] See: ECHR, judgement of 18 January 2001, case of Chapman versus The United Kingdom.

[17] See: ECHR, judgement of 22 October 2002 case of Taylor-Sabori versus The United Kingdom.

[18] See: ECHR, judgement of 21 February 1975 case of Golder versus The United Kingdom; ECHR, judgement of 25 March 1983 case of Silver and others versus The United Kingdom; ECHR, judgement of 24 April 1990 case of Huvig versus France; ECHR, judgement of 24 April 1990 case of Kruslin versus France; ECHR, judgement of 30 August 1990 case of Fox, Campbell and Hartley versus The United Kingdom; ECHR, judgement of 25 March 1992 case of Campbell versus The United Kingdom; ECHR, judgement of 25 March 1998 case of Kopp versus Switzerland; ECHR, judgement of 20 June 1998 case of Schönenberger and Durmaz versus Switzerland; ECHR, judgement of 23 September 1998 case of Petra versus Romania; ECHR, judgement of 4 June 2002 case of William Faulkner versus The United Kingdom; ECHR, judgement of 24 October 2002 case of Messina versus Italy; ECHR, judgement of 5 November 2002 case of Allan versus The United Kingdom; ECHR, judgement of 19 December 2002 case of Salapa versus Poland; ECHR, judgement of 29 April 2003 case of Poltoratskiy versus Ukraine; ECHR, judgement of 3 June 2003 case of Cotleț versus Romania; ECHR, judgement of 11 January 2005 case of Musumeci versus Italy; ECHR, judgement of 20 December 2005 case of Wisse versus France; ECHR, judgement of 30 January 2007 case of Ekinci and Akalin versus Turciei; ECHR, judgement of 26 April 2007 case of Dumitru Popescu versus Romania; ECHR, judgement of 4 October 2007 case of Năstase-Silivestru versus Romania; ECHR, judgement of 1 July 2008 case of Calmanovici versus Romania; ECHR, judgement of 21 April 2009 case of Răducu versus Romania.

[19] See: ECHR, judgement of 23 November 1993 case of A. versus France.

[20] See: ECHR, judgement of 12 May 2000 case of Khan versus The United Kingdom.

Both private life and the right to privacy of correspondence are strongly connected to a person's home[21]. According to the case-law of the European Commission, home is an autonomous concept, which is not limited to the meaning given by the civil law; in order to consider a certain area as home we have to take into consideration the real circumstances of each cause, and considering a sufficient and continuous connection with a certain place[22]. „Home" is usually the defined physical area where a person can live his private or family life, including secondary residences, vacation houses[23], a parcel of land in a nomad destined area[24], but, through extension, it is also the place where a person's professional activity is conducted. The headquarters and bureaus of a company[25] can also be regarded, within certain limits[26], as home.

II. Penal protection of private life in Romania. The New Criminal Code of Romania (NCC)[27], passed by Law No 286/2009, brings a significant improvement to the area of means of protection of the individual's private life, both by introducing new incriminations (violation of private life, violation of professional office, harassment), as well as by rephrasing some of the already existing incriminations (violation of home, disclosure of professional secrecy, violation of the secret of correspondence, illegal access to IT system, illegal intercepting of a IT transmission of data, unauthorized transfer of IT data). In respect to the formal systematization, yet, we note that, although these actions harm in a certain way a person's intimacy, they are not totally stipulated under the chapter "offences against the inviolability of home and private life" (chapter IX, Title I, Special Book). Thus, we find again "harassment" under the chapter destined to "offences regarding the obligation of helping those endangered", violation of the secret of correspondence is part of the category "offences relating to working", while other offences are grouped under Chapter VI ("violation of the security and integrity of IT systems or data"). We consider that such systematization was chosen because of the complex specialized judicial object of these offences, the social values and relations protected by the law being, at the same time, part of a lot of fields that the legislator had in mind.

We shall make a short presentation of the novelties brought by the NCC on this matter, generally, approaching a systematization in respect to that part of private life, which is mainly protected by the criminal rule, as follows: the protection of intimacy, the protection of correspondence, the protection of home.

II. 1. The protection of intimacy. We have grouped here the aspects regarding the offences against privacy, the disclosure of professional secrecy and harassment and illegal access to IT system.

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[21] See: ECHR, judgement of 6 September 1978 case of Klass versus Germany.

[22] See: ECHR, judgement of 25 September 1996 case of Buckley versus The United Kingdom; ECHR, judgement of 24 November 1986 case of Gillow versus The United Kingdom; ECHR, judgement of 18 November 2004 case of Prokopovich versus Rusiei.

[23] See: ECHR, judgement of 31 July 2003 case of Demades versus Turciei.

[24] See: ECHR, judgement of 27 May 2004 case of Connors versus The United Kingdom.

[25] See: ECHR, judgement of 16 December 1992 case of Niemietz versus Germany; ECHR, judgement of 25 March 1998 case of Kopp versus Switzerland; ECHR, judgement of 16 April 2002 case of Société Colas Est and others versus France; ECHR, judgement of 13 November 2003 case of Elci and others versus Turkey; ECHR, judgement of 28 April 2005 case of Buck versus Germany; ECHR, judgement of 27 September 2005 case of Petri Sallinen and others versus Finland; ECHR, judgement of 16 October 2007 case of Wieser and Bicos Beteiligungen Gmbh versus Austria; ECHR, judgement of 7 October 2008 case of Mancevschi versus The Republic of Moldova. Following this case-study, the Western doctrine (See J.F. Renucci, *Traité de Droit Européen des droits de l'homme*, Librairie Générale de Droit et de Jurisprudence, Paris, 2007, pg.264) noted there is a consecration of "commercial private life".

[26] See: ECHR, judgement of 6 September 2005 case of Leveau and Fillon versus France. The European court decided that exploitation specialized in pigs breeding, sheltering several hundreds of animals, is not part of – even by extention – the concept of home.

[27] Hereinafter refered to as NCC.

Violation of privacy (Article 226 NCC). This incrimination can not be found in the Criminal Code of 1968. The source of inspiration for the Romanian legislator was the legislations of Western states[28].

The NCC regulates the offence relating to the violation of privacy in a standard, aggravating and absorbed form.

In a standard form, the offence consists in unlawfully harming one person's privacy, by taking, catching or recording the picture of a person, by wiretapping or recording a person who is on a private place, room or one of its auxiliary building or a person's private conversation.

Speaking about the external element (actus reus), the material element for this offence is the act of harming a person's private life, namely to injure, hurt, and prejudice one's own intimacy. From a ruling prospective, the material element can be accomplished by the following means:

a) taking, catching or recording pictures of a person.

Taking pictures refers to the operation through which, using a certain device designed for this purpose or that has a technical function for this purpose (for example, a mobile phone), based on certain procedures specific to optic laws, an image is put on a paper, photographic board, photosensitive tablet or on a photographic film.

To catch pictures means to intercept visual representations, using certain technical means.

Recording pictures means to impress, through electromagnetic methods, visual representations on certain data storage devices (magnetic tape, photosensitive film, etc.). The operation of recording not only implies catching but also saving, storing the pictures. Therefore, recording pictures always implies their catching, but the reciprocal is not valid; we can have an operation of catching a visual representation, but without having it recorded (for example, the subject, unlawfully, acquires and visualizes, with the help of such technical means, pictures of the victim staying in his own home, but he does not saves them by recording).

The three ruling means of the material element are alternative, thus committing any of them constitutes an offence. If the subject commits the act resorting to two or three means, there shall be one single offence.

The doctrine[29] has, reasonably, noticed that the act of tacking a picture or filming a home or a private room is not an offence, but it is required that the act aims at a person being in one of these spaces. Yet, we ask ourselves if the reason and spirit of this regulation – the protection of the individual's intimacy – should not have needed a wider incrimination, which could cover other

[28] For example, according to Article 201 of the German Criminal Code, constitutes a crime against a person's confidentiality the act of the offender who unlawfully: (1) records on tape the conversation of another person on a private place; (2) uses or gives to another person such a recording; (3) wiretappings with the help of a device to intercept the discussion of another person on a private place; (4) turns to the public, in order to jeoperdize another's person interests, the text or the content of other people's conversation, that he recorded as above. Article 226-1 of the French criminal code, punishes the person who, willfully, by any mean, harms another the intimacy of a person's private life: (1) by intercepting, recording or transmitting words uttered in confidential or private circumstances, without the consent of their speaker; (2) taking, recording or transmitting the picture of a person who is within a private place, without the consent of the person concerned. Article 226-2, same Code incriminates the act of keeping, bringing or causing to be brought to the knowledge of the public or of a third party, or the use in whatever manner, of any recording or document obtained through any of the actions set outunder Article 226-1. Article 226-8 also sanctions to the publication by any means of any montage made that uses the words or the image of a person without the latter's consent. On its turn, the Spanish criminal Code (Article 197-1) incriminates the act of a person who, in order to find out the secrets or to violate the intimacy of another person, without his consent, intercepts his communications or uses the means of wiretapping, recording or reproducing of sounds or images or any other signal of communication. Also the Italian Criminal Code sanctions, under Article 615 bis. (1) the person who, using the instruments for video or audio recording, illegally procures information and images that harm a person's private life who is on private places or one of its auxiliary buildinges. The law also punishes the person who brings to the knowledge of the public or broadcasts, regardless of the means, the information or images obtained by those means.

[29] See V. Dobrinoiu, N. Neagu, *Drept penal. Partea specială. Teorie şi practică judiciară*, Universul Juridic PH, Bucureşti, 2011, pg.176.

hypothesis too, when the right to privacy is violated. For example, we consider that a significant harm to intimacy is also made by the act of recording pictures from inside the victim's house, when he is not present, by filming certain personal use staff, indicating a certain sexual orientation (homosexual relations). Such an offence does not fulfil the constituting elements of the offence in question, although it obviously harms the individual's private life. Or, *ubi ratio este, idem est jus*. One could argue that the perpetrator will be hold responsible for home violation, but we find this argument not functional in all the cases. For example, when, with a telephonic approval of the victim, who is outside the city, a neighbor breaks his door in order to turn off the water, which out of negligence, had been left running and there was a risk of flooding; if the neighbor, out of curiosity, exceeds the approval given by the homeowner and films his bedroom, the offence does not constitute a violation of home and neither of privacy.

Thus, we assess that a form of incrimination that answers adequately to the necessities to protect the individual's intimacy, was postulated under Act No 301/2004, which has not been enforced[30] yet. Thus, Article 209 from this law punishes "the violation of a person's right to private life by using any means of remote interception of data, information, images or sounds from inside the places noted by Article 208 point 1 (*namely a dwelling, room or one of its auxiliary buildings – author's note*, *R.S.*), without the consent of the person that uses them or the law authorization". We consider, *lege ferenda,* that the text of Article 226 NCC should be rethought to cover also the hypothesis of unlawful recording of images from a dwelling, room or one of its auxiliary buildings, even when the person is not at home, if this act harms his private life.

The doctrine[31] also considered that, although the law does not stipulate, the protection is also extended to the enclosed area surrounding the victim's residence and which is enclosed. We are reluctant to this point of view, as – according to our opinion – such a hypothesis is stipulated by the incrimination rule. If the law had intended to mention the enclosed area too, it would have done it explicitly, just as in the case of violation of home. Yet, it is undoubtedly that the legislator's choice is questionable, as, for example, a person's intimacy is harmed in the same way as when he is unlawfully filmed in his courtyard, not only when he is inside the house. An individual's private space does not end at his home door. On the other hand, we do not see the reason for which the act of unlawfully entering an enclosed area of a person's residence, even when he is not at home, constitutes an offence, (the violation of home), and the act of filming[32] a person in his own courtyard does not constitutes an offence. We need to mention that if the acts of taking pictures or filming a person who is on enclosed area representing an auxiliary building do not constitute the of offence of violation of private life, it can still constitute the offence of harassment (they can represent actual means through which the action of observing a person occurs, under the provisions of Article 208 NCC), under the condition that this action is repeated and causes the victim to fear.

b) wiretapping or audio recording

Wiretapping means to seize or overhear sounds, and to record means to fix, impress on a data storage devices sound representations.

These acts regard either simple sounds, or private conversations. Yet, the provisions under Article 226 NCC do not protect all types of private communications, but only direct, verbal ones shared by two or more persons (the so-called indoor conversation). Although private, the communications through technical means (for example, using a telephone) enjoy the protection established by the incrimination of violation of the secret of correspondence, and specifically

[30] Law No 301/2004 – The Criminal Code was revoked (before its entrence into force) by Article 446 point 2 NCP. For details, See G. Antoniu, *Noul Cod penal. Codul penal anterior. Studiu comparativ*, All Beck PH, Bucureşti, 2004, pg.77.

[31] See V. Dobrinoiu, N. Neagu, *op. cit.*, pg.176.

[32] The issue is related to the acts of taking, catching or recording images, and not to the acts of audio recording of a private conversation that – as we shall present below – is incrimnated regardless of where it is held.

stipulated under the provisions of Article 302 point 2 NCC. Our conclusion is also confirmed by the verb used by the legislator to designate the material element of the external element; Article 226 point 1 NCC refers to "wiretapping", and not "intercepting" (as it is the case of the violation of the secret of correspondence)[33], the latter being specific to technical means of remote communication.

There are several substantial requirements associated to these means of the material element. Firstly, overhearing sounds or conversations is an offence only when is committed through technical means (tape recorder, recorder, etc.). Merely listening to a conversation held inside a dwelling (for example, by keeping the ear close to the separating wall) does not constitute an offence.

Secondly, the act can be associated to either the sounds uttered by the victim or, depending on the situation, the conversations he has inside a dwelling, room or one of its auxiliary building, or private conversations. There are certain differences between the two hypotheses.

Thus, on the one hand, the law protects against the unauthorized interferences all the sounds and conversations that a persons makes within his private space. Taking into consideration the indissoluble connection between a person's private life and home, we can state that the legislator, implicitly, admits a presumption of confidentiality over all that happens inside the individual's private space, a presumption equally originating both in the special nature of this place and in the fundamental principle of the inviolability of home (Article 8 of ECHR and Article 27 of the Constitution). In terms of private space, in the case of the offence relating to the violation of private life, the law has in view the dwelling, room and its auxiliary building, except for the enclosed area around it.

On the other hand, all the other conversations that the individual has outside his home or his room or outside their auxiliary buildings are protected, under the condition of having a private nature. By the following phrasing, in a rather redundant manner, „ wiretapping […] or audio recording of a person who is in a dwelling or room or one of its auxiliary building *or* of a private conversation *(our note – R.S.)*"; the legislator intended only to emphasize that the concept of private conversation is a wider category compared to the conversation held in a private space. It is a part to whole type of relations. Practically, the protection of the criminal rule extends not only to the conversations inside one's own home, room or auxiliary building, but also to the private conversations that the individual has outside these places, regardless of the place, whether in another person's private place, or just in a public place. For example, it shall constitute an offence the act of, unlawfully, audio-recording a private conversation held in the courtyard of the residence (an area, which, under the strict meaning of Article 226 point 1 NCC, is not a private space).

The Romanian legislator thought it necessary to resort to this type of phrase construction of text considering that, in absence of a legal definition of the private conversation, doctrine has outlined two theories (criteria) to distinguish the concept[34]. Thus:

- the theory of the privileged place, specific to the British law. According to this theory, the nature of a conversation exclusively depends on the place where it is held. Consequently, we shall have a private conversation only if it is held in a private space;

- the theory relating to the nature of communication, specific to the American and French legislation. According to this theory, in order to classify a conversation as private, the stress does not fall on the place where it is held, but on the corroboration of two elements – the mental element (mens rea) and the external element. The mental element is represented by the subject's expectation

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[33] We are reluctant to the author's opinion (Al. Boroi, *Drept penal. Partea specială*, C.H. Beck PH, Bucureşti, 2011, pg.145) who considers that the material element of this crime is rendered by "the use of means of interception", defined as means by which one can "catch and control a *telephonic conversation, a correspondence*" *(author's note – R.S.)* between two persons […] that can be secretly palced in the room where the conversations are to be wiretapped, *either insdide the telephone, or on a telephonic line (author's note – R.S.)*".

[34] See, for details, E. Tanislav, *Protecţia penală a dreptului la intimitate în perspectiva noului Cod penal*, pg.123-125; Al. Boroi, M. Popescu, *Dreptul la intimitate şi la viaţă privată. Elemente de drept comparat*, Dreptul nr.5/2003, pg.163-165.

that the conversation is known only by his partner, and the external factor consists in the reasonable nature that this expectation must have considering the dominant rules of society.

The Romanian legislator has provided efficiency to both criteria. The theory of the privileged space received an answer through the incrimination of the act of wiretapping and of audio-recording a person being inside a dwelling, room, or one of its auxiliary buildings. Nonetheless, the theory of the nature of communication was enforced by incriminating wiretapping or audio-recording of any other private conversations than those held in one's own private space. For example, the act of someone who, unlawfully, records a private conversation of the victim with a third party in a theatre loge, in a restaurant booth, on a bench in the park, on the street, in a vehicle shall be punished; thus we notice that public places are also taken into consideration, but the accent falls under the confidentiality of the conversation.

The difficulty emerges when trying to establish how the defendant, in a concrete situation, identifies whether a conversation is or is not private. This, because the law has to be predictable so that the subjects to whom it refers can adapt their behavior to the rule stipulated by the incriminating rule. In public places, people behave differently: some whisper, others speak loudly, some hide, others would try to impress even by speech. For example: two young lovers fight, loudly, on a bench in the park; at a family reunion, at a table in the courtyard, some persons talk fiercely about certain events from the lives of the participants. Are the passers-by authorized to record these talks? Or, is the producer of a TV show authorized to record the talks between a cheated wife, the adulterine husband and his mistress, who are observed in public, if only the wife (who had phoned the so-called detective) had consented to that?

The answer to this problem derives from the provisions of Article 226 point 4 letter b) NCC, according to which there is no offence if the victim explicitly acted with the intent to be seen and heard by the offender. The text reveals, *per a contrario,* that an unlawful recording of a private conversation constitutes an offence in all situations when the victim was apart from any intention to be heard by others or, if such an intention existed, but it was not clearly expressed. Analyzing the entire construction of the Article 226 NCC, we assess that the provisions stipulated under point 4 (including those under letter b) have the status of exceptions from the general rule, namely the private nature of any conversation. Consequently, we believe that the legislator implicitly uses a relative presumption of confidentiality of any communication between two or more persons.

Thus, as we mentioned above, Article 226 NCC protects all the conversations of an individual in his private space, namely his home, room or one of its auxiliary buildings, as well as all the confidential conversations made outside this space. We note that the obligation imposed by the criminal law – not to wiretap or record private conversations on tape – has *erga omnes* effects, thus applying not only to third parties, but also to the participants in the conversation. Moreover, the act of the subject who unlawfully records a conversation, to which he is part of, shall constitute an offence. This conclusion is deduced by interpreting the provisions of Article 226 point 4 letter a) NCC, according to which the act of a person who attended a meeting together with the victim when sounds, talks or images, were registered, it shall not be a offence, but not under any circumstances, except the case when the subject justifies a legitimate interest. At first glance, such an area of incrimination is superfluous, because a recording is nothing but an exact fixing of an audio representation on a special device. Whether it is obvious that the recording made by a third party, who was not accepted to take part in the conversation between other two persons, is consider to be a violation of the privacy of those two, it seems more difficult to identify the reason for which the recording made by one of the participants in a conversation, even without the consent of the other, was categorized as an offence, and when the collected information is not further disclosed, disseminated, reported or transmitted to others (the problem, under these circumstances, also refers to taking, catching or recording images). The conversation itself, being a private one, involves sharing certain elements of intimacy that the allegedly victim is willingly and consciously revealing to the allegedly offender. One could claim that recording such a conversation does not harm intimacy anymore than the victim himself through

his confessions. However, we believe that the criminal rule is welcomed, the legislator's object being, probably, to provide the individual with a strong form of protection against those who, under a pretense friendship and by taking advantage of what the victims is telling, sometimes in cases of emotional vulnerability, turn the life of the victim into a subject of public controversy, deepening his suffering. For such a "friend", recording the confessions of the victim constitutes "the supreme evidence", an "excitement", it represents the proof that the subject is real; further more, it protects him from the scepticism of the public (what else than the voice of the victim could be more convincing?)

Postulating that this was also the legislator's reasoning, we consider that further on the discussion must concentrate on the fairness of some authors' opinion who state that "if the images are recorded, the taken pictures or the audio or visual recordings are kept only for personal purpose, without being disclosed to somebody else or to the public, the constituent elements of this offence are not accomplished[35]". The law makes a distinction not in respect to the destination of the images, pictures or recordings, but to whether the offender (who took part in the meeting with the victim) justifies or not a legitimate interest. We would rather assess that, if the circumstances of the case do not reveal that the recordings, pictures or images had been destined to disclosure, dissemination, reporting or transmission to others or to the public, it is unlikely to prove whether there was an intention to harm the victim's private life, thus the act shall not be an offence due to the failure of accomplishing the conditions of the mental element.

In respect to the problem of unlawful wiretapping or recording conversations, we note that – according to our opinion – there shall be as many offences as participants in a conversation, even if the action of the offender is single. Thus, if the agent recorded a private conversation in which three persons participated, there are three distinct offences, which constitute an ideal concurrence. This is due to the fact that, on one hand, private life, as a social value, has an absolutely personal nature, even when intimate issues are shared to others, and on the other hand, criminal law protects each person's private life, and not the private life. However, we must notice that these offences can be committed in different ruling means. Thus, if somebody unlawfully records a conversation held by a person with his guest inside his home, the offence is represented by the act of recording a person in his home for the homeowner, and the offence of recording of a private conversation for the partner.

The aggravating form of the offence of violation of private life refers to unlawful disclosure, dissemination, reporting or transmission of sounds, conversations or images to another person or to the public, according to the provisions of point 1.

To disclose means to publicize, to reveal; disseminating signifies the spreading, propagation of sounds, conversations or images; to report means to present, show, expose them; and to transmit signifies to communicate, to let the others know about those sounds, conversations and images. All these acts represent the activity of the subject who divulges issues concerning a person's intimacy to unauthorized persons.

The object of these acts is represented by illegally obtained images, sounds or private conversations. The text of Article 226 point 2 NCC explicitly postulates: unlawful disclosure, dissemination, reporting or transmission must refer to sounds, conversations or images *"provisioned under point 1 (author's note – R.S.)"*, those that were unlawfully taken, caught, wiretapped or recorded. If the images and conversations that were recorded are unlawfully divulged, certain particularities are encountered. Thus:

- if the active subject holds a certain profession or position that allows him to know personal secrets, he has, at the same time, the obligation to preserve the confidentiality of these data, the act

[35] See P. Dungan, T. Medeanu, V. Pașca, *Manual de drept penal. Partea specială*, Universul Juridic PH, București, 2010, vol. I, pg.253.

constituting disclosure of professional secret. (Article 227 NCC). For example[36], if a private conversation was recorded by the law enforcement agency on the bases of a judicial authorization[37]. We consider such a solution to be correct also considering the modification of the legal content of the offence relating to the disclosure of the professional secret, since the legislator has abandoned the condition according to which the information had to be "entrusted" to the offender;

- if the offender is any other person, who illicitly intercepted or recorded sounds, conversation or images, the act does not constitute an offence, as it is not stipulated under the criminal law. We regret such oblivion of the legislator. We do not consider the arguments to be pertinent when stating that an unlawful recording of indoor images or private conversations harms intimacy, whilst the unlawful disclosure to the public of some illegally obtained images could not render the same effect. What is the difference, for example, between the situation in which a private event (for instance an onomastic celebration) is unlawfully filmed by an intruder, through the window and then disseminated to the public, and the situation in which one of the attendees films the event with his mobile phone, having the others' consent, and then publishes the film on the Internet, although lacking the others' consent? The same problem also rises in the case of unlawful disclosure of indoor conversations legally recorded. We shall demonstrate, when analyzing the offence relating to the violation of the secret of correspondence that the aggravating form of this act (Article 302 point 4) does not refer to this type of conversations. We consider that not incriminating these acts is a significant loophole for the system of protection of the individual's private life, as it is obvious that they can seriously harm private life. Otherwise, we believe that it is hard to explain the reason for which the NCC incriminates the act of audio-recording of a conversation by one of the participants, without the consent of the other and without a legitimate interest, but it does not incriminate the unlawful disclosure of the content of such a conversation, if it was legally recorded.

For these arguments, to which we add those to be discussed under the section of offence relating to the violation of the secret of correspondence, we propose that the rule provided by Article 226 point 2 NCC is completed, as follows: "unlawful disclosure, dissemination, reporting or transmission to another person or to the public, of sounds, conversations or images stipulated under point 1, *legally or illegally collected,* is punished […]".

According to the law, the disclosure, dissemination, reporting or transmission must be communicated either to the public, or to "another person", namely to a third party. If the perpetrator reports the recording exactly to the persons that had the conversation, the act does not constitute the content of the aggravating form, and there shall be a concurrence of the offence regarding the violation of private life in its standard form and another offence (for example, assault – Article 206 NCC; extortion – Article 207 NCC).

The actions of taking, catching or recording images, wiretapping, audio-recording, and also the actions of disclosing, disseminating, reporting or transmitting sounds, conversations or images have to be made unlawfully, in other words illegally. Therefore, the actions of video, audio or

[36] Another example can be identified in a non-penal law containing criminal provisions. Thus, according to Article 21 Law No 51/1991 regarding Romania national security, the information related to the private life, honor or reputation of the persons incidentally met during the course of collection of data for national security, can not be brought to the knowledge of the public, and the, illegal disclosure or use of this information by the employees of secret services is a crime and is punished by imprisonment from 2 to 7 years (the text is written as it was put forward for change by the project of the Law for the enforcement of the Criminal Code, as it can be found on the site: www.just.ro, 29.01.2012). As it is the case of data obtained during the process of collection of information necessary for national security (therefore, including audio recording operations of indoor private conversations), therefore a licit process, it means that the unlawful disclosure of legally collected information related to private life by the employees of the secret services, constitutes a crime.

[37] For this case, the disclosure of the professional secret could form an ideal concurrence with the disclosure of confidential or non-public information (Article 304 point 1 NCC) or compromising justice interests (Article 277 point 2 NCC).

photographic surveillance do not constitute an offence if made by the law enforcement agencies, as a special technique of surveillance or investigation authorized by the judge for rights and freedoms (Articles 138-139 of the New Code of Criminal Procedure) or in case of a house search (Article 159 point 12 of the New Code of Criminal Procedure).

The absorbed form of the offence regarding the violation of private life is represented by the act of unlawfully placing technical devices of audio or visual surveillance in order to commit the acts pursuant to point 1 and point 2. Placing technical devices for audio or visual recording represents the action of laying, putting, fixing, and installing together with its result. We consider that this equipment must be functional, able to capture sounds or images, regardless of the fact it actually functions or not.

In this case, there are certain preparatory acts necessary to commit the offences pursuant to the standard or aggravating form of the offence, which however, according to the legislator's will, were incriminated as independent and were more seriously punished than the scope-acts themselves. The problem rising is whether there is only one offence or one concurrence, in case a scope-offence was committed. The doctrine[38] stated that only the absorbed form of the offence is to be considered. One can argue this by postulating that if the legislator had intended that the acts constituted a concurrence, he would have explicitly mentioned it, as he had done it in other cases[39].

We consider that one can postulate a separate opinion. We find the uncommon punishing regime for the preparatory acts (even more sever than the one stipulated for the scope-act) reveals the legislator's will that, when the scope-act are committed, the acts shall constitute a concurrence of the offence stipulated by Article 226 point 1 or, depending on the situation, point 2, and the offence under Article 226 point 5 NCC. If only the absorbed form stipulated by Article 226 point 5 is reckoned, the result would be that the preparatory acts absorb the full offence. If the doctrine generally adopts the idea that the full offence naturally absorbs the intended offence and the preparatory acts (the so-called natural complexity[40]), in fact the validity of the mutual thesis has never been reckoned. However, it is hard to admit that the offence, which from an objective point of view is less harmful for the society and individual, could comprise the most severe one.

Admitting this opinion could also raise some inequities; for example, the person who placed technical means of audio-recording of a private conversation, but he failed to commit the actual recording, he would be subjected to a sanction that has the same limits as for the person who succeeded to wiretap the conversation. However, an actual harming of the victim's private life, namely what the criminal law intends to prevent, was done in the second case, and not in the first.

Likewise, if we admit this point of view, it would mean that we encourage the person to use the technical devices for audio-recording he had placed, as he is aware that his situation can no longer be aggravated. Or, the distinct incrimination of these preparatory acts has the nature of an obstacle-offence, meaning an act that – as it renders a social peril by the fact that its own commission allows the commission of another, which is more serious – is specifically incriminated to prevent the commission of the latter.

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[38] See V. Dobrinoiu, N. Neagu, *op. cit.*, pg.178.

[39] For example, for the crime of establishing an organized criminal group (Article 367 point 3 NCC).

[40] Specifically see V. Dongoroz, *Curs de drept penal*, Cursuri Litografiate PH, Bucureşti, 1942, pg.307; I. Fodor în V. Dongoroz, S. Kahane, I. Oancea, I. Fodor, N. Iliescu, C. Bulai, R. Stănoiu, *Explicaţii teoretice ale Codului penal român (citat în continuare Explicaţii)*, Romanian Academy PH şi All Beck PH, Bucureşti, 2003, ediţia a II-a, vol. I, pag.262; C. Mitrache, Cr. Mitrache, *Drept penal român. Partea generală*, Universul juridic PH, Bucureşti, 2006, ediţia a V-a, pg.265-266; C. Duvac în G. Antoniu, C. Bulai, C. Duvac, I. Griga, Gh. Ivan, C. Mitrache, I. Molnar, I. Pascu, V. Paşca, O. Predescu, *Explicaţii preliminare ale noului Cod penal*, Universul juridic PH, Bucureşti, 2010, vol. I, pg.361-362. To the contrary, see N.T. Buzea, *Principii de drept penal. Infracţiunea penală*, vol. I, Iaşi, 1937, pg.138; M. Basarab, *Drept penal. Partea generală*, Fundaţia Chemarea PH, Iaşi, 1992, vol. II, pag.348; C. Butiuc, *Infracţiunea complexă*, All Beck PH, Bucuresti, 1999, pg.21.

We believe, on the basis of these arguments, that the act of unlawful placing of technical devices to audio or video record, with the scope of violating private life, has the nature of an autonomous offence in relation to the scope-offence. It would have definitely been desirable that, from the point of view of the legislative technique, this offence had a distinct article, and not a point of the Article 226 NCC, but we consider that this legislator's "negligence" does not impede us to consider a concurrence including the instrument-offence and the scope-offence. It is in fact the solution admitted in the case of other similar situations[41].

Regardless we refer to the standard, aggravating or absorbed form of the offence, the resulting effect is a harm of the person's private life.

In respect to the mental element, the act is committed with intention, most of the time direct intention, and the oblique one can also be encountered. In the absorbed form, the culpability is only direct intention based on its scope.

The active subject of this offence can be any person who fulfils the conditions for the mental element, and penal concurrence is possible in all its three forms.

Article 226 point 4 stipulates four justifiable special causes. Thus, the act constitutes an offence under the following circumstances:

a) when the offence was committed by the one who participated in the meeting with the victim, whereat sounds, conversations and images were wiretapped, under the condition to justify a legitimate interest. The legitimate interest refers to the protection of certain important social values (for example, the offender audio records the conversation with his wife – who is confessing that she is having sexual relations with another man – can be justified by the interest to sustain the reasons for divorce);

b) if the victim explicitly acted with the intention of being seen or heard by the offender. As a premise, this justifiable cause implies that there was no meeting between the victim and the offender, as otherwise it would be confounded with the previous hypothesis. For example, this special justifiable cause can function when several high school students, seeing that on the corridor of their school, a TV coverage is shot, they start talking loudly, due to their specific rebellious behavior, about what they did in a school trip, being aware and with the intent that these conversations are caught and recorded by the technical device used by the reporter; thus they can not complain later about violation of their intimacy.

This situation excludes the offence, on grounds that the victim himself gave up the right to protection of the intimacy, thus one can not ask for more diligence from the third party. The law stipulates that the intention of the victim to be seen or heard is explicit, meaning an obvious, clear and evident behavior. The intention is explicit if any other person in the offender's place had understood the same think from the victim's behavior: that the latter intends to be seen or heard.

Another issue rises, related to this justifiable special cause, whether it functions in the form pursuant to Article 226 point 1 as well as in that under point 2. Still, we find that such a conclusion must be detailed. The content of the text implies that the victim has to behave with the purpose of being seen or heard by the offender, and not by a third party or by the public. If, on the bases of this consent, there is a justification for the act of taking pictures, filming, audio recording, one can not always claim the same in respect to the disclosure, dissemination, reporting or transmission to other persons the information obtain as such. The doctrine[42] presented the example of a woman who widely opened the window and took off her clothes looking in a provocative manner to the offender,

[41] For example, for the crime relating to the possession of instruments for the purpose of forging of values and the offence relating to forgery of coinage. Specifically see V. Dongoroz în *Explicaţii*, vol. IV, pag.351 şi pag.356; V. Papadopol în T. Vasiliu. D. Pavel, G. Antoniu, Şt. Daneş, Gh. Dărîngă, D. Lucinescu, V. Papadopol, D.C. Popescu, V. Rămureanu, *Codul penal comentat şi adnotat. Partea specială*, Ştiinţifică şi Enciclopedică PH, Bucureşti, 1977, vol. II, pg. 230-231.

[42] See V. Dobrinoiu, N. Neagu, *op. cit.*, pg.179.

who was her neighbor, and it was reasonably demonstrated that taking pictures of that woman was not an offence. We do not consider that the same conclusion can be drawn in regards to the reproduction and display of the picture in the corridor of the condominium where the victim dwells. One can but reluctantly state that, if the victim acted with the intent to be seen by the offender, who is her neighbor, she also acted with the intent to be seen by all the neighbors and that the offender has the right to show the picture he took to the neigbors. Despite this conclusion, the act of disseminating the picture shall remain unpunished (even if the special justifiable cause does not operate) because, as we previously mentioned, the NCC incriminates nothing else but the disclosure, dissemination, reporting or transmission to third parties or to the public, of the indoor images and conversations that were unlawfully recorded; or, for this example, taking pictures is not forbidden by the law, meaning it is licit. It is our opinion that this is another loophole in the protection system of the individual's intimacy stipulated by the NCC;

c) if the offender observes the commission of an offence or he supports to establish the commission of an offence. This special justifiable cause can be explained by the public interest that the protection of the criminal law over the individual's private life is not debauched into an umbrella for criminality;

d) if the agent notices acts of public interest, which are important for the life of the community and the disclosure of which brings public advantages that are more significant than the prejudice they cause to the victim. The justifiable nature of such circumstances can be explained by the necessity to keep a balance in the interaction between private and public interest, being a specific stipulation of the provisions under Article 26 point 2 from the Constitutional Law, according to which "natural person has the right to decide about himself, if he does not breach […] public order […]".

In the case of the offence relating to violation of private life in its standard and aggravating forms, the prosecution is initiated upon the complaint of the victim. This stipulation does not apply to the absorbed form, which is initiated ex officio.

Disclosure of professional secret (Article 227 NCC). The offence consists of the unlawful disclosure of data or information regarding a person's private life, which can cause harm to a person, by the one who obtained them due to his profession or position and who has the obligation not to disclose these confidential data.

In the Criminal Code of 1968, this offence was incriminated by Article 196. The NCC does not bring significant changes to the legal content of the offence, but it presents certain elements more accurately.

Thus, the generic phrase "the disclosure of certain data", which had an indefinite aspect and thus relatively uncertain, in favor of the one relating to "data or information regarding a person's private life" (for example, those regarding the individual's health, sexual orientation, etc.).

Likewise, the NCC specifies more adequately the active subject, meaning a person who accumulates two conditions: he knows the respective information due to his profession or position and has the obligation not to disclose those confidential data. In the system of the Criminal Code of 1968, the offender could also be a person to whom the information had been entrusted. Article 227 NCC does not maintain this condition, which makes us assess that the offence is committed whatsoever the active subject had known those data with the victim's consent or not[43].

For this offence, the NCC decided for a harsher punishing system than the one under the Criminal Code of 1968.

[43] On the contrary, related to the compulsion that the offenders had known the data with the consent of the victim, SeeV. Dobrinoiu, N. Neagu, *op. cit.*, pg.181.

Harassment (Article 208 NCC). This offence is not included in the Criminal Code of 1968. Similar incriminations can be encountered in foreign legislations[44].

Harassment is regulated in a standard and a mitigating form.

The standard form is the act of a person who systematically and unlawfully or without legitimate interest, observes a person or monitors his residence, professional office or other places that the victim usually attends, thus causing him to fear.

The mitigating form is the act of making phone calls or communicating through electronic devices, which due to frequency or content, causes a person to fear.

The standard form, the material element of the offence is, alternatively, represented by the action of observing a person or monitoring his residence, office or other places he usually attends.

To observe a persons – as postulated under Article 208 NCC – means to keep under observation, to lurk, monitor his behavior, programme, and life, such a manner that the victim becomes anxious and worried. We do not believe that *verbum regens* is limited only to the strict meaning of the verb "to observe", meaning only the action of walking or running after someone; in fact, the incrimination refers to keeping a person under observation, in any way. We base our opinion on the meaning of the term "to harass", meaning not leaving alone, bother, causing all sorts of displeasures.

Consequently, we consider that the material element of the external element is render not only by the offender's action of taking the same road as the victim (although they do not know each other), walking close behind him every morning, despite the fact that the victim – who notices this – changes his schedule or itinerary; or waiting and observing the victim by car, every evening when the latter leaves his working place for home; but also when, for example, the boss repeatedly gives tasks to a subordinate, forcing him to stay over, just in those days when the latter must be, due to family reasons, at a certain hour in a certain place (for example, the school where his child studies), or repeatedly and temporarily hiding objects that are indispensable (for instance, the mouse of the computer) for the victim to urgently write a paper; or ostentatiously displaying food products in the office where a certain person works, each day when the latter, due to religious conviction, fasts (for example, on Fridays), thus being the subject of his colleagues' amusement. For this reason, we consider that, unlike other authors[45], the legislator did not excluded *ab initio* the teasing gestures of the neighbors from the incrimination sphere of harassment; one must investigate, from case to case, whether such actions are the expression of a control that the offender has over the victim's regular programme. For instance, the fact that every time the victim gets ready to leave home by car, he finds the access area to the parking place blocked by one of his neighbors' car may be considered observation as stipulated under Article 208 NCC.

To monitor a certain place means to lurk, keep under control, under attention. The act of monitoring must refer to the dwelling, working place or other places usually visited by the victim. "Usually visited places" must be understood as those places where the victim regularly goes (for example, a medical office where a pregnant woman systematically goes, the faculty where a student goes almost every day, the bar where the victim meets with his friends every weekend). All theses places mentioned by the legislator – home, working place, usually visited places – define the constancies of a person's behavior, so that their observance indicate the action of keeping under observation the victim's everyday programme. We note that the law does not require that the victim is in those places at the moment when the offender commits the act of observation, this fact being irrelevant.

[44] For example, Article 222-16 of the French Criminal Law sanctions the malicious and repeted telephonic calls or the sounds that troubles the others' rest.

[45] See V. Dobrinoiu, N. Neagu, *op. cit.*, pg. 105.

Both ruling means express actions through which the offender has a certain control, even temporarily, over the victim's regular life. According to our opinion, this is the substance of the offence of harassment.

Three fundamental conditions are necessary to be fulfilled. First of all, both observing and monitoring must be repeated, which makes harassment a habitual offence. An isolated act of observation or monitoring does not constitute the content of this offence. The law claims for multiple actions (in the case of habitual offences, our judicial practice usually stops at three), made at certain time periods, thus rendering the offender's habit. A thorough investigation of the period of time between actions, but corroboration with the victim's schedule, is extremely significant in the process of establishing whether the offender has or not the victim's schedule under observation. According to our opinion, the key is not the objective period of time between the offender's actions, but whether they are regular in respect to the victim's schedule. For instance, if the victim takes the same route to his working place everyday, the offender's presence on the same route every time, can constitute harassment; likewise, the offender's appearance in front of the victim's house whenever he celebrates his marriage day. For both examples, even if the elapsed time between the material acts is obviously different (a day – a year), there is a correspondence between the offender's and the victim's behavior, thus we can talk about harassment. On the other hand, the sporadic, irregular appearance, endows a rather occasional nature to the offender's action, questioning the existence of the offence.

A second fundamental condition is that the observation or monitoring is unlawful or without a legitimate interest. The act of observing a person's moves and activities, as a special technical of surveillance or investigation used by the law enforcement agencies (Article 138 point 6 New Code of Criminal Procedure), does not constitute the offence of harassment, when it is authorized by the competent judge. Likewise, we assess as legitimate a husband's monitoring of his wife's lover, while the latter is inside, or a journalist's monitoring a dignitary about whom he possesses information of being involved in an illegal activity.

A third fundamental condition is implicit, derived from the resulting effect of the offence, which is the victim's state of fear. The actions of observation or monitoring must be known, observed by the victim[46], even if he does not know who the offender is; otherwise, they could not induce him a state of fear. Such acts do not constitute the offence of harassment, but they can obviously have criminal relevance under different circumstances (for example, repeated covert observation of the victim's everyday schedule can constitute a preparatory act for an offence of theft or robbery).

For the mitigating form, the material element is given by the action of making calls or communications through means of remote communication. The telephone call implies the action that produces a signal, usually an audio one, which indicates the intent of initiating a telephonic connection. To communicate means to reveal, transmit information; in order accomplish the content of this form of harassment, the communication must be made through means of remote communication (telephone, telegraph, mail), and not directly.

The telephonic calls or communications must be made in such a way that, due to frequency, or content, they cause a person to fear.

We agree to the opinion expressed by the doctrine[47] according to which, also in the case of the mitigating form, the offence is still a habitual one, as the law uses the plural (telephonic calls or communications). If there is only one communication that, through its content, causes the person to fear, the action does not constitute harassment, but can constitute an offence of threatening (Article 206 NCC).

We consider it useful, hereby, to stress an essential difference between the offences of harassment and of threatening. The two acts are similar in respect to the resulting effect (state of

[46] See also P. Dungan, T. Medeanu, V. Pașca, *op. cit.*, pg.158.
[47] See Al. Boroi, *op. cit.*, pg.108.

fear), but are different in respect to the material element of the external element. In the case of threatening, the action is to cause the passive subject a state of fear that harm will be done to him due to an offence or a another damaging act against him or another, whereas in the case of harassment, the state of fear is induced by the circumstances that the victim's life is the object of the offender's observation. In the first situation, the cause of fear is the direct threat coming from the offender; while in the second, there is an indirect cause derived from what might happen if the offender has the control over the victim's regular schedule. In the case of threatening, the peril for the passive subject is known (he is to suffer the offence or the damaging act that he is threatened with), in the case of harassment, the fear comes from an infinite of eventual perils due to the circumstances that the offender has his behavior under control and observation. Hence, we believe that this is also the reason for the subsidiary nature of harassment in respect to the act of threatening, thus, every time, the repeated observation of the victim is doubled by threats of committing offences, and the act shall constitute a continuous offence of threatening and not harassment. For example, when, every evening, on his way from the office back to home, the victim is observed by the offender who threatens to kill him.

The criminal punishment for the offence of harassment is different in regards to the forms postulated under Article 208 NCC. Thus, for the standard form, the penalty is 3 to 6 months imprisonment or a fine. In the case of mitigating form, the offender is liable to imprisonment from one to 3 months or a fine, if the act does not constitute a more serious offence. Such a case could be encountered when, due to the offender's repeated telephonic calls, the victim panics and thereafter commits suicide; if the offender had a clear foresight and accepts the attendant consequence, the offence is of determining or facilitating suicide (Article 191 NCC), and the law stipulates a harsher punishment.

The prosecution for the offence of harassment is initiated upon the complaint of the victim.

II.2. The protection of home. We shall refer, for this matter, to the offences relating to the violation of home and the violation of professional office.

The violation of home (Article 224 NCC). The standard form of this offence is identical to the one in the Criminal code of 1968.

The NCC has introduced a modification in respect to the aggravating form, abandoning the hypothesis in which violation of home is committed by two or more persons together. When the offence is committed by three or more persons together, this shall determine the legal aggravating circumstances under Article 77 letter a) NCC to be considered.

Another modification was also made in respect to procedural issues, thus the prosecution is initiated upon the complaint of the victim for both the forms of the offence relating to the violation of home.

Likewise, the legislator opted for a milder punishing regime, in respect to the Criminal Code of 1968, in the case of this offence.

The violation of professional office (Article 225 NCC). This offence was not incriminated by the Criminal Code of 1968; but it was stipulated under the Law No 301/2004, which did not come into force, under a similar regulation as the offence of violation of home[48].

This new incrimination is intended to protect intimacy in a working place, the commercial private life, closely tied to the professional premises – the Romanian legislator's source of inspiration being ECHR jurisprudence.

The act is incriminated in a standard and an aggravating form. The standard one constitutes of unlawful entering, by any means, in any of the offices where a legal or natural person conducts its professional activity or the denial to leave it when the entitled persons asks so. The aggravating form can be encountered when the act is committed by an armed person, during the night or by fraudulent capacities.

[48] For details, see G. Antoniu, *op. cit.*, pg.73-77.

As to the legal content, the violation of professional office is significantly similar to the violation of home. For example, the material element is represented by the same actions (the act of entering a certain place or the denial to leave it), there is the same essential condition (unlawfully), the aggravating form is similar, and the punishing regime is identical.

Several comments are necessary regarding the material object of the offence. It is the case for any of the premises where the natural or legal person conducts his professional activity.

Office generally means the place where a public institution, organization or company has its administration and conducts its activity. It is the attribute meant to place an agency within space. From a criminal point of view, the concept of office is not limited only to legal persons, and it also extends to natural persons who conduct a professional activity. It can be a place where central or local authorities, public authorities, companies, familial organizations, authorized natural persons; privateers[49] (lawyers, doctors) conduct their activities.

It is essential that the incriminated activity refers to a place where a professional activity is conducted. As long as this condition is fulfilled, it does no longer matter whether the office is a partially or totally opened space (for example, an enclosed construction site or a land demarcated by signs, from which agricultural workers harvest), if it is immobile or can be divided and moved (for example, a tent where circus rehearsals are conducted). Otherwise, the act of entering a place called office, but where no activity is conducted, does not constitute an offence: for instance, the office of the so-called "shell-companies".

We consider compulsory that the professional activity, related to the office, is a legal one. We do not consider that criminal law intended to provide protection to the spaces where, constantly, illicit activities are carried out, as the legislator can not protect what himself prohibits. Consequently, the protection stipulated under Article 225 NCC does not operate, for example, in the case of the office of an unauthorized cigarettes or fuel factory, brothels, clandestine casinos. On the other hand, we can discuss he problem of committing, associated to these places, the offence of violation of home, under the circumstances those spaces are used at the same time also as home by those involved in such activities (for example, a prostitute who lives in the same building where she receives her clients).

We agree with the opinion that the passive subject of this offence is but a natural person using the office being violated[50], even if the office is owned by a legal person[51]. The offence of violation of professional office is part of the crimes against private life, therefore it can not be otherwise analyzed but in connection with the natural persons. The incriminating form protects the individual's intimacy at his working place, and not the authority of the natural or legal person that conducts the activity inside that office, as the doctrine has stated[52].

II.3. The protection of correspondence. We consider this category includes the offences relating to the violation of the secret of correspondence, illegal surveillance of a transmission of IT data and the unauthorized transfer of IT data.

Violation of the secret of correspondence (Article 302 NCC). The act is incriminated in a standard, three aggravating and an absorbed form.

A first comment over this offence is related to the fact it was included in the chapter relating to professional offences. We find the legislator's motivation criticisable. It is undeniably that violation of the secret of correspondence, if committed by a public servant, also harms the social relations associated to the well-development of the activities and the reputation that public authorities

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[49] The protection of liberal professions is also regulated by certain specialized laws (see, as an example, Article 35 of the Law No 51/1995 on the organization and conduct of lawyer profession).

[50] V. Dobrinoiu, N. Neagu, *op. cit.*, pg.173.

[51] Other authors (P. Dungan, T. Medeanu, V. Paşca, *op. cit.*, pg.243) consider that the passive subject can also be a legal person.

[52] Idem.

and institutions ought to receive, but we consider that the key social value that is therefore harmed by this offence, especially when the offender is a public servant, continues to be the individual private life[53]. Moreover, this thesis is also valid if the offence is committed by a non-special subject. As if to deepen more the confusion, the Law of enforcement of the criminal Code (Article 245)[54] stipulates that "the provisions under Article 302 of the Criminal Code apply *regardless of them having been committed* within professional relationships or *outside of them (author's note – R.S.)*".

For the standard form, the offence is committed by unlawfully opening, taking, destroying or retaining a correspondence that is addressed to another person, as well as the unlawful disclosure of the content of a correspondence, even when this was sent opened or was accidently opened.

The offence is more serious when it is committed by unlawful interception of a conversation or communication made by telephone or by any other electronic means of communication.

In principle, these two forms of the offence have a content similar to the one in the Criminal Code of 1968, but it has been adopted a more correct systematization of the rules. Thus, the standard form of the NCC includes the ruling means related to the so-called classic correspondence (for example, letters), whilst the form under Article 302 point 2 refers to telephonic correspondence or by other electronic means of communication.

In regards to the second form, we notice – on the one hand – that the legislator refers to the communications made by any electronic means of communication, thus including by e-mail. It would have been better to avoid such a concurrence of rules, especially in the case of a comprehensive law as the Criminal Code. We consider that the offence under Article 361 NCC absorbs the offence of violation of the secret of correspondence, thus it being obvious that its special judicial object is represented not only by the social values and relations associated with the security and integrity of IT systems and data, but also with the individual private life. Likewise, even the punishing system, which is harsher than in the case of illegal interception of a transmission of IT data leads to this conclusion.

On the other hand, direct private conversations and communications between individuals shall not constitute the object of protection stipulated by Article 302 point 2 NCC. Unlawful wiretapping constitutes the offence of violation of private life (Article 226 NCC).

For the second aggravating form, the acts stipulated under point 1 and point 2 are committed by a public servant who has the legal obligation to respect the professional secret and confidentiality of the information he has access to. We notice that the NCC has limited the sphere of the active subject for this form of violation of the secret of correspondence, mentioning only the public servant[55] (as it is defined under Article 175 NCC), and not any other servants.

A third aggravating form consists of unlawful disclosure, dissemination, reporting and transmission to another person or to the public of the content of an intercepted conversation or communication, also when the offender knew about it by mistake or accidently.

We can make some interesting comments in respect to this form of the offence.

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[53] See V. Dobrinoiu, N. Neagu, *op. cit.*, pg.512. By comparison, the authors properly note that the unit of offence related to profession, it would have been more appropriate to include the offence related to the disclosure of professional secret, and not the one related to the violation of the secret of correspondence.

[54] We envisage the form existing on the site: www.just.ro, on 29.01.2012.

[55] Under the particular situation in which the active subject is an employee of an intelligence service, the right judicial regulation for this act is under Article 20 din Legea nr.51/1991, which postulates: "running, without a warrant, the activities subject to the authorization under Article 13 *(it is also the case of interception of conversations and communications– author's note, R.S.)*, except for those carried out under the situations postulated under Article 15, or exceeding the authorized warrant is punished by imprisonment from 1 to 5 years, if the act is a more serious cime". Thus because, although the offender is a public servant who has the legal obligation to respect the professional secret and the confidentiality of the information to which he has access, Article 20 of Law No 51/1991 has a the nature of a specialized rule compared to the general rule of Article 302 NCC.

Firstly, the way the legislator conceived the Article 302 point 4 NCC reveals that the law penalizes the disclosure, dissemination, reporting and transmission to another person or to the public of the content of any conversation or communication made by telephone or electronic devices, regardless of it having been legally or illegally intercepted. The content of the Article 302 point 4 makes no reference to the hypothesis under point 2, thus unlawful interceptions have not been taken into consideration. If the NCC would have intended to exclusively refer to illegal interceptions, it would have explicitly mentioned them, as it is the situation, for example, of violation of private life (Article 226 point 2 NCC incriminates disclosure, dissemination, reporting and transmission of "sounds, conversations or images *stipulated by point 1 (author's note – R.S.)*", thus of those unlawfully recorded). Consequently, the act of unlawful disclosure of a legally intercepted conversation or communication shall constitute an offence, as well as the unlawful disclosure of an illegally intercepted conversation.

Secondly, if the content of an e-mail correspondence is disclosed, we shall have the aggravating form of violation of the secret of correspondence if that specific communication was legally intercepted, and if not, we shall have a concurrence of offences (violation of the secret of correspondence in its aggravating form and the illegal interception of IT data). This is due to the fact that the chapter relating to the offences against the security and integrity of IT systems and data does not incriminate the act of unlawful disclosure of illegally intercepted IT data[56].

Thirdly, the offence of Article 302 point 4 NCC does not envisage the content of direct communications between two persons. Their unlawful disclosure can constitute violation of private life, in its aggravating form, if the conditions under Article 226 point 2 NCC are accomplished.

This issue needs a more comprehensive analysis. By analyzing the incrimination manner of illegal interception of personal conversations helps us notice that the Romanian legislator has somehow distanced from the meaning that ECHR jurisprudence consecrates to the concept of correspondence: the communication of thoughts and information by any means (verbally, by letters, telegrams, fax, telex, pager, telephone, e-mail, SMS, MMS). Inside the NCC, correspondence by means of remote communication (letters, telegrams, telephonic conversations, etc.), the elementary rule that penalizes the interception is Article 302 – the violation of the secret of correspondence; otherwise, for direct private communications or conversations, the basic text is Article 226 – the violation of private life.

We shall analyze the way the legislator regulates the issue of disclosing someone else's correspondence. As we have mentioned above, the unlawful disclosure, dissemination, reporting and transmission of the conversations and communications made by telephone or electronic means of communication, regardless of being legally or illegally intercepted, constitutes violation of the secret of correspondence (Article 302 point 4). The unlawful disclosure of the content of the recorded indoor conversations constitutes violation of private life, but only when the recording was illegally made (Article 226 point 2).

Otherwise, the new criminal law does not stipulate – in principle – that the act of unlawful disclosure of the content of an indoor conversation that was legally recorded[57]. For example, when handwriting a testament, the testator admits him being the father of a child outside marriage, in order to dissolute any eventual doubts, and he asks a friend to assist him and audio-video record him while reading the testament. He also asks him to give the tape to the legal inheritances only after his death. Not happy with his share of the fortune, the friend, before the subject's death, shows this tape to the wife of the testator, thus finding out about her husband's past extramarital affair. The act obviously harms the testator's intimacy. However, it is not stipulated as so by the penal law; the communications of the victim were recorded with his consent, thus their unlawful disclosure does not

[56] According to Article 181 point 2 NCC, IT data means any representation of facts, information or concepts in a form that can be processed in an IT system.

[57] Some exceptions were mentioned for the analysis of the crime relating to violation of private life.

constitute violation of private life and neither the violation of the secret of correspondence, as they were not made by means of remote communication.

The above mentioned hypothesis could be considered as included under the provisions of Article 302 point 4 NCC, which refers to conversations or communications, but it does not include also the rest of the phrase in point 2 ("made by phone or any other means of electronic communication"), thus not being detailed. *Ubi lex non distinguit, nec nos distinguere debemus.*

We are reluctant to this argument. The etymology of the terms used by the legislator show that Article 302 NCC has never taken into consideration the indoor conversations, and only those made by means of remote communication. In the case of violation of the secret of correspondence the adjective "intercepted" was used, being derived from the verb "to intercept", which means to detect and control a telephonic conversation, a correspondence between two persons[58]. The new criminal legislation uses the concept of "interception" only when it refers to the conversations and communications made by means of remote communication (in the case of violation of the secret of correspondence, of illegal interception of IT data transfer), whilst in the case of direct conversations between two or more persons, face to face, only the terms "wiretapping" and "recording" are used (as in the case of violation of private life). The criminal proceeding legislation adheres to the same semantics. The Criminal Proceedings Code of 1968 refers, in Article 91^1, to the "interception and recording of conversations and communications *made by telephone or by any other electronic means of communication (author's note – R.S.)*", whilst Article 91^4, refers to indoor conversations, the legislator uses only the term of recording, avoiding interception. The New Criminal Proceeding Code stipulates it more clearly: according to Article 138, not only interceptions of conversations and communications, but also video, audio or photographic surveillance are considered special techniques of surveillance or investigation. The phrase interception of conversations and communications is defined under Article 13 point 2, by referring to conversations or communications "*made by telephone, IT system or any other means of communication (author's note – R.S.)*", excluding direct (indoor) conversations, as the latter are associated to video, audio or photographic surveillance, which also means "recording the *conversations" (author's note – R.S.)*" of persons.

On the basis of these arguments, we reiterate the proposal – already postulated under the analysis of the violation of private life – that the text of Article 226 point 2 NCC is properly completed.

The absorbed form of the offence was introduced by the draft of the Law for the enforcement of the Criminal Code (Article 246 point 10)[59] and consists of unlawful possession or manufacturing of special means of intercepting and recording communications. The act is currently incriminated in a similar manner under Article 19 thesis II Law no15/1991[60].

This form is nothing but the incrimination, as a stand-alone offence, for the preparatory acts of violation of the secret of correspondence.

Several comments ought to be made regarding the absorbed form of the offence.

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[58] See Dicționarul Explicativ al Limbii Române, Romanian Academy PH, Bucureşti, 1975, pg.434. The doctrine did not give a very accurate definition of this term. Sometimes (See: V. Dobrinoiu, N. Neagu, *op. cit.*, pg.514; Gr. Theodoru, *Tratat de drept procesual penal*, Hamangiu PH, Bucureşti, 2008, ed. a II-a, pg. 414), the concept of interception was connected exclusivelly to conversations or communications made by telephone or by electronic means of communication, whilst audio recording aimed at all the conversations or communications, thus including the indoor ones. Other authors (See D.I. Cristescu, *Investigarea criminalistică a infracțiunilor contra securității naționale şi de terorism*, Solness PH, Timişoara, 2004, pg.195-197) gave a definition to the operation of interception by refering to any confidential communications made directly or indirectly by a person. Personally, we noted that this latter opinion that we adopt (See M. Udroiu, R. Slăvoiu, O. Predescu, *Tehnici speciale de investigare în justiția penală*, C.H. Beck PH, București, 2009, pg.17-18).

[59] We envisage the form on the site: www.just.ro on 29.01.2012.

[60] According to the text, which is to be abolished by the enforcement of the NCC, it shall be a crime and therefore punished by imprisonment from 2 to 7 years, if the offence constitutes a more serious crime, "illegal possession, manufacturing or use of specialized means for the interception of communications".

Firstly, we notice that the legislator atypically uses the term "communications" and not "conversations" or "communications". By communication we understand the action to communicate and its result, meaning to bring something to knowledge, inform, notify, and conversation means a talk, a discussion. Yet, the concept of communications defines the means of communication between different points or technical systems used to accomplish the action of communicating. Thus, communications represent the means through which individuals communicate (telephone, telegraph, mail, radio, electronic mail, etc.) as this is the accurate meaning of the terms, we consider it obvious that it is not the "communications" that can be intercepted or recorded (for example, it is not the telephone that is wiretapped – as we often encounter in everyday speech), but "the communications" or, depending on the situation, "the conversations", namely the communicated information (for instance, by telephonic communications). Therefore, we consider that the legislator misused the word "communications", the syntagma of "special means of intercepting or recording of communications", hereinafter referred to as conversations and communications.

Secondly, as the law does not mention the type of conversations or communications, we assess that unlawful possession or manufacturing constitutes an offence when the special means is destined to intercept or record telephonic conversations or by any electronic means of communication and also when it is destined to wiretap or record private indoor conversations. The exception is for IT devices and recordings designed and adapted to commit the offence of illegal interception of a transmission of IT data, and whose unlawful possession or manufacturing is separately incriminated (illegal operations using illegal IT devices or programmes – Article 365 NCC).

Thirdly, as the absorbed form of the violation of the secret of correspondence postulated under Article 302 point 6 NCC, has the nature of a habitual-offence (it is incriminated in order to prevent the commission of more sever offences, the unlawful interception of a conversation), we consider that it is not absorbed by the aggravating form postulated under point 2, and therefore they shall form a concurrence of offences. Certainly, we envisage the situation in which the possession and interception have the nature of relatively autonomous activities in respect to their frame time, and not the situation when, absolutely naturally, the first is comprised by the second; it is obvious that the operation of interception inherently implies the possession of special means, thus, it can not be the case of concurrence. However, it shall be concurrence when, for example, a private detective possesses such means, in his office, for a long time, using them only on certain occasions, when a client asks him so.

A particular situation is met when the unlawful possession or manufacturing regards the special means for recording the indoor conversations. Thus, if they are placed and later used, we consider it shall be no concurrence of three offences: violation of private life in its standard form (Article 226 point 1), violation of private life in the absorbed form (Article 226 point 5), and violation of the secret of correspondence in the absorbed form (Article 302 point 6).

In respect to the criminal punishment of the violation of the secret of correspondence, we note that unlawful disclosure of the content of an intercepted conversation or communication is punished more sever that the disclosure of the content of a classic communication. The situation is justified due to the ampleness of the interpersonal communication by technical means in modern society. We find it hard to understand the legislator's choice to stipulate a milder penalty for the disclosure of the content of the intercepted communication (imprisonment from 3 months to 2 years or a fine) compared to the offence relating to the unlawful interception of a conversation or communication made by telephone or by any other means of communication (the penalty being imprisonment from 6 months to 3 years or a fine). We find it very important the harm brought to private life, for example, when certain intimate information are disclosed to the public by the offender, thus the person's intimacy becoming a general subject of gossip, compared to the situation in which the offender is the only one to find about that information, when he intercepts a victim's telephonic conversation. Likewise, it is difficult understand why the legislator opted a such a penalty system for the violation

of the secret of correspondence, whilst in the case of violation of private life by audio recording of a private conversation and, respectively, by disclosing such a conversation to a third party or to the public, the penalties stipulated by the law are increasing: imprisonment from one month to 6 months or a fine relating to recording, respectively, imprisonment from 3 months to 2 years or a fine relating to disclosure.

Such an inconsistency allows us to conclude that it is a concurrence of the offence provided by point 2 and the one provided by point 4, at least for the case of violation of the secret of correspondence, if the offender discloses the content of a telephonic conversation that was unlawfully intercepted. The situation is relatively unusual as the disclosure is not possible without a prior interception, whereas the penalty requires it; thus being hard to accept that an offence stipulating a milder sanction (the disclosure) could absorb the one stipulating a more severe one (the interception).

The legislator devoted only two of the justifiable special causes specific to the violation of private life, for the violation of the secret of correspondence (if the offender notices the commission of an offence or contributes by evidence that an offence was committed or if he notices acts of public interest, which are significant to the life of the community and whose disclosure has public advantages that are more important than the prejudice caused to the victim); the other two not being compatible with the acts of interception of correspondence or of the conversations or communications made by telephone or electronic means.

From the proceeding point of view, the offence of violation of the secret of correspondence, the prosecution is initiated upon the complaint of the victim, only for the standard form; the initial text of Article 302, which excludes ex officio investigation for any form of the offence, being advanced for a modification under the Law for the enforcement of the Criminal Code.

Illegal Interception of a transmission of IT information (Article 361 NCC). The NCC copied this offence, without any modification in respect to the constituent elements, form the Article 43 of the Law no161/2003. The only distinction refers to the penalty regime, which became milder.

Unauthorized transfer of IT data (Article 364 NCC). The offence of unauthorized transfer of IT data is encountered, in an identical form, under the provisions of Article 44 point 2-3 of the Law no161/2003. Likewise, for this offence, the legislator opted for a milder punishment.

IV. Legal interference with private life. If it is compelling that the law assures a complete and adequate system of protection of the individual's intimacy, making also appeal to the coercion specific to the criminal law, nonetheless we must admit that private life is not an absolute right. Every society admits, for the general interest of its members, the legal possibility of certain public authorities to interfere in a person's intimacy, home or correspondence, related to, for example, the prevention and combat of the criminal phenomenon.

Considering the provisions of the New Criminal Proceedings Code[61], enacted by the Law No 135/2010, we further propose certain comments regarding the methods and proceedings, which are used by the judicial agencies, implying interference with the individuals' private life.

Thus, Article 138 NCPC also regulates, under the phrase of special techniques for surveillance and investigation, the following proceedings:

- interception of conversations and communications – meaning the interception, access, monitoring, collection or recording of conversations or communications made by telephone, IT system or any other means of communication, as well as the recording of trafficking data that indicate the source, destination, data, hour, dimension, duration or the type of communication made by telephone, IT system or any other means of communication;

- access to an IT system – means entering an IT system or IT data storage device, either directly, or remotely, by the use of specialized programmes or of a network, in order to look for evidence;

[61] Herinafter refered to as NCPC.

- video, audio or photographic surveillance – means to photograph persons, to observe or register their conversations, moves or any other activities;

- to locate or survey by technical means – the procedure implies the use of certain devices that determine the place where a person is at;

- to withhold, release or search mail communication – means checking, through physical or technical means, the letters, other mail communications or the objects sent or received by any means, made by the offender, suspect, defendant or any other person suspected of receiving or sending those goods from or to the offender, suspect or defendant.

These measures are taken by the judge for laws and freedoms, if three conditions are accomplished at the same time: *(i)* there is a reasonable suspicion regarding the preparation or commission of a serious crime (for example, those against national security, acts of terrorism, arms trafficking, drugs trafficking, human being trafficking, corruption[62]); *(ii)* the measure is proportional with the restraint of fundamental rights and freedoms, considering the particularities of the cause, the importance of the information or evidences to be collected or the seriousness of the crime; *(iii)* the evidences could not be collected in any other means or their collection may imply great difficulties that could jeopardize the investigation or there is a peril for the safety of people or certain valuable goods.

The measures are mandated during the course of investigation, for a period of maximum 30 days, and can be prolonged, for justifiable reasons; every prolongation must not be longer than 30 days. The total period for these specific surveillance or investigation techniques, related to the same person and the same offence, is of maximum 1 year; the exception being video, audio or photographic surveillance that, when made in private places, can not exceed 120 days.

By derogation from the above mentioned procedure, Article 141 NCPC allows the prosecutor to authorize these proceedings, if the three conditions previously mentioned are accomplished, and also in case of emergency when the time to obtain a warrant from the competent judge could lead to a significant delay of the investigation, or to a loss, impairment, annihilation of evidences, or it could jeopardize the safety of the victim, witness or members of their families. The prosecutor can institute those measures for a period of maximum 48 hours, having the obligation to inform the judge in order to obtain their validation, in a 24 hours timeframe.

Considering the intrusive conspicuous nature of such measures, the law compels the prosecutor to immediately stop the surveillance if the bases on which it was started are no longer justifiable and to inform the person in writing, in maximum 10 tens, regarding the measure taken against him. If the subject, who has been under surveillance, asks for, he has the right to listen to the conversations, communications or discussions and to see the images.

Another specific surveillance technique that implies interferences with the person's intimacy is that of obtaining the list of telephonic conversations. The measure is instituted by the prosecutor, with the previous consent of the judge for rights and freedoms.

Likewise, house search implies interference in the individual's private life. This measure can be instituted if there is a reasonable suspicion regarding the commission of an offence by a person and it is expected that the search leads to the detection and collection of evidences regarding this offence, to the preservation of the traces of the offence or to the catching of the suspect or offender. House searching is instituted by the judge for rights and freedoms, during investigations, and by the institution invested to take it to court, during the course of a trial.

The law explicitly stipulates that house search must not constitute a disproportionate interference in the private life (Article 156 point 2 NCPC). The judicial agencies that perform the search can adequately and proportionately use of force, in order to enter a house, in two situations: *(i)* for reliable reasons to anticipate armed defence or other types of violence or in case of risk of

[62] With exception, withholding, release and search of mail communications can be instituted in case of reasonable suspicions regarding the preparation or commission of any crime.

destroying the evidences; *(ii)* in case of denial or if no answer was given to the judicial agencies' requests to enter the house (Article 159 point 17 NCPC). Likewise, the judicial agency has the right to open, by force, and avoiding unjustified damages, the rooms, spaces, furniture items and other items that might store objects, documents, evidences of the offence or of the searched persons, if the possessor is absent or does not wilfully want to open them (Article 159 point 12 NCPC).

The law allows that the place and the persons or objects found during the search to be photographed or recorded on tape or film (Article 159 point 12 NCPC).

Conclusions.

A complete analysis of the provisions of the NCC allows us to assess that the system for the protection of the individual's private life has substantially improved. This is welcomed both from the point of view of the practice requirements and also in order to provide the Romanian legislation with the compatibility with the European standards in this matter, and the decision to incriminate certain acts evidently representing attacks on a person's intimacy and that happen more and more often in every day life (the violation of private life or the violation of the professional office). We shall see, in the following years after the NCC enters into force, to what extent the legislation will ensure the prevention function of the criminal law and how it will contribute to the civilizing function that any legal system ought to have for the society to which it addresses.

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TERMINATION OF RIGHT TO PREVENTIVE MEASURES

RADU MARIUS*

Abstract

Preventive measures were binding, without, however, being procedural criminal sanctions or penalties and not run counter to the freedom of the individual and does not attack the principle of presumption of innocence.They ensure the good running of the criminal process, which has led to the inclusion of modern legislation in all imprisonment by way of judicial review, as a procesuala of the most severe.Termination of right to preventive measures shall designate by virtue of which the legal situation, whether in judicial activities involved some \"incident\" which recognizes ope legis effect subject to extinctive interpretation towards preventive measures, judicial bodies are required to cease such action.

The judicial authority is obliged, therefore, to release the detained or arrested when there is one of the situations referred to in article 140 from the code of penal procedure.This study has proceeded from the need to standardise and judicial practice and the consistent application of the law in the matter of the termination of the preventive measures — as a guarantee of the respect for rights indispensable accused\/defendant in criminal proceedings.

Even if at first glance the law is clear and concise, however, judicial practice has passed different solutions, often giving the misinterpretation, and precisely why during the study I will present some of the most relevant solutions jurisprudențiale, both published and unpublished, as well as the jurisprudence of the European Court of human rights, also commenting on his own option likely controversy.In view of these considerations in the present research wish to realize a complete documentation and jurisprudențiala and doctrinara, trying to force through the comments made on the text of regulations and solutions given by courts to make a judgment necessary and useful to practitioners of law cases of cessation of the right to preventive measures.

Keywords: *Preventative measures, preventive arrest, prosecution, custody, reasonable time*

Introduction

The procedural measures are procedural penal law institutions used for the functioning of the judicial bodies in the normal and effective prosecution and judgment, their functionality is to prevent or eliminate the circumstances which hinder the realization of condițiuni in criminal proceedings[1].

Of procedural measures, including preventive measures are considered by the legislator as being the most important, having as purpose, as provided for in article 136 of the code of penal procedure, to ensure the proper conduct of the criminal proceedings and\/or prevention of theft indicted or defendant in criminal proceedings, trial or enforcement of penalty.

Preventive measures are provided for in legislation of the Romanian detention pre-trial arrest, the obligation not to leave the city and the obligation not to leave the country.With regard to these preventive measures, the code of criminal procedure reglemeteaza procedure to take roman, revoking, replacement or termination thereof.

The study that I'll develop will treat the main issues raised by the termination of the preventive measures.

The need for this study stemmed from the existence of a national uniform judicial practice, in particular as regards the provisions of article 140 paragraph 2 of the code of penal procedure, in relation to the provisions of article 159, paragraph 8 and paragraph 13 of the code of penal procedure

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[1] Nicolae Volonciu, Dealt with in criminal proceedings. The general part, vol. I, Publisher Paideea, Bucharest, 1996, p. 399.

and decision no. 25\/2008 the High Court of Cassation and Justice United Stations, rendered in an appeal in the interest of the law.

The issue was subject to analysis of the subject and other doctrinal terms, are both as a subheading in the various treaties or specialized courses of the great teachers of the criminal procedural law (Ion Neagu, Nicolae Volonciu, etc.), as well as study alone or as part of the studies published (either by theorists or practitioners) in specialised magazines relating to preventive measures.

Having regard to the numerous and erroneous solutions given in the judicial practice in cases of termination of the pre-trial detention measure, perhaps in a not very distant future, we will have a practice of the European Court of human rights which will see different criminal violation of a fundamental human right, namely the right to liberty, and which likely will condemn the Romanian State to pay damages.

The conclusions at which I got from întocmiri this study were based on both the solutions given by our courts, on the various opinions of scholars and its own analysis of the texts, regulations and cases related to the case with whom I had contact in the practice.

Perhaps, in so far as that will prove correct findings of this study will form a useful support in developing the future Code of criminal procedure.

Prevention measures are procedural penal institutions of law with binding to bind the accused or convicted person is prevented from carrying out certain activities that would adversely affect the attention upon the criminal process or on the aim of this[2].

In view of the fact that by taking measures of prevention, notwithstanding the fundamental right of inviolability of the person, the legislator has established reasonable procedural guarantees, which require strict laws that allow making the replacement, revocation or termination of these measures of procedural law[3].

Termination of right of preventive measures is a legal institution through which in the cases and under the conditions provided for by law judicial (Court or Prosecutor) have, by an order of the Ordinance, immediately putting freedom of the detained or arrested, or termination of the culprit for the accused or the obligation not to leave the place or country, and of all other obligations laid down by the judicial authority when he ordered the taking of such measures.

While revoking measures preventing is a procedural opportunity act which one judges judicial law, cessation of measures for prevention is a legal obstacle against maintaining them[4].

According to article140 of the code of penal procedure, preventive measures shall:

a. law upon expiry of the deadlines laid down by law or established by judicial bodies or at the expiry of the stipulated in article 160^{b} paragraph 1 of the code of penal procedure, if the Court has not made the verification of the legality of pre-trial and continuing in that period.

By decision No. VII\/2006, the High Court of Cassation and Justice – United Stations was considered an appeal in the interest of the law declared by the General Prosecutor of the Prosecutor attached to the High Court of Cassation and justice, on the application of the provisions of article 140 paragraf 1 of the code of penal procedure and decided that: "neverificarea by the Court during the trial, and the continuing legality of pre-trial detention of the accused staff before the meeting period of 60 days referred to in art. $160^{\mathbf{b}}$ paragraf 1 of the code of penal procedure, of the accused minor aged between 14 and 16 years old inaite the expiry of 30 days referred to in art. 160^{h}, paragraf 2 of the code of penal procedure, and of the accused minor more than 16 years before the expiry of the

[2] Grigore Theodoru, Procedural law criminal. Special part, vol. II, Alexandru Ioan Cuza University, Iaşi, Faculty of law, 1974, p. 194.

[3] Ion Neagu, Handled by the criminal proceedings.The general part, Publisher Legal Universe, Bucharest, 2008, p. 536.

[4] Ion Neagu Handled by the criminal proceedings.The general part, Publisher Legal Universe, Bucharest, 2008, p. 536.

period of 40 days provided for in, art. 160 [h], paragraf 3 of the code of penal procedure, cessation of the pre-trial detention measure taken to inculptati and putting them immediately in freedom \".[5]

Circumstance that in the judgment the measure of pre-trial detention ceased law cannot constitute a legal basis for a new arrest in the same question, where no cause during the settlement appeared new elements which would justify this measure[6].

In respect of time limits for 60 days, 30 days or 40 days, they, on the restriction of rights of the person, rights conferred outside criminal proceedings may not be substantial than some that will be calculated in accordance with article 188 of the code of penal procedure, time and date of the beginning and ending with its duration.

Imperative nature of the term result of legal text content \"check periodically, but the Court not later than 60 days ...\"; What is missing is the sanction non-compliance with current rules limit that must be terminated as the measure of arrest, other procedural penalties and forfeiture – nullity – mandatory time limits applicable in the case of having no effect in this case[7].

In practice, the Court has ordered the arrest of the accused for a period of 3 days, providing for both the end and the term of arrest, the measure begins on 18 February 2004 and expired on 21 February 2004[8].

We consider the solution given by the Court as one flawed, having regard to the provisions of article 188 of the code of penal procedure, which provide that the calculation of time limits on preventive measures, the hour or the day that begins and ends at that time in its duration.

Thus, taking into account the text of the regulations mentioned above, we find that in this matter the measure of pre-trial detention ceased as on 20 February 2004.

In accordance with article 3001 combined with article 160[b] of the code of penal procedure, where the accused is detained, the Court second seised is obliged to periodically, but not less than 60 days, the legality and appropriateness of pre-trial detention; to collate with these laws, article 140 paragraph 1 of the code of penal procedure, which stipulates that preventive measure shall cease as from the expiry of 60 days if the Court has not made the verification of lawfulness and continuing in this period, the figure in the trial so far as pre-trial detention is limited to a period of 60 days, calculated from the date of conclusion of the Court of the measure; It is theoretically possible that within 60 days of the Court to verify the appropriateness of the measure several times.

Speaking about procedural sanction in case of exceeding the deadline of 60 days in the older doctrine explained that in any event the omission will not have the consequence of termination of the measure of pre-trial detention, the penalty in this case is relative nullity according to article 197 paragraf 1 and paragraph 4 of the code of penal procedure [9].

In another opinion if it considers that the limit is exceeded the term of 60 days of detention occurs termination of verification as a preventive measure with regard to the constitutional and imperative provisions of the code of criminal procedure resulting from the topical nature of this legislation[10].

In judicial practice has raised the question of whether the measure is terminated or not arrest law where the Court of appeal or the appeal does not verify the legality and appropriateness of pre-

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[5] Official Gazette nr. 475 from 01.06.2006.

[6] The Bucharest Court of appeal, Criminal Division II, criminal decision No. 12\/2005 in Dan Lupascu, Antoneta Nedelcu, Ionut Matei, Collection of practice in criminal matters through Court -2005, Publishing House universe binding , Bucharest, 2006, p.77.

[7] Julius Caesar Dumitrescu, Arrest the accused at the stage of proceedings, in the RDP. 2\/2006, p. 91.

[8] The Superior Council of Magistracy, the 2004-2005 National Jurisprudence, ed. Brilliance, Piatra Neamț, 2006, p. 704.

[9] Mircea I Cretu, The preventive arrest.Recent legislation in the RDP. 3\/2004, p. 129.

[10] Leontin Coras, Foetus, the preventive arrest.Termination of the measure of pre-trial detention of the accused, the No. 6\/2005, p. 181.

trial detention within 60 days from the date on which the Superior Court pronounced a judgment of conviction, by maintaining the State of arrest.

Some courts have considered, wrongly, that the economy of the texts of regulations (article 23 of the Constitution and article 160^b of the code of penal procedure).

It follows that overcoming the cessation of the measure of pre-trial detention, whereas this case not provided for in article 140 and article 350 of the code of penal procedure; violation of this obligation may result not only disciplinary judge guilty of exceeding the deadline of 60 days[11], overcoming time; in the case of 60 days are incidental provisions article 185 paragraf 3 and not those of art. 185 paragraph 2 thereof, which is why the sanction of invalidity relating to article 197 paragraf 1 and 4 the convicted may be an injury caused by overdue check; injury might be interfering, before verification of grounds which would have caused the revocation of the measure[12].

Maintenance of pre-trial detention, failing to indicate a term which shall not be more than 60 days are available only up to the next term of court, to arrest verification failure next trial would lead to termination of the preventive measure for the deadline of the judicial body (article 140, paragraf 1 (a) of the code of penal procedure).[13]

Another preventative measure which may terminate by expiry of the period laid down by law or by the judiciary is retention.

The arrest can be taken as both Prosecutor and criminal investigation body or clues are reasonable for committing an offence by the accused or defendant.

The measure of detention may last for more than 24 hours, but the judicial organ and may be less than the measure of detention.

Where the judicial authority does not consider that it is necessary to take the measure of pre-trial detention, as well as in cases where the Court referred to the proposal of preventive arrest until the Fund does not decide upon the expiration of the duration of detention, then this measure, once safely on time shall cease.

Following the arrest, Prosecutor incetariii is obliged to immediately provide entry into the freedom of the detained, a conduct contrary to the provisions of articles involving the incidence of article 266 of the code of penal procedure, which funds the crime of illegal arrest and abuse research.[14]

Very short term, for which you may order forfeiture, can create, in some cases, the Prosecutor does not have the disadvantage that the material time to draft and submit a proposal for the preventive arrest of Prosecutor in a timeframe that will ensure the possibility of solving the proposed arrest warrant within 24 hours of arrest, what is the consequence of the release of the detained[15].

It is therefore necessary to formulate a rethink of the duration of the measure of detention for the purpose of increasing its length is 48 hours or 72 hours, and this is justified by practical aspects, where due to the short interval of time of detention, very often the accused or convicted person who has ceased to be capable of holding up to rule on the merits of the opportunity to take the measure of pre-trial detention, departing from the courtroom and evade prosecution and judgment although it is arrested in missing.

Crossing borders and the measures to leave the village, crossing not to leave the country-law ceases during prosecution through to arrive at a period where they are extended under the conditions

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[11] Braşov, Court of appeal, the conclusion of 12.01.2004, file No. 155\/ap\/2004 in Braşov court of appeal, Judicial practice gathering in criminal matters, 2003-2004. Criminal law.The criminal procedural law, Publisher Merona, Bucharest, 2005.

[12] Ioan Cristian Uța, Checks on the arrest of the accused during the judgment against arbitrary-warranty maintenance of preventive measure, the No. 2\/2006, p. 219.

[13] Ioan Cristian Uța, Checks on the arrest of the accused during the judgment against arbitrary-warranty maintenance of preventive measure, the No. 2\/2006, p. 221.

[14] Grigore Theodoru, Criminal procedural law. Treatise, Publisher. Hamangiu, Bucharest 2007, p. 491

[15] L.N. Pirvu, arresting during criminal prosecution against No. 3\/2004, p. 28-44.

laid down by law or by reaching the maximum period laid down by law to an accused or defendant may be forced to leave the city or country.

According to the law, the maximum duration of these procedural measures during criminal prosecution is one year, except where the penalty prescribed by law for the offence is imprisonment for life, or detențiunea for 10 years or more, in which case the maximum duration of the preventive measure is 2 years.

Whereas the rules of criminal procedure do not provide for the duration and the need to verify the legality of the measure and the determination not to leave the crossing place of the Court, concluded that emerges is that the measure of the time of judgment shall be for an indefinite period and lasts until delivery of the solution in the process; in support of this opinion, the provisions of articles we invoke article 350 of the code of penal procedure, which paragraph 1 stipulates that in its decision the Court must first rule on taking preventive measures or revocation on the grounds the solution, this obligation is valid also for the Court of appeal in accordance with article 383 paragraf 1 of the code of penal procedure[16].

In the event that the Court has not acted on the decision expressly on the maintenance or revocation action, crossing borders to leave the village, in the doctrine it was considered that this measure cease as with the pronouncement, it is accepted that the preventive measure, which in essence is repressive of indefinite duration, would haveeven beyond the date on which the procedure acts cycle ends; so far, crossing not to leave the place, when it is not replaced during revocata or judging the case, has processual cycle, and if the Court fails to pronounce the judgment adopted on this measure cease[17].

b. in the event of withdrawal of prosecutions, the termination of criminal prosecution or the termination of the criminal proceedings or acquittal;

The interpretation of the text of the law (art. 140, para. C.proc.pen.) at the stage of criminal proceedings, in the event of removal under criminal investigation or prosecution, the Prosecutor ex officio or following the information of the criminal investigation body, has an obligation to ensure the cessation of the preventive measure, for sending immediately the freedom, detained or arrested for possession of premisesa copy of the Ordinance, or an extract[18].

When the case of termination of criminal prosecution or removal under criminal prosecution of a defendant charged or arrested, the Prosecutor must decide on the termination of criminal prosecution or prosecution under the release on the same day in which he received a proposal for termination or removal from the criminal investigation body, whether the Prosecutor has ordered the cessation or removal under criminal investigationthe measure of pre-trial detention of the accused ceases, or the accused being placed immediately in freedom.

In the Ordinance of the Prosecutor shall make mention of the establishment and termination of the pre-trial detention measure, where the cessation or prosecution under criminal prosecution of a defendant charged or arrested.

Note, however, that, according to article 246 of the code of penal procedure, paragraph 2, as regards the procedure for notification about termination of criminal prosecution, provided that where the accused or the suspect is arrested, the Court shall notify by pre-emptively address the administration of the detention, to put it immediately blamed on the freedom or the culprit; therefore,

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[16] Costel Niculeanu, Opinion on the termination of the measure, crossing not to leave the place, if the Court fails to rule on the appeal in accordance with art. 350 para. 1 of the code of criminal procedure, law No. 6\/2009, p. 212.

[17] Costel Niculeanu, Opinion on the termination of the measure, crossing not to leave the place, if the Court fails to rule on the appeal in accordance with art. 350 para. 1 of the code of criminal procedure, law No. 6\/2009, p. 212.

[18] Anca-Lelia Lorincz, termination of right of preventive measures in the case of judgment and don't send in the need to adjust the provisions in this area, following the amendments introduced through law No. 202\/2010 in Law no.9\/2011, p, 213.

should be amended and 246 paragraf 2 of the code of penal procedure, in the sense that, in the event of termination of criminal prosecution or removal under criminal detention place administration finance for implementation immediately accused or indicted person freedom of the detained or arrested to be made by the Prosecutor by providing a copy of the Ordinance in which it was found the cessation of the preventive measure[19].

c. when, prior to the pronouncement of a judgment of conviction in first instance, the duration of the arrest reached half the maximum penalty prescribed by law for the offence which is the subject of accusations without being able to overcome, in the course of criminal proceedings within a reasonable period, and no more than 180 days.

According to article 139 of the code of penal procedure, total length of pre-trial detention during criminal prosecution may not exceed a reasonable period, and no more than 180 days.

Having regard to the provisions of article 140 paragraph 2 of the code of penal procedure, we appreciate that the termination of the pre-trial detention may take place and if its duration exceeds a reasonable time without touching but 180 days, being neither distinction between the two categories of maximum time limits[20].

In regards to it within a reasonable time cannot be determined in abstracto but has to be examined on a case-by-case basis depending on the specific features of it.

The time at which it starts to calculate the duration reasonable (dies a quo) is that which the person accused is detained or arrested[21].

In judicial practice has raised the question of whether or not arresting stops right in the event that the appeal against the closure of the extension of the measure of pre-trial detention in the course of prosecution are judges after expiry of the period of pre-trial detention ordered earlier conclusion.

Some courts have held that in this situation the preventive arrest never ceases.

The motivation was that in article 140 of the code of penal procedure, look what causes termination of law among them being mentioned and nejudecarii appeal within the 30-day extension of the State of detention ordered by the conclusion of recurata; If the legislator had wanted to understand the imperative nature of provisions oblige the Court of appeal to hear the appeal within a period of extension of the State of detention ordered earlier by subject to judicial review, the ought to correlate this provision with the provisions of article 140 of the code of penal procedure, the only text on this matter are limiting cases and specifically look for termination of right of preventive measures; These entries have been made per a contrario that result in the legislature did not understand to consider case of termination of the pre-trial detention measure non-recourse înlăuntrul term extension of the measure ordered by the conclusion contested[22].

By decision No. 25\/2008, the High Court of Cassation and Justice-offices-United admitted the appeal in the interest of the law, declared by the General Prosecutor of the Prosecutor attached to the High Court of Cassation and justice, on the interpretation and application of article 159, paragraph 8 of the code of penal procedure, is second sentence concerning the resolution of the appeal brought against the conclusion by which it was decided to extend the pre-trial detention ordered in the course of criminal proceedings and decided that: \"the provisions of article 159, paragraph 8 of the code of penal procedure, second sentence, shall be construed that: (1) the words

[19] Anca-Lelia Lorincz, termination of right of preventive measures in the case of judgment and don't send in the need to adjust the provisions in this area, following the amendments introduced through law No. 202\/2010 in Law no.9\/2011, p, 213.

[20] Julius Caesar Dumitrescu, Considerations relating to the duration of the measure of pre-trial detention, the No. 3\/2008, p. 208.

[21] Mikhail Udroiu, Within a reasonable time of pre-trial detention, Law No 3\/2007, p. 142.

[22] Conclusion No. 168\/R in 04.05.2011 pronounced the Court Bucharest, section II of the Penal Code in the file. 32046\/3\/2011 (with the dissenting opinion of Judge Radu and Ioana Cleopatra), unpublished.

used by the legislator \"before the expiry of the duration of pre-trial detention ordered earlier conclusion attacked\" is binding, and no recommendation;

2. appeal against the closure which has ordered the admission or rejection of the proposal to extend the measure of pre-trial detention always will be solved before the expiry of the period of pre-trial detention ordered earlier conclusion. \"[23]

According to article 5 paragraph 1 of the code of penal procedure, indicate absolution date problems as judged is compulsory for instances of the date of publication of the decision (in the interest of law) in the Official Gazette of Romania, part I.

However there were judges who have come to the conclusion that the measure of pre-trial detention shall cease as the situation.

It was reasoned that although appeals against the conclusion of the meeting declared that it was willing to extend the duration of pre-trial detention have no suspensive nature of enforcement, the solution being substantive court enforceable until the pronouncement of the Court for judicial review, this time of the superior court that was established to be the imperative before the expiry of the duration of pre-trial detention ordered earlier conclusion was taken as against the appeal, concluding that it was willing acceptance of the proposal to extend the measure of pre-trial detention was settled after expiry of the period of pre-trial detention ordered earlier conclusion that the measure was taken, was ordered to arrest the suspect stopped as recurring and should be immediately freely if not detained or arrested in another question[24].

d. in other cases specifically provided for by law according to article 350 of the code of penal procedure, the judge has immediately putting freedom of the accused arrested pre-emptively when pronouncing: a. an imprisonment not more than the duration of pre-trial detention, and b. a punishment with imprisonment with conditional suspension of the execution of the times with a stay of execution under supervision or enforcement to work fine educational measures according to paragraf 6 of the same article the Court convicted the accused and the State of ownership is liberat soon during arrest and detention are equal to the length of the sentence handed down, although the decision is not final.

The difference between the cases of article 140 of the code of penal procedure and article 350 of the code of penal procedure, that is, to produce legal effects, for the situations provided for in article 140 of the code of penal procedure, no need for an express provision of the Court to ascertain that preventive measure in cases of ceased, however, provided for in article 350 of the code of penal procedure, device resolution to obligatorily contain this provision[25].

I might add here and the case against the punishment, which applies in full pardon; this case results from all regulations relating to pardons, as a logical consequence of its application[26].

Another case of termination of the pre-trial detention measure represents a situation where, in the course of criminal prosecution or trial, following the administration of evidence takes place a change of the legal classification of the offence, and the new criminal law provides for offence or pedepasa alternative punishment of prison or fine penalty fine.

Taking into account the provisions of article 136 para 6 of the code of penal procedure, that the measure of pre-trial detention may not be ordered in the case of offences for which the law provides for alternative penalty fine, we consider that in this case the competent judicial body has the

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[23] Official Gazette nr. 372 fron03.06.2009.

[24] Ioana Radu Cleopatra, No dissenting opinion at the end. 148\/R of the Bucharest Court pronounced 20.04.2011 section II of the Penal Code in the file. 9712.4.2011, unpublished.

[25] Gigel Potrivitu, Alexandra Sibinovici, Discussions regarding some situations for termination of the preventive measures, Law nr. 6\/2009, p. 217..

[26] Ion Neagu Handled by the criminal proceedings.The general part, Publisher Legal Universe, Bucharest, 2008, p.220.

obligation to ensure the cessation of the measure of pre-trial detention and to send a copy of the Ordinance on the device or by the administration of the place of detention for the purposes of the immediately preceding the preventive arrest.

Against the conclusion that the judge shall, during the cessation of criminal prosecution as a preventive measure, the Prosecutor and the accused or the defendant may appeal to the High Court within 24 hours after its pronouncement, for those present, and from the lack of communication, for those.

Conclusion that, in the course of the prosecution, the judge rejected the request for termination of the measure of pre-trial detention is not subject to any appeal.

In this case the High Court of Justice Casatie and decided to file an appeal in the interest of the law as a conclusion of the ordering, during the criminal investigation, rejecting the application for termination of pre-trial detention may not be contested separately appeal.

Participation of Prosecutor in the judgment the appeal is mandatory[27].

The accused or convicted person arrested will be brought before the Court of appeal and will be listened to, legal assistance is compulsory.

The appeal will be examined in the absence of the accused or indicted when he was in the hospital and because of his State of health cannot be brought before a judge, and when his movement is not possible due to a State of necessity or of a case of force majeure.

And in this case, the judgment of the appeal cannot be made only in the presence of the accused\/defendant\/attorney, which gives the word to make conclusions.

Appeal brought against the conclusion whereby it was found as a cessation of the measure of pre-trial detention during the criminal prosecution is not the suspension of enforcement.

In its judgment the Court conclusion date or call ordering termination of a preventive measure may be attacked separately appeal, the accused or the Prosecutor.

Instead the conclusion by the Court or the Court of Appeal rejected the application for termination of the preventive measure is not subject to any appeal.

Appeal brought against the conclusion whereby it was found as a cessation of the measure of pre-trial detention is not the suspension of enforcement.

Having regard to the matters under examination, we appreciate that, in principle, the legal insitutia of the cessation of the preventive measures include modern regulations covering largely the multitude of situations arising in the judicial practice.

The institution has as its main Foundation to avoid abuse in which the accused or the defendant may be subject to criminal proceedings in the course of taking, extension or maintenance to the preventive measures under conditions other than those provided for by law.

Moreover, taking into account the jurisprudence of the European Court of human rights, the roman legislator inserted in the code of criminal procedure, the procedural guarantees to the accused or indicted person, able to lead us to the conclusion that the criminal process itself will take place within the limits and under the conditions provided for by law and with observance of all the principles that govern the conduct of fundamantale.

Emphasize that with the introduction of the article 140 paragraph 2 of the code of penal procedure relative to article 159 of the code of penal procedure in paragraph 13, of the notion of \"reasonable time\", the legislator has given effective roman and Romanian legislation harmonised with the provisions of the European Convention on human rights.

The main problem facing the practice court at this point is therefore that the preventive arrest is terminated or not right where the appeal against the closure of the extension of the measure of pre-trial detention during the criminal prosecution shall be judges after expiry of the period of pre-trial detention ordered earlier conclusion.

[27]ICCJ United stations, Dec. nr. 12\/2005, published in Official Gazette No. 119 of 08.02.2006.

To this aspect and taking into account the solutions which we have argued throughout the trial, we consider as a logical conclusion that is relevant and of nesesar ferenda amending article. 140 C.proc.pen., within the meaning of that provision of express the extent of pre-trial detention law ceases when the appeal against the closure which has ordered the admission or rejection of the proposal to extend the measure of pre-trial detention in the course competencies will have as a basis of settlement once duration of pre-trial detention after expiry of the previously arranged.

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THE REFERRAL BACK TO COURT IN CASE OF EXTRADITION

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Abstract
Article 522 ind.1 Criminal procedure code, governing the referral back to court in case of extradition, refers to article 405-408 provisions review applicable to appeal, but this reference is limited to retrial procedure and solutions that can be pronounced by the court.
The review procedure and the retrial procedure after extradition have a distinct finality: if the review involves removal of essential errors to the facts withheld in a final decision, the purpose of referral back to court in case of extradition is to guarantee the right of of extradited person, who was tried and convicted in the absence, to have a fair trial and, mainly, to exercise the right to defence in a new procedural cycle, which implies the possibility for the person to be heard, to question the witnesses or other parts of the process and to administer favorable evidence, both on the facts, as well as circumstantial.

Keywords *: extradition, review, trial, judgement, conviction.*

Introduction :

The extradition, as a special and incidental criminal procedure institution (concept) that frames within the criminal procedure realm, is carried out among sovereign states, and presuppose that a state also called the requested state, on whose territory there lives a person that has been investigated or prosecuted by the court authorities of a different state, called the demanding state, it extradites such person to the demanding state upon the special application of the same, for the person to be investigated and judged by the court authorities of such state or for such person to be compelled to carry out a sentence or a detention order ruled against him/her by such authorities.

By the extradition obligation undertaken by the contracting parties they undertake to mutually extradite, according to the rules and conditions provided by the Convention, the persons investigated for committing a crime or searched for enforcing a conviction or a safety measure by the law enforcement authorities of the demanding parties, such action being subject to denial if certain requirements are not complied with.

For eliminating all the inconveniences, interdictions and inabilities initially involved by the procedure of judgement by default, that entered in conflict with the provisions of European Convention on Human Rights and Fundamental Freedoms, regarding the right to defence, the right to a fair trial, the right to cross examine the prosecution witnesses and the right to be heard before the court in the criminal law trial, the European Convention on Extradition, concluded in Paris, on 13th of December 1957, when a second Additional Protocol has been added, protocol concluded in Strasbourg, on the 17th of March 1978, introducing several provisions on the judgment by default, i.e. judgment *in absentia*.

According to this Protocol: *"When a Contracting Party requests from another Contracting Party the extradition of a person for the purpose of carrying out a sentence or detention order imposed by a decision rendered against him in absentia, the requested Party may refuse to extradite for this purpose if, in its opinion, the proceedings leading to the judgment did not satisfy the minimum rights of defence recognised as due to everyone charged with criminal offence.*

However, extradition shall be granted if the requesting Party gives an assurance considered sufficient to guarantee to the person claimed the right to a retrial which safeguards the rights of defence. This decision will authorise the requesting Party either to enforce the judgment in question

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if the convicted person does not make an opposition or, if he does, to take proceedings against the person extradited.

When the requested Party informs the person whose extradition has been requested of the judgment rendered against him in absentia, the requesting Party shall not regard this communication as a formal notification for the purposes of the criminal procedure in that State".

The right to a new trial procedure presents itself thus as a condition for granting the extradition, and the communication of the sentence rendered against him/her by the requested country to the convicted person has no effect towards him/her in the criminal procedure o the demanding country, thus it cannot be considered as the start date as of certain procedural deadlines for exercising the ordinary redress procedures (appeal or second appeal past the prescription) or the extraordinary redress procedures against the conviction order.

The above-mentioned provisions of the Strasbourg Protocol make no distinction whether the convicted person evaded the judgment or not, the reason for which the convicted person reached the territory of the requested country making no difference, from this aspect. The right to a new trial procedure is, thus, opened to both those entering the territory of the requested country, unaware of the existence of a trial brought against them, as well as to those who, although aware of the existence of a trial brought against them, have evaded the judgement.

The Convention warranties the right of the person to defend and to cross-examine or to ask for the interrogation of witnesses, which implicitly presupposes the accused presence in front of the court.

However, in the practice of the European Court for Human Rights the judgment *in absentia* does not represent a violation of the Convention, if the state has taken the necessary reasonable actions for finding and summoning the accused, the person judged by default being entitled to ask for the referral back of the case, except for the case such person has evaded the trial.[1]

The provisions of the European Convention on Extradition, concluded in Paris, including those comprised in the Strasbourg Protocol, have been initially included in the Law no. 296/2001 on extradition, but the provisions of this law have not been completed with correlative provisions in the Code of criminal procedure, stipulating the right of the person convicted person in absentia to a new trial procedure after its extradition; this completion has only been done in 2003, by the text of the article I pct. 221 of the Law no. 281/2003[2], the Code of criminal procedure being amended by the article 522 index 1 called „The case referral back of the persons judged *in absentia* in case of extradition", and which provides that „*in case of requesting the extradition of a person judged and sentenced in absentia, the cause shall be referred back to the first instance, upon the request of the convicted person*". Further, the Law no. 302/2004 regarding the international legal cooperation in the criminal matters, as further amended and completed, has reunited in a single legal instrument all forms of international legal cooperation, by including in the article 34 almost integrally the provisions of the article 3 of the Strasbourg Protocol in 1978.

In addition, by the article 69, the above-mentioned law provides that, by the extradition request, the Romanian state shall guarantee – by the Ministry of Justice – the referral back of the case for its judgment in the presence of the extradited person. Moreover, the lawgiver has provided by the art.72 paragraph 2 that "if the extradited has been sentenced *in absentia*, he/she will be put to trial again, upon request, by complying with the rights provided under the article 34 paragraph (1)".

It is thus noticed that the regulation of the institution of case referral after extradition is provided in both the Code of criminal procedure, as well as in the Law no. 302/2004. Considering the laws sequence in time, the conditions that should be considered on the case referral for a re-judgment

[1] D.Bogdan, M.Selegean, Fundamental rights and freedoms in the E.H.C.R Jurisprudence, Ed.All Beck, Bucharest, 2005, p.245-247.

[2] Published in Official Romanian Gazette, part I, no.468 from 1 st of July, 2003.

of a case subsequent to the extradition are the ones in the more recent legal instrument, i.e. Law no. 302/2004, as further amended and completed.

Unlike the provisions of the article 522 paragraph 1 Code of criminal procedure stipulating the cumulative compliance of two conditions, i.e. the person should have been judged and sentenced *in absentia*, the Law no. 302/2004, by its article 72 paragraph 2 provides solely the condition that the person to have been sentenced *in absentia*.

The right of the extradited person to benefit of the case referral back can be limited in the cases when the judgment in absentia is the consequence of the voluntary waiver from the accused to the right of being present in court for its defence. Thus, this right of the accused to the opening of the procedure is recognized only if such accused has missed the judgement of his / her cause duet o reasons beyond his/her will, caused by force majeure or other grounded reasons (see the cases Colozza vs. Italy, Demebeikov vs. Bulgaria, Medenica vs. Switzerland, and Sejdovic vs. Italy etc.).

The lack of compliance with these conditions can lead to the conclusion of a faulty procedural conduct of the extradited person, which cannot be invoked in supporting the claim for referring the case back, such conduct being unprotected by the provisions of the article 34 of the Law no. 302/2004 on international judicial cooperation in criminal matters and the Convention on extradition.

However, the summary nature of the provisions of the article 522 index 1 Code of cr. pr. raises enough questions, and numerous debates among the practitioners and generating already a series of legal interpretation problems.

A first issue of interpretation and application is whether by these provisions there has been established a new extraordinary redress procedure or a new ground for review, the references in the paragraph 2 to the procedural provisions on the review judgment, offering some grounds for such interpretation. To this end, there must be considered that in both the case of review as well as in the case of referral back to the court that has passed the decision after extradition, the first court can face the situation of recalling its own decision. Moreover, in both cases the result can be the cancellation of final court decisions.

Both the review, as well as the case referral back after the convicted person extradition renders possible the amendment of the conviction decision, both in the criminal matter and the civil matter. However, although there are obvious similarities regarding the consequences and there are even some common procedural provisions, it cannot be concluded that the case referral back after the convicted person extradition would represent a new case of review, existing major differences between the two procedures.

Paper content :

The review procedure is an extraordinary redress procedure, grounded on reasons related to the substance of the case related to new evidence that might prove the innocence of the convicted person, or by the distortion of truth by false documents or by the existence of final court decisions that cannot be reconciled, while the case re-judgment after the extradition of the convicted person is a new court procedure meant to secure the right to defence of the convicted person. However, the procedure provided by the article 522 index 1 Code of cr. pr., establishes a new redress procedure as to the reference to the provisions of the article 405-408 Code of cr. pr., an extraordinary redress procedure that might recall final court decisions, the exercise of which cannot be denied to the person facing the situation described under the article 522 index 1 paragraph1 Code of cr. pr.

The principle of guaranteeing the right to defence supersedes the *res judicata* principle applicable to the court decision ruled *in absentia* against the convicted person, thus the judgement in absentia seems rather a procedure meant to secure the direct service of evidence to the court and the preservation of such evidence until the identification and extradition of the convicted person, the case referral back after the extradition completing the procedure carried out in the absence of the convicted person by the contradictoriality ensured by the right to defence, principle that could not be complied with by a judgment *in absentia*.

The review can be requested by any of the parties in the trial, within the limits of its standing to bring proceedings, by the husband and by the close relatives of the convicted person, even after its death, as well as by the prosecutor, while the case referral back after the extradition can be exclusively requested by the extradited convicted person, who at its own discretion can accept the conviction or the referral of the case back to the court that has passed the decision.

A major difference is the fact that the review can be requested both in favour as well as against the best interest of the convicted person, while the case referral after the extradition of the convicted person can only be in its favour. Due to this fact, the effects of the case referral after the extradition of the convicted person are more extended than in the review case. If, after the review, the decisions can, in principle, only be completely opposite, i.e. conviction in case of acquittal and acquittal in case of conviction, the case referral back to the court that has passed the decision after the extradition of the convicted person can also have the effect of re-individualizing the sanction, of removing the relapse, of decreasing the quantum of the damage, etc.

Article 522 index 1 Code of criminal procedure regulating the referral back of the case after extradition makes reference to the provisions of the article 405 - 408 Code of criminal procedure, applicable to the extraordinary redress procedure of the review, however this reference is limited to the back referral procedure and to the solutions that can be ruled.

Practically, the review and the referral of the case after extradition have a different finality: if the review entails the removal of some major errors on the facts held in a final decision, the case referral back to the court that has passed the decision in case of extradition has the purpose of guaranteeing the extradited convicted person, judged in absentia, the right to a fair trial and, in principle, the exercise of the right to defence within a new trial, which presupposes its possibility to be heard, to interrogate witnesses or the parties in the trial and to service evidence in his/her defence, both regarding the *de facto* situation and the circumstantial evidence.

If there is no contrary disposition, the case referral back to the instance in case o extradition does not limit to the removal of an essential error on the facts, but it can also have effects on the individualization of the punishment and, therefore, even if the list of evidence submitted on the case referral confirms the de facto situation and the guilt of the accused, the request of the same can be accepted exclusively on the individualization of the punishment, the consequence of which being the ruling of the new decision, if the evidence presented as circumstantial evidence lead the instance appointed for judging the case again to a different conclusion on the individualization than the one established in the first trial.

Even if the article 522 index 1 Code of criminal procedure makes reference to the legal provisions applicable in the matter of review, this reference is limited to the case referral procedure and to the court decisions that can be ruled at the end of it.

In other words, although they are partly identical, the review and the case referral back to court in case of extradition have a distinct finality: if the review entails the removal of some major errors on the facts held in a final decision (mainly, the conviction of an innocent person or the ungrounded acquittal), the case referral back to the court that has passed the decision in case of extradition has the purpose of guaranteeing the extradited convicted person, judged in absentia, the right to a fair trial and, in principle, the exercise of the right to defence within a new trial.[3]

If there is no contrary disposition, the case referral back to the instance in case o extradition does not limit to the removal of an essential error on the facts, consisting in a possible conviction of an innocent person, but it can also have effects on the individualization of the punishment, if the list of evidence submitted on the case referral shall lead to a different conclusion than the one established for the same case during the first trial.

[3] H.C.C.J, penal decision no.560 from 17 th of February, 2009.

Besides the differences between the two institutions, this solution is the obvious choice, considering the situation of the extradited person, that is to be convicted in absentia, which presumes the fact that it had no possibility to submit evidence for his/her defence, both from the guilt point of view, as well as from the aspect of the applicable sanction.

This means that, even if the de facto situation and the guilt of the accused shall remain unchanged due to the list of evidence submitted on the referral of the case back to the court, the request of the accused shall be admitted exclusively on the individualization of the punishment (which might result in ruling a new decision), if the evidence submitted as circumstantial evidence lead the court appointed for judging the case again to a different conclusion regarding the sanction to be applied.

For the reasons presented above, the regulation of the procedure of case referral in case of extradition by the references to the court decision review procedure are insufficient and meant to generate doubts and interpretations of the laws, therefore a more complex regulation of such procedure is required, as the problems raised by the legislative instruments above quoted, of the case referral in case of extradition, cannot be have a unitary settlement by reference to the provisions of the article 405 – 408 C. c.pr.

Another aspect that raises numerous interpretations in the legal practice is related to the absence of the convicted person during the case judgment, as long as the referral procedure is opened solely upon the request person judged and convicted *in absentia*, without specifying however, whether the absence of the convicted person is relevant for all the procedural stages or only in the trial court.

Thus, is shapes the first situation that provides the fact that the accused did not participate either to the trial judgment, or to the other redress actions, being of no importance whether the accused has evaded or not from the case judgment or had no knowledge of that. In this case, the access to the procedure of case referral back to the court after extradition cannot be challenged.

A different situation might be that in which the accused has participated to the judgment of the case in the first instance and has exercised the right to defence, and later he/she evaded the judgment in appeal and second appeal, if such redress procedures have been exercised by the prosecutor. In these cases, too, the access of the extradited convicted person to a new judgment could not be denied, as this procedure is precisely meant to provide the due exercise of the right to defence, such right presupposing even the possibility to challenge the grounds for appeal or second appeal lodged by the prosecutor. The practice of the courts considers the priority of the principle of guaranteeing the right to defence as to the principle of res judicata related to the sentence ruled in the absence of the convicted person, by showing that the judgement in absentia seems rather a procedure meant to assure the direct service of evidence to the court and the preservation of the same as to the identification and extradition of the convicted person, such procedure being solely requested by the extradited convicted person and solely in its best interest.

If, in case of review procedure the court is asked to rule on new evidence, in case of case referral back to the court after the extradition, the reason for referring the case back to the court consists in the need to establish the procedural framework for exercising the right to defence, which would require the resuming of the judgment from that stage of the trial where such right could not be exercised.

Another possible situation would be the existence of an acquittal decision for the accused by the trial court and the absence of the accused from the case appeal, when, due to the reassessment of the evidence, the court rules a verdict that convicts the accused. Moreover, there is a similar case when the accused is acquitted by the first instance, the sentence remains the same in the appeal procedure, but the accused that fails to participate to the second appeal procedure, is convicted person by the second appeal court due to the second appeal lodged by the prosecutor. For the reasons shown above, the access of the convicted person to a new trial procedure cannot be denied.

The situation is identical also when the conviction occurs during an extraordinary redress procedure (review unfavourable to the acquitted), if the judgment of the case has been carried out in the absence of the convicted person.

If the accused participated to the judgment of the case in the first instance and had the possibility to exercise the right to defence, and subsequently, after being convicted, lodged an appeal against the court decision, however he/she failed to present to the court for supporting can no longer argument in the same manner his / her access to a new trial.

Considering the fact that the right of the accused to be present in the court is recognized in the International pact on the civil and political rights and the article 6 paragraph 3 from the Convention for the protection of human rights and fundamental freedoms recognizes for the accused „the right to defend himself" and „the right to interrogate witnesses", the European Court of Human Rights has established that the accused presence is basically obligatory when judging the case. The Court constantly states that in the case of appeal or second appeal procedure article 6 of the Convention applies less strictly, even admitting the regularity of the procedure where the hearings take place in the absence of the accused (the Ekbatani Decision). Exceptions from the rule according to which the accused must be present when the compliance with such condition would result in the unjustified delay of the procedure, especially that this situation has been checked and ascertained and if the accused is faulty missing from the court (the Colozza and Rubinat Decision).

For securing the access to a new trial for the extradited convicted person, presupposing the existence of final criminal decisions, the court referred for settling such request having to examine whether the request could be qualified as an over lapsed appeal or second appeal, or if there are reasons for acting as a relief of the defendant from the effects of the expiry of the time for appeal or second appeal, in which case the request shall be removed and no longer pending with the court and sent to the court competent for judging these redress procedures.

Regarding the possibility of admitting the request for case referral in case of extradition of a convicted person that has been judged in absentia but has been represented by a chosen lawyer, we consider that the solution that should be ruled by the court should be to admit the application, as the legal request for judgment in absentia is complied with, as the law makes no distinction for the situation in which, being absent, the accused benefited of legal representation or not, and the interpretation according to which, by the presence of his / her lawyer, there has been respected the right to defence of the convicted person, would be an addition to the law, which is unacceptable.

Moreover, in the case of an appointed lawyer, when the person convicted was absent from the judgement, the court should admit the request for referring the case back to the court after the extradition because, if in the above-illustrated example the court might find the accused absence as an interpretation of failure to comply with the right to defence – as long as the one absent from the court had however a chosen lawyer (opinion that is not shared by the author, as also mentioned above) – in the case of an appointed lawyers, the initial trial procedure has been carried out with a formal defence.

The request for case referral back to the court after the extradition of the convicted person is *de lege lata* falling always under the jurisdiction of the first court. The jurisdiction is similar to the one established in the case of review procedure, when, with the exception of existing decisions that cannot be reconciled, it is still the first instance that is the competent one for settling the review application (article 401 Code of criminal procedure). We consider that this provision should be reformulated, in the sense that the application should be referred to that court that ruled the sentence of conviction, as the need to take the case for a new judgment in front of the court of first instance or of appeal, when the decisions of such courts acquitted the accused, seems completely unjustified.

Still related to the jurisdiction of the first court there can be also raised the question whether the judge participating to the judgment of the case on the merits can judge again the same case based on the request for case referral back after extradition, or is incompatible according to the article 47

paragraph 2 Code of criminal procedure, as such judge has previously expressed his / her opinion on the decision that might be ruled in the case.

The judgment of the review request can be performed by the same panel of judges, as there is no incompatibility, the judge being asked to rule over new evidence that were unknown during the first judgement, therefore, for similar reasons, there is no incompatibility for the same panel of judges to judge the case after extradition, as the panel directly took note of the evidence serviced during the first trial and the presumption of impartiality in judging the case again could not be affected, as long as it is summoned to rule based on the new statements of defence formulated by the convicted person, defences based on evidence unknown during the first trial.[4]

In the E.C.H.R. practice, there has been stated that the presumption of impartiality of the court also subsists if, after quashing and referring the case back to court, the court vested again with the judgment of the case substance has the same structure as the one that ruled the quashed decision, situation that is totally forbidden by the Romanian criminal procedure (article 47 paragraph 1 Code of criminal procedure). Moreover, the impartiality of the court cannot be doubted in a procedure based on new evidence. We consider that there is no case of incompatibility either the case in which the convicted person understands to benefit of the provisions of the article 320 index 1 Code of criminal procedure related to the procedure of pleading guilty, by which the convicted person asks the court to rule based on the evidence serviced during the stage of criminal investigation.

As a gap of law, the provisions of the article 522 index 1 Code of criminal procedure do not establish a term for the convicted person to ask the referral of the case back to the court, such gap being able to generate procedural abuses, on one hand, and, on the other hand, the *res judicata* authority regarding the decision of conviction cannot be suspended for the whole period of sanction execution. Therefore, there should be established a term within which the convicted person can request such a procedure; when establishing such term there should be considered the fact that the communication of the sentence by the requested state can have no effect on the procedure applied in the demanding state.

We consider that such a term could be calculated from the moment the convicted person that was extradited is delivered to the imprisonment camp, on which occasion he/she could be informed, in the presence of a chosen or appointed lawyer, on the right to ask the case referral back to court, to this end drafting a protocol that would record the convicted person option, existing thus, enough guarantees that the exercise or waiver to such exercise of this right are the result of an informed decision.

The term for exercising the right to case referral back to court should be sufficient for the convicted person and for the defendant to study the file and to prepare the defence, considering that, in principle, we start from the assumption that the whole trial would have been carried out in the absence of the accused.

As far as the admission in principle is concerned, these provisions involve an option of adapting the procedural provisions on review to the procedure of case referral back to court after extradition, operation that presents its own difficulties.

According to the article 405 paragraph 1 Code of criminal procedure, the case referral to the court after the admission in principle of the review application is done according to the rules of criminal procedure on the judgment by the first instance. The provisions of the article 522 index 1 Code of criminal procedure, regarding the case referral back to court after the convict extradition make no reference to the admission in principle of the review application, provided by the article 403 Code of criminal procedure

The due application of the provisions of the article 405 paragraph 1 Code of criminal procedure to the procedure of case referral back to court after the extradition means however the

[4] D.V.Mihaiescu, V.Ramureanu, *The extraordinary redress procedures in criminal trial*, Scientific Ed., Bucharest, 1970, p.275.

existence of an admission in principle of the referral request, although the lawmaker made no reference to the provisions of the article 403 Code of criminal procedure, neither does it distinctly and actually regulate the stage of admission in principle, the provisions of the article 405 paragraph 1 Code of criminal procedure refers to the procedure subsequent to the admission in principle of the application.

In this stage, the judge shall examine whether the conviction decision is final or the request for case referral back to the court can be qualified as an appeal or second appeal over lapsed, or whether there are reasons for a relief of the defendant from the effects of the expiry of the time, in which case the judge shall send the request to the competent court.[5]

Moreover, the court must render certain prior investigations regarding the object of this procedure, and in particular whether the decision in the case is final, regarding the purpose of the extradition of the convicted person – i.e. if it has been carried out for executing the sentence or based on a temporary arrest warrant, which results in the verification of the trial jurisdiction and ordering accordingly -, regarding the manner the initial trial has been carried out, that is whether the judgment has been carried out in the absence of the convicted person or, on the contrary, the convicted person has been present to the judgment of the case, in which case it shall dismiss as inadmissible the case referral request.

If the court finds that the extradition has been done based on a temporary arrest warrant, the request shall be sent to the court settling the case that involves the accused, considering the principle of extradition speciality.

By admitting in principle the request for case referral back to the court, the court shall also establish the limits for such action, proceeding obligatory to the hearing of the convicted person, further examining the evidence submitted by the convicted person, and the new evidence requested by the convicted person shall be analyzed in the light of their pertinent and conclusive nature of the same, the court ruling on all the requested evidence, in the sense of either admitting it, fully or partially, or reasoning the dismissal of those considered not to be pertinent and conclusive, or, if it deems necessary, it shall resubmit the evidence presented during the first trial.

The court has the obligation to proceed to the hearing of the convicted person, hearing during which the court, in case of the convict judged in absentia, would have the opportunity to take note of the convicted person version of the events unfolding or of his/her option on the procedure of pleading guilty, in accordance with the provisions of the article 320 index 1 of the Code of criminal procedure.

In no case there shall be denied the convicted person requests to ask questions to the other accused persons, as well as to the prosecution witnesses, this right being guaranteed by the provisions of the article 6 of the Convention; as to other new evidence requested by the convicted person, the court shall rule depending on the pertinent and conclusive nature of such evidence.

The admission in principle of the request for case referral back to court has no effect on the conviction decision. Subsequent to case referral back to court, after submitting the list of evidence requested by the accused, if the court finds that it has no influence on the decision ruled in the first trial, shall dismiss the request for referral back to court and shall maintain the ruled decisions. This solution would result from the due application of the provisions of the article 406 paragraph 4 of the Code of criminal procedure.

If, from the evidence presented it results that the decision passed in the first trial is ungrounded or illegal, the court, after judging the case again, annuls the decisions of the first instance, even if the conviction decision has been ruled by the court of appeal or the court of second appeal, and rules a new decision according to the provisions of the article 345 – 353 Code of criminal procedure.

The court shall be able to rule, by reference to all the evidence, to pass any of the solutions provided by the article 345 Code of criminal procedure, i.e. the conviction, the acquittal or the

[5] Viorel Pasca, The referral back of a case in case of extradition, The Right Review no.2/2007.

termination of the criminal trial, as resulting from the due application of the provisions of the article 406 Code of criminal procedure. By convicting the accused, the court shall not, however, be able to create a less favourable situation than the one already created by the first conviction. The case referral back to the court is an exclusive option of the convicted person, therefore the principle *non reformatio in peius* is also applicable in the procedure of case referral after the extradition of the convicted person.

In the case referral back to the court, the court can proceed to a re-individualization of the sanction, but only in the sense of decreasing it, as fast as such decrease is allowed based on the evidence presented during the case referral back to court (i.e. mitigating circumstances, the change of legal framing to a less serious crime, the adoption of a more favourable law, etc.).

The case referral back to the court upon the request of the convicted person that has been extradited can have an extensive effect on the case of other convicted persons that would not have been able to use this procedure. Thus, the acquittal of the convicted person for no illegal deed, the lack of substantiating elements of the crime or the existence of a cause that removed the criminal nature of the deed with *in rem* effects (i.e. self defence, state of necessity, fortuitous case), is also reflected upon the other convicted persons in the case. There shall have the same extensive effect the real mitigating circumstances (the extension of the self defence or of the state of necessity).

The extensive effect of the case referral back to the court after extradition of the convicted person results from the due application of the provisions of the article 406 paragraph 2 of the Code of criminal procedure that make reference to the extensive effect of appeal (article 373 of the Code of criminal procedure).

If, after the case referral back to court, the extradited convicted person is acquitted, the referral court shall order the return of all the seized assets and of the legal expenses if paid or enforced against the convicted person (article 406 paragraph 3 Code of criminal procedure).

The case referral back to court has effect also on the civil part of the criminal trial, the referral court being able to exempt the convicted person from de payment of the civil compensations, or to reduce the quantum of such compensations as far as the need to adopt such a solution results from the evidence presented.

The provisions of the article 522 index 1 Code of criminal procedure do not have an imperative nature, leaving the court to assess whether the judgment should be rendered again, thus: „*in case it is requested the extradition of a person judged and convicted in absentia, the case can be referred back to the court that was the first court of instance, upon the request of the convicted person*".

From the analysis of the legal text it results that for proceeding to the case referral back to the court there are certain conditions that must be complied with: to be in the case of extradition to Romania of a convicted person, for the execution of a prison penalty, applied by a national court, i.e., the person whose extradition has been requested by the Romanian state must have been judged and convicted in absentia. As for the second request, the text of law requires the compliance of an essential condition, i.e. the person must have been judged and convicted in absentia, even in this situation, resulting that the case referral back to court must be seriously grounded by essential violations of the convicted persons rights, the new procedure having the purpose of safeguarding the rights to defence of such person, who, judged and convicted in absentia, was in no position to defend herself.

Therefore, the competent court opts for the admission or dismissal of the request for case referral after extradition depending on the need to go again through the stages of the trial for ensuring the compliance with the extradited person's right to a fair trial and to defence.

However, even if the article 522 index 1 Code of criminal procedure does not impose on the Romanian courts the obligation to retrial the case when by the extradition decision this is expressly stipulated, as it is a conditioned extradition according to the article 73 of the Law no. 302/2004 on the

international cooperation in criminal matter, the case referral procedure becomes obligatory for the Romanian court.

Moreover, the procedure of case referral of the extradited person that has been convicted in absentia is also provided under the article 72 paragraph 2 of the Law 302/2004 that makes reference to the provisions of the article 34 of this legislative instrument that stipulates that the extradition shall be granted if the demanding state, i.e. the Romanian one, provides sufficient proofs to the requested state of guaranteeing the person to be extradited the right to a new trial securing the right to defence of such person. The fundamental right resulting from the above-mentioned norms is closely related to the provisions of the art.6 of the E.C.H.R., any interference in the right to benefit of the case referral back to court according to the article 522 index 1 Code of criminal procedure being analysed in this context.

The legal text shown above has the purpose of harmonizing the Romanian law with the international regulations, especially for the compliance with the provisions of the article 6 of the European Convention of Human Rights providing, as an implicit guarantee for the application of the procedure of a fair trial, the right of the convicted to be present in front of the court. As the Court constantly held in its case law, the possibility of the accused to take part to the trial, results from the object and the purpose of the provisions of the article 6 of the Convention, as the letters c), d) and e) of the paragraph 3 of the same article recognize the right of „any accused" „to defend himself", „ to examine or have examined witnesses", „ to have the free assistance of an interpreter if he cannot understand or speak the language used in court", all these actions being unconceivable in its absence. The presence of an accused in the court is of at most importance considering both its right to be listened, as well as the need to control the accuracy of his/her allegations, to confront it with the ones of the victims, if the case, whose interests should be protected, as well as with the witnesses' statements.

By analyzing the case law of the European Court of Human Rights there can be established the content of the notion „judgment *in absentia*", which includes solely the situations in which a person has been sent to trial and convicted without being heard by an independent, impartial court established by law, did not have the possibility to defend herself / himself in the court, thus as to analyze the solidity of the deeds he / she is accused of (the case Constantinescu vs. Romania). Such a conviction in absentia of a person shall however meet all the requirements of the article 6 of the Convention if from all the details of the case it results that the accused, by its own will and beyond doubt, waived the right to be heard and the right to defend himself in the court (see the case Mihaies vs. France etc.). In the same time, the right to stand in court in person is not an absolute right, therefore during the redress procedures it can be subject to certain limitations, such as the case when the second appeal regards only the applicable law and not the actual deeds, limitations allowed as far as during the judgment of the case on the merits the accused has benefited of such right to stand in court in person (see the case Ekbatani vs. Sweeden).

Therefore, a person can claim she / he has been judged and convicted in absentia when the court judging the case has ordered her/his conviction, regardless of the sanction and of the enforcement means, without proceeding to the hearing of such person, without such person to have knowledge of the judiciary procedure carried out against her/him, without being defended by a law specialist, without enjoying the right to lodge statements of defence, to counter argue the evidence presented by the prosecution, to participate to the trial, to the witnesses' cross-examinations etc. More precisely, a person is judged and convicted in absentia, as provided also by the article 34 of the Law no. 302/2004, amended, when the trial procedure carried out with him/her as the accused ignored the right to defence recognized to any person accused of committing a crime, or, in a more wide approach, the right to a fair trial.

From the interpretation of the provisions of the article 34 paragraph 1 of the Law no. 302/2004, to which the provisions of the article 72 paragraph 2 of the same law make reference to, it results that the Romanian law, as requested state, can deny the extradition when the person has been

judged in absentia and the judgment failed to comply with the right to defence; however, it can grant extradition, if the demanding state guarantees the extradited person the right to have the case judged again, this time with the compliance of the rights to defence. The reference that the text of the article 72 paragraph 2 of the Law no. 302/2004 makes to the provisions of the article 34 paragraph 1 of the same law must be interpreted in the sense that, based on the reciprocity principle in the matter of international cooperation, Romania, if it is a demanding state, must offer the same guarantees and insurances as the ones that Romania can demand when it is a requested state.

Moreover, the article 69 of the Law no. 302/2004 amended and republished, called the referral back of the case of the extradition, provides that, the Ministry of Justice is the one guaranteeing the case referral back to court in the presence of the extradited person, according to article 34 paragraph 1.

Therefore, this article provides the obligation of the Ministry of Justice to guarantee to the requested state the fact that the person requested for extradition shall benefit of a new judgment, if the initial judgement was rendered in absentia.

In conclusion, the above-mentioned texts of laws illustrate the will of the Romanian legislator to establish, as a guarantee granted to the requested states, the possibility that any extradited person to Romania, that has been convicted in absentia, to benefit upon request of the case referral back to court, thus as to comply with such person's right to defence.

In the case Colozzo *versus* Italy from 12th of February 1985, E.C.H.R. established that, although the accused has the right to participate to hearings, according to article 6 of the Convention, this right is not absolute, but when the national laws allow the judgment in absentia, the convicted person must have access to a new procedure regulating in the accusations against him / her, the contracting states having a wider liberty in choosing the necessary means for this purpose. As illustrated above, E.C.H.R. makes no distinction on whether the person convicted in absentia was or was not extradited, but, it denies the right to a new procedure to those evading the trial.[6]

Conclusions

We have shown that, according to the Strasbourg Protocol, to the Convention on extradition adopted in Paris, there has been introduced in the procedure of extradition the requirement according to which the requested state guarantees the right to a new trial to the extradited convicted person. The procedure regulation however, is rested with the national legislator.

The possibility of exercising the right to a new trial granted solely to the extradited convicted person creates an unequal treatment, which might result in the violation of the constitutional principle of equality in front of the law (article 16 of the Romanian Constitution), as well as of the provisions of the article 6 of the Convention as to the persons convicted in absentia, but who remain in the country and who are not extradited, who shall have no access to this procedure. If we consider the realities of the Romanian justice that show that most of the extradited convicted persons evaded the criminal investigation and criminal trial, some of them being the authors of crimes that have been widely covered by the media, the unfairness of the procedure seems even more obvious. To this end, there must be a distinct regulation on this special procedure included in a section regarding the judgment in absentia, the E.C.H.R. practice pointing out the same solution.

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THE ORGANIZATION OF JURISDICTION FROM A EUROPEAN UNION PERSPECTIVE

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Abstract
Nowadays, universal jurisdiction is the favorite technique used to prevent impunity for international crimes and it is one of the most effective methods to deter and prevent international crimes by increasing the like hood of prosecution and punishment of its preparators. In regard to the defendant's rights, the European Union states consider applicable all the rights that are necessary to assure that the trial is equitable and expeditious. There is no exception to the right to a fair trial. So, a defendant who is being prosecuted on the basis of the universality principle can rely on all the procedural rights provided for the Convention on Human Rights and the domestic code of criminal procedure without any restrictions. In Germany, the Federal Constitutional Court, in a case concerning genocide committed abroad, declared expressly that no special criminal proceedings must be provided for specific crimes.

Keywords: *"universal jurisdiction", "human rights", "European Union", "criminal procedure"*

Introduction

According to the principle of mandatory prosecution who prevails in many countries such Belgium, Croatia, Hungary, Spain, Sweden and Turkey, the criminal prosecution authorities are obliged to initiate the measures necessary for prosecution when they gain knowledge or form a suspicion of the commission of a criminal offence.

This means that they have no discretion as to whether to initiate criminal proceedings; they are deluged to take the necessary investigative measures. No particular national rules are set up with regard to the exercise of prosecutorial discretion as far as crimes are concerned that are subject to universal jurisdiction. In Belgium the Public Prosecutor (procureur federal) has a duty to ask preliminary judge to investigate, if a complaint is submitted, with exception.

In contrast, the principle of discretionary prosecution allows prosecuting authorities to refrain from prosecution in certain cases. Regarding the prosecution of extraterritorial crimes, some countries recognize specifically the principle of discretionary prosecution.

The application of a pure universal jurisdiction can cause a lot of problems. For example, due to the lack of restrictions, the prosecution of crimes subject to universal jurisdiction can create political problems. Also, the risk of overstretching national investigative resources exists in those cases in witch it appears to be very unlikely that a criminal trial over be completed.[1]

The principle of discretionary prosecution can solve some of these problems, because the prosecutor can refrain from prosecutor, taking into account the political ramifications of the case or the case or the existence of "prima facie" evidence.

Concerning the principle of universal jurisdiction, a distinction can be made between two systems.

First, the prosecution of crimes committed abroad in general depends on the approved of the Prosecutor General, exercising his discretion, such in Croatia and Finland. In Hungary, the Attorney

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[1] Florian Jessberger, *National Reports (CD Rom annexe),* at XVIII-th *International Congress of Penal Law (Chine.-2007).*

General has the right to exercise discretionary power in deciding whether or not to initiate proceedings based on universal jurisdiction.

In some countries there are guidelines for the prosecutor on how to make use of his discretion. For example, in Finland, the prosecution order procedure is needed, because it enables a case-by-case consideration of whether prosecution in Finland is appropriate. The consideration must take into account factors such as the sovereignty of other states and possible conflicts of multiple jurisdictions. In practice, the lack of necessary evidence might prevent prosecution.[2] In Croatia, concerning crimes against international war and humanitarian law, the Chief state Prosecutor may deport from the "ne bis in idem" principle if he believes that proceedings in another state were concluded contrary to internationally recognized standards of a fair trial.

In the Netherland, the general rule is that the Public Prosecutor may decide not to prosecute of this in the general interest. No particular national rules are set with regard to the exercise of prosecutorial discretion as far as crimes are concerned that are subject of universal jurisdiction. Notwithstanding there is a Regulation on the Consideration of Accusations With Regard to Crimes Included in the International Crimes Act 2003 wich deals with a significative question. The Public Prosecutor must consider whether there is a reasonable case in order to initiate further investigations. So, reference is made to the existence of "prima facie" evidence. Moreover, the accusation must be sufficiently specified as for as time and place are concerned. Subsequently, the Public Prosecutor has to weigh all the facts and circumstances in order to establish whether there is a reasonable prospect of successful investigations and subsequent criminal proceedings within a reasonable time. The Public Prosecutor has to take into account: 1)when were the alleged acts commited; 2) what are the chances that witnesses will be willing to be present in court in the Netherlands; 3)will it be possible to gather sufficient evidence to warrant a conviction; 4) will other states be able and willing to render assistance if requested.

The second, in Germany, the scope of prosecutorial discretion varies depending on whether universal jurisdiction is exercised under international crimes or under treaty-based crimes.

Regarding treaty-based crime, the public prosecutor can exercise his or her wide discretion and refrain from prosecution.

With regard to the scope of universal jurisdiction over international crimes such genocide, crimes against humanity and war crimes committed abroad, investigation and prosecution are mandatory. But the law provides for discretion whether to prosecute genocide, crimes against humanity and war crimes committed abroad only if a foreigner who is accused of the crime is not present on German territory and he is not expected to enter German territory or a German who is accused of the crime is not present on German territory, his entry into Germany is not expected and if the offence is being prosecuted before on international court of the state on whose territory the offence was committed or whose national was harmed by the offence.

The law contains some guidelines for the prosecutor. According to these, the prosecutor is encouraged to refrain from using his power to prosecute if the following conditions are fulfilled: a) a German is not involved in the crime, either as preparator or as victim; b) the offence is being prosecuted by a primarily responsible international or foreign jurisdiction ; c)the accused is not present on German territory and he is not expected to enter the country or his transfer or extradition to a primarily responsible international is permissible and intended.

It is interesting that even if the conditions are met, and prosecution is discretionary, prosecution and trial remain permissible.

The decision to refrain from or to terminate investigations or proceedings is the exclusive responsabillity of the Federal Attorney General. The prosecutor can withdraw the charges at any

[2] Isidoro Blanco Cordero, *Universal Jurisdiction-General report*-International Rewiew of Penal Law (vol. 79), p. 68-69.

stage of the proceedings, even if charges have already been preferred. The Federal Attorney General has full discretionary power.

In some countries, such Germany and Belgium, concerning the prosecutor's discretionary decision, it is final and it is not subject to appeal. In Belgium, the arbitral Court has repealed the law, because the decision not to prosecute in some cases is not taken by a judge. Neverthless , in the Netherlands, if the Public Prosecutor decides not to initiate criminal proceedings, an interested party can file a complaint against this decision.

Regarding the competence, there is no concentration of prosecutorial or adjudicative competencies concerning the exercise of universal jurisdiction. In Croatia, crimes against values protected by international law must be judged by panels of the competent court, composed of three judges distinguished by their experience in the most complex cases. Therefore, all courts of the states are able to exercise universal jurisdiction, such in Japan.

However, regarding the competence of courts *rationae materiae* concerning crimes subject to universal jurisdiction, in some countries there is a specific judicial organ. For example, in Japan the judicial organ competent to exercise universal jurisdiction is the *Audiencia National*, in Belgium, the *Cour d'assises* with a popular jury is competent to prosecute the graves crimes. In the Netherlands, with regards to international crimes, the District Court at The Hague has been declared exclusively competent. In Germany, as regards international crimes, special rules applies: the competence to prosecute international crimes is concentrated; exclusive competence lies with the Federal Attorney General and the Higher Regional Court (Oberlandesgericht) in whose district the provincial government is situated .

Regarding all other crimes over which universal jurisdiction has been established exclusively that no court has been appointed exclussively. The competent court therefore has to be determined according to the general principles of competence as are set out in the Code of Criminal Procedure, such in the Netherlands, Germany, Finland, Hungary and Turkey. In Netherlands, the Code of Criminal Procedure states some rules: the Court in which district the alleged offender is present is competent; the Amsterdam District Court is also competent if the crime has been committed at sea and again, the Amsterdam District Court if no other Court has been declared competent.

In Germany, if a local venue cannot be established in any domestic court, the Federal High Court decides which court shall be competent. In Finland, according to the Criminal Procedure Act, the competent court for an offence committed outside Finland is the court of the place where the person to be charged lines, is resident or is found.

In Sweden, due to the fact that are specialist prosecutors chambers for international crimes, in practice the prosecution will be usually concentrated in only certain district courts, in particular the Stockholm district court.

Concerning international arrest warrants or detention requests for crimes subject to universal jurisdiction, can be distinguished three systems.

First, in some countries (Finland, Croatia, Germany, Hungary, Romania, Sweden) no particularities need to be taken into consideration concerning crimes over which universal jurisdiction has been established. So, in Croatia only the court before which criminal proceedings are pending can issue on international arrest warrant.

Second, in other countries the institution competent to issue on international arrest warrant depends on the crime concerned. In the Netherlands, the National Prosecutor 's Office, located in Rotterdam, has been declared exclusively competent concerning international crimes.

So, only the Public Prosecutor located at this office may issue on international arrest warrant with regard to war crimes, genocide, crimes against humanity and torture. Regarding the other crimes subject to universal jurisdiction, any Public Prosecutor can issue on international arrest warrant as far as those crimes are concerned.

Third, if the presence in the territory of the European Union state is necessary to initiate criminal proceedings, the competent court cannot issue on international arrest warrant against

perpetrators of the crimes residing abroad (for example, in Croatia, in cases of international crimes subjects to universal jurisdiction).

In the context of the European Union, extradition between European Union members states has been replaced by another instrument: the surrender of a requested person which can be arderd by an European Arrest Warrant and is prescribed by the Framework Decision on the European arrest warrant and the surrender procedures between member states.[3]

Because of the existence of the European Arrest Warrant, the transmission of arrest warrants and inprisonement requests between the European Union States became easier and faster.

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THE CONCLUSION OF THE CONTRACT FROM THE PERSPECTIVE OF THE NEW CIVIL CODE

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Abstract
The New Civil Code regulates in large the general rules regarding the conclusion of the contract. These rules regard the formation of the contract, between parties that are either present or at a distance.
The rules in question have as foundation the classical principles regarding the formation of the contract and also reflect the realities of the modern society.

Keywords: *offer to contract, offer's acceptance, offer's withdrawal, acceptance withdrawal, offer's ineffectiveness, closing of the contract*

1. Having as basis the dogma of will autonomy, The Romanian Civil Code of 1864 did not regulate formation of contract. Such loophole was partially covered, by The Commercial Code of 1887, which, in art. 35-39, regulated the conclusion of contract "between remote persons".

Taking into consideration this reality, the new Civil Code comprehensively regulated the general rules of form and contract (art. 1182-1203). These rules regard the conclusion of contract both between present persons and between absent ones.

The rules established by The Civil Code rely on the classic principles of contract conclusion, yet considering also the realities of modern society.

2. The contract is the will agreement between two or more persons intending to constitute, modify or terminate a legal relation (art. 1166 of The Civil Code).

Any natural or legal person may freely manifest their will, according to their interests, it being possible for them to conclude any contract, with any partner and having the contents the parties have agreed on, within the limits imposed by the law, public order and good customs.

Concluding the contract means, in essence, reaching the parties' will agreement on the contractual clauses.

The contract is concluded by the parties' simple will agreement, if the law does not impose a certain formality for its valid conclusion, such as in the case of real and solemn contracts.

Will agreement, which signifies the conclusion of the contract, is achieved by the concordant match of an offer to contract with the acceptance of such offer[1]. To this end, pursuant to art. 1182 of The Civil Code, the contract shall be concluded by its negotiation by the parties[2] or by acceptance without reference of an offer to contract.

As the contract is concluded by the parties' agreement, one party's will may not be replaced by court decision[3].

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[1] See C. Stătescu, C. Bîrsan, Civil Law, General Theory of Obligations, 9th Edition, revised and enlarged, Bucharest, Hamangiu Printing House, 2008, p. 37.

[2] On contract negotiation, see Gh. Piperea, Introduction in Professional Contract Law, C.H. Beck Printing House, Bucharest, 2011, p.86 and the next; Mariana Buric, Legal Aspects of Contract Negotiation, in Revista de drept comercial no. 11/2004, p.114 and the next; Ivanița Goicovici, Progresive Formation of Contract – Notion and Scope, Walters Printing House, Bucharest, 2009; S. Deleanu, Letters of Interest, in Revista de drept comercial no. 1/C 995, p. 110 and the next.

[3] The High Court of Cassation and Justice, Commercial Section dec. no. 876/2002, in Revista română de drept al afacerilor no.3/2004, p.199.

For the conclusion of the contract it is sufficient that the parties achieve the will agreement on the essential elements of the contract, even if some secondary elements are left aside in order to be agreed subsequently, and entrust their determination to third parties. If the parties do not reach an agreement on the secondary elements in question and the person entrusted with their determination makes no decision, it is the court of law the one that will complete the contract, at the request of any of the parties, taking into account, depending on the circumstances, the nature of the contract and the parties' intention.

Upon negotiating and concluding the contract, and also during the performance of the contract, the parties have to act in good faith, which is presumed until proved otherwise.

According to the law, the parties have the liberty to initiate, have and break off negotiations, without being responsible for their failure, if they responded to the exigencies of good faith. It goes without saying that the conduct of the party initiating or continuing negotiations without intending to conclude the contract is contrary to the exigencies of good faith.

Initiating, continuing or breaking off negotiations against good faith entail the liability of the breaching party for the damage caused to the other party. Liability cannot be but a civil liability *ex delicto*, in the conditions of art. 1357 of The Civil Code. Upon establishing the compensations, the expenses incurred for the negotiations, the other party's waiver of other offers and any other similar circumstances will be taken into account.

In the negotiation for the conclusion of the contract, the parties can have in view certain information with confidential character. In such a case, the law imposes on the parties a confidentiality obligation. The party that has been communicated, during negotiations, confidential information is forbidden to disclose it or use it in its own interest, no matter if the contract is concluded or not. The breach of the confidentiality obligation engages the civil liability *ex delicto*, under the conditions of art. 1357 of The Civil Code.

In certain cases, during the negotiations, a party can insist on reaching an agreement on a certain element or on a certain form. In such a case, the contract will not be concluded until an agreement is reached in connection to the above, no matter if the element in question is an essential or a secondary one or the form is not imposed by the law for the validity of the contract (art. 1185 of The Civil Code).

Conclusion of any contract involves the meeting of the essential conditions required by the law for the validity of the contract: the capacity to contract; the parties' consent; a determined and licit object; a licit and moral cause (art. 1179 of The Civil Code).

In those cases in which the law provides a certain form of the contract, this has to be observed, under the sanction provided by the applicable legal provisions. Consequently, the manifestations of will forming the will agreement, and namely the offer to contract and the acceptance of the offer, have to take the form required by the law for the valid conclusion of the contract (art. 1187 of The Civil Code).

3. The offer to contract is a proposal of a person, addressed to other person, to conclude a certain contract. This comprises a manifestation of will expressing the offeror's intention to obliges itself, in case of its acceptance by the recipient.

Pursuant to the law, in order to constitute an offer to contract, the proposal must contain sufficient elements for the contract formation (art. 1188 of The Civil Code).

According to doctrine, the offer to contract must be manifestation of real, unvitiated will, concretized in a precise, complete and firm proposal[4].

[4] See C. Stătescu, C. Bîrsan, op.cit., p.41; L. Pop, p.41; L. Pop, Civil Law Treaty. Obligations, Volume II, The Contract, Universul Juridic Printing House, Bucharest, 2009, p.156-160; Albu, Civil Law. The Contract and the Contractual Liability, Dacia Printing House, Cluj-Napoca, 1994, p.72-73.

The offer is precise and complete when it comprises all those elements that are necessary for concluding the contract, indispensible to the recipient of the offer for making a decision, in the sense of acceptance or rejection of the offer. These elements are not the same for any contract, being specific to the various categories of contracts.

The offer will be firm, if it expresses a legal engagement of the offeror, which, by its acceptance by the recipient, would lead to the conclusion of the contract. This condition is not met if the proposal comprises certain reserves.

The offer to contract can be exteriorized expressly, in writing, verbally, exhibit of the merchandise by displaying the price, or tacitly, resulting without any doubts from the behavior of a person; for example, the conclusion of the lease contract, in case of tacit relocation (art. 1810 of The Civil Code).

According to the law, the offer to contract may have as issuer the person who has the initiative to conclude the contract, which determines its contents or, depending on circumstances, the person that proposes the last essential element of the contract.

The recipient of the offer may be a determined person, generically determined persons or undetermined persons (the public).

In what regards the offer addressed to undetermined persons, the new legal regulation makes certain distinctions.

Pursuant to the law, the proposal addressed to undetermined persons, even if precise, is not equal to the offer to contract, but, depending on circumstances, request for offer or intention to negotiate (art. 1189 of The Civil Code).

Exceptionally, the proposal is equal to an offer if this results from the law, from usual practices or, undoubtedly, from circumstances, for example, standing of a taxi in the taxi stand, with the meter indicating "vacant". In these cases, the revocation of the offer addressed to the undetermined persons produces effects only if made in the same form with the offer or in a way allowing it to be known to the same extent with this; for example, the standing of the taxi in the taxi stand, with the meter indicating "occupied".

The request of undetermined persons or more determined persons to formulate offers does not stand, in itself, for the offer to contract. In such cases, the requesting party becomes the recipient of the offer.

The offer to contract represents a unilateral manifestation of will of its author. As provided by the law, the offer to contract produces effects only from the moment when it arrives at the recipient, even if this does not take note of the offer for reasons that are not imputable to it (art. 1200 of The Civil Code).

Consequently, until it arrives at the recipient, the offer produces no effects, and can be withdrawn without consequences for the offeror, but only if the withdrawal arrives at the recipient prior to or simultaneously with the offer.

It goes without saying that, if the offer makes provision for an acceptance term, the offeror must comply with the term granted. The acceptance term elapses from the moment when the offer arrives at the recipient.

For the purpose of this solution, art. 1191 of The Civil Code provides that the offer is irrevocable as soon as its author undertakes to maintain it for a certain term.

Yet, pursuant to the law, the offer is also irrevocable when it may be considered as such, under the parties' agreement, under the practices settled between them, negotiations, contents of the offer or usual practices.

One should note that, whereas the term offer is irrevocable, any statement for revocation of such an offer produces no effect (art. 1191, paragraph 2 of The Civil Code).

The matter that has been discussed in the past and that is also currently debated regards the offer without acceptance term. The new Civil Code establishes the fundamental doctrine solutions, distinguishing between the offer being addressed to a present person or to an absent one.

If the offer without acceptance term is addressed to a present person, this remains without legal effects if not accepted immediately (art. 1194 of The Civil Code).

The solution is the same also in the case of the offer transmitted by phone or by other means of remote communication.

If the offer without acceptance term is addressed to a person that is not present, this has to be maintained in a reasonable term, depending on circumstances, in order for the recipient to receive it, analyze it and dispatch the acceptance (art. 1193 of The Civil Code).

Such an offer can be revoked and prevents the conclusion of the contract, but only if revocation arrives at the recipient before the offeror receives the acceptance or, as the case may be, before carrying out the act or fact determining the conclusion of the contract, under the terms and conditions of art. 1186, paragraph 2 of the Civil Code.

Revocation of the offer before the expiry of the reasonable term, provided by art. 1193 of the Civil Code, engages the offeror's liability for the damage caused to the recipient of the offer (art. 1193, paragraph 3 of The Civil Code).

In the past, against the background of inexistence of any regulation in The Civil Code, there were discussions on the mandatory force of the offer and the grounds for liability for revocation of the offer[5].

Both doctrine and judicial practice admitted that the withdrawal of the offer, before the expiry of the acceptance term provided by the offer entails the offeror's liability for the damages caused as a consequence of the unexpected revocation of the offer. The issue that was subject to the controversy was the legal ground of the offeror's liability.

In general, it has been sustained that unexpected revocation of the offer, which causes damages, entails the civil liability *ex delicto* of the offeror (art. 998 of the old Civil Code)[6].

Some authors considered that the legal ground for liability is not the illicit and guilty deed of revocation, but the legal fact of the abusive exercising of the right to revoke the offer[7].

Other authors found the justification of the obligation to maintain the offer in the term provided by the offer, in the idea of validity of the unilateral will engagement representing the offer to contract[8].

The new Civil Code comprises provisions regarding the offeror's liability for the damage caused by the revocation of the offer (art. 1193, paragraph 3 of The Civil Code).

Still, one should note that this liability of the offeror regards the case of the offer without term addressed to an absent person, which was revoked before the expiry of the reasonable term considered by the law for the recipient to receive it, analyze it and dispatch the acceptance.

As regards the offer in which the offeror undertook to maintain it for a certain term, this is, pursuant to art. 1191 of The Civil Code, immediately irrevocable. Moreover, any statement of revocation of the irrevocable offer produces no effect (art. 1191, paragraph 2 of The Civil Procedure Code).

As the offer with acceptance term cannot be revoked by the offeror, and any revocation produces no effects, it means that the offer "revoked" before the expiry of the term can be accepted and, consequently, leads to the conclusion of the contract.

As regards the liability of the offeror for the damage caused by the offer revocation, in the conditions of art. 1193 of The Civil Code, its ground is the illicit and guilty deed of the offeror (art. 1357 of The Civil Code).

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[5] See T. R. Popescu, P. Anca, General Theory of Obligations, Ed. Ştiinţifică, Bucharest, 1968, p.75 and the next; C. Stătescu, C. Bîrsan, op.cit., p.41-44; L. Pop, op.cit., p.167 and the next.

[6] See T. R. Popescu, P. Anca, op.cit., p.78.

[7] See C. Stătescu, C. Bîrsan, op.cit., p.44.

[8] See I. Albu, op.cit., p.75; D. Chirica, Civil and Commercial Special Contracts, Volume I, Rosetti Printing House, Bucharest, 2005, p.145; L. Pop, op.cit., p.172.

In certain cases, the offer to contract may become null and, therefore, may no longer produce legal effects. The cases of nullity of the offer are the ones provided by art. 1195 of The Civil Code.

Thus, the offer will become null if the acceptance of the offer does not get to the offeror in the term laid down in the offer or in the reasonable term provided by art. 1193, paragraph 1 of The Civil Code.

Then, the offer becomes null when refused by the recipient.

Finally, the irrevocable offer becomes null in case of the offeror's decease or incapacity, but only when the nature of the business or circumstances impose so.

To conclude here, it has to be specified that the offer to contract should not be mistaken for the promise to contract (sale promise). Unlike the offer, which is a unilateral manifestation of will, the promise to contract (sale promise) is a pre-agreement (art. 1669 of The Civil Code).

In the case of bilateral sale promise, the promissory party undertakes to sell, and the beneficiary undertakes to buy a certain asset, at a certain price, based on a sale-contract to be concluded in the future.

In the case of the unilateral sale promise, the promissory party undertakes to sell, or, as the case may be, to buy a certain asset, and the beneficiary reserves the faculty to subsequently manifest the will to purchase, respectively to sell the promised asset.

In both cases, the sale promise is a pre-agreement giving rise to an affirmative covenant, and namely that of concluding a sale contract in the future.

4. Acceptance of the offer is the manifestation of will of the recipient of the offer to conclude the contract in the conditions provided by the offer.

Pursuant to art. 1196 of The Civil Code, acceptance of the offer means any act or fact of the recipient, if it undoubtedly indicates its consent to the offer, as formulated, and arrives in due term at the offer author.

The conditions required by the law for the validity of acceptance of the offer result from this definition.

Thus, the acceptance of the offer may consist in a legal act, and namely a manifestation of the recipient's will, in the sense of conclusion of the contract, or in a legal fact, such as the dispatch of the merchandise to which the offer refers.

Then, from the recipient's act or fact it must undoubtedly result the recipient's consent with regard to the offer, as formulated by the offeror.

Consequently, in order for it to stand for an acceptance, the recipient's manifestation of will cannot be confined to the confirmation of the receipt of the offer, but it has to undoubtedly express the recipient's will to legally engage, and namely to conclude the contract in the conditions proposed in the offer[9]. This means that acceptance must be total and have no reserves or conditions.

According to the law, the recipient's answer does not represent acceptance when it comprises amendments or supplementations that do not correspond to the offer received (art. 1197, paragraph 1, letter a) of The Civil Code).

An answer of the recipient comprising changes or supplementations to the contents of the offer may be considered, depending on circumstances, a counter offer (art. 1197, paragraph 2 of The Civil Code).

Doctrine has sustained the necessity to distinguish between the essential and non-essential amendments and supplementations comprised by the acceptance of the offer and that only in the case of essential amendments and supplementations, acceptance should have the value of a counter offer. As regards the non-essential amendments and supplementations, if the offeror does not immediately

[9] See The High Court of Cassation and Justice, Commercial Section dec. no.35/2009, in Buletinul Casației no.3/2009, p.33.

manifest its disagreement with them, the contract should be considered concluded in the terms of the recipient's acceptance[10].

In supporting this solution, one could invoke the provisions of art. 1182, paragraph 2 of The Civil Code, pursuant to which in order to conclude the contract it is sufficient for the parties to reach an understanding on the essential elements of the contract, even if they leave aside certain secondary elements to be subsequently agreed on.

Still, we consider that it is only the recipient's agreement with regard to the offer, as formulated by the offeror, that leads to the conclusion of the contract. Any amendment or supplementation, even if a non-essential one, involves an insecurity element in what regards the conditions of the conclusion of the contract. Therefore, an acceptance with any amendment or supplementation represents a counter offer addressed by the recipient to the offeror, which can be accepted or rejected.

Finally, in order for it to have legal value, the acceptance of the offer must reach the author of the offer in due term.

Acceptance of the offer will be legally inappropriate, if it reaches the offeror after the offer has become null (art. 1197, paragraph 1, letter c) of The Civil Code).

According to the law, the offer will become null if the acceptance does not reach the offeror in the term set out in the offer or, in absence, in the reasonable term, necessary for the recipient to receive it, analyze it and dispatch the acceptance (art. 1195 of The Civil Code).

The offer will also become null if this is refused by the recipient or in case of the offeror's decease or incapacity.

One should show that, according to the law, also tardy acceptance, and namely that has reached the offeror after the term set out in the offer or after the reasonable term contemplated by the law, may lead to the conclusion of the contract.

Tardy acceptance produces effects, i.e. leads to the conclusion of the contract, only if the author of the offer immediately informs the accepting party of the conclusion of the contract (art. 1198 of The Civil Code).

For the case in which the acceptance was performed in due term, but it reached the offeror after the expiry of the term, for reasons that cannot be imputed to the accepting party, the law provides that such an acceptance will produce legal effects, and namely will lead to the conclusion of the contract, if the offeror does not immediately inform the accepting party accordingly.

For the conclusion of the contract, acceptance of the offer, like the offer itself, has to take the form required by the law for the valid conclusion of the contract.

If by the offer a certain form of the acceptance of the offer has been established, acceptance will be inappropriate if it does not comply with the required form and, therefore, produces no legal effects (art. 1197, paragraph 1, letter b) of The Civil Code).

Like the offer, acceptance of the offer may be express or tacit.

Express acceptance of the offer may manifest itself by a written record or verbally or by certain gestures signifying the recipient's agreement to the received offer.

Tacit acceptance consists in an act performed by the recipient involving the idea of conclusion of the contract in the conditions formulated in the offer; for example, dispatch of the merchandise to which the purchase offer refers or payment of the price of the merchandise received from the seller.

The problem that has been discussed in the past was that of knowing whether the acceptance of the offer can result from the recipient's silence. Doctrine distinguished between silence accompanied by positive attitudes and simple silence of the recipient[11].

[10] See L. Pop, op.cit., p.176.

[11] See T. R. Popescu, P. Anca, op.cit., p.74; I. Albu, op.cit., p.76.

In the case of silence accompanied by positive attitudes of the recipient, silence means, in fact, tacit acceptance; for example, dispatch of the merchandise object of the offer.

In case of pure and simple silence, silence cannot have the significance of acceptance of the offer, whereas the principle "who is silent, consents" does not apply in law.

Exceptionally, doctrine admitted that silence can have the value of acceptance of the offer in the cases provide by the law or agreed by the parties or when the offer is made exclusively in the recipient's interest[12].

The solutions of the doctrine have been taken over and recognized in the new civil code. Pursuant to art. 1196, paragraph 2 of The Civil Code, the recipient's silence or inaction stands for acceptance only when it results from the law, from the parties' agreement, from the practices settled between them, from usual practices or from other circumstances.

A known case provided by the law in which silence is equal to acceptance of the offer is tacit relocation.

Art. 1810 of The Civil Code provides that if, after the elapsing of the term, the lessee continues to hold the asset and to fulfill the obligations without resistance on the lessor's part, it shall be considered that a new lease has been concluded, in the conditions of the old one, including in what regards the guarantees.

In commercial activity there may be legal relations between certain partners with continuity, and for facilitating the conclusion of contracts, they agree to conclude them in the simplified form, by order followed by execution, without there being necessary a formal acceptance of the order. Such an understanding between partners may lead to the establishing of practices between them, which makes superfluous the acceptance of the offers.

In certain areas of activity, usual practices can impose that the recipient's silence be equal to the acceptance of an offer to contract.

Acceptance of the offer must be communicated to the offeror. Communication must be made by means at least as fast as the ones used by the offeror for transmitting the offer, if by the law, from the parties' agreement, from the practices settled between them or from other such circumstances does not result otherwise (art. 1200, paragraph 2 of The Civil Code).

It being a unilateral manifestation of will, acceptance of the offer produces effects only from the moment at which it gets to the offeror, even if this does not become aware of the same for reasons that are not imputable to it. Consequently, the recipient may withdraw the acceptance of the offer, provided that the withdrawal reaches the offeror previously or simultaneously to the acceptance (art. 1199 of The Civil Code).

5. Conclusion of contract implies the achievement of the parties' will agreement on the contract clauses.

As showed, the parties' will regarding the conclusion of the contract manifests itself in the offer to contract and the acceptance of the offer.

If these two manifestations of will are concordant, the will agreement is achieved, i.e. the contract is concluded.

The matter brought forward by the conclusion of the contract is that of the moment of achievement of the agreement of will, as this represents the moment of conclusion of the contract.

In absence of a legal regulation in the old civil code, establishing of the moment of conclusion of the contract between absent parties was the subject of a controversy.

Civil and commercial law doctrine has proposed several theories (systems) regarding the determination of the moment of conclusion of the contract between absent parties[13].

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[12] See C. Stătescu, C. Bîrsan, op.cit., p.47-48; L. Pop, op.cit., p.179-181.

[13] See C. Stătescu, C. Bîrsan, op.cit., p.49-50; L. Pop, op.cit., p.186 and the next. See also St. D. Cărpenaru, Romanian Commercial Law Treaty, p.451-453.

According to the **theory of issuing**, named also the **will declaration theory**, the contract shall be considered concluded at the moment when the recipient has manifested its will to accept the offer received, even if such offer was not communicated to the offeror.

This theory was criticized for not allowing to establish exactly the acceptance moment and, therefore, the moment of the contract conclusion. Moreover, this does not offer any certainty, because, not being known to the offeror, acceptance may be revoked.

According to the **theory of dispatching**, also named the **transmission theory**, the contract should be concluded at the moment when the recipient dispatches the answer regarding the acceptance to the offeror.

The theory has been contested for not ensuring total certainty of contract conclusion, whereas, although the acceptance of the offer was dispatched to the offeror, its author can revoke it until the arrival of the acceptance at the offeror, using a faster means of communication. At the same time, by applying this theory, the offeror takes note of the conclusion of the contract after the moment when the same took place, and namely upon the receipt of acceptance of the offer.

In the **theory of receiving**, also named the **theory of acceptance receipt**, the contract is considered concluded at the moment when the offeror receives the answer regarding the acceptance of the offer, even if the offeror did not take note of such answer.

It has been showed that, although it offers a higher guarantee regarding the certainty of the moment of contract conclusion, still, the inconvenience of this theory lies in the fact that it considers the contract concluded, even in the case in which the offeror is not aware that the offer has been accepted[14].

Finally, according to the **theory of informing**, named also the **theory of knowledge of the acceptance**, the contract should be considered concluded at the moment when the offeror actually becomes aware of the acceptance of the offer.

This theory found legal support in art. 35 of The Commercial Code, according to which synallagmatic contract shall not be considered concluded ”if acceptance was not brought to the notice of the proposing party”. In other terms, the contract is considered concluded at the moment when the offeror becomes aware of the acceptance of the offer.

In relation to the theory of informing in has been objected, for good reason, that this does not ensure the possibility to exactly establish the moment when the offeror became aware of the acceptance of the offer. Moreover, by relating the moment of conclusion of the contract to the moment of actual knowledge of the acceptance of the offer one creates the possibility for the offeror to prevent the conclusion of the contract, by not opening the correspondence containing the acceptance of the offer.

Considering its advantages, but also the objections to it, the theory of informing has been applied in practice, using the simple presumption that the offeror has taken note of the acceptance of the offer at the moment of receipt of the answer regarding the acceptance of the offer. As presumption is relative, it could be overthrown by contrary evidence, in the sense that, without being in a breach situation, the offeror has not become aware of the acceptance of the offer upon the receipt of the correspondence, but at another date.

By applying in this manner the theory of informing, practically one applies the theory of receiving, considered the most correct both theoretically and practically and, for such reason, recommended for being adopted in future civil legislation[15].

Taking into account the past situation, the new civil code adequately regulates the moment of conclusion of the contract.

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[14] The theory of receiving was adopted by the United Nations Convention on Contracts for the International Sale of Goods (art.18 item 2), Vienna, 1980.

[15] C. Stătescu, C. Bîrsan, op.cit., p.50.

In the case of the contract that is concluded between present persons, in which case each party's will is received by the other party directly and instantaneously, the contract shall be considered concluded at the moment of acceptance of the offer. To this end, art. 1194 of the Civil Code provides that the offer without term addressed to a present person remains effectless if not immediately accepted.

The solution is the same also in the case of the offer transmitted by phone or by other such means of remote communication.

In the case of the contract concluded between the persons that are absent, in which case the offer and the acceptance of the offer will be communicated by correspondence (letter, phone, fax) and, consequently, there is a time interval between the offer and acceptance, the contract will be considered concluded at the moment when the acceptance of the offer arrives at the offeror. To this end, pursuant to art. 1186 of The Civil Code, the contract will be concluded at the moment and in the place in which acceptance arrives at the offeror, even if this does not take note of it for reasons that are not imputable thereto.

As one can notice, in relation to the moment of conclusion of the contract between absent parties, the new Civil Code provides for the theory of receiving.

In order to ensure full certainty and exactness of the moment of contract conclusion, the new regulation is more categorical; in all cases, the contract is considered concluded at the moment when the answer regarding the acceptance arrives at the offeror, even if the offeror does not become aware of the answer for reasons that are not imputable thereto.

The new Civil Code regulates the moment of conclusion of the contract in simplified form (art. 1186, paragraph 2 of The Civil Code).

In the case in which, according to the offer, practices settled between the parties, usual practices or nature of the business, the offer may be accepted by a conclusive act or fact of the recipient without informing the offeror any longer of the acceptance of the offer, the contract will be considered concluded at the moment when the recipient performs the conclusive act or fact (for example, dispatch of the merchandise that is the object of the offer).

Establishing the moment of the contract is of interest not only theoretically, in relation to the conclusion of the contract, but also practically.

Thus, the effects of the contract produce from the moment of its conclusion, except for the cases in which the parties have agreed otherwise.

Then, at the moment of conclusion of the contract, one assesses the meeting of the validity conditions of the contract (capacity, consent flaws etc.).

Also, in relation to the moment of conclusion of the contract, one determines the law applicable to the contract with extraneity elements.

Finally, the moment of conclusion of the contract serves to determining the venue of conclusion of the contract.

The new Civil Code regulates not only the moment of contract conclusion, but also the venue of contract conclusion between absent parties.

According to art. 1186 of The Civil Code, the contract shall be concluded at the moment and in the venue in which acceptance arrives at the offeror. So the venue of contract conclusion is the locality where the offeror is and where acceptance of the offer arrives at the offeror.

We consider that this solution of the law is applicable also in the case of conclusion of the contract by phone or by other such means of remote communication.

In the case of conclusion of the contract in simplified form, when the contract is considered concluded at the moment when the recipient performs a conclusive act or fact (for example, dispatch of the merchandise that is the object of the offer), the venue of conclusion of the contract is the locality where the recipient of the offer is (art. 1186, paragraph 2 of The Civil Code).

Determining the venue of contract conclusion is of practical interest.

Thus, depending on the venue of contract conclusion one determines the competence of the court of law (territorial competence) for the resolution of the disputes regarding the contract.

Then, the venue of contract conclusion is of interest for determining the applicable law, in the case of a conflict of laws in space regarding the contract with extraneity elements.

6. By concluding the contract, the parties agree on the contract clauses, which synthesize each party's obligations.

Of course, the parties are bound by the obligations assumed by the contract clauses, which express their will.

The new Civil Code regulates also the legal regime of special clauses regarding the conclusion of the contract. The external clauses, the standard clauses and the unusual clauses are being contemplated.

The contract concluded by compliance with the law obliges not only to what is expressly stipulated, but also to all the consequences that the practices settled between the parties, usual practices, law or equity confer on the contract, depending on their nature.

Pursuant to the law, the parties shall be also bound by the extrinsic clauses to which the contract refers, if the law does not provide otherwise (art. 1201 of The Civil Code).

The law has in view also the conclusion of contracts using standard clauses (art. 1202 of The Civil Code). These standard clauses are stipulations previously established by one of the parties in order to be generally and repeatedly used and that are included in the contract without having been negotiated with the other party; for example, the general conditions regarding the leasing contract.

In principle, the conclusion of the contract in which standard clauses are used is governed by the general rules for the conclusion of the contract, provided by art. 1178-1203 of The Civil Code, which apply accordingly.

But, according to the law, the clauses negotiated prevail over the standard clauses.

In the case in which both parties use standard clauses and do not come to an agreement regarding such clauses, the contract will be still concluded based on the agreed clauses and on any standard clauses that are common in their substance. The contract shall not be concluded if either of the parties notifies the other party, either before the moment of conclusion of the contract, or afterwards and immediately, that it does not intent to be bound by such a contract (art. 1202, paragraph 4 of The Civil Code).

In order to ensure the parties' protection, upon the conclusion of the contract, the law especially regulates the legal regime of unusual standard clauses. There are contemplated the clauses providing for the benefit of the one proposing them the limitation of liability, the right to unilaterally terminate the contract, to suspend the fulfillment of the obligations or providing to the detriment of the other party the losing of rights or from the benefit of the term, limitation of the right to oppose exceptions, restriction of the liberty to contract with other persons, tacit renewal of the contract, applicable law, arbitration clauses or clauses by which one derogates from the norms regarding the competence of the courts of law.

Such unusual standard clauses produce effects only if expressly accepted in writing by the other party (art. 1203 of The Civil Code).

7. All that have been showed above lead to the **conclusion** that the regulation of the new Civil Code regarding the conclusion of the contract stands for actual progress in comparison with the previous legal regulation.

Even if, in many cases, the solutions adopted are not a novelty towards the solutions accepted by the civil law and commercial law doctrine, as well as by the judiciary practice, they have the merit of offering legal support and, therefore, a guarantee for the security of contractual relations.

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THE EFFECTS OF THE COLLECTIVE LABOR CONTRACT

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Abstract
The modifications operated on the first part of year 2011 over the work legislation (by Law no 40/2011 for the modification and completion of Law no 53/2003 – Labor Code, and by Law no 62/2011 of the social dialogue) assumed interventions over some regulation solutions which, in time, had shaped as constants of the specific standardization. Concurrently, new institutions received a legal commitment, whose validity shall be confirmed or, on the contrary, infirmed by the practice of the individual reports and of the working collectives. Not at last, there is to be remarked also the taking over – with minor changing, most of the times of terminological nature – of previous solutions, which proved their utility within the practice of the working juridical reports.

Keywords: *social dialogue; labor collective contract, effects of the contract, extension of the labor contract's effects, collective agreements, opposability of the collective labor contracts*

Introduction

One of the most important juridical institution in the field of the labor law is the social dialogue. The framework of the collaboration between the social partners is the same both international and national level. Since 1919, when International Labor Organization (ILO) was founded, the dialogue between workers representatives, employers' representatives and Governments were a constant concern in order to keep – or restore – the social peace.

Social dialogue is possible only when certain conditions are fulfilled[1]:

- Strong independent workers' and employers' organizations with the technical capacity to access relevant information for participating in social dialogue;

In article 3 paragraph 5 of the ILO Constitution there is a reference to organizations which are "most representative". Also Article 3 (a) of the Collective Bargaining Recommendation 1981 (No 163) enumerates "the recognition of the representative" employers' and workers' organizations as a mean of promoting collective bargaining. Consequently, social dialogue is only possible between strong partners. An employer would be unlikely to consider negotiation otherwise.

- Political will and commitment to engage in social dialogue on behalf of all the parties; social dialogue is only possible if the parties are, to some extent, willing to sit around the table;
- Respect for the human rights of freedom of association and collective bargaining; freedom of association and collective bargaining are the two cornerstones of social dialogue;
- Appropriate institutional support.

Social dialogue assumes interferences on behalf of the authorities. Even if they did not participate in social dialogue, "measures appropriate to national conditions (should) be taken, where necessary, to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers or employers' organizations and workers' organizations, with a view to the regulation of terms and conditions of employment by means of collective agreements" – Article 4 of ILO Convention No 98.

The base of the social dialogue – at the national level – is the relation between the (individual) employer and its workers. The content of the social dialogue at this level implies the consultation, the information, the negotiation and the agreement between the parts.

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[1] See Mark Rigaux, Jean Rombouts (eds.), *The Essence of Social Dialogue in (South East) Europe. A primary comparative legal survey*, Intersentia, Antwerpen – Oxford, 2006, p. 3-4.

1. A. Law no 62/2011 of the social dialogue[2] regulates under the title of „the effects of the collective labor contracts" (name of Chapter II of the 7th Title – "Work collective negotiations") the means of applying the clauses of the collective labor contract in terms of the ending level. Hence, according to the article 133 paragraph (1) from the law: „The clauses of the collective labor contracts produce effects as following:

a) for all the employees within the unit, in case of the collective labor contracts concluded at that level;

b) for all the employees hired in the units that belong to the group of units for which the present collective labor contract has been concluded;

c) for all the employees hired within units belonging to the field of activity for which the collective labor contract was concluded and who belong to the employer's organizations, subscribers of the contract".

We mention that *the collective negotiation within the enterprise is compulsory*, except when the enterprise has less than 21 employees. The employer's refusal to negotiate may lead to a collective labor conflict. When the employer does not initiate negotiation, this takes place at the request of the union or the employees' representatives, within 15 days from the date of submitting the request. In Romania, as in most European States (except United Kingdom), negotiation at the enterprise level is used to complement the collective agreements concluded for the sector as a hole[3].

But, the employer's obligation to negotiate does not mean that the conclusion of the collective contract is a mandatory effect of the negotiation. The parts could agree to conclude a contract or not to conclude a contract (to postpone the negotiation for at most 12 month). If they do not agree, a collective labor conflict could be started.

Collective negotiation at the sector level[4] *at the level of groups of enterprises* is carried out between the representative trade unions and the representative employers' organizations. Whilst quantitative matters (wages and hours) are still regulated mainly by way of collective labor agreement at enterprise level, there is a tendency to shift to agreements at sector level.

B. Analyzing the legal text – article 133 paragraph (1) –, it results that there cannot be any interpretation and application problems regarding the opposability *erga omnes* of the effects of the collective labor contract concluded at the unit's level: the clauses of this contract are applicable to all the employees from that particular unit, including to those who:

- having the statute of employee of the unit at the moment of negotiation and conclusion of the collective labor contract, were not represented by the specific representation forms [the representative syndicate or the representatives of the employees, or the syndicate federation representatives where the non representative syndicate is affiliated to *together* with the representatives of the employees – art. 134 point B letter a) correlated with art. 135 paragraph (1) letter a) from Law no 62/2011];

- acquire the statute of employee of the units, subsequent of the conclusion of the collective labor contract, anytime during its validity term [presently, determined by art. 141 paragraph (1) and (2) from the law][5].

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[2] Published within the Romanian Official Monitor, part I, no 322 from May 10th 2011.

[3] See Mark Rigaux, Jean Rombouts (eds.), *op. cit.*, p. 208. 933 from December 29th 2011.

[4] The sectors of activity were regulated by the Government Decision no 1260/2011, published within the Romanian Official Monitor, part I, no.

[5] See I.T. Ştefănescu, *Theoretical and practical paper for labor law,* Universul Juridic Editor, Bucharest, 2010, p. 173.

C. Still, regarding the effects of the clauses of the collective labor contracts concluded at higher levels, it is necessary, in our opinion, in order to establish a correct area of manifestation of the opposability of the collective contractual clauses, the correlation of letters b) and c) of article 133 paragraph (1), on one hand, with the dispositions of art. 143 paragraph (4) and paragraph (5) and of art. 136 paragraph (2) from the law, on the other hand.

Art. 143 paragraph (4) from law no 62/2011 establishes as an express request that, for the collective labor contracts concluded at the units group's level and, respectively, area of activity, the file made by the parties in order to register the contract within the Ministry of Labor, Family and Social Protection, must also comprise "the list of the units for which the contract is applied..."[6]. It results, *per a contrario*, that it is accepted the existence, either within the group of units, or within the area, of the activity of some units – the employers – to whom the clauses of the collective labor contract concluded at that level, are not opposable. The effects of the collective labor contract would be limited, as applicability, only for the employees of the units highlighted on the list found within the file made for the registration[7].

In case the collective labor contract concluded at the level of the sector of activity, the solution we highlighted is confirmed also by the option of the legislator expressed in 143 paragraph (5) from the law (text on which we have developed a number of ideas *infra*, point 3 of the present material). To the extent that the effects of the collective labor contract concluded at the activity sector level, it would presume the application of clauses of the contract of all units from that respective sector and their employees; it would have no procedure justification for the extension of the contract by ordinance of the ministry of labor, family and social protection. But, as a result of this extension – operated administratively and normatively – the collective labor contract concluded at the level of the activity sector acquires *ope legis* a character of opposability *erga omnes*.

For the hypothesis of the collective labor contract concluded at group level of units, the highlight of the group units to whom that contract applies is justified only in case the group was *not* made only for the negotiation (and conclusion) of the contract at this level. The solution comes from the interpretation *per a contrario* of art 143 paragraph (2) letter d) from Law no 62/2011, in which it is expressly highlighted the situation of constituting the group of units „only for negotiating a collective labor contract at this level". Hence, the group of units:

- can be constituted into one of the modalities mentioned in art. 128 paragraph (3) the second thesis from the law (voluntarily, the cause of the constituting agreement being the negotiation of the collective labor contract itself);

- can be constituted independently of the manifestation for a negotiation intention for the collective contract, this manifestation of the group being achieved, at a certain point, during its existence (for example, we highlight in this second category the association mentioned by art 41 from the Emergency Ordinance of the Government no 34/2006 regarding the attribution of public acquisition contracts, of the concession contracts for public works and services concession contracts).

Within this last situation, it is possible that one or more units from the group wish not to participate at the collective negotiation. The collective labor contract concluded following the getting through the negotiation step, *shall not apply* within those units [which did not give express mandate to the representatives art 136 paragraph (1) from the law refers at].

We underline that, no matter the manifested situation – from those presented above – if the member unit of the group or found within the domain of activity is highlighted on the list found

[6] See A. Ţiclea, *Paper on labor law*, 5th edition, revised, Universul Juridic Editor, Bucharest, 2011, p. 251.

[7] We highlight that under the action of the previous regulation – art. 13 from Law no 130/1996 – the solution was the same: the collective labor contracts concluded at the level of the field of activity were applicable in the units mentioned in the contract, respectively in the component units of the established field and mentioned by the parties negotiating the contract (at branch level).

within the file made in order to be registered, the effects of the contract shall produce for all the employees of the respective unit.

2. As a particular expression of the principle *pacta sunt servanda*, regulated as a common norm rule by art. 1270 paragraph (1) Civil Code, article 148 paragraph (1) from Law no 62/2011 stipulates that the execution of the collective labor contract is compulsory for the parties. According to the paragraph (2) of the same article, "the lack of fulfillment of the obligations assumed by the collective labor contract attracts the liability of the parties which are to be blamed for it".

The compulsory effects of the contract, which assume a specific conduit of its parties in executing the obligations that come up, lead to the contractual liability of the party who fails to fulfill its duties.

If this party is the employer himself, we believe that the other party – *the employees as a collective* (article 134 from the law) – can act in front of any Court requesting the obligation of the unit to respect the contractual frame.

Even if the legislator suppressed any reference to what under the rule of the previous regulation (Law no 168/1999 regarding the solution of the working conflicts) constituted in *collective right conflict*, we believe that art. 148 paragraph (2) from Law no 62/2011 bases the procedural approach of the *employees* (represented or not by the syndicate or in other form of representation) to act this way.

In our opinion, it is not justified the option found in practice to disjoint such a cause in so many files as the number of the employees having the quality of complainants, especially given that the obligation of the employer – expressing, correlatively, the subjective right of the employees – it has as a single source the collective contract (not being "disseminated" in the individual labor contracts).

3. Article 143 paragraph (5) from Law no 62/2011 decides:

„In case it is fulfilled the condition mentioned in paragraph (3), the application of the collective labor contract registered at the level of all units from the sector, by ordinance of the ministry of labor, family and social protection, with the approval of the Tripartite National College, on the basis of a request addressed to it by the subscribers of the collective labor contract at sectorial level".

Regarding this text, the following ideas can be expressed:

- the approach of the extension belongs *solely* to the subscribers of the collective labor contract; we believe that the request should be submitted to the ministry by *all the signatories of the contract*, and not by *one part* of them;

- the approval of the Tripartite National College represents a *letter of conformity*; it represents a condition of legality (validity) of the expansion paper, being necessary – even if the text does not distinguish – its expression previous to the issue of the ministry's ordinance;

- the expansion document is, from the juridical point of view, an administrative normative paper, which can be contested during the procedure regulated by Law no 554/2004 of the contentious administrative; the active standing in such a cause belongs, hypothetically, to any unit *over which* the expansion is being done;

- the extension cannot be achieved for the collective labor contract concluded at the level of units.

4. Although it is not aimed at the factual effects of the collective labor contracts, we appreciate that it presents interest, within a larger context of the analysis of the effects provided by the collective conventions, and article 153 from Law no 62/2011 that rules:

„According to the principle of mutual recognition, any trade union organization legally constituted can conclude with an employer or with an employer's organization any types of

agreements, conventions or understandings, in written, that represent the law of the parties and whose provisions are applicable only for the members of the signatory organizations".

The quoted norm raises the problem of identification of the elements of content of such agreements, conventions or understandings which – from the perspective of the effects they produce – are totally governed by the principle of relativity of the contract's effects (article 1280 Civil Code), unlike the effects of the contracts or of the collective labor agreements. So to say, is it possible that by means of such juridical papers to be established certain elements of content common with the ones of the labor collective contracts or agreements ("*clauses regarding the rights and obligations that come up from the labor relations*"), or it must be delimited the content of the collective contracts or agreements from those of the juridical documents it was made reference to by means of art. 153 from Law no 62/2011?

We believe that the second solution is the correct one. We start our argumentation from the premise that a superposition would not be justified – logically and juridical – even a partial one, between the content of the contract or from the collective labor contract and those of the juridical documents named in article 153 from the law. The latest have a distinct content, negotiating and elements of agreement being able to be determined *analytically* by reporting to the attributions of the syndicate attributions, regulated by article 25 and art 27 – 31 from Law no 62/2011, other than those which target the labor relationships of the employees and of the employers.

There can be, hence, determined – without the enumeration to be exhaustive - the following domains of negotiation and agreement which bring content to the juridical papers mentioned by article 153 from the law:

- the material support of the syndicate members in exercising the profession, to which, hypothetically, the employer participates too;
- the setting up of aid houses for the syndicate members, to which the employer contributes;
- commonly editing and printing own publications;
- setting up and administration, in common, within the legal conditions, for the benefit of the syndicate members, of social, culture, study and request units in the domain of syndicate activity, commercial companies, insurance companies as well as the bank;
- setting up of funds for helping the syndicate members, with the participation of the employer;
- organizing and support for the material and financial issue in common of the cultural – artistic activity;
- organizing and developing, in common, of preparation courses for professional qualification, in the conditions of the law;
- drawing up/or promoting in common of certain legislation proposals.

Synthetically, the content of the agreements, conventions or understandings evoked by article no 153 from Law no 62/2011 can be determined as following: according to the principle of contractual liberty, the syndicate organizations can conclude with the employer or with an employer's organization, a juridical bilateral document by which it is established – in full compliance with the principle of the specialization of the usage capacity of the juridical person – clauses related to any area of activity except those related to the labor relationships of the employees and employers.

5. A collective labor agreement has similar binding effect to a law, at the level at which it was concluded, for its parts, and the lower levels. At the ground level, as a rule, it is therefore compulsory not only for those that signed it, but for all employees working for that employer.

The general binding nature represents a significant exception from the principle of agreements, relativity of common right, as well as from the principle of freedom of will. That is why criticism was sometimes formulated with regard to the doctrine postulating that if a collective labor

agreement has not been concluded at a certain level, the provisions of the labor law should become directly applicable.

The actual regulation having object the effect of the collective labor contract and other collective agreements has the merit that clarify – as we already have presented – some issues occurred while the previous regulations were applied. But, there are some parts which still need some clarification, because the practice of the collective labor relations has to activate on a clear legislative framework. We are referring especially to the institution of the extension of the collective labor contracts' effects – concluded at the sector level of activity – to all the employers activating in that sector.

Conclusion

The legal framework of the social dialogue implies specific rules of law. It is mandatory for such regulations to be as close as possible to the social partners, in order not to make more difficult the social dialogue.

De lege lata, it is clear that the effects of the labor contract are general at the employer's level. At the level of group of units and activity sector, the effects occurring only the parts of the contracts.

Another important aspect is the elimination of the collective labor contract at the national level.

The trade unions can conclude with the employer or with an employer's organization, any juridical bilateral document by which it is established. Its clauses are related to any area of activity except those related to the labor relationships of the employees and employers. The effects are produced only to the parts of the accord.

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PROBATION PERIOD IN THE INDIVIDUAL LABOUR CONTRACT

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Abstract
This study wants to present the period of probation in the labour contract as an optional way to verify the sills of the employee, because of the Labour Code changes and from the view of the legal practice in this field. In fact, in actual labour relations, often, the work performed during the period of probation is consider performed outside of labour contract legal frame. Even more, period of probation appears, sometimes, as a unilateral manifestation of the employer's will and it manifest itself as a resolutory condition of the contract and not as a forfeiture clause of this contract. All these led us to achieve a clear and thorough research of the probation period and of the specific employment relationship during the course of it.

Keywords *probation period, forfeiture clause, dismissal, optional valability clause, seniority.*

Introduction:

The valid conclusion of the individual employment contract supposes the cumulative meeting of some general[1] and special[2] conditions of validity. The general conditions must apply to all contracts and are stipulated by the common law. The special conditions must take into consideration the provisions of Articles 27-33 from the Labour Code. Article 29 Labour Code expressly stipulates that the individual employment contract can be concluded only after the verification of professional and personal skills of the future employee. In this case, we find ourselves in the presence of a prior condition that is specific and mandatory for the valid conclusion of the individual employment contract. In other words, the employer has the legal obligation to verify the already mentioned aptitudes before concluding the individual employment contract, but he has the possibility to choose (except the public institutions and the budgetary units) the way to realise this verification, within the limits stipulated by Article 29 paragraphs 3 and 4 Labour Code. But, according to Article 30 Labour Code, the employment for the public institutions and authorities and other budgetary units can only be done by examination or contest.

Further, the same normative act regulates another way to verify the employee's skills, namely *the probationary period*. But, this time we are in the presence of a *facultative and subsidiary* verification to the contest and examination, that take place after concluding the individual employment contract[3].

The employer and the employee establish the probationary period, with one accord. Its existence, respectively the verification of employee's skills in such way *does not presume*, even if the

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[1] The legal capacity of the parties, the agreement, the object and the cause of the contract.

[2] The condition on health status, conditions of studies or training, conditions of seniority and studies, condition of work repartition, conditions of prior approval or authorization, conditions concerning the verification of personal and professional skills, conditions of election, appointment or accreditation, conditions referring to the conclusion, in Romania, of the individual employment contracts of foreigners and of the staff of foreign social commercial representations and that of the economical organizations.

[3] In this regard, Al. Ţiclea, *Tratat de dreptul muncii*, Ed. Universul Juridic, Bucureşti, 2007, p. 413 and next, L. Uţă, F. Rotaru, S. Cristescu, *Codul muncii adnotat*, vol. I, Ed. Hamagiu, 2011, p. 209 and next.

text law does not expressly stipulate it. The probationary period represents one of the employer's obligation of notifying, according to Article 17 paragraph 3 (n) Labour Code. Consequently, it may be the object of negotiation between the future employee and the employer, along with other contractual clauses.

If before the amendment of the Labour Code by Law No. 40/2011, the failure to inform the employee of the probationary period led to the withdrawal of employer's right to verify in such way the skills of the employee, we question ourselves (with reason) if it did not changed into one-sided measure of the employer, according as the above stipulation was rescinded. In other words, from the *per a contrario* interpretation of the new regulations, the failure to inform the employee of the probationary period, prior the conclusion or modification of the individual employment contract, does no longer influence the validity of the probationary period established by contract. According to Article 17 paragraph 2 Labour Code, the obligation to notifying, completely, shall be deemed to be fulfilled when the employee signs the individual employment contract. But, the presumption is a relative one, if we relate this text of law to Article 19 Labour Code. Thus, if the employer does not fulfil his obligation to informing (which, as we have already mentioned, includes the probationary period, too), the future employee or the employee (if the contract changes) may refer the matter to court and seek appropriate compensations according to the damage he suffered, as a result of the infringement in question. We cannot ignore that, today and in this field, the violation of the right to informing the employee is not sanctioned, except for the eventual damage caused. As it had been well shown by the legal literature in matter[4], in the Labour Code as subsequently amended, the obligation to inform is a mere formality, whose failure does not influence, in a significant way, the labour relationships developed later.

Returning, the reason of the possibility of resorting to the verification of the employee's skills during the probationary period is, firstly, that of giving to the employers the possibility to verify if the employee fits to his qualification, if he/she holds the aptitudes they consider to be necessary for executing the duties, and secondly, to provide them with a legal mechanism that allows them to dismiss the person that does not correspond to the requirements. On the other hand, this stipulation can work for the employee, too, because, during the probationary period, he can observe if he is content with the given job[5].

The beginning of the probationary period is marked, in principle, by the moment of concluding the individual employment contract, if the parties did not convened that the performance of the contract shall start after a certain period.

During the whole length of the probationary period, the work's performance must be done under normal conditions for the respective job. In other terms, the employee cannot be obliged, during this period, to perform work under other conditions, different or additional to those specified by the respective job[6].

Specifically, this probationary period is directly influenced by the category of the employees to which it applies and by the type of the individual employment contract. As a consequence, the effective length of the probationary period is established by the employer, but it cannot exceed 90 calendar days for the operational positions and up to 120 calendar days for the managerial positions[7].

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[4] R. G. Cristescu, C. Cristescu, *Codul muncii. Analize şi soluţii*, Ed. Hamagiu, Bucureşti, 2011, p. 83.

[5] J. C. Jevellier*, Droit du travail*, 6e édition, L. G. D., Paris, 1998, pp. 211-250.

[6] I.T. Ştefănescu*, Perioada de probă în reglementarea Codului muncii*, in the magazine *Dreptul* nr. 8/2003, p. 29.

[7] Before the amendment of the Labour Code by the Law No. 40/2011, a probationary period for the unskilled workers was established, but it could not exceed 5 working days. Nowadays, the special legal legislation applicable for the probationary period in the case of this category of employees has been abrogated. Thus, this category of employees respects the general legal legislation of the probationary period, by reference to the operational position they occupy and by reference to the concluded individual employment contract.

These periods are applicable, by category of employees, to the individual employment contracts for an unlimited duration, representing the rule in the field.

As for the modality to calculate the length of the probationary period, it has been established by jurisprudential[8] means that it is not question about a legal procedural term and that the provisions of Article 101 paragraph 1 Code of Civil Procedure do not apply in this situation. Therefore, when calculating the probationary period established in the individual employment contracts of unlimited duration, all calendar days shall be counted, inclusively the day when the probationary period starts and the day when it ends[9].

According to Article 85 Labour Code, the probationary period, for the individual employment contracts of limited duration, shall not exceed:

- 5 working days for a length of the individual employment contract of less than 3 months;
- 15 working days for a length of the individual employment contract between 3 and 6 months;
- 30 working days for a length of the individual employment contract exceeding 6 months;
- 45 working days for the employees in a management position, for a length of the individual employment contract that do not exceed 6 months.

Special lengths of the probationary period are regulated for the activities developed through a temporary employee. In this particular case, according to Article 97 Labour Code, the probationary period that can be stipulated for the accomplishment of the mission shall not exceed:

- 2 working days, when the temporary employment contract has been concluded for a period shorter or equal to 1 month;
- 5 working days, when the temporary employment contract has been concluded for a period between 1 and 3 months;
- 15 working days, when the temporary employment contract has been concluded for a period between 3 and 6 months;
- 20 working days, when the temporary employment contract has been concluded for a period exceeding 6 months;
- 30 working days for the employees in a management position, when the temporary employment contract has been concluded for a period exceeding 6 months.

It is obvious that in all these situations, the maximum length of the probationary period is regulated by imperative norms. Thus, including in the individual employment contract a probationary period that exceed the maximum length stipulated by law will engender, on the one hand, the nullity of the clause and its replacement with the applicable legal provision, and, on the other hand, the employer's engagement of the contraventional liability, under Article 260 paragraph 1 (d) Labour Code.

In the case of persons with disabilities and in the case of graduates of higher education institutions we find derogatory disposals to the norm according to which the probationary period has a subsidiary and facultative character.

Thus, the probationary period for the employees with disabilities has, first of all, an exclusive character, meaning that no other way is accepted to verify the professional skills in this situation. Since it does not exist the prior verification of the professional skills before concluding the individual employment contract, the probationary period turns into a condition of validity of the employment contract. Secondly, the probationary period for the persons with disabilities has a mandatory character: its insertion cannot be negotiate by the contractual parties.

Regarding the length of this probationary period, there are two normative acts that establish different durations. Article 31 paragraph 3 Labour Code stipulates a length of the probationary period that shall not exceed 30 calendar days; Article 83 paragraph 1 (d) of Law No. 448/2006 regarding the

[8] C. A. Bucureşti, s.a VII-a civ., confl. mun. şi asig. soc., dec. nr. 2009/R/2010.
[9] R. G. Cristescu, C. Cristescu, op. cit. p. 86.

protection and promotion of the rights of disabled persons, republished, stipulates a length of the probationary period when concluding the contract for at least 45 working days. As the principle of right *specialia generalibus derogant* works for the case of labour relationships, too, we consider that, when hiring persons with disabilities, the employer must take into consideration the length stipulated by the special law in matter: respectively to establish a minimum length of 45 calendar days[10].

Another regulation of exception, in this field, can be found in Article 31 paragraph 5 Labour Code. In this case, the graduates of higher education institutions, at the beginning of their career, benefit by an obligatory *period of stage* of six months. This term comes into force from the moment of their employment for the job or profession they obtained a licence. The length of 6 months is a general length, because, by special laws, different periods of stage can be regulated[11]. In this specific case, most of the liberal professions involves the performance of an obligatory period of professional stage when starting the career – it is the case of lawyers, notaries, legal executors, and others.

It must be specified the fact that, the probationary period, as understood by the Labour Code, must not be confused with the period of stage. The stage represents the, limited, length in which the employee, without a professional experience has the possibility to develop his/her skills, to put in practice the theoretical knowledge he acquired during his/her studies, and, last but not least, it supposes the accumulation of work experience. All this while the probationary period aims exclusively to verify the professional skills of the employee[12].

In this regard too, it must be specified that the probationary period cannot be mistaken for the professional certification, which represents the verification of the professional preparation during the execution of the individual employment contract, having as purpose to keep the employee further in the function or the job he/she performs by contract.

Coming back to the professional stage, it is provided that the employer has the obligation, at the end of the stage, to issue a graduation certificate for the employee, certificate confirmed by the territorial labour inspectorate. Also, it is forbidden to establish a probationary period for the same job after graduating the professional stage.

The exact way to realise the professional stage, respectively the rights and obligations of the parties involved in the individual employment contracts during this period, is regulated by special law.

As we had shown, the probationary period has both an optional and an obligatory character. The two features do not contradict each other, because they refer to two distinct moments. The optional character refers to the parties' possibility of negotiating a probationary period in the individual employment contract, within the limits stipulated by law. In other words, even if the initiative of introducing a probationary period belongs to the employer, it cannot be imposed to the employee. The parties' agreement is mandatory, as long as the employer and the employee find themselves on positions of legal equality. Moreover, nothing stops the employer to renounce at the probationary period in the employment contract he is about to conclude (or the concluded one).

On the other hand, the obligatory character follows two aspects. Firstly, if the parties agree on including the probationary period in the individual employment contract, this will be specified in a contractual (optional) clause, or accordingly, in an addendum to the employee's individual contract. Secondly, the employer has the obligation to verify the professional skills of persons with disabilities under the form of the probationary period. This time, as we have already seen, the law regulates a

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[10] In this regard, R. G. Cristescu, C. Cristescu, op. cit. p. 89.

[11] According to Law No. 514/2003 on organisation and practice of the profession of legal adviser, this professional category has the obligation, at the beginning of career, to perform a professional stage for 2 years, under the surveillance of a legal adviser.

[12] In this regard, Ş. Beligrădeanu, I.T. Ştefănescu, *Perioada de probă în reglementarea Codului muncii*, in the magazine *Dreptul* nr. 8/2003, p. 25; R. G. Cristescu, C. Cristescu, op. cit. p. 91.

special legal status which is derogatory from the norm established by Article 31 paragraph 1 Labour Code.

When concluding the individual employment contract, it can be established a single probationary period. If the individual employment contract is affected by a suspension, the probationary period shall not exceed the moment when the employee effectively begins his/her activity. If until this moment the employer did not express his will to verify the employee's skills in this particular case, he will not be able to negotiate a probationary period during the performance of the labour relationship.

According to Article 32 paragraph 2 Labour Code, during the performance of the individual employment contract, a new probationary period may be negotiated, if the employee enters a new position or profession with the same employer or is to perform the activity in a difficult, unhealthy or dangerous workplace[13].

There is also a case when the employer may only one time negotiate and establish a probationary period in the individual employment contract. It is the situation regulated by Article 74 Labour Code, according to which, the employer who made collective redundancies resumes his activity within 45 calendar days from the date of the collective redundancy, the dismissed employees have the right to be reemployed, with priority, on their jobs without any examination, contest or probationary period.

Following the same reasoning, the employer's right to negotiate and establish in the individual employment contract more probationary periods is limited. If, before the modification of the Labour Code, the limitation referred to the number of persons that could be employed on probation for the same position[14], at present the limitation is a temporal one. Thus, the employer can make successive employments on probationary periods for several persons, for the same position, only within 12 months. When this period ends, the employer can no longer establish a probationary period for that position. This term produces effects from the date of the first employment for the specified position, for which it had been established a probationary period[15].

The probationary period is part of the individual employment contract and it makes the object of an optional contractual clause, as we have already shown. Consequently, during its length, the employee shall enjoy all rights and duties provided for, negotiated or established by the individual employment contract, the collective labour agreement or the internal regulation. It is expressly[16] stipulated that, the probationary period represents length of service[17] and it counts as stage of contribution for the social insurance systems.

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[13] Workplaces are classified into normal workplaces, workplaces with special conditions and workplaces with special conditions as determined by legal regulations. The employees engaged in such workplaces will be subject to a compulsory medical examination conducted by the occupational physician, in the conditions and terms established by the collective labour contract at the unit and institution. In case one or more of the special conditions are found for all employees of an establishment, a department, a workshop or a workplace, it will be set for them by negotiating wages. The amount of these basic wages will not be lower than the amount of the basic wage and of the negotiated increases. For providing work in jobs with heavy, dangerous, harmful, painful or in other similar conditions, the employees are entitled, if necessary, to increases to the basic wage, to reduced duration of working time, to food to strengthen the body's resistance, to free equipment protection, sanitary materials, additional leave, provided by collective labour contracts at branch level, groups of units, units and institutions; the lengths to reduce the retirement age are those stipulated by law. At workplaces with specific conditions, where only a part of the employees are working in such conditions, only they will receive bonuses. (Collective labour contract at national level 2011- 2014).

[14] Otherwise, this legal provision was criticized, being considered that it impedes the employer's possibility to select his personnel.

[15] The legal literature has shown that this statutory provision privileges small and middle employers who can, in this way, roll an important number of employees on probationary periods, because they do not have a good recruitment system. (R. G. Cristescu, C. Cristescu, op. cit. p. 91).

[16] Article 32 paragraph 3 Labour Code.

[17] And, according to Article 16 paragraph 4 Labour Code, only the work performed under an individual employment contract shall be included in employee's length of service.

The cessation of the individual employment contract and therefore of the work relationship during or even at the end of the probationary period raised many discussions in the legal literature. The disputes referred, in generally, at the adjustment of the probationary period, under the provisions of the unadjusted Labour Code, but that appeared in practice. In fact, by O.U.G. no. 65/2005 on modification and completion of the Labour Code, it was specified that during or at the end of the probationary period, the individual employment contract could cease by a written notification, on the initiative of either party. The problem of this legal text was that it regulated a possibility that, in practice, met the refusal of the Labour Inspectorate to write this article in the employees' record books.

The jurisprudence of law courts settled this polemic. It established that, during or at the end of the probationary period, the individual employment contract may only cease by a written notification, ground on (old) Article 31 paragraph 4^1 Labour Code, the written form of this notification representing its unique condition of validity[18].

The current legislation in matter is much more clear, because it stipulates the exclusive character of the written notification, as ground for cessing the work relationships, the lack of obligation to give notice, the lack of obligation to motivate the notification[19]. In this way, the probationary period represents a true forfeit clause, the issue of the notification involving immediately the cessation of the individual employment contract, without being necessary other formalities or the motivation of the respective act. It is obvious that, the cessation of the contract during or at the end of the probationary period is an independent situation of the work relationships, different from dismissal (for professional inadequacy) and resignation.

The notification may come from any of the contractual parties – employee or employer, but it must have a written form. Also, the notification must be communicated to the other party in a manner likely to make possible its acknowledgement, but as we have mentioned, it is not necessary to motivate it.

The initiative of any of the contractual parties to denounce the contract by a written notification, at the end of the probationary period, engages the liability of the person in cause[20]. There is also the possibility that the employee goes to law if the forfeit clause was realized by violating the law (without being respected the written form of the notification or without being communicated) or if an abuse of distress has been committed, demanding for compensations. On the other hand, the employer's appreciation of the employee's professional skills and qualifications cannot be limited by the law court, because the employer is the only person capable to assess the necessities in balance with the job description, the demands and the efficiency required.

From the norm according to which, in the situation of ceasing the work relationships during or at the end of the probationary period, there is no right to notice, one exception exists. Thus, in the case of employee's dismissal during the probationary period, either on medical problems or on job abolition, the employer will have to give to the employee a notice period of up to 20 working days.

In conclusion, probation period is a subsidiary and subsequently, in principle, method in relation with contest, examination, interview or any other verification form of the future employee's perofesional and personal skills.

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[18] C. A Bucureşti, s.a VII-a civ., confl. mun. şi asig. soc., dec. nr. 1421/R/2007; C. A Bucureşti, s.a VII-a civ., confl. mun. şi asig. soc., dec. nr. 3760/R/2010.

[19] Article 31 paragraph 3 Labour Code: "During or at the end of the probationary period, the individual employment contract may only cease by a written notification, without notice, on the initiative of any party, without being necessary to motivate the decision".

[20] V. Barbu, C. Cernat, *Analiză critică asupra dispoziţiilor legale privind perioada de probă*, in Revista Română de Dreptul Muncii, nr. 4/2008, p. 46.

The setting of the probation period in the individual labor contract is optional, that means it insert into the contract as a mutual clause. In fact, the agreement of the future employee is needed, because the initiatives to verify the profesional skillls of employee wil belong to the employer. But, if the probation period is setteled it becames mandatory, like any other contractual clause. The beginning of the probation period is , also, means the beginning of the individaul labour contract, so, can not conceive of a probationary period of employment outside of a legally binding contract.

On another hand, the settling of the probation period is a mandatory, by law, only in case of employment of disable persons and in case of the graduates of higher education institutions. In this last case, the skills verification takes the form of internship.

We consider that the employment probation period has the legal nature of a forfeiture clause which works for both contracting parties and it produces the consequences provided by law. It can not be considering a resolutory condition because if it would be considering that the labor law will be eluded. In fact, it would violate the provisions that sets the reasons and conditions termination of the employment probation period.

The cease of individual employment contract in probation period is made only by written notice. In other words, whenever the employer considers that the employee does not meet the requirements of the position held or employee does not agree work needed to perform, may terminate the employment contract by giving written notice. Written form of notification is a condition *ad validitatem*, it should not be grounded in fact or law and is not required prior to completing an employee performance evaluation procedures.

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CONSIDERATIONS ON THE GENERAL PROVISIONS OF THE NEW CIVIL CODE IN THE FIELD OF WILL*

ILIOARA GENOIU**

Abstract
Generally speaking, the will institution has been reconfigured by the new Civil Code. Even through its general provisions which have been consecrated to will, Law No. 287/2009 brings a few novelty elements. The present work is aimed to analyze the general aspects which characterize will (definition and legal features of will, contents of will, mutual will, proof of will, testator's consent and interpretation of will), in a comparative manner, both in relation to the provisions of the 1864 Civil Code and the provisions of the new Civil Code. Thus, this will allow us to point out the novelty elements brought within the field subject to our analysis by the new Civil Code and to assess their justness and appropriateness.

Keywords: *testamentary provisions, mutual will, proof of will, testator's consent, interpretation of will.*

1. Introduction

Law No. 287/2009[1] reconfigures the field of successions in general, preserving from the former regulations only those provisions characterized by a justness and actuality which were never doubted throughout time.

The present work aims to analyze the general provisions of the new Civil Code regarding will. They are included in Book IV "On inheritance and liberalities", Title III "Liberalities", Chapter III "Will", Section 1 "General provisions", art. 1034-1039. In relation to these, the new Civil Code regulates the following aspects: definition and legal features of will, contents of the will, mutual will, proof of will, testator's consent and interpretation of will.

In the actual context, the objective of the present work is to analyze the legal provisions mentioned above in a comparative manner, so as to point out the elements which the new Civil Code has preserved from the former civil regulations (the 1864 Civil Code), but also the novelty elements consecrated by the new Civil Code. Moreover, the present work will also make an assessment on the justness and the appropriateness of the novelty elements consecrated by Law No. 287/2009.

Under the circumstances in which, after the new Civil Code entered into force, on October 1st 2011, it has been published only a specialized work relating to successions[2], we consider that our scientific initiative is both actual and useful. We also want to popularize this way the novelties consecrated by law No. 287/2009 in the field of will, so as to contribute, hopefully, to the good enforcement of the justice act. Moreover, we consider that the results of our current analysis can be of interest for notaries public and Romanian diplomatic representatives abroad, judges, lawyers, Law students and any other law subject intending to express his will according to legal conditions.

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[1] Law no. 287/2009 on Civil Code was republished in the Romanian Official Gazette, Part I, No. 505 from July 15th 2011.

[2] The work in question was written by professor Dumitru C. Florescu and is called *Dreptul succesoral,* (Bucharest: Universul Juridic Publ. House, 2011).

2. Contents

2.1. Definition of will

According to the provisions of article 955 of the new Civil Code, "The deceased's estate is passed on by legal inheritance if the person leaving that inheritance did not leave any contrary provision in his will. A part of the deceased's estate may be transmitted through testamentary inheritance, while the other part through legal inheritance". Thus, the Romanian legal system admits the coexistence of legal inheritance and testamentary inheritance, the former representing the rule and constituting the common law when it comes to the transmission of inheritance estate. The rules instituted by the lawmaker in the field of legal inheritance can be removed, totally or in part, through the deceased's will, expressed in his will. Given that the Romanian legislation has acknowledged the principle of testamentary freedom, any capable person can decide the way his estate will be used after his death by means of a last will act.

According to provisions of article 1034 of the new Civil Code "A will represents a unilateral, personal and revocable act, by means of which a person, called testator, leaves dispositions in one of the forms requested by law, for the time when he will no longer be alive".

Therefore, the new Civil Code, taking into account the criticism stated by the doctrine in relation to the definition of will in the light of the 1864 Civil Code[3], defines in an appropriate manner the last will act, by consecrating its contents not only to legacy (that testamentary provision regarding the inheritance estate or the assets which compose it), but also to other provisions, such as those regarding the establishment of a legatee, partition, rescission of former testamentary provisions, disinheritance, institution of testamentary executors, duties imposed on legatees or legal heirs, other provisions having effect after the deceased's death (art. 1035 of the New Civil Code).

Specialized literature[4] has defined will as a pattern, as a form comprising various freestanding legal acts, with a different legal regime. In order to support the thesis according to which the several legal acts which can take the form of a will do not have the same legal character, by evincing different legal characters, are invoked the provisions of article 416 paragraph (3) of the new Civil Code, which state that the acknowledgement of an outside marriage child's paternity through a will is irrevocable, under the circumstances in which a will is an essentially revocable act. Thus, we are not in front of an exception from the principle on revocable character of the will, but on the presence of the proof that, within will, several freestanding documents can coexist[5].

From the theory according to which a will can comprise several freestanding legal acts, it also results the consequence that the validity of such acts is analyzed separately, so that the nullity of an act does not also trigger the nullity of other acts as well.

In turn, the form flaws of only one testamentary provision trigger the absolute nullity of the will, because the testamentary form is common.

2.2. Legal features of a will

From the definition of will also result the latter's legal features. Thus, the last will act is a legal unilateral act, evincing a personal, revocable, solemn and *mortis causa* character. Therefore, when it comes to the legal features of a will, the new regulations in the civil field do not innovate, as it was in fact naturally to happen.

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[3] According to provisions of article 802 of the 1864 Civil Code, "A will is a revocable act by means of which a testator orders the way a part or his whole estate shall be administered after his death".

[4] See: Constantin Hamangiu and others, *Tratat de drept civil român,* (Bucharest: 1929), 826; Mihail Eliescu, *Moştenirea şi devoluţiunea ei în dreptul Republicii Socialiste România,* (Bucharest: Academiei Publ. House, 1966), 199-205; Constantin Stătescu, *Drept civil. Contractul de transport. Drepturile de creaţie intelectuală. Succesiunile,* (Bucharest: Didactică şi Pedagogică Publ. House, 1967), 156-8; Dumitru Macovei, *Drept civil. Succesiuni*, (Iaşi: „Chemarea" Publ. House, 1993), 69-70. In fact, the same terms are used unanimously by specialized literature.

[5] See Emil Poenaru, „Recunoaşterea prin testament a copilului din afara căsătoriei", in *„Justiţia nouă" Magazine* (3/1956): 463 şi urm.

a) Will – a legal unilateral act

From the perspective of its constitution, a will is a legal unilateral act, which expresses only the testator's will. In order for a will to be constituted, it is not necessary for the testamentary disposition to be accepted by the legatee. Only through testator's exclusive will, a will can produce legal effects, so that legacy is passed on to the legatee from the moment inheritance is opened, on the condition that the legatee does not reject legacy. The acceptance of legacy constitutes a unilateral act (the inheritance option act), different from will and generating particular legal effects. Thus, the acceptance of legacy must not be confounded with the acceptance necessary for concluding a contract (bilateral legal act).

b) A will is a legal act essentially personal, so that it cannot be concluded through representation or with the legal tutor's consent.

The personal character of a will is not removed if the testator requests and receives specialized advice for drafting his last will act, if such act expresses exclusively its author's personal will.

From the personal character of will (and, equally, from the unilateral and revocable character), it also results the individual character of will, lawmaker[6] clearly forbidding mutual will (by means of which two or more persons leave testamentary provisions within the same act either on each other's behalf or on behalf of a third party).

c) A will is a legal solemn act which, in order to be valid, it has to have the form requested by law, otherwise is declared absolutely null.

A testator has the possibility to choose one of the forms regulated by law[7]. Thus, testator's freedom is restricted by the lawmaker.

d) A will is a *mortis causa* legal act, since it produces effects only after testator's death.

As a consequence, a legatee receives no right while the testator is still alive, the latter having the right to decide on the assets which make the object of the will. Although a will start to generate effects on the moment testator's inheritance is opened, the conditions in which that will is valid are assessed in relation to the moment when it was drafted.

d) A will is legal act essentially revocable

At any time (until he dies) and in an absolute manner, a testator, through his unilateral will, can revoke or modify his testamentary provisions. A testator cannot give up at his right to revoke his will, since he would perform a legal act upon an inheritance not opened, which is clearly forbidden by law[8].

Thus, from the perspective of its legal features, a will takes the form of an exception from common law, being governed by special background and form rules.

2.3. Contents of will

According to the provisions of article 1035 of the New Civil Code, "A will contains provisions regarding the inheritance estate or the assets which compose it, but also the direct or indirect establishment of a legatee. Together with such provisions or even in their absence, a will may contain provisions regarding partition, revocation of previous testamentary provisions, disinheritance, appointment of testamentary executors, duties imposed on legatees or legal heirs, but also other provisions producing effects after a testator's death".

Thus, a will may comprise[9]:

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[6] Article 1036 of the new Civil Code.

[7] In relation to testamentary forms, see Ilioara Genoiu, „Formele testamentului în noul Cod civil", in *„Dreptul" Magazine* (12/2011).

[8] Article 956 of the new Civil Code.

[9] See also the National Union of Notaries Public, *Codul civil al României. Îndrumar notarial,* vol. I, (Bucharest: Monitorul Oficial Publ. House, 2011), 374-5.

a) legacies (universal, by universal or particular title), which constitute, according to article 986 of the New Civil Code, those testamentary provisions "(…) by means of which a testator stipulates that, at his death, one or more legatees shall receive all his estate, a part of it, or certain determined goods".

As it results from the provisions of article 1035 of the new Civil Code, legacies represent the main object of a will.

b) disinheritances – represent those legal provisions according to which some legal heirs are removed from inheritance, within the limits provided for by law;

c) an appointment of one/or more testamentary executors to insure the enforcement of testamentary provisions;

d) duties (obligations) imposed on the legatee or legal heirs, either of a patrimonial nature, or of another nature;

e) a revocation, total or partial, of a previous will or only of a previous testamentary provision, or withdrawal of the previous revocation;

f) an ascendant partition - represents the partition performed by the ascendant testator among his descendants, regarding all his inheritance assets or only a part of them;

g) the acknowledgement, by the mother, of a child born from unknown parents, or by the father of a child outside marriage;

h) provisions regarding funerals and burial or testator's body after his death (art. 80 of the new Civil Code);

i) the establishment of the person who is to be appointed tutor of testator's children (art. 114 of the new Civil Code) or removal of the possibility for a person to be a tutor (art. 113 of the new Civil Code);

j) provisions regarding that part of assets to which testator's spouse would be entitled at the marriage termination (art. 350 of the new Civil Code);

k) a testator may agree to or forbid the use, after his death, of organs, tissues and human cells sampled from him, for therapeutic or scientific purposes (art. 81 of the new Civil Code);

l) provisions regarding the creation of a foundation;

m) an interdiction on the alienation of an asset, for a period longer than 49 years, on condition that there is a serious and legitimate interest for that matter (art. 627 of the new Civil Code);

n) the empowerment of a person to administer one of several assets or an estate which does not belong to him (art. 792 of the new Civil Code);

o) the choice of the law applicable to one's own inheritance (art. 2634 of the new Civil Code);

p) also other provisions regarding testator's last will, if they do not transgress public order.

2.4. Mutual will

Similar to the 1864 Civil Code, the new Civil Code consecrates two form conditions, which are common to all wills.

a) written form;

b) forbiddance of mutual will

According to provisions of article 1036 of the new Civil Code, "Under the sanction of absolute nullity, two or more persons cannot make provisions, by means of the same will, on behalf of each other's or on behalf of a third party". The aim of the interdiction mentioned above is to guarantee the personal, unilateral and revocable character of a will.

It can be thus noticed the fact that the new Civil Code calls "mutual will" that will by means of which two or more persons make provisions on behalf of each other's or on behalf of a third party. Therefore, Law No. 287/2009 abandons the notion of "conjunctive will", which has been used by the 1864 Civil Code.

As to us, we consider that neither of the two denominations (conjunctive will and mutual will) cover the contents of the will in question. Thus, mutual will covers only that hypothesis in which two persons make provisions, by means of the same act, on behalf of each other, whereas conjunctive will[10] covers that hypothesis in which two persons make provisions, by means of the same act, on behalf of a third party. In our opinion, it would have been more appropriate for the lawmaker to call the second general form condition of a will "separate act interdiction".

Also in the light of the new Civil Code, it can be considered that a will is not mutual if two or more persons make provisions on the same sheet of paper, if the manifestations of their will are distinct, valid per se and separately signed, each of them expressing the will of one person. Thus, a will is mutual only if it represents the common work of two or more persons and if its provisions merge in the same context. There are valid, nonetheless, the separate wills which contain mutual and interdependent provisions. At the same time, one of the spouse's will is valid even if it was signed by the other spouse as well[11].

The transgression of the interdiction on mutual will triggers the sanction of absolute nullity of that will. Still, in some circumstances, the rigour of such a sanction is attenuated or even removed. Thus:

a) the confirmation of a will by a testator's universal heirs or by universal title triggers the fact of giving up to the right of contrary invoking form flaws or any nullity reasons, without prejudicing the rights of third parties (art. 1010 of the new Civil Code)[12].

Thus, the will which does not abide by the essential validity conditions creates a natural obligation for the heir involved, which cannot be imposed by means of any constriction, but which can be executed or confirmed out of good will and full awareness, constituting a valid payment, which is nonetheless not subject to indemnification.

b) The sanction of nullity for form flaws does not concern those testamentary provisions which can be accomplished also in another form. For instance, the recognition of a child outside marriage, by means of an authentic will, but mutual, produces legal effects. According to provisions of article 416 of the new Civil Code, the recognition of a child may be carried out by means of a statement at the Register Office, by means of an authentic document or by means of a will. Thus, if the recognition of the child was performed by means of an authentic but mutual will, the latter has legal effects as a result of the fact that the same recognition could have also been carried out by means of an authentic document. Therefore, when it comes to the recognition of a child, it operates the conversion of an authentic will, which is null as a result of not abiding by the interdiction on mutual will, in an authentic document acknowledging filiation.

At the same time, the revocation of a will through a subsequently authentic one, but which is null for not observing the form of a separate act, produces legal effects (article 1051 of the new Civil Code which refers only to the authentic character of the revocation act).

c) the authentic will, which is null as a result of form flaws (for instance, it was authenticated by an incompetent civil servant), is valid as other testamentary form, if it abides by the conditions provided for by law in what that form is concerned (article 1050 of the new Civil Code).

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[10] We mention nonetheless that the new Civil Code regulates conjunctive legacy at article 1065, by referring through this type of legacy to that testamentary provision by means of which a testator leaves an asset to more legatees by particular title in the same will, without mentioning the part to each of them is entitled.

[11] Francisc Deak, *Tratat de drept succesoral,* II edition, updated and completed (Bucharest: Universul Juridic Publ. House, 2002), 176-7.

[12] This provision was taken over from the French Civil Code (art. 1339-1340) and is explained by the fact that the act confirming an inform donation made by a testator while he was alive is sanctioned with absolute nullity, since that testator has the possibility to make again that donation in the form provided for by law. Once the testator dies, since such a thing is no longer possible, his heirs have the right to "repair" the donation flaw by confirmation. See the National Union of Notaries Public from Romania, *quoted works*, 364.

d) absolute nullity intervenes in the case of wills which do not observe the form requisites regulated by *lege lata* and which were drafted by the Romanian citizens on the Romanian territory. On the contrary, if wills are drafted by Romanian citizens according to other laws or outside Romania, their form rules will be differently assessed. Thus:

- from a temporal point of view, within internal law is applicable the principle *tempus regit actum,* according to which the validity of a will (also under a formal aspect) is assessed according to the laws in force at the moment the will was drafted.

- from a spatial point of view, the will which was drafted, modified or revoked by a Romanian citizen abroad is valid only if it abides by the form conditions applicable either at the moment when it was drafted, modified or revoked, or at the moment when the testator died, and such conditions were consecrated by one of the following laws (art. 2635 NCC):

- national law on testator;
- law on testator's residence;
- law on the place where the act was drafted, modified or revoked;
- law on the situation of the premises constituting the object of the will;
- law on the court or institution complying with the procedure regarding the transmission of inherited goods;

e) in what the classification of the separate act condition is concerned, specialized literature contains two theories.

According to one of the two, to which we also agree, the interdiction of mutual will constitutes a form condition, its transgression triggering the application of absolute nullity sanction[13]. Such sanction becomes inapplicable in the case of a will drafted by a Romanian citizen in a country having a legislation which does not forbid common will.

There has also been stated the opinion according to which the interdiction of mutual will constitutes a form condition, so that a common will cannot generate effects, not even if it was drafted by a Romanian citizen in a country having a legislation which does not forbid this kind of will[14].

2.5. Proof of will

The new Civil Code regulates the proof of will at article 1037. Thus: "Any person claiming a right founded on a will must prove its existence and contents in one of the forms provided for by law" [article 1037 paragraph (1) of the new Cicil Code]. Consequently, the duty to prove the existence and contents of the will belongs to the interested person, according to the rules of common law within the field.

Currently, the common law within the field is represented by the provisions of articles 1169-1206 of the 1864 Civil Code, which constitute the only provisions of the normative act in question which were not abrogated by the entry in force of the new Civil Code. Nonetheless, such provisions regulating the field of proofs will be abrogated at the date when Law No. 134/2010 on the Civil Procedure Code[15] enters in force.

We also mention that the new Civil Code does not contain any provision regarding evidence, such provisions being naturally included in the new Civil Procedure Code.

As a consequence, any interested person can prove the existence and contents of a will, in one of the forms provided for by law, according to the rules contained by articles 1169-1206 of the 1864 Civil Code. Given that the written form of the will constitutes a condition for the latter to be valid,

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[13] Matei B. Cantacuzino, *Elementele dreptului civil,* (Bucharest: All Educational Publ. House, 1998), 364; Mihail Eliescu, *quoted works,* 432; Dumitru Macovei, *quoted works.,* 74; Eugeniu Safta-Romano, *Dreptul de moştenire,* (Iaşi: Grafix Publ. House, 1995), 180-2.

[14] Constantin Hamangiu and others, *quoted works,* 822-3.

[15] Law No. 134/2010 on Civil Procedure Code was published in Romania's Official Gazette, Part I. No. 485, from July 15th 2010, but the date when it will enter in force was not yet established.

while its absence triggers the absolute nullity of the last will act, the interested person can prove, as a rule, the existence or contents of the will only by means of a document which observes, as the case may be, the conditions of authentic, holograph, privileged will or of the will regarding deposited amounts of money and values.

Nonetheless, by exception, "If a will disappears as a result of an unpredictable or force majeure case or of a third party's deed, either after testator's death or during his life, but without testator knowing that his will disappeared, it will be possible to prove the validity and contents of the will by using any means of proof" [art. 1037 paragraph (2) of the new Civil Code].

Therefore, only if a will disappears as a result of an unpredictable or force majeure case or of a third party's deed, its validity of form and contents can be proven by using any means of proof. We mention that it can be used any means of poof to prove the validity of the form and contents of the will, even when that will disappeared as a result of an unpredictable or force majeure case or of a third party's deed, during testator's life, if the testator under scrutiny did not know about the disappearance of his last will act.

The provision contained by article 1037 of paragraph (2) of the new Civil Code rests with the exclusive competence of the court.

2.6. Testator's consent[16]

Although the new Civil Code, when regulating the issue of will, refers only to testator's consent, the last will act must nonetheless abide by all the conditions essential for the validity of a contract, which constitute the common law within field. Thus, a will must observe the essential validity conditions provided for by article 1179 of the new Civil Code and regarding capacity, consent, object and cause. Moreover, a will – by being a legal solemn act – must take a solemn form.

We will continue by pointing out only the features which a testator's consent evinces in relation to the field of will.

Thus, according to provisions of article 1038 paragraph (1) of the new Civil Code, "A will is valid only if the person who ordered it had discernment and his contents were not corrupted"

Still, the legal provisions mentioned above must be corroborated with those of articles 1204-1224, which regulate the validity of consent in the field of contract.

Consequently, testator's consent must be serious, free and expressed with full awareness.

In principle, in the field of will, a testator's consent can be vitiated by error, malice (Latin: dolus) or violence, while lesion cannot be encountered in this field.

An error can trigger the vitiation of consent and the annulment of a will only if that will was drafted at a moment when the testator could be found committing an essential error [art. 1207 paragraph (1) of the New Civil Code]. An error is essential and can trigger the annulment of a will only in the following hypotheses:

- regards the identity of a legatee or his essential qualities, in the absence of which a testator would have never bequeathed anything to that legatee (the testator thought that the legatee was his child outside marriage);

- regards the determinant reason of the will (the testator did not know he had blood relatives; if the testator had known he had blood relatives, he would have not instituted legatees);

Similar to the former regulation in the civil field, the new Civil Code does not provide that for the second cause mentioned above intervenes the nullity of the contract. But in the case of will,

[16] See also Ilioara Genoiu, **„**Condiţiile de validitate ale testamentului în noul Cod civil român şi în dreptul francez", in *Lumen International Scientific Conference 2011 Volume, „Logos, universalitate, mentalitate, educaţie, noutate", Section Law*, (Iaşi: Lumen Publ. House, 2011), 87-106.b. For analyzing the issues in question in the light of the former Civil Code, see, among others, also Dumitru Văduva, *Succesiuni. Devoluţiunea succesorală*, (Bucharest: Universul Juridic Publ. House, 2011), 65-105.

which is a legal unilateral act, it is necessary for the nullity of that will to be instituted, for such a reason[17].

In theory, a will can be annulled as a result of testator's consent being vitiated by physical or moral violence. But in practice such a hypothesis is not encountered, given that the testator whose consent was vitiated by violence has the possibility to subsequently revoke such a will.

In the field of will, malice is most frequently encountered. Article 1038 paragraph (2) of the new Civil Code points out that "Malice can trigger the annulment of a will, even if the malice practices were not used by the beneficiary of testamentary provisions and he was not familiar with them"

Also in the light of the new Civil Code, we can say that malice evinces some features in the field of will, represented by trapping and suggestion. The vitiation of consent by malice consists in the use, by the legatee (or by a representative, delegate or guarantor of his business) of some devious tactics, in order to gain testator's confidence and determine him to make provisions on favour of that person, under the circumstances in which he would have never done that out of his own initiative[18].

It is difficult to make a clear distinction between the two forms of malice, in the field of will, since they are interconnected from the perspective of the activities used and the goal pursued.

In essence, trapping consists in the use, by a person, of some deceiving methods and direct brutal illegal means (such as sequestrating the testator, violating testator's mail, keeping testator's friends and relatives away from him), with the view to gain testator's confidence, by deceiving his good faith and determining him to make provisions on favour of that person in his will.

Suggestion consists instead the use of indirect means, with a hidden, insidious, refined character (such as: tricks, false statements regarding legal heirs, speculating certain conceptions or feelings of the testator), so as to induce to the testator the idea to create a liberality which otherwise would have not made.

Suggestion and trapping trigger the annulment of will only if they altered testator's consent, that is, if in their absence, the testator would have never made that liberality. Thus, trapping and suggestion do not constitute per se causes for annulling a will. Simulated affection shown to a testator or the fact of providing certain services or cures to him do not determine the nullity of a will. The tactics which are typical to malice must not be confounded with the true, natural manifestations of compassion and help between people, which do not constitute the result of a fraudulent intention of trapping and suggestion.

In conclusion, in order to speak of malice in the field of will, the following conditions must be met altogether[19]:

a) the use of some devious, fraudulent tactics and methods;

b) the intent to mislead the testator in bad faith;

c) the use of some fraudulent tactics resulting in altering testator's will, the latter making provisions under the circumstances he would have never done it out of his own initiative.

Taken into account the fact that a will is a unilateral act, it must not be observed for that matter the condition requiring for malice to come from the other party, so that malice can come from any person.

The notary public's assessment, according to which testator's consent was not vitiated at the moment his last will act was drafted, it is considered proof until contrary evidence, being possible to be challenged by any means of proof.

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[17] Ioan Adam and Adrian Rusu, *Drept civil. Succesiuni*, (Bucharest: All Beck Publ. House, 2003), 163.

[18] Mihail Eliescu, *quoted works*, 178-9; Stanciu Cărpenaru, „Dreptul de moştenire" in *Drept civil. Contracte speciale. Dreptul de autor. Dreptul de moştenire,* Francisc Deak and Stanciu Cărpenaru (Bucharest: Bucharest University, 1983), 430; Francisc Deak*, quoted works,* 171.

[19] Francisc Deak, *quoted works,* 171; Ioan Adam and Adrian Rusu, *quoted works,* 165.

In the field of wills with complex contents, comprising several legal freestanding acts, it can be encountered a consent vitiated only partially, so that some testamentary provisions can be annulled as a result of consent being vitiated, while others can stay perfectly valid. Unlike the vitiation of consent, the absence of consent triggers the complete nullity of a will, since it is not conceivable for discernment to exist only in relation to certain testamentary provisions and be absent in relation to others.

Therefore, in the field of wills with complex contents, the court must carry out a very complicated operation, consisting in the establishing, along with the vitiation of consent, also the influence of such vice upon the contents of last will act.

If testator's consent was vitiated, the sanction of relative nullity intervenes. The legal action for establishing relative nullity must be taken by observing the general statute of limitations term.

2.7. Interpretation of will

Although a will is a solemn act, it is drafted by a competent public servant only when it comes to authentic will. Moreover, under no circumstance must a testator's will be expressed in sacramental terms. Thus, will (particularly holograph will) may contain doubtable, ambiguous clauses which must be interpreted. The entity which is competent to perform such a legal operation is the court, the judge not being guided, in principle, in his legal action, by special legal provisions.

Thus, according to provisions of article 1039 of the new Civil Code, "The rules for interpreting contracts are also applicable to will, if they are compatible with the latter's legal features". According to the provisions of paragraphs (2) and (3) of the same legal text, constitute special rules for interpreting a will the following:

- the elements which are extrinsic to a testamentary document can be used only if they are based on the intrinsic ones;
- the legacy in favour of a creditor is not presumed to be made so as to compensate his debt title

Consequently, when it comes to interpreting testamentary clauses lacking clarity, the following rules must be observed[20]:

a) when interpreting testamentary provisions, it must be taken into account the real will of a testator, and not the literal meaning of terms (art. 1266 of the new Civil Code), since *in conditionibus (testamenti) primum locum voluntas defuncti obtinet;*

b) testator's intent will be sought, first of all, in the contents of the will and only afterwards in exterior deeds and circumstances[21], whereas the extrinsic elements of the testamentary document can be used only if they are based on the intrinsic ones;

c) in case of doubt, a clause is interpreted in favor of legal heirs and not of legatees;

d) a testamentary clause is interpreted as having an effect, and not as not having any [article 1268 paragraph (3) of the new Civil Code];

e) testamentary clauses are interpreted through each others, by providing to each of them the meaning resulting from the whole act (article 1267 of the new Civil Code)

f) the legacy in favour of a creditor is not presumed to be made so as to compensate his debt title.

3. Conclusions

At the end of our analysis, we are listing the novelty elements consecrated by Law No. 287/2009 and regarding the general aspects of a will. Thus:

- unlike the Civil Code in force, the new Civil Code defines will in a complete adequate manner, by referring to its main legal features and by assigning its contents properly;

[20] Francisc Deak, *quoted works,* 160-1.

[21] Constantin Hamangiu and others, *quoted works,* 874.

- according to the new Civil Code, the contents of a will can be completed also by other provisions, such as: establishment of the person who is to be appointed tutor of testator's children or the removal of the possibility for a person to become tutor; provisions regarding the part to which testator's spouse would be entitled from his estate, at the end of matrimony; a testator may agree to or forbid the use, after his death, of his sampled organs, tissues and human cells, for therapeutic or scientific purposes; provisions on the creation of a foundation; an interdiction relating to the alienation of a good, for a period of at most 49 years, on the condition that there is a serious legitimate interest for that matter; the empowerment of a person to administer one or several assets or an estate which does not belong to him; the choice of the law applicable to one's own succession;

- in what the form of will is concerned, the new Civil Code regulates mutual will as equivalent of the conjunctive will from the former regulation;

- contains special provisions regarding the proof of will, under the circumstances in which the new Civil Code no longer regulates the issue on evidence, the latter constituting the monopoly of the new Civil Procedure Code;

- states the fact that malice (dolus) triggers the annulment of a will, even if the malice tactics were not carried out by the beneficiary of testamentary provisions or were not familiar to him;

- consecrates two special rules for interpreting a will.

As to us, we consider that new Civil Code, by using an actual specialized language, provides a modern, just and flexible regulation of the general aspects typical to will.

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SOCIETAS PRIVATA EUROPAEA VERSUS SOCIETAS EUROPAEA

LUMINIȚA TULEAȘCĂ*

Abstract
The stage of political procedures and negotiations related to the statute of a new European company: European Private Company triggers the analysing of the main features of such a company and comparing them to those of the companies regulated in Romania and on other member states of the European Union.
Therefore, we shall have a complete picture on the organic statute of this new company and, especially, on the divergent aspects, aspects having prevented the enactment of the Regulation regarding European Private Company (Societas Privata Europaea).
And not least, it is the only way to determine the extent the new trading company contributes to exceed the current issues of business development in the European Union, in which extent the European private company shall represent or not a progress in the matter of European trading companies, where the main mark is represented by the European Company (Societas Europaea).

Keywords: *European company, European private company, transfer of registered office, capital, cross-border element.*

I. Introduction

The statistics indicate that more than 40% of the SMEs in the European Union might develop their cross-border activity but claimed that they lack in the needed instrument[1] as the existing transnational companies: European Economic Interest Group (EEIG), the European Company or the European Cooperative Society[2] do not grant a proper type of SMEs[3]

Therefore, according to Libertas - Europaisches Institut GmbH in the member states, during the period 2004 – 2011, only 739 European Companies were established with various sizes (including family business), which operate in various fields of activity amongst which, 47 were dissolved, during the period 1989-2011 only 1361 GEIE were established (out of which 214 are dissolved) and, during the period 2008-2011, 20 SCE[4] were established.

On the other hand, the diversity of the limited liability companies in the member states indubitably generate their lack in flexibility and, in case of groups of companies, it renders difficult the deployment and effectiveness of the activities of their branches from other states of the European Union. The parent company is compelled to establish each branch of another type in each and every

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[1] KPMG survey presented at Business Europe's SME Action Day on 21 November 2007.

[2] See respectively Council Regulation (EEC) 2137/85 of 25 July 1985, Council Regulation (EC) 2157/2001 of 8 October 2001, Council Regulation (EC) 1435/2003 of 22 July 2003.

[3] According to a general EU definition, small and medium sized enterprises are those with less than 250 employees. Within this category the following sub-categories are distinguished as per Commission recommendation 2003/361/EC: (i) Medium-sized enterprises [headcount <250 and turnover ≤€ 50 million and/or balance sheet total ≤€ 43 million]; (ii) Small enterprises [headcount <50 and turnover ≤€ 10 million and/or balance sheet total ≤€ 10 million] Micro enterprises [headcount <10 and turnover ≤€ 2 million and/or balance sheet total ≤€ 2 million]; (iii) Micro enterprises [headcount <10 and turnover ≤€ 2 million and/or balance sheet total ≤€ 2 million].

[4] The statistics supplied by Libertas-Europaisches Institut GmbH, are made at the level of November 2011; available at <<www.libertas-institut.com>> (latest visit on January 30, 2012)**.**

member state where established, branches to company to different legal regimes. All this generates costs and inconveniences, barriers for the development of international business[5].

To this end, in order to create a type of company destined for small and medium enterprises, The European Commission drafted a study for the feasibility of an European statute of small and medium enterprises (PME –"Les petites et moyennes entreprise").

Based on the Communication of the Commission to the Council and Parliament from May 21, 2003: "Modernization of trading companies' law and strengthening of corporative management in the EU. A plan to advance"[6] and of the Commission Report for legal businesses of the Parliament in 29.11.2006[7], the European Parliament enacted on February 1, 2007 the Resolution which included the recommendations of the Commission regarding the statute of the European private company and the request for the Commission to present, during the year of 2007, a bill according to the recommendations of the Parliament.

In such background, in June 2008, the European Commission presented in front of the Council a proposal for a Regulation (hereinafter the Regulation) for the Statute of the European Private Company (Societas Privata Europaea; hereinafter, the SPE).

The proposal was made on the grounds of art.352 in the TFUE (article 308 EC Treaty) with the significance that, in order to pass it, they needed the approval of all the 27 Member States of the European Union.

On March 10, 2009, the European Parliament approved the proposal with amendments and adopted a law resolution[8] and indicated the Commission to alter its proposal accordingly.

The revised wording of the regulation of the Council regarding the statute of SPE (hereinafter the Regulation Proposal) is in its final step to be passed, as indicated in the document of the Council DRS 84 SOC 432 from May 23, 2011[9] following to conclude a final political agreement

There is currently a decision making blockage due to the rule of unanimity, proposing as way out of the impasse, the elaboration of a new directive or the amendment of the twelfth directive of trading companies, in order to create a simplified company which shall be established by a sole associate, who shall allow the reduction of the business deployment costs of useless formalities. Such proposal was not agreed upon as it would not reach the targets as good as the SPE related proposal.

There existed no preoccupation in Romania for the SPE and the legal studies in the matter al almost inexistent, the undertakers in Romania are interested in extending their activity on the territory of the single market.

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[5] Andreas Bernecker, "A European Private Company - Is Europe's single legal form for SMEs close to approval?", Deutsche Bank Research, July 19, 2010, available at: <<http://www.dbresearch.de/PROD/DBR_INTERNET_DEPROD/ PROD0000000000260277 /A+European+Private+Company%3A+Is+Europe%E2%80%99s+single+legal+form+for+SMEs+close+to+approval%3F.PDF>>.

[6] Communication of the Commission to the Council and Parliament from May 21, 2003 entitled: *"Modernization of the law of trading companies and strengthening of corporative governing in the EU. A plan to go ahead",* COM(2003)284, celex:52003DC0284.

[7] Report from November 29, 2006 of the Commission for legal business of the European Parliament, containing as well regulations to the European Commission related to the statute of the European private company and proposal for the Resolution of the European Parliament in such direction [2006/2013 (INI)] rapporteur Klaus-Heiner Lehne, stage of procedure: A6-0434/2006; This report is based on a regulation draft regarding the statute of EPC jointly promoted by MEDEF and CCI, available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A6-2006-0434+0+DOC+PDF+V0//EN&language=EN.

[8] European Parliament legislative resolution of 10 March 2009 on the Proposal for a Council Regulation on the Statute for a European Private Company, P6_TA(2009)0094; available at <<http://www.europarl.europa.eu/sides/getDoc.do;jsessionid= 3A6D2E4B375D4F87B4AF504459A78D53.node2?pubRef=-//EP//TEXT+TA+P6-TA-2009-0094+0+DOC+XML+V0//EN>> (last seen November 12, 2011).

[9] DRS 84 SOC 432 from May 23, 2011, available at:
<< http://register.consilium.europa.eu/pdf/ro/11/st10/st10611.ro11.pdf>> (last seen on November 11, 2011).

We proposed by this paper to analyse the main features of the European Private Company marked out in official documents, to compare them to those of the main European company: the Europea public limited company - *Societas Europaea*, in order to determine and indicate the extent such new company shall represent or not a progress in the matter of European trading companies and the extent it shall contribute to the removal of the current issues in doing business in the European Union

II. The Main Features of the European Company and of the European Private Company

As indicated, the premise of SPE regulation was created by the current issues existing in the cross-border activity of small and medium enterprises, the SE being, in principle, destined to large enterprises and, by the fact that, SE regulation contains enough limitations of its transnational character.

The statute of the public limited company passed by the European Council Regulation no. 2157/2001 from October 8, 2001[10](hereinafter, the Regulation 2157/2001), was received with lots of enthusiasm by the European legal world and is registered amongst the acts the Council should have passed before 1992 based on the White Paper of the Commission related to the finalization of internal market, approved by the European Council met in Milano in June 1985.

The great advantage of the establishment of a European company is considered that of simplifying the structure of the enterprises which can develop their activity in the entire Europe without the establishment of lots of branches complying with different national regulations[11].

In Romania, the European Company is regulated by Emergency Governmental Ordinance no.52/2008[12] for the amendment and completion of Law no.31/1990 related to trading companies and for the completion of Law no.26/1990 related to the register of companies and, based on such regulation, by the European Regulation no. 2157/2001 related to the Statute of the European Company.

The main features of the Europea public limited company[13] consist of the fact that, it is a capital joint-stock company, with a subscribed capital which cannot be lower than EUR 120,000 and becomes legal person on the date of its registration with the National Register in the member state where its headquarters has the registered office, that is, on the date of its registration with the Register of Companies for those with registered office in Romania, without the possibility for its

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[10] Council Regulation no. 2157/2001 from October 8, 2001 entered into force in 2004, published in the Official Gazette L 294/1 from October 10, 200, Regulation supplemented by Directive no. 2001/86/CE and of the Council from October 8, 2001 to supplement the Statute of the SE regarding workers' involvement, published in the Official Gazette L 294/22 from October 10, 2001, with subsequent amendments, with the last amendment made by Regulation no. 1791/2006 (adopted as a consequence of the adhesion of Romania and Bulgaria to the EU on January 1, 2007), published in the Official Gazette L 363 from December 20, 2006.

[11] F. Blanquet, *Pourquoi créer une société européenne?,* in: *La société européenne*, Dalloz, Paris, 2003, p. 5; J. Beguin, M. Menjucq, G. Bourdeaux, A. Couret, B. le Bars, D. Mainguy, H. Ruiz Fabri, J.-M. Sorel, C. Seraglini, *Droit du commerce international*, Litec, LexisNexis, Paris, 2005, p. 200-214.

[12] Emergency Governmental Ordinance no. 52/2008 for the amendment and supplementation of Law no. 31/1990 related to trading companies and for the supplementation of Law no. 26/1990 related to the Register of Companies, published in the Official Gazette no. 33 from April 30, 2008.

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registration to be performed if the company did not conclude any prior agreement related to the involvement of its employees in the activity of the company, under the conditions provided for by Governmental Decision no. 187/2007 related to the information, advise procedures and other employees' involvement methods in the activity of the European Company[14].

SPE is forecasted to be a limited liability company, legal person starting on the date of its registration with the special register of the member state where it has its registered office, being conceived as a closed company which can be established ex nihilo, with a registered capital of minimum EUR 1.

By its field of application, the regulation draft indicates its implacability in the matter of property, tax regime, labour law, insolvency and tort liability. Such aspects are to be regulated by the applicable domestic law.

Below, the study shall exclusively regard the main features of the two types of European companies and those features, especially, which represent weak points in the negotiations to pass the SE regulation, features which lead to the reforming of the current European company structures.

1. Law of Organic Statute

Regarding the law applicable to SE, seeing that it was designed as a real European law company, this aspect is the outcome of a compromise. Although they went for rare referrals to domestic laws, the referrals were more and more frequent, the European company being a hybrid[15].

According to the provisions of art.9 of Regulation 2157/2001, a SE is regulated by: (a) de provisions of the regulation, (b) in case this regulation explicitly allows it, the provisions in its own statute or (c) in case of aspects not regulated by this regulation or, for the aspects partially regulated by it, in case of those elements which are not regulated by this regulation, by : (i) the legal provisions enacted by the member states for applying the community measures related to the SE; (ii) the legal provisions in the member states applicable to a public limited company established according to the law of the member state where the concerned SE has its registered office; (iii) the provisions in the statute of the company, under the same conditions as for a public limited company established according to the law of the member state where the concerned SE has its registered office.

In case of SPE, its applicable law represented one of the most difficult issues of the regulation draft, as it aimed to the strongest autonomization, in proportion to domestic law, of such entity,

Article 4 of SPE regulation establishes the applicable right of SPE, organic statute of which shall be governed first of all by the provisions of the regulation and, secondly, by the provisions of the article of association of SPE, creating by it a shield to the application of the Member States' law[16].

The associates, *based on the free will principle and on the provisions of art.4 from the Regulation, can insert as well in the articles of association provisions related to the aspects listed in Annex I of the SPE Regulation* (additionally to the compulsory content of the articles of association established by art.8 in the SPE Regulation).

The aspects included in Annex I of the SPE regulation are a lot (there are more than 40 positions), and mainly regard the internal organizing of the SPE

[14] Governmental Decision no. 187/2007 related to the procedures of information, consultancy and other employees' involvement methods in the activity of the European Company, published in the Official Gazette no. 161 from March 7, 2007.

[15] Michel Menjucq, *Droit international et europeen des societes,* 2e edition, Montchrestien, Paris, 2008, p.221-p.222.

[16] Susanne Braun, *"Essay-The European Private Company: A Supranational Company Form for Small and Medium-sized Entreprises?",* German Law Journal, Vol.05 No.11, 2004, p.1393-1408, available at: << http://www.germanlawjournal.com/article.php?id=518>>.

Nevertheless, the *SPE Regulation does not offer the SPE a total autonomy of the legal regime* but, the provisions of the domestic law of the company only apply in case of the aspects expressly mentioned by the regulation. The national law of the company or the domestic applicable law is the law of the Member State where the SPE records its registered office

Third of all, *the aspects uncovered (unregulated) or partially covered by the regulation and by its Annex I, as well as in case of aspects included in Annex I but not contained in the articles of association, they are object of the laws passed by the member states for applying the regulation and, in default, the provisions of the law applicable to the company*

The method to nominate the aspects regulated by the domestic law of the company, by elimination, is criticised in the specialty literature, as there are opinions according to which the application scope of domestic law shall be determined by the interpretation given in each and every Member State to the words: "uncovered by" the Regulation or by Annex I[17].

Obviously, by the legislative technique used by article 4 of the SPE Regulation it is avoided as much as possible the application of the domestic law of the company

2. Formation

2.1. The establishment methods of a company, especially of European companies, have a strong role in the process to choose the establishment type of the company, the simplicity of its establishment offering indubitable advantages.

Unfortunately, being conceived for the development of large businesses, SE cannot be directly established as such, but only indirectly, by four methods[18]:

(i) by merger of two or more public limited companies established based on the law of a member state, having its registered office and headquarters within the Community, provided at least two of them be regulated by the law of different member states.

(ii) by the establishment of an European Holding Company by public limited companies and limited liability company established based on the law of a member state, with the registered office and headquarters on the territory of the Community if at least two of them are regulated by the law of different member states or hold of at least two years a branch regulated by the law of another member state or a branch on the territory of another member state.

(iii) by the establishment of an European Company branch by companies or other public or private law legal entities established on the grounds of the law of a member state, having its registered office and headquarters on the territory of the Community if at least two of them are regulated by the law of different member states or have been holding for at least two years a branch regulated by the law of another member state or by a branch on the territory of another member state.

(iv) by transformation into SE of a public limited company established based on the law of a member state, having its registered office and headquarters on the territory of the Community and if it has been holding for at least two years a branch regulated by the law another member state[19].

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[17] H.J. de Kluiver, J.Roest, *"Expulsion and Withdrawal of Shareholders"* and M.I.Lennarts, *"Voice Rights of Shareholders"*, bouth in: D.F.M.M. Zaman et al. (eds.) *The European Private Company (SPE). A Critical Analysis of the EU Draft Statute*, 2009, p.70 and p.126, indicated by Sandra van den Braak in *"The European Private Company, its shareholders and its creditors"*, Utrecht law Review, Volume 6, Issue 1 (January), 2010.

[18] Romanian regulation does not contain special provisions related to the establishment of European Company, with referrals for such purpose to the European regulation: *"related to this emergency ordinance, European company is the joint stock company established under the conditions and by the mechanisms provided for in the Council Regulation (CE) no. 2157/2001 from October 8, 2001 related to the statute of European Company"* – art. IV paragraph 1 from Emergency Governmental Ordinance no. 52/2008.

[19] For details related to the establishment of SE, in the Romanian doctrine, please see: Manole Ciprian Popa, *Grupurile de societati*, Ed.C.H.Beck, Bucuresti, 2011, p.250 si urm.

Unlike all the other current European entities (European company, European groups with economical interest, the European cooperative companies), SPE can be established *ex nihilo, according to the traditional method for a trading company formation, by its transformation and by the merger of current trading companies.*

We therefore remove a main inconvenient of European company forms which were not to be established as such, from the beginning. Such aspect may have been an obstacle for the option of business agents for an European company.

An SPE shall be established ex nihilo (directly) by one or more private or public law natural or legal persons, according to the provisions of SPE regulation.

The transformation of a current legal person, regulated by the internal law of a member state is the second establishment method for an SPE, under the conditions, according to the regulation*, the member states are compelled to allow the transformation of a limited liability national company in an SPE.* Regarding the other types of national companies, the member states shall allow their transformation in an SPE in the extent domestic law allows their transformation in a limited liability company, in general.

In this establishment method for the SPE, according to the general rules in the matter, the legal person / company which is transformed is neither dissolved nor loses its legal personality.

When domestic law imposes a restriction related to the transformation of a legal person in a limited liability company, such restriction is applied, mutatis mutandis, to the transformation of the SPE as well.

In case the SPE is established *ex nihilo* or *by transformation*, *the establishment of the company shall be regulated by the regulation.*

And not least, the SPE can be established *by merger, according to domestic law.*

2.2. In any of the establishment methods allowed by the regulation, *SPE is established by the signature of the articles of association by the founder members, in written form, it being object of the formal requirements provided for in the applicable domestic law*

By such provision, the regulation first concedes in favour of the member states, giving the possibility of the applicable domestic law for the establishment of SPE to impose as well other shape conditions of the articles of association. In this direction, domestic laws include various provisions, in some cases, being imposed the written form for the validity of the articles of association, in others for proving the articles of association and as well its authentic form for its validity

As for example, the Romanian law[20] imposes as regulation the written form of the articles of association, for its validity and, by exception, the authentic form when the limited liability company is established where a land is brought as contribution to the establishment of the registered capital

The opposability of the articles of association is as well obtained, according to the provisions of the applicable domestic law.

The article of association of the SPE must include at least the aspects provided for by art.8 in the regulation.

The inclusion of additional clauses related to the aspects mentioned in Annex I of the SPE regulation is to be appreciated by the founder members. In such case, domestic law is not applied to those aspects in the extent they are included in the articles of association.

The articles of association may include as well other aspects than those compulsory and elective from the regulation but, such other aspects shall not be regulated by the regulation, but by the applicable domestic law.

2.3. For its legal establishment, *the SPE must be registered according to the provisions of domestic law, with the register held by each and every origin member state.*

[20] Law no.31 from 1990 regarding trading companies and the new Romanian Civil Code.

The same rule applies to the SE which is registered in the member state where it has its registered office, with the publication of the SE registration related announcement, for information, in the Official Gazette of the European Union.

The founder members or any person authorized by them request the registration, which can be performed by electronic means as well.

Article 3 item 3 of the regulation requires as *essential element of the registration as European entity of the SPE, its transnational structure.*

The current shape of the SPE regulation alienates from the initial proposal which included no referral to a cross-border element as they considered that such requirement might significantly reduce the potential of the SPE. The alteration of conception was determined by the fear that such lack of community dimension as precondition of its establishment as an SPE may infringe the principle of subsidiarity regulated by article 5 in the EC Treaty[21].

The difficulties created by the cross-border components imposed for the existing European entities (European company, European group with economical interest, European cooperative company) are removed by flexible criteria included in the regulation

The needed cross-border structure must be proved in the moment of the registration of the SPE by one of the following elements, very easily to fulfil[22]:

i) an intent to operate in another member state than that where the SPE is registered; or

ii) a cross-border activity object mentioned in the articles of association of the SPE; or

iii) a branch or subsidiary registered in member state different from that where the SPE is registered; or

iv) an associate or several associates with residence or registered in more than one member state or in a member state different from that where the SPE is registered

In order to reduce administrative costs and duties related to the registration of the company, the formalities to register the *SPE* are limited to the requirements needed to guarantee the legal certainty, and the *validity and conformity to the provisions of the regulation and to the domestic law of documents registered in the moment an SPE is created are object of one sole check of legality, performed according to domestic law*

Therefore, the member states request the supply of only those pieces of information contained in the Articles of Association of the SPE, the articles of association, the documents certifying the payment of the capital, the police record of the directors, the evidence related to transformations or mergers of the SPE

In all cases, irrespective of the method to check the fulfilment of the registration conditions by an SPE, useless checks of documents and information are avoided.

The sole control of the legality of the articles of association generates the fear of notaries, mainly, in France, Germany and Austria that, the entry of SPE in such form, shall generate losses for their profession[23].

Without derogation from the general rules in the matter of companies, *the legal personality is acquired in the moment of registration with the Register of Companies of the SPE constituted ex nihilo and by transformation and, in the moment of the registration of the merger of the absorbing company with the register of SPE resulted as a consequence of the merger*

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[21] Sandra van den Braak, op.cit., p.4.

[22] A.F.M. Dorresteijn, O.Uzuahu-Santcroos, "The Societas Privata Europaea under the Magnifying Glass (Part 2), European Company Law, no.4, 2009, p.159.

[23] Source: Frankfurter Allgemeine Zeitung. November 4, 2008, p. 21. Wirtschaftswoche.http://www.wiwo.de/politik-weltwirtschaft/bundesregierung-blockiert-europa-gmbh-397226/ (May 19, 2009, called up June 9, 2010); indicata in: Andreas Bernecker, op.cit., p.6.

The attainment of the legal personality by the SE and SPE generate the consequence of the associates' liability for the obligations of the company within the limit of their contribution to the registered capital, with the exclusion of their personal liability for the obligations of SE and SPE, respectively.

3. Registered Capital

The requirements of the minimum registered capital represent one of the most sensitive and debated aspects of a company, which can provide its success or lack of success.

Therefore, one of the three current differences of SPE regulation is represented by that of capital requirements.

Being considered a form for large companies, the capital of a SE cannot be inferior to the amount of EUR 120 000 with the possibility for the law of a member state which provides a higher subscribed capital for the companies developing certain types of activities to be applied to SE with the registered office in the concerned member state.

All the other aspects related to the registered capital of a SE: its maintenance and alteration, as well as the shares, bonds and other similar securities of the SE are regulated by the provisions applicable to a joint stock / public limited company with registered office in the member state where such SE is registered.

For the moment, the SPE is not object of a requirement of compulsorily high capital, as it would be an obstacle for the creation of SPEs. Despite all this, the creditors are protected by excessive distributions to the shareholders, which may affect the capacity of the SPE to pay its debts. For such purpose, they prohibited the distributions consequence of which the liabilities of the SPE is superior to the value of the assets. Additionally, the shareholders may request the executive management body of the SPE to sign a certificate of good standing.

There are, amongst new and especially important provisions which may provide the premises for reaching the targets of the SPE regulation, those related to the *minimum registered capital of the SPE of at least EUR 1.*

Germany objected to such requirement of minimum capital and, in order to avoid abuses, it requested the introduction of a of a minimum capital related requirement which shall provide the good standing of the company, which means that the minimum capital be of at least EUR 8 000.

The base of the possibility of a EUR 1 registered capital for a private company operating on a single market is given by the alteration of the conception on the guarantees the creditors of a company expect and request.

It is well known that, according to its legal significance, the registered capital represents the general pledge of the company's creditors[24]. Despite this legal reality, the social obligations exceeding by far the value of the registered capital so that, de facto, the assets of the company are those providing or not satisfaction of social creditors[25].

And not least, it is proven that the creditors prefer to request other types of guarantees, individual and enforceable, to that offered by the registered capital, the assets being those value of

[24] For this conception effectiveness, please see: Mathias M. Siems, Leif Herzog and Erik Rosenhäger, *"The Protection of Creditors of a European Private Company (SPE)"*, European Business Organization Law Review (2011), vol.12, nr.1, p.152-153; available at: <<http://journals.cambridge.org/action/displayFulltext?type=1&fid=8243692&jid=EBR&volumeId=12&issueId=01&aid=8243691&bodyId=&membershipNumber=&societyETOCSession=>>.

[25] Details in: H.Boschma, L.Lennarts, H.Schutte Veenstra, "The Reform of Dutch Private Company Law: New Rules for Protection of Creditors", European Business Organization Law Review 8, 2007, p.573.

which grants solidity to the company[26]. In certain cases, even the reserve of ownership on grounds of which the seller holds over the property on goods until their full payment presents an important pledge[27].

There is, in the light of the decisions of the Court of Justice of the European Union, the tendency to waive, for the future, the requirements related to the minimum capital.

Therefore, even Germany has recently entered *Unternehmergesellschaft* with a minimum capital of EUR 1 and The Netherlands is in full progress of removing the capital related requirements for *Besloten Vennootshap*[28].

Despite such tendencies, a minimum registered capital of EUR 1 represents a level which cannot be accepted by the legal traditions of all the member states of the European Union, for which reason, politically speaking, the opinions are still divergent regarding the capital of the SPE.

Of course such limitation of the liability of the company leads to additional risks for the business; therefore, they quote studies which show that, for example, 90% of the limited liability companies newly registered in Germany which use the legal form of Great Britain with a minimum capital of EUR 1, were erased in 18 months[29]. For such grounds, a minimum registered capital with a significant value is requested for the SPE[30].

Neither the European Parliament agreed to such new conception and, in order to make a balanced compromise, the last version of the regulation includes the *possibility of each and every member state to be able to establish for the SPE registered on its territory, a minimum registered capital higher than EUR 1, but not more than EUR 8000.*

The large interval between the two minimum thresholds of the registered capital of the SPE shows the difference existing between the member states of the European Union. Poland requests a minimum registered capital of limited liability companies of: EUR 13,869, United Kingdom EUR 1.5, France EUR 1, Hungary, EUR 11,760, Austria EUR 35,000, the Netherlands EUR 18,000, Bulgaria EUR 2,500[31], Romania EUR 45 etc.

We do not believe that the establishment of the minimum capital of SPE by each and every member state, within the interval established by the regulation: 1 Euro- 8,000 Euro, shall lead to the success of the SPE, the minimum share of EUR 1 regarded by the initial proposal being that which, amongst other arguments, may represent an important criterion in choosing this type of private company. There are opinions according to which, such solution related to the share of the capital is capitalized for the Member States which shall set the minimum threshold of the capital, taking into account the particularities of their economical past and the differences existing amongst the economies of the Member States[32].

In all cases, the establishment of the minimum capital to EUR 8000 must not represent a barrier for a trading company which wants to develop international activities but, it must indicate trust in the seriousness of the SPE's associates.

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[26] Drury, Robert/Hicks, Andrew: *"The proposal for a European Private Company"*, The Journal of Business Law, p.441, 1999, :"But the provisions of a minimum capital has not always the effect of providing any sort of guarantee that the business is sufficiently capitalised to protect third parties dealing with it".

[27] For a comparative analysis, please see: L.-C. Wolff, *"Statutory Retention of Title Structures? A Comparative Analysis of German Property Transfer Rules in Light of English and Australian Law"*, 14 Deakin Law Review (2009) p. 1.

[28] Sandra van den Braak, *"The European Private Company, its shareholders and its creditors"*, Utrecht law Review, Volume 6, Issue 1 (January), 2010, available at:<<http://utrechtlawreview.org>>.

[29] Maul/Röhricht. Betriebs-Berater. Heft 30/2008, p. 1578.

[30] Andreas Bernecker, op.cit., p.6.

[31] Source: Impact Assessment, Working Document accompanying the Proposal for a Council Regulation on the Statute for a European Private Company (EPC), op.cit., Annex A3;

[32] Mathias M. Siems, Leif Herzog and Erik Rosenhäger, *"The Protection of Creditors of a European Private Company (SPE)"*, op.cit., p.156;

Additionally, the creditors of the SPE are guaranteed as well by its obligation not to distribute the dividends of its associates if, on the date of the last tax year end, the net assets resulted from the annual accounts of the SPE is, or after such a distribution, may decrease below the share of the capital plus that of the reserves which cannot be distributed according to the articles of association of the SPE. The member states have the possibility to enter as well the *requirements related to the "certificate of good standing"* by which the management body of the SPE certifies that the company is able to pay its debts on the maturity term, in one year's term from the dividends distribution date.

And not least, *the capital of the SPE is integrally subscribed by the associates who can contribute by contributions in cash and in kind, and divided in shares. The labour and service contributions are not allowed.*

Regarding the payment of the registered capital, the regulation establishes that the equivalent of the minimum capital must be fully subscribed and paid on the date the SPE is registered. Where the capital of the SPE is higher than the minimum registered capital, at least 25% of the amount by which the minimum capital is exceeded, shall also be paid on the SPE registration, establishment date

On such grounds, seeing these conditions and the associates' decision, *the articles of association of the SPE must include the share of the capital which is to be paid upon its establishment*.

4. Registered Office

The placement of the registered office of SPE represents a source of differences, due to the various domestic regulations of the member state by which, they either allow the separation of the registered office from the headquarters, or they impose their coexistence on the territory of one member state.

Regarding the SE, the dissociation of the registered office from the headquarters is expressly sanctioned by art.64 in the regulation 2157/2001, with the liquidation of SE, unless such situation is remedied[33].

Generally, analyzing the issue of the registered office of European companies, we must mention that the cross-border mobility of companies is mainly guaranteed by the freedom for establishment, although, article 49 from the TFUE which established such principle does not recognize to companies according to article 54 from the TFUE, the right to move their registered office from the legal system of the home member state in another member state so that, the companies must change for it their nationality and adhere to the legal regime of a new home state. The case law of the Court of Justice of the European Union is sufficiently clear in this direction and there is no reason to be altered

De facto, the company is a legal fiction existence of which is recognized by a domestic law, applicable law due to the connection existing by the registered office of the company - the registered office[34]-, between the company and the member state where established, laws of which are met upon the establishment of the company. Therefore, the application of a domestic law is the prior condition for the existence of any company.

In essence, the main principle of trading company mobility cannot be only reduced to the possibility to extend its activity on the territory of other member states of the European Union, by the establishment of branches, subsidiaries, representative offices or agencies.

[33] Michel Menjucq, op.cit., p.223.

[34] The registered office of companies is named "the registered office" as, all the companies are registered in a National Register of Companies, held by the member state where it declares its office in the articles of association, register kept according to the 1st Company Law Directive (Directive 68/151/EEC of 9 March 1968).

It includes by its nature, the right of the company to move its registered office from one member state to another, according to the business opportunities.

Of course trading companies must be able to develop their activities on the territory of a state different from that where it was established, based on its settlement right and without national formalities which may excessively limit or prevent the effective exercise of the settlement right.

In such context, SE can transfer its registered office from a member state to another, without it leading to the dissolution and liquidation of the company or to the creation of a new legal entity. Such possibility offers a great mobility to the SE[35].

The only restrictions in the freedom of the transfer of the registered office of a SE are those involved in case SE is in progress of dissolution, liquidation, insolvency or insolvability or in other similar procedures.

In order to allow to enterprises to take advantage of all the advantages of the internal market, the SPE must be allowed to establish its registered office and real office in different member states and to transfer the registered office from one member state to another, without being compelled to transfer as well its headquarters or main registered office. Despite all this, one must take measures in the same time in order to prevent the use of the EPC in order to elude the legitimate legal requirements in the member states.

Germany prefers the registered office and the headquarters of the SPE to be in the same state, in order to avoid the tax evasion, and therefore, the difference on such aspect is still unsettled.

According to the SPE regulation, the *SPE has its registered office and headquarters or the main place for the development of the activities on the territory of the European Union, according to the domestic applicable law.*

By this provision, the SPE regulation would rather only make half a step on a territory of "moving sands", establishing as principle the possibility of a company to have its registered office different from the real office and, additionally, to have its registered office and real office in different member states. "The step finalization" is launched according to the desires of each and every member state which can accept or not this possibility by its internal provisions

Therefore, *the domestic law applicable to the SPE shall decide, by its regulations, if the registered office and headquarters or main place for the business activities should be or not on the territory of the same member state.*

More, *the SPE regulation allows the SPE to transfer its registered office from one member state to another, under the conditions shown by the regulation, without the dissolution and loss of the legal personality of the SPE.*

The transfer of the registered office of the SPE from one member state to another can only get involved if dissolution, liquidation or insolvency or SPE payment suspension procedures were initiated.

The check of the legality to transfer the registered office of the SPE devolves upon the competent national authority. Should the conditions of the transfer of the registered office be fulfilled*, the competent authority with control of such transfer legality from the home state can only oppose to the transfer of the registered office due to public order reasons.*

The same right is also held by the national authority of financial surveillance of the SPE, if the SPE is subject to such a check.

The decision of the competent authority on the home state can be brought to court in front of a judicial authority.

In its turn, *the competent authority in the host state* shall analyze if all the conditions of the transfer indicated in the SPE regulation are met as well as all the relevant provisions in its law and, if affirmatively, *it shall decide the registration of the SPE, moment when the transfer produces its effects.*

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[35] Veronique Magnier, Droit des Societes, Dalloz, Paris, 2009, p.373.

On the grounds of the notification related to the registration of the SPE in the host state, the competent authority in the home state decides the erasure of the SPE from its register.

For the opposability of the new registered office registration and of the erasure of the old registered office, such documents are object to advertising.

5. Organizing structures

According to the organizing structures of the SPE, the regulation does not produce conception alterations seeing that, *the main decision making body is the general assembly of the associates, decisions of which must be written down; the management of the SPE is provided by directors which can only be natural persons, the associates having the possibility to decide between the two traditional management methods: unitary or dualist system and, related to the elaboration, delivery, auditing and printing of accounts, SPE is object of the requirements of domestic law.*

Out of such perspective, there is no difference between the SPE and the SE, the SE benefiting from the same main corporative organizing structures.

The representation of the SPE in its reports to third parties is a general duty of the management body of the SPE.

The SPE regulation establishes the main attributions of the general assembly and the minimum majority related conditions needed by the general assembly to pass decisions.

Therefore, *as a general rule, except for contrary provisions from the articles of association, the decisions are passed by the associates with the vote of the simple majority from the total of the voting rights related to the shares of the SPE.* By this provision, the associates have the possibility to establish majority related conditions much lower than those mentioned by the regulation, for passing the low importance decisions for the company

The decisions related to the purchase of its own shares, the increase of the registered capital, the reduction of the registered capital, the transfer of the registered office of the SPE to another member state, the dissolution and amendment of the articles of association are made by the associates with the qualified majority, of at least two thirds of the total of voting rights related to the shares of the SPE, except for the cases when the articles of association provide no higher majority.

An important alteration of the tradition conception related to the convocation of general assembly is marked by the *introduction of the principle of non-convocation of the associates' general assemblies.*

Therefore, *according to article 28 item 3 in the SPE regulation, passing decisions does not need the convocation of a general assembly.*

Such principle one cannot derogate from by the provisions of the applicable domestic law is imposed by the need to reduce the costs of the business but as well by the effective use of the time to pass a decision. Therefore, they remove the conditionings included by all laws of the member states related to the observance of a certain number of days which should flow from the date the associates' general assembly is convoked to the date of its occurrence. The expenses needed for the convocations are added.

In order for the associates' general assembly of an SPE to pass decisions, the management body makes available for all the associations the proposals for decisions, together with sufficient information in order to grant them the possibility to pass a decision, in full knowledge of the facts. Decision passing is recorded in writing, as they are object of the formal requirements provided for by the applicable domestic law. Copies of the decisions and the results of the vote are sent to each and every associate.

As a natural reflection of the fact that associates' passing decisions is fully regulated by the regulation, as principle, *the decisions passed by the associates of the SPE must meet the provisions of the regulation and of the articles of association.*

However, *the right of the associates to bring to court the illegal decisions of the associates' general assembly, which infringe the provisions of the regulation and of the articles of association, is regulated by the applicable domestic law*.

Due to the fact that one must allow the shareholders a high level of flexibility and freedom for organizing the internal business of the SPE, *the private character of the company must reflect as well in the fact that its actions can neither be offered to the public or negotiated on the capital market, nor admitted for transactions or quoted on the regulated markets.*

They appreciate that the private character of "closed company" of the SPE can be an instrument for the limitation of the size of the companies constituted in the SPE, by making the possibility for experimented partners to get involved in the company more and more difficult[36].

The condition to distribute dividends and the reduction of the registered capital, the assignment of shares are regulated by the regulation and the articles of association while the *transformation in a new legal type, the merger and division, dissolution, liquidation, insolvability, suspension of SPE payments and other similar procedures are regulated by the domestic applicable law and by the Regulation (CE) no.1346/2000 of the Council.*

6. Employees' Participation

The third point of difference for passing SPE regulation is that related to employees' participation. This time, Sweden is the one having objected to the initial wording and to the compromise proposals, based on the fear that, the aspects of the regulation related to employees' participation shall not be included in domestic laws.

The blockage created by the issue of employees' participation, extremely sensitive, is no news as the same issue is known to have represented the cause why the passing of SE statute occurred after more than 30 years.

Therefore, directive 2001/86/CE and that of the Council to supplement the Statute of SE related to the involvement of workers[37] offer pledges based on which the establishment of a SE does not lead to the disappearance or attenuation of the employees' involvement regime, which exists in the companies participating to the establishment of a SE.

Such rule set in the matter of employees' participation by directive 2001/86/CE is based on the principle of acquired rights and is known as "avant-apres"[38] principle.

Such a regulation form was used for the employees' involvement seeing the wide diversity of rules and practices which exist in the member states related to the manner employees' representatives are involved in the decision making process at the level of a company, diversity which makes it pointless to introduce a single European model of employees' involvement, applicable to the SE.

Such European directive was transposed in our country by Governmental Decision no.187/2007 related to information, consultancy procedures and other employees' involvement methods in the activity of the European Company.

Employees' involvement represents information, consultancy and participation, as well as any other mechanism by which the representatives of the employees may exert an influence on the decisions to be made within the enterprise and, it is so important as much as, the establishment itself of a SE is subordinated to such involvement.

By the European directive, and according to it, the Governmental Decision no.187/2007 as well establishes concrete procedures to inform and consult the employees, at transnational level, according to the following methods:

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[36] See Susanne Braun, op.cit., p.1399.

[37] Directive 2001/86/CE to supplement SE statute related to workers' involvement, published in the Official Gazette L 294, November 10, 2001, p. 22-32.

[38] For details, see: Michel Menjucq, op.cit., p.235- p.236.

– Special negotiation group consisting of employees' representatives in case of establishment of a SE, group with the role to decide together with the bodies of the participating companies, by written involvement agreement, the involvement methods of employees within SE;

– Representation body**,** established on the grounds of Involvement Agreement, which represents the employees, that is, it informs and consults the employees of a SE and its branches and facilities found in the Community.

The significant differences in the matter of employees' participation within a SPE are due to the different legislative traditions of the member states so that, there must be a balance compromise

On the other hand, we must take into account that employees' rights must be of course met, the Member State must not use the law of the European Union and –export the domestic system[39].

In the meaning of the SPE regulation, "employees' participation" means the influence the body representing the employees and/or the employees' representatives has on the activity of an SPE by:

i) the right to choose or appoint a part of the members of the board of surveillance or of directors of the company or

ii) the right to recommend and/or to oppose to the appointment of some or all the members of the board of directors of the company (art.2 item 2 letter f in the SPE regulation).

As principle, the regulation establishes that the SPE is applied the regulations in the matter of the employees' participation, if such case, applicable in the member state where it has its registered office, except for the aspects regulated by the regulation, offering a uniform solution for any SPE[40].

The SPE regulation contains special dispositions to be applied with precedence related to those of the applicable domestic law, for exceptions, cases when one of the conditions is fulfilled:

i) SPE, for a continuous period of three months from the registration, has at least 500 employees usually working in a member state which provides a degree of employees' participation higher than provided for the employees in the member state where the SPE has its registered office; or

ii) In case of transfer of the registered office of an SPE

- at least a third of the employees, but not less than 500, ordinarily working in the home state on the date it is registered in the host state; and,

- employees in the home state had more participation rights than those in the host state.

Despite all this, if the transnational participation system for the employees created according to this article is applied to the SPE in the moment of the transfer, is to be applied after the transfer, if the SPE and the special negotiation body do not decide in another way.

Employees' participation to the management of the company is a sensitive subject for the member states where there is no such tradition, states where no private company accepts intrusions in the development of its businesses which they regard as a private issue and related to which only the associates are entitled to decide.

The SPE regulation does not impose the obligation of the member states to introduce rules related to the participation of the employees in the limited liability companies managing to correct the regulation of employees' participation in the operation of the SPE, without improperly disturbing the legal culture of each and every member state[41] *which may discourage the establishment of SPE.*

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[39] Joëlle Simon, *"Purpose and tools of European Company Law",* Conference on European Company Law: the way forward, 16 – 17 May 2011, p.4, available at: <<http://ec.europa.eu/internal_market/company/docs/modern/conference201105/simon_en.pdf>>.

[40] Daniel Karnak, *"The European Private Company - Entering the Scene or Lost in Discussion?"*, German Law Journal vol.10, No.08, 2009, p.1327.

[41] Situation we meet at the European Company in which case, the regulations related to the employees' participation within SE is applied to all member states (see: Directive 2001/86/CE of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees).

III. Conclusions

Even if the regulation related to the statute of the European company was transposed in the domestic law of several states[42], the alterations made by it do not lead and cannot lead for now to a revolution in the matter of trading companies operating the European space, seeing that the European company is endowed with a compulsory but limited European identity, it does not benefit from the advantage of European nationality[43], the organic statute of such companies being mainly governed by the law of the member state where the European company has its registered office and the principle of its mobility is affected by the opposition right found at hand of the public authorities in the host member state, opposition based on public interest reasons[44], in case of the intent to move the registered office in another member state.

Related to the statute of the SE, even in its current configuration, the SPE related regulation proposal represents a significant progress to the regulation of European companies.

The European company was conceived as a transnational company which shall provide for the mobility of the companies by the possibility to transfer its registered office from one member state to another, to enable the merger and the establishment of their branches in other member states. Such daring targets did not benefit from the necessary political support and the proposal was amended many times before its enactment. Under such conditions, statistics indicate that the European company did not represent a progress and does not benefit from success.

SPE presents indisputable advantages to any European entity: the possibility of direct establishment - ex nihilo, reduced minimum registered capital, easily performed cross-border structure, possibility for a registered office in a member state and real office in another member state, possibility of registered office transfer form one member state to another, flexibility of the articles of association, of internal organizing, lack to impose the requirements of SPE employees' participation in member states which do not regulate employees' participation etc.

There is to establish the extent in which the largely more extended incidence of the domestic law applicable to the SPE shall represent an important inconvenient in the use of SPE. There is no doubt that in its current configuration, SPE regulation does not offer certainty related to the role of the domestic law applicable to the SPE and, the more the aspects regulated by the domestic law of the SPE, the less uniform the law applicable to the organic statute of the SPE.

We appreciate as the strongest advantage of the SPE: the deployment of cross-border business within a single market through the agency of an instrument legal regime of which is sufficiently uniform, independently from the member state where it develops its activity, directly or by branches, may determine the success of this new instrument for doing business in the European Union.

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[42] For example, France is the member state where the full EU law was transposed, including that related to Societas Europaea – Law no. 2005-842 from July 26, 2005, published in the Official Gazette from July 27, 2005, found as well in C. com. fr. In art. L 229.1 – L229-15.

[43]Please see J. Beguin, *Le rattachement de la societe europeenne,* în *La societe europeenne*, Dalloz, Paris, 2003, p. 31 and subs.

[44]The grounds for the opposition right was criticised being considered much too general and generating legal insecurity; for such purpose, *Noelle Lenoir Report, op. cit.*

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THE FINANCIAL RESTORATION OF INSURANCE COMPANIES

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Abstract
The entire legal regulation of the insurance market is focused on the protection of the insurance policies holders, on keeping their trust in the insurance system and on the maintenance of the financial market steadiness. Noticing and solving the problems prior to the occurrence of insurers' insolvency situation represents a fundamental aspect for the means of achieving such objective.
By this survey we will analyse the financial restoration procedure of the insurance companies, Romanian legal entities, through the perspective of the whole aggregate of legal issues involved by this extremely complex and sensitive process required by the special nature of the insurance companies and by the impact of the activities carried out by these companies for the economic and social life of a state.
Thus, there have been pointed out the particularities and the special nature of the insurance companies' financial restoration as compared to the reorganization of the regular trade companies, the insurers' means of avoiding the business failure, of avoiding the bankruptcy.

Keywords: *insolvency, financial restoration, insurers, financial restoration plan, special management, insurers' bankruptcy*

I. Introductory information

The insurance companies, just like the banks, might be subject to temporary or definitive business failure. A risk management lacking certain prudence may result in the speedy deterioration of the financial situation of the insurers. The classical example is the one of the aggressive market policies manifested by establishing insurance premiums that are too law associated with the increase in the subscriptions volume that can lead to major losses determined by the high volume of damages, which is likely to affect the available solvability margin of the insurer and, implicitly, its liquidity.

The entire legal regulation of the insurers' market is focused on the protection of the insurance policies holders, on keeping their trust in the insurance system and on the maintenance of the financial market steadiness. Noticing and solving the problems prior to the occurrence of insurers' insolvency situation represents a fundamental aspect for the means of achieving such objective.

The authorities supervising and controlling the insurance market have an essential role, too, in prematurely identifying the financial problems of the insurance companies and the „treatment" applied for the purpose of restoring the financial balance.

The competence of the supervision authorities from the origin member states grant them the opportunity of noticing both the risks of the insurers' activity that might result in the deterioration of their activity, as well as any difficulty the insurers might face.

The European and domestic laws establish very precise competences, directions and action procedures for the supervising authorities regarding the insurance companies in difficulty or in a financially inadequate situation, companies that will be immediately subjected to restoration of reorganization procedures.

In Romania, the Insurances Supervision Commission is the administrative authority that has exclusive competence in applying any actions or procedures of financial restoration of the Romanian insurance companies and of their branches located in member states or/and in third states.

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By this survey we will analyse the financial restoration procedure of the insurance companies, Romanian legal entities, through the perspective of the whole aggregate of legal issues involved by this extremely complex and sensitive process required by the special nature of the insurance companies and by the impact of the activities carried out by these companies for the economic and social life of a state.

We will point out the particularities and the special nature of the insurance companies' financial restoration as compared to the reorganization of the regular trade companies.

II. On the financial restoration of the insurers

In principle, the insurance companies facing a difficult or financially inadequate situation shall be subject to specific restoration and/or reorganization measures, for avoiding the insolvency of such companies, for avoiding the bankruptcy.

The financial restoration procedure represents the aggregate of administrative means and measures ordered by the Insurance Supervision Commission, as the competent authority, meant to maintain or restore the financial situation of an insurance company.

The recovery of the insurance companies' restoration is a specific procedure for redressing the insurers, and not a reorganization procedure as defined by the general regulations on insolvency or by the European laws.

According to the European laws, the insurance companies facing difficulties can be subject to distinct procedures: restoration or reorganization.

In all the cases, the insurers' restoration or reorganization is characterized by the absence of the insurers' insolvency. In the matter of special trade companies, the insolvency situation indicates the impossibility to financial restore and the bankruptcy procedure initiation for these companies.

The existing specific differences between the procedure of financial restoration of the insurance companies and the reorganization procedure of the regular trade companies consist in the differences between the reasons causing the procedures implementation, the features of the same and the purpose of each procedure.

Thus, the *financial restoration of the insurance companies excludes he insolvency state of the same,* while the judicial reorganization regulated by the Law no.85/2006[1]applies only to a company in insolvency.

The reorganization provided by the Law no.85/2006 has as main purpose the payment of the debtor's duties, while the *financial restoration procedure has the sole purpose the financial restoration of the insurer excluding any concern for the payment of its duties*.

Basically, this happens because the purpose of any legal procedure of insolvency is represented by the creditors' payment, *pari passu,* according to the equality of treatment of these creditors[2], in any of the ways provided by the law[3].

According to the general regulation, the priority of the insolvency procedure consists in the best interest of the creditors, the payment of the debts of the debtor towards them, by any of the means used for achieving this purpose, "liabilities cover-up" representing, as rule, the full payment of the declared duties[4].

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[1]Law no. 85 / 05.04.2006 regarding the insolvency procedure, published in the Off. M. Part I no. 359 on 21.04.2006, as further amended and completed.

[2] Roy Goode, *Principles of Corporate Insolvency Law: Student Edition,* London, Thompson–Sweet & Maxwell, 2005, p. 56.

[3] I. Turcu, Falimentul. Actuala procedura (Bankruptcy. Current procedure), Editura Lumina Lex, Bucuresti, 2005, p.287; I.Schiau, Regimul juridic al insolventei comerciale (The legal regime of the commercial insolvency), Ed.All.Beck, Bucuresti, 2001, p.81.

[4]See also: Stanciu D.Carpenaru, Vasile Nemes, Mihai Adrian Hotca, Noua lege a Insolventei . Legea nr.85/2006. Comentarii pe articole (The new insolvency law. Law no. 85/2006. Commented articles), Ed.Hamangiu,

Last, but not least, *the financial restoration of the insurance companies is an administrative procedure, decided and applied by the Insurance Supervisory Commission* while the reorganization of the regular trade companies is always a judicial procedure falling under the exclusive competence of the courts of law.

On the other hand, *the financial restoration of the insurance companies cannot be qualified as a reorganization procedure specific for insurers either considering the criterion of differentiating between the judicial reorganization and financial restoration procedures,* criterion implicitly imposed under the Directive 2001/17/EC on the reorganization and winding-up of the insurance companies[5].

According to the Directive 2001/17/EC, *the "reorganisation measures" means measures involving any intervention by administrative bodies or judicial authorities which are intended to preserve or restore the financial situation of an insurance undertaking and which affect pre-existing rights of parties other than the insurance undertaking itself, including but not limited to measures involving the possibility of a suspension of payments, suspension of enforcement measures or reduction of claims* (art.2 let. c) Directive 2001/17/EC).

The criterion of classifying a procedure applied to the insurance company as being a special reorganization procedure, is the one concerning the effects of such procedures: if by the measures adopted under this procedure the pre-existing rights of third parties are affected the procedure applied to the insurance company is itself a reorganisation procedure.

By the definition of reorganisation provided by the Directive 2001/17/EC it results that a reorganization procedure involves the suspension of enforcement measures related to the creditors' claims against the debtor imposed by the courts or by other competent authorities[6].

Usually, the measures by which insurance company and its creditors reach an agreement in relation to the insurer's undertakings, does not determine the classification of a procedure as being a reorganisation measure, if such agreements are reached by other means than by the courts decisions or by the supervisory authorities decisions of suspending the enforcement of claims.

By the insurance companies restoration procedure regulated by the law no.503/2004 regarding the financial restoration and the bankruptcy of the insurance companies[7] *the pre-existing rights of third parties are not affected and, this procedure, is not a reorganization procedure specific for insurance company.*

The Law no. 503/2004 provides - although quite inadequately by reference to the substance of the differentiation provided in the Directive 2001/17/EC - this characteristic of the restoration procedure of the insurance companies: "*The opening of the financial restoration procedure does not affect the rights in rem of the creditors and third parties regarding the corporal or incorporeal assets, movable or immovable assets– both determined assets, as well as aggregates of un-determined assets – belonging to the insurance company and which are situated on the territory of a different member state upon the procedure opening"* (art.9 para.7 of the Law no.503/2004).

2008, p.24-25; Gheorghe Piperea, *"Despre evitarea procedurilor de insolvenţă şi tratamentul extrajudiciar al crizelor financiare" ("On how to avoid the insolvency procedures and the extra-judicial treatment of the financial crises"),* în Revista Româna de Drept Privat nr.3/2007, p.147; In the context of the Law no. 64/1995, which does not differ from the current regulation of the insolvency considering its purpose: Ion Turcu, Madalina Stan, *"Compatibilitatea normelor codului de procedură civila cu specificul procedurii insolvenței" ("The compatibility of the norms of the civil procedure code with the insolvency procedure specifics"),* Revista de Drept Comercial nr.12/2005, p.12.

[5]Directive 2001/17/EC regarding the reorganization and winding-up of the insurance companies, published in the O.J. L 110/20.04.2001, p.28-39.

[6] Gabriel Moss QC, Bob Wessels, *EU Banking and Insurance Insolvency,* Oxford University Press, New York, 2006, p.113.

[7]Law no.503 on 17.11.2004 regarding the financial restoration and bankruptcy of the insurance companies, published in the Off. M. Part I no.1193/14.12.2004, as further amended and completed.

Except for this provision of the Law no.503/2004, from the entire regulation of the procedure it results that it does not affect the pre-existing rights of third persons.

III. The features of the financial restoration procedure.

By the specific differences between the financial restoration procedure of the insurance company as to any other form of special or general reorganization of a special or ordinary company, the characteristics of the financial restoration procedure of insurers is emphasized.

(i). The administrative nature

The measures of the insurance company restoration represent the intrinsic component of the permanent process of prudential supervision and control, implemented by the Insurance Supervision Commission.

It is a totally different conception as to the judicial nature of the general reorganization procedure of regular trade companies, such characteristic being deemed to have been imposed by the imperative norms governing the insolvency treatment considered to be a problem of general interest[8].

As far as the matter of general insolvency procedures are concerned, there has been established that, only the court of law is able to impose restrictions or to suspend the debtor's right to manage its own business, to administer its assets[9], and to limit the creditors' rights, in case of insolvency.

Thus, the Insurances Supervision Commission is the only competent authority to order restoration measures by the initiation of the financial restoration procedure by any of the means of enforcing such procedure: based on a plan or by means of special receivership applied to a Romanian insurance company, including its branches from other member states as well as to the branches and subsidiaries of insurance companies from other third parties, with the registered office in Romania (art.5 para.2 of the Law no.503/2004).

Therefore, the financial restoration procedure is *an administrative procedure and it excludes the intervention of the courts in applying, implementing and closing the procedure*[10].

The Romanian law option for applying the methods and measures for financial restoration exclusively by the competent administrative authority responsible for the supervision and control of the insurance activity is based on the need of speedy adoption of the most adequate measures for the financial restoration of the insurer.

As in the banks' case, the insurance companies can function only if they keep the public's trust and any restoration of judicial reorganization would result in failure, due to the panic that would occur among the policies holders.

On the other hand, the European law regulates the possibility of "financial restoration" of the insurance companies as a distinct action from the reorganization of the same, through the competent authorities with the supervision of the insurance companies (art.37 and art.38 of the Directive 2002/83/EC.

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[8] Yves Guyon, *Droit des Affaires, Tome 2, Entreprises en difficultes. Redressement judiciare- Faillite, 7e edition, Economica, Paris, 1999,* p.31; Boy, Guillaummond, Jeammaud, Jeantin, Pages et Piravano, *Droit des faillite et restruction du capital,* Presses Universite Grenoble, 1982.

[9] The bankruptcy procedure "deprives a person of her or his right to manage her or his own assets", right provided by the European Convention on Human Rights, European Commission on Human Rights, December 10th, 1984, no.10259/1983, ANCA c/Belgique, C. Barsan, *"European Convention on Human Rights – Commented articles. Rights and freedoms",* Vol. I, Ed.All Beck, Bucharest, 2005, p.409.

[10] See also: R.N.Catana, *Dreptul asigurarilor – Reglementarea activitatilor de asigurare. Teoria generala a contractului de asigurare* (The right of the insurances – The regulation of the insurance actions. The general theory of the insurance contract), Editura Sfera Juridica, Cluj Napoca, 2007, p.85.

(ii). The preventive nature

The fundamental objective of the supervision and of the control exercised by the competent authority on the insurers is to prevent them from becoming insolvable and for them to carry out an activity that is compliant with the operational and prudential requirements specific for the insurance market.

For this purpose, the Insurances Supervision Commission periodically checks all the essential aspects of the insurer's activity by means of controlling the financial statements, of periodic reporting and informing and by means of analysis, guidance and control actions exercised by the specialized departments of the same authority.

According to the law, the Insurances Supervision Commission has the right to intervene for preventing the insurance companies insolvency and for avoiding the initiation of the bankruptcy procedure in all the cases where there are noticed any irregularities and incompliance with the prudential requirements, especially financial difficulties (art.5 para.1 of the Law no.503/2004).

The preventive nature of the financial restoration presupposes the inexistence of the insurers' insolvency and the avoidance of the same.

The main purpose of the procedure is „the restoration of the financial situation of the insurance company" (art. 20 let. a) of the Law no.503/2004 and art.37 pct.2 of the Directive 2002/83/EC[11])

The preventive nature of the financial restoration procedure explains also the lack of involvement of the insurance company creditors in the procedure.They are simply notified on the content of the redress measures ordered by the Insurances Supervision Commission by the decision of implementing the financial restoration procedure.

(iii). The remedy nature

This characteristic of the restoration procedure is a natural consequence of its preventive nature**.**

By acting preventively, by speedy and special measures *the financial imbalance of the insurance company is settled.*

None of the actual measures to be ordered under the financial restoration methods shall not affect its remedy nature.

IV. Initiating and implementing the financial restoring procedure

The causes for applying the financial restoring procedure are common to both methods of implementing the procedure: based on a plan or by means of special receivership.

According to the law, the insurance company enters the financial restoring procedure when:

(i) the insurance company fails to present the Insurance Supervision Commission, in 48 hours term from its request, the financial statement and the minimum solvability margin and when there are ascertain failures in complying with any other legal provisions related to the insurance activity, thus endangering the compliance with the obligations undertaken in relation with the insurance creditors;

(ii) the value of the available solvability margin decreases bellow the minim limit provided by the regulations issued by the de Insurance Supervision Commission;

(iii) the value of the available solvability margin decreases below the minimum limit provided by the legal regulations for safety fund (art.7 of the Law no.503/2004).

[11] Directive 2002/83/EC of November 5th 2002 on the direct life insurance, published in the OJ L 345 on December 19th 2002.

All the causes for opening the restoring procedure indicate the insurance company positioning out of the prudential, operational requirements. Such company faces an insolvency risk.

Statistically, the insurance company can resist with an available solvability margin equal or lower than the legal safety fund value (however, the value of the available solvability margin should not go below half the minimum legal value of the safety fund) but, the activity carried out under these conditions is affected by a high risk of insolvability, risk that is inacceptable for the insurance market.

By way of exception, the insurer is presumed to be in a difficult financial situation when it fails to comply with the Insurance Supervision Commission request to present its financial statements indicating all the basic elements of its stability, the financial situation and the available solvency margin.

The right of the Insurance Supervision Commission to assess the financial situation of an insurance company beyond the classical elements used for such assessment (available solvency margin and safety fund) *is pointed out by the possibility of the same to decide the application of the restoration procedure in all the situations where the insurance company endangers its ability to honour its claims to the creditors, by the failure to comply with the applicable legal provisions.*

Therefore, *the financial restoring procedure can be also initiated as a result of the failure to comply with the liquidities indicator, due to risky investment policies, due to the failure to comply with the requirements on the assets type that should be comprised in the safety fund, a.s.o.*

Thus, the sphere of the causes determining the application of the financial restoring procedure of the insurance companies is much wider, the law offering the basic criteria for determining it[12].

The Insurance Supervision Commission orders the initiation of the financial restoring procedure by grounded decision, indicating the means of financial restoring measures applicable to the insurance company in difficulty: restoration based on redress plan or restoration by means of special receivership.

According to the law, regardless of the restoration means that has been opted for, the Supervision Commission can order the adoption of the main prudential measures, which will be the actual means for financial restoration of the insurance company, among which: the insurance portfolio immediate transfer by the insurance company, in whole or in part, within maximum 60 days as of the measure adoption, the insurance company director's obligation to summon an extraordinary general assembly, for proposing some actions of registered capital increase, assembly to take place within maximum 5 days as of the summoning date, and, the increase of the registered capital within maximum 30 business days as of the reception of the decision informing on the initiation of the financial restoring procedure, the interdiction to carry out certain investments, a.s.o. (art.8 para.2 of the Law no.503/2004).

We consider that these main measures for the insurer's restoration shall be ordered by the Insurance Supervision Commission, in principle, in case of opting for the financial restoration by means of special receivership. Our opinion is stated considering the „temporal" differences of the two forms of the financial restoring procedure but also the legal conception regarding the content and the means of adopting the financial restoration of each of these procedures.

In other words, the financial restoration based on a plan entails a more relaxed time-frame than the special receivership one and, additionally, he content of the („short term") redress plan is left with the discretion of the board of directors or of the company supervisory board, subject to the measures ordered by the procedure opening decision and provided that such plan is approved by the Insurance Supervision Commission.

[12] See also: the Insurance Supervision Commission, the Decision no.1068/21.12.2001 on the opening of the financial restoration procedure based on a financial restoration plan of S.C. FORTE Asigurari - S.A., Published in Of. M., Part I, no.9 on 05.01.2012.

The Insurance Supervision Commission can endorse or dismiss such plan and, in the later case, it can force the company to adopt a speed-up financing program (art.15 let. a)of the Law no.503/2004).

The intervention of the Insurance Supervision Commission by „the prudential main measures", indicates an alarming financial situation of the insurance company requiring an immediate and aggressive action, specific for the special receivership even if, the law does not establish an hierarchy for the redress measures based on the criterion of the gravity of the financial imbalance of the insurer.

Applying the financial restoring procedure is not confidential, the compliance with the publicity formalities being compulsory; however the failure to comply with this request does not prevent the application of the procedure.

The publicity of the opening decision of the financial restoring procedure of the insurance company is done by publishing it in the Official Monitor of Romania, Part I, as well as in two other national newspapers.

The Insurance Supervision Commission, as the competent authority, has the duty to immediately inform the supervision authorities in all the other member states on its decision to apply the financial restoring procedure for an insurance company, including also the effects of applying such procedure.

The financial restoring procedure does not affect the pre-existing rights of third persons and is effective within the entire European Union as of the moment of it becoming effective in Romania.

The effects of the financial restoring procedure are the ones provided by the Romanian law, without other formalities even if the laws of the member states do not provide such financial restoring measures or subordinate such measures enforcement to certain conditions that have not been fulfilled.

A) The redress based on financial restoration plan

The insurance company redress based on a plan is enforced by the insurance company by means of the board of directors or of the supervisory board. By this means of financial restoration, the Insurance Supervision Commission offers the insurer the means to choose and to propose the financial restoration measures that it considers to be the most adequate and speedy for restoring the financial balance, even if the insurer decides to appoint a person to supervise the drafting and implementation of the financial restoration plan.

The board of directors or, if the case, the insurer's supervisory board, drafts the financial restoration plan in maximum 20 days from the date of communicating the decision of opening the financial restoring procedure.

The plan must include the perspectives for financial restoration of the company and the actual means and terms for achieving such restoration as well as the terms for complying with the measures and provisions comprised in the procedure opening decision.

The approach of the financial situation of the insurance company must be carried out for a 3 year term considering the main coordinates of the financial aspects of the insurer; income and revenue budget, re-insurance programs, debts payment program, financial resources for covering the outstanding obligations a.s.o.

The Insurance Supervision Commission is the authority that decides the financial restoration plan feasibility of the insurer by approving, dismissing or completing it.

As of the date of communicating the decision on the approval of the financial restoration plan as proposed by the insurance company or as amended and/or completed by the Insurance Supervision Commission, the insurance company has the duty to comply with all its provisions and to

communicate to all known creditors, within 5 business days term as of the reception of such decision, the measures and provisions established by the Insurance Supervision Commission.

In case the financial restoration plan is dismissed, the Insurance Supervision Commission, by its decision shall order one of the following measures:

(i) to order the insurance company to adopt an immediate financing program, that must comply with the terms, conditions, and procedures provided by the law for drafting and presenting the financial restoration plan;

(ii) the financial restoration of the company by special receivership;

(iii) the cancellation of the insurance company operating permit.

The decision of the Insurance Supervision Commission of cancelling the operating permit entails the winding-up and the liquidation of the insurance company or, in case of ascertaining the insolvency state, the opening of the bankruptcy procedure upon the request of the Insurance Supervision Commission.

B) Special receivership restoration

The restoration of the insurance company by means of special receivership is carried out through the special receiver (director), appointed by the decision of the Insurance Supervision Commission. In such conditions, the special receiver (director) has the capacity of the Insurance Supervision Commission proxy without the possibility to transfer its attributions to a third person.

Its mandate is an agency mandate, the special receiver being the one representing and hiring the insurance company in its relations with the third parties[13].

As of the date of appointing the special receiver, the insurance company is „temporarily discharged", by suspending the powers of the major shareholders and of the important officers of the company, powers that fall with the special receiver during the financial restoring procedure.

The shareholders right to appoint and revoke the board of directors or the sole director and/or the supervisory board and the shareholders right to receive dividends shall be also suspended during the entire financial restoring procedure interval by means of special receivership.

The powers of the special receiver are established by the Norm approved by the I.S.C. Order no.3122/21.09.2005[14].

In principle, the special receiver shall implement and shall take all the measures required for restoring the financial situation of the insurance company, by complying with the provisions, with the terms and conditions from the financial restoration decision.

V. Closing the financial restoring procedure

Acting as a remedy action, the financial restoring procedure is firstly closed when the purpose of such procedure has been reached and the financial situation of the insurance company is restored.

The closing of the financial restoring procedure shall also occur when, the measures applied within the financial restoring procedure have not been adequately complied with, within the terms and conditions established for such actions, or the application of the same failed to reach the pursued purpose and to eliminate the causes generating it.

The closing of the procedure is decided by the decision of the Insurance Supervision Commission.

[13] For the powers of the special receiver, please see, Vasile Nemes, *Dreptul asigurarilor* (Insurance Law), Editura Hamangiu, 2009, Bucuresti, p.137.

[14] The Order no.3122/21.09.2005 for approving the Norm on the rights, obligations and competences of the special receiver, Published in the Off. M., Part I no.866/25.09.2005.

By the decision of closing the financial restoring procedure the Insurance Supervision Commission shall order the revocation of the decision to open the procedure when the procedure closing is determined by the restoration of the financial situation of the insurer and, as the case may be, by the revocation of the special receiver.

The impossibility to restore the financial situation of the insurer by means of the financial restoring procedure leads to the adoption of the Insurance Supervision Commission decision ordering the closing of the procedure, the cancelation of the operating permit of the insurer and, if the case, the revocation of the special receiver.

If the insurance company has been subject to financial restoration by means of special receivership, the decision of the Insurance Supervision Commission regarding the procedure closing and the cancelation of the operating permit shall be grounded on the special receiver reports, ascertaining that there are no conditions for restoring or maintaining the financial situation of the insurance companies.

If the insolvency state of the insurance company is ascertained, by the decision for closing the financial restoring procedure is also decided the registration of the request to initiate the bankruptcy procedure.

If the insurance company is not insolvable, the decision to cancel the operating permit due to the impossibility to financially restore shall entail the company winding-up and deletion from the trade register.

The decision of the Insurance Supervision Commission regarding the closing of the financial restoring procedure and the ascertaining of the insolvability situation of the insurance company shall result in the registration of the request to initiate the bankruptcy procedure for the insurer and, as of the decision publication, shall also result in the creditor's right to ask for the payment of the due amounts payable from the Guarantee Fund.

To this end, in 10 days as from the publication of the decision for closing the financial restoring procedure, the insolvable insurance company must provide the director of the Guarantee Fund a complete record of all the damage compensation files, as well as the technical-operational records and the book-records related to such files, for publishing the list of potential creditors, beneficiaries of the amounts payable under the Guarantee Fund. The liability for the failure to comply or for the improper compliance with this obligation shall fall with the liable persons from the insurance company.

In practice, the financial restoration of the insurance companies based on a financial restoration plan and/or by special receivership manages to achieve the avoidance of the insurer's insolvability and there-launching of the same.

A good example on the Romanian insurance market is the one of S.C. ARDAF asigurari reasigurari- S.A. that underwent the financial restoring procedure based on a restoration plan in September 2005, due to the decrease of solvability margin indicators and of the liquidation ratio below the limit established by the regulations of the Insurance Supervision Commission.

The restoration plan has been reached by a capital increase and the financial restoring procedure has been closed.

Subsequently, in June 2006, due to the decrease of the financial indicators S.C. ARDAF asigurari reasigurari- S.A. has been subject to financial restoring procedure by special receivership. The solution for the company financial restoring has been, again, the increase of the registered capital up to the level established by the decision of the Insurance Supervision Commission for opening the financial restoring procedure; thus, in January 2007 there has been decided the closing of the financial restoring procedure[15].

All the decisions of the Insurance Supervision Commission adopted in relation to the financial restoring procedure of the insurers, are administrative documents and they can be

[15] Sursa: S.C.ARDAF ASIGURARIRI REASIGURARI S.A., http://www.ardaf.ro/ro/site/index.php.

challenged by action lodged with the administrative court, i.e. with the Court of Appeal in Bucharest, in 10 days term from its communication (there is a time limitation for such action).

For the speediness of applying the financial restoration measures for the insurer the legislator granted that such decisions of the Insurance Supervision Commission shall be enforceable, its challenge with the courts of law not suspending their enforcement.

VI. Conclusions

The procedure for financial restoration, as regulated by the Romanian law, represents the only and the best method for restoring the financial imbalance of the insurance companies and, by its nature and causes, by its purpose and by the accomplishing means, it is significantly different from the judicial receivership provided under the Law no.85/2006.

Thus, the financial restoration procedure of the insurers is a special procedure, imposed naturally, by its special statute of the insurance companies.

As far as its application does not lead to the insurance company financial restoration, such company must be eliminated from the market in a manner as safer and as compliant as possible with the principle of policy holders protection.

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THE LOAN CONTRACT IN THE NEW CIVIL CODE

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Abstract

The new Civil Code maintains, mainly, the stipulations of the Civil Code of 1865 regarding loan contracts, in its both forms (the loan for use and the loan for consumption). As a variety of the loan for consumption, a few new specific stipulations were included, regarding the loan with interest.

This research is focused on the current regulation of the loan contract, including a series of changes, of which the most important refers to: the loan promise, the risk regarding the asset placed in a bailment, property transfer and the risk in the loan for consumption contract, loan return and the interest regime.

Also, what kept my attention is the significant changes brought to the interest regime by the Law for applying the Civil Code, included for now in Chapter I of the O.G. no. 13/2011, regarding the legal compensatory interest and the penalty interest for financial duties, as well as for the regulation of certain financial-fiscal measures in the banking department.

Keywords*: loan promise, loan for use, loan for consumption, compensatory interest, penalty interest.*

1. Introduction

In the present study we aim at analyzing the regulation of the loan contract in the New Civil code, entered into force on the 1st of October 2011, while emphasizing the new elements, which do not exist in the Civil Code of 1865.

Though the new regulation mainly maintains the dispositions of the Civil Code in 1865 in the matter of the loan contract, it also contains a series of important changes which give a new configuration to a contract with a large applicability in the day-to-day life. That is why we consider that the analysis of the loan contract in the light of the new civil regulation is particularly actual and useful; both for specialists and for all those who wish to know the features of the new Civil Code compared to the previous regulation.

Nowadays, multiple economic and social causes generate an extension of crediting, in which case, knowing the juridical rules in the matter became almost indispensable for the parties negotiating the terms of the contract.

As operations like credits have a major importance in doing several activities, and such operations can also be realized by entities, other than those performing crediting activities with professional character, without constituting the object of special regulations in the matter of crediting and financial activities, we think it is necessary to know the dispositions of the new Civil code in this matter and its correct application in the relations with the interested parties. As recipients of the new civil dispositions in this matter we cannot ignore the law courts and other partners of justice, such as lawyers, notary publics, theoreticians of law. Also, we consider the students of faculties of law for who we can ease the process of knowing the dispositions of the new Civil Code in the matter of the loan contract.

At the same time, convinced of the necessity to permanently perfect the juridical rules, we also hope to have a contribution in this direction.

In the present study, we aim at analyzing the juridical regime of the loan contract, while emphasizing the new elements, consisting of: the loan promise, the risk regarding the asset placed in a bailment, property transfer and the risk in the contract of loan for consumption, loan return and the interest regime.

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Up to this moment, the loan contract constituted, mainly, the subject of academic manuals elaborated for the students' study, without exhausting the theoretical and practical issue of the loan contract.

The purpose of the present scientific approach is to emphasize the novelties of the current regulation, and we are sure that, in our turn, we can open other gates in this matter.

2. Content

2.1. The loan promise

In the first section of Chapter XIII of the new Civil Code[1] called *General dispositions*, the legislator regulates the types of loan and the loan promise.

According to art. 2144 of the new Civil Code, the loan is of two types: the loan for use (the bailment) and the loan for consumption[2].

If, in regard to the classification of the loan, the dispositions stipulated in the Civil Code in 1864 are kept, the novelty is represented by the loan promise regulated by the dispositions of art. 2145 in the new Civil Code, according to which: „When the asset is in the possession of the beneficiary and the promisor refuses to close the contract, the court, at the request of the other party, can pronounce a decision to the contract, if the requirements of the law for its validity are met". As a consequence, in these dispositions, one stipulates the possibility for the promise beneficiary to ask the court to pronounce a decision that can substitute the loan contract if the following conditions are fulfilled:

- the asset is in the beneficiary's possession, regardless of its nature;
- the promisor creditor refuses to sign the contract; and
- the other validity conditions for the loan contract are fulfilled.

Thus, so that the action grounded on the dispositions of art. 2145 in the new Civil Code is admitted, which lead to a forced closing of the contract, the court will always check for the existence of these special conditions. Besides, these special conditions, and especially the asset existence in the bailee's possession characterizes this exceptional regulation in the matter of the loan contract, compared to the dispositions of art. 1279 in the new Civil Code, which regulate the promise to sign a contract[3].

These dispositions reflect the parties' will, allowing them to sign the contract without entrusting (tradition) the asset[4]which is already in the beneficiary's possession. In such cases the parties' agreement is enough to validly sign the loan contract or, according to case, the decision that can be pronounced by the court when the promisor refuses to sign the contract.

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[1] Law no. 287/2009 regarding the Civil Code, republished on grounds of the art. 218 of Law no. 71/2011 to apply the Law no. 287/2009 regarding the Civil Code, published in the Official Gazette of Romania, Part I, no. 409 on 10th June 2011.

[2] The contract by means of which the Romanians took the loan for consumption is designated by the term *mutui dație* or by that of *mutuum*, words which suggested the fact that closing the contract meant the transmission of a thing from the creditor towards the his debtor. For details, see, Emil Molcuț, *Drept private roman,* Edition that was reviewed and completed, (Universul Juridic Publishing House, Bucharest, 2004), 269 and the foll.

[3] In accordance with paragraph 3 of art. 1279 in the new Civil Code: „In addition, if the promisor refuses to sign the promised contract, the court, at the request of the party which respected its own obligations, can pronounce a decision to substitute contract, when the nature of the contract allows this, and the requirements of the law for its validity are fulfilled. The stipulations of the present paragraph are not applicable in case of the promise to sign a real contract, unless the law stipulates otherwise."

[4] Both the bailment and the loan for consumption are real contracts, and to close them the parties' agreement has to be followed by handing in the good which is the object of the contract.

The loan promise can also be analyzed in relation to the dispositions of. art. 2193 in the new Civil Code where the credit facility is defined.[5] Regulated for the first time in the new Civil Code, the credit facility is a contract, whose defining element is the financer/creditor's obligation to make available an amount of money for the customer for a determined or an undetermined period of time.[6]

Practice remains to offer us the applications of the loan promise regulation.

2.2. The loan contract: enforceable title

In the legislator's current vision, both the loan contract for use and the loan contract for consumption are considered enforceable titles.

We are in the presence of relevant dispositions for the non-banking contracts that we meet in art. 2157 and 2165 in the new Civil Code, dispositions that accompany the main obligation of the loan beneficiary, which is the return obligation.

Thus, according to the dispositions of art. 2157 in the new Civil Code, „the bailment contract concluded in the authentic form or by a document under private signature with fixed date, constitutes enforceable title, in accordance to the law, in case of termination by the bailee's death or the term expiration". In the 2nd paragraph of art. 2157 in the new Civil Code one stipulated that „unless a term was stipulated for the restitution, the bailment contract constitutes enforceable title, on condition that the use for which the asset was given is not stipulated or the use has a permanent character."

Based on these dispositions, the bailer has the possibility to foreclose the bailee, unless the later executes his obligation to return the asset, based on the bailment contract and without going to court. In accordance to the law, the loan contract for use is considered enforceable title, if the following conditions are cumulatively fulfilled:

- the contract is signed in its authentic form or as a document under private signature with fixed date;
- the contract is terminated by the bailee's death or the term expiration. Bailment without a term is enforceable title only when, in its content, one has not specifically mentioned the use for which the asset was given or the use has a permanent character.

In its turn, art. 2165 of the new Civil Code stipulates, similarly to the bailment, the loaner's possibility to start foreclosure against the borrower if the loan is not returned, based on the contract considered enforceable title and which cumulatively fulfills the following conditions:

- it is signed in its authentic form or as a document under private signature with fixed date;
- it was terminated by the term expiry.

These dispositions keeps the creditor of the restitution obligation from going to court in order to set the debt against the debtor, even in the case of non-banking loans. As for the banking credit contracts, they remain enforceable titles, according to the stipulations of the special law[7]

2.3. The loan for use (bailment). Novelty elements

2.3.1. The capacity to loan

According to the dispositions of art. 2147 in the new Civil Code, „unless forbidden by law or by the contract, any person who has the right to use the asset can be a bailer". The text regulates the capacity to loan. On its grounds, the bailee (not owner) too can loan to third parties the asset subject of the contract, if this transmission was not forbidden by the contract.

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[5] According to art. 2193 of the new Civil Code: „The credit facility is the contract by which a credit institution, a non-banking credit institution or any other entity, authorized by a special law binds itself to make available an amount of money at the customer's discretion for a determined or undetermined period of time".

[6] For details, see, Rada Postolache, *Credit Facility According To The New Civil Code*, in the Agora International Journal of Juridical Sciences (2/2011), 2.

[7] In accordance with art. 120 of the O.U.G. no. 99/2006 regarding credit institutions and credit suitability, approved with additional changed by Law no. 227/2007.

2.3.2. Non-observance of the obligations regarding the asset use or restitution by the bailee

According to the dispositions of art. 2149 in the new Civil Code, the bailee is not responsible for the asset loss or damage, if these are the result of asset use for the purpose which constitutes the object of the contract. But, in case the bailee violates the use or the restitution obligations, he is responsible for the asset loss, including for causes of force majeure, according to the 2nd paragraph of art. 2149. In such a case, according to the law, he will be exonerated of his responsibility, if he can prove that asset was lost or damaged as a consequence of force majeure. The novelty compared to the old regulation is that the bailee's responsibility is involved inclusively as a consequence of force majeure, and not just for acts of God (art. 1565 in the Civil Code of 1864).

2.3.3. The lien

As it is mainly a unilateral contract, the bailment does not create obligations for the bailer. Nevertheless, during contract execution, the bailer can have certain extra-contractual obligations, that the new Civil Code stipulates in the dispos. of art. 2151 and art. 2152. Thus, according to the dispos. of art. 2151, par. (2) of the new Civil Code, the expenses that are necessary and urgent, made for the asset maintenance, and which could not be stipulated at the end of the bailment contract will be paid by the bailer. Obviously, the origin of this restitution obligation for the asset maintenance expenses is represented by the business administration or by the enrichment without a right cause.[8] Another obligation of the bailer, this time of penal type[9], is that to repair the damages caused to the bailee by a *flaw* of the asset. Thus, according to the dispositions of art. 2151 in the new Civil Code, the bailer who, on the signing date of the contract, was aware of the borrowed asset hidden vices, but did not prevent the bailee regarding these vices, is bind to repair the damage suffered by the baillee as a result of this."

In relation to these obligations occurred as bailer's responsibility, the bailee does not have, in any circumstances a lien. The legislator states it expressly in art. 2153 of the new Civil Code, whose dispositions removes the bailee's lien, lien instituted by the dispositions of art. 1574 in the Civil Code of 1864[10].

2.3.4. The asset restitution

As we have already shown, the bailee's main obligation is to return the borrowed asset at due term in its specific nature. If in the system of the Civil Code of 1864 this obligation is a result of the contract definition[11], as novelty element, in art. 2156 of the new Civil Code this obligation is expressly stipulated. Thus, according to the law, the bailee must return the asset at due term or, if not, at the bailer's request. As a rule, the bailer cannot ask the asset restitution before the term set in the contract. Nevertheless, as an effect of the contract free character, and to provide the parties' equity, exceptionally, the legislator expressly regulates this right of the bailee in art. 2156 of the new Civil Code. As a result, according to the law, the bailer can ask for the asset restitution before due term, if:

- an urgent and unpredictable need for the asset has occurred;

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[8] Francisc Deak, *Tratat de drept civil. Contracte speciale,* (Actami Publishing House, Bucharest, 1998), 300; Florin Moțiu, *Contractele speciale,* 2nd edition reviewed and complated, (Universul Juridic Publishing House, Bucharest, 2011), 288; Dumitru C. Florescu, *Contractele civile* (Universul Juridic Publishing House, Bucharest, 2011), 257.

[9] Florin Moțiu, *op.cit.,* 288. D. Chirică, *Tratat de drept civil. Contracte speciale,* (C.H.Beck Publishing House, Bucharest, 2008), 212.

[10] Francisc Deak, *op.cit.,* 296; Mircea Mureşan, *Drept civil. Contracte speciale,* (Cordial Lex Publishing House, Cluj Napoca, 1999), 242.

[11] The bailment is a contract by which someone lends someone else a thing to use it, having the obligation to return it to the creditor (art. 1560).

- the bailee dies, or
- the bailee violates his obligations.

Furthermore, by the new legislative dispositions, one eliminated the possibility for the courts to decide regarding an anticipated restitution of the asset[12].

2.4. The loan for consumption.

2.4.1. Juridical features

The dispositions of the new Civil Code in the matter keeps unchanged the juridical features of the loan for consumption, and this is the contract by which one transfers ownership over certain amounts of money or other fungible and consumptible things, with the restitution obligation. In the matter of the loan for consumption, the law considers that the loan whose object is an amount of money is assumed to be for good and valuable consideration [art. 2159 par. (2)]. As it is a contract with property transfer, the borrower becomes owner and bears the risk of the borrowed asset loss, independent of what happens with the borrowed assets.

2.4.2. The restitution obligation

The siege of this matter is represented by article 2164 of the new Civil Code. In the matter of the loan for consumption too, the main obligation of the debtor is to return at due term, assets of the same type, quantity and quality, regardless of its price variation until the time of restitution. We are in the presence of dispositive rule that represents a reunion of the dispositions in the matter of the Civil Code in 1864. Therefore, the parties can derogate by contract, setting for instance, an adjustment with the inflation or with the evolution of a currency exchange[13]. As for the loan whose object is an amount of money, the debtor must return the nominal amount, and the parties can derogate this rule [art. 2164 par. (2)]. In the last paragraph of art. 2164, the new Civil Code considers the case when it is impossible to return assets of the same quality and quantity, setting that, in such a case, the debtor will return their value, established at the date and place where he will pay. This can be the case of some loans in lei, with due term on a date when Romania will adopt the EURO as official currency.

2.4.2. The restitution term

Here, one must consider an interpretation correlated with the general dispositions in the new Civil Code, regarding the term, namely art. 1411-1420. According to art. 2161 in the new Civil Code, in case of the loan for good and valuable consideration the restitution term is supposed to be stipulated in favor of both parties. As a result, one cannot give up its benefice except by the parties' agreement, and the payment can take place before the term, but only with the creditor's agreement. In the matter of banking contracts, in case of a banking credit at due term, the debtor can unilaterally give up the profit of the term within the conditions stipulated in the contract for anticipated restitution.

According to the dispos. of art. 1417 in the in the new Civil Code, the debtor loses the advantage of the term if:

- he is in insolvency. In the sense of the law, insolvency is a state that will be ascertained by the court, in which the value of the founding asset that can be subject to foreclosure is smaller than the total value of the demandable debts. Until the current regulation in the new Civil Code, the term insolvency could be met in the fiscal regulations;

[12] In accordance with art. 1573 of the Civil Code Codul civil in 1864, if the bailer has an urgent and unpredicted need of the asset, the court could, according to case, force the bailee to return it.

[13] I. Urs, *Obligaţia de restituire a împrumutului de consumaţie oglindită în doctrina şi practica judecătorească,* in the magazine Dreptul (3/2005), 127-135.

- he is in insolvency;[14]
- deliberately or due to a serious fault, it reduces the warranties given to his creditor or cannot give the promised warranties; or
- because of him, the debtor no longer fulfills an essential condition to sign the loan contract.

Loss of the term advantage triggers anticipated due term of the obligation, with the same effects as coming to due date (art. 1418).

In case a restitution term was not set in the contract, article 2162 of the new Civil Code regulates the possibility to have a term set by the court. Thus, according to the first paragraph of art. 2164, if the contracting parties did not stipulate a restitution term, the court will stipulate, sovereignly, considering the case features. The novelty is found in the dispositions of the 2nd paragraph of the same article, dispositions which limit the sovereignty of the court in setting the restitution term to 3 months only. The petition will be solved according to the procedure of the president's ordinance [art. 2162 par. (3)].

2.4.3. The interest loan

According to the law, the loan for consumption can only be a gratuitous loan, but also a loan for good and valuable consideration. In case of a loan for good and valuable consideration, the creditor pretends from the debtor, besides the obligation to return the loan, another amount of money or other goods of this kind, called interest[15]. For this reason, the loan for good and valuable consideration is called a loan with interest, for which – either by derogation or by fulfilling the rules stipulated for the loan for consumption – the special rules stipulated in the new Civil Code apply (art. 2167 – 2170) or those stipulated in other normative documents[16].

In art. 1 par. (1) of the GO no. 13/2011, one stipulates that the parties are free to set the interest rate by contract. The interest must be set in a written document, otherwise the legal interest is due (art. 6 of the O.G. no. 13/2011).

According to the law, the interests can be[17]:

- compensatory: due by the debtor for the amount of money borrowed, previous to the due date;
- penalizing: due by the debtor for not fulfilling the obligation at due date.

If the law or the contract stipulates that the obligation triggers compensatory and/or penalizing interests, according to case, and the parties did not expressly set their level, the legal interest is due. The legal interest is set at the level of the set at the level of the NBR interest level.

In the civil matter, except for the relations connected to enterprise exploitation[18], the legal interest is set at the level of the NBR reference interest diminished by 20%. In the same matter, the

[14] The main element of insolvency, in all its forms, is the lack of finances to pay the eligible debts. For more details, see, Stanciu D. Cărpenaru, Vasile Nemeş, Mihai Adrian Hotca, *Noua lege a insolvenței. Law no. 85/2006. Comentarii pe articole,* (Hamangiu Publishing House, Bucharest, 2006), 13 and the foll.

[15] According to art. 2168 in the new Civil Code, the interest can be set in money or other performances under any title or name for which the borrower binds himself as equivalent of the asset use.

[16] G.O. no. 13/2011 regarding the legal compensatory or penalizing interest for money obligations, as well as for the regulation of some financial – fiscal measures in the banking field, published in Romania's Official Gazette no. 607 on 29th August 2011. When the GO no. 13/2011 entered into force it abolished the G.O. no. 9/2000 regarding the value of the legal interest for financial obligations.

[17] The new regulation in the matter of interests for financial obligations reflects the opinions expressed in the doctrine regarding the legal definition given to the interest by the G.O. no. 9/2000 considered to be more economic than juridical. For details, see, Gheorghe Piperea, *Introducere în Dreptul contractelor profesionale* (C.H.Beck Publishing House, Bucharest, 2011), 210 and the foll.

[18] According to art. 3 in the new Civil Code, exploitation of an enterprise means to systematical run an organized activity, by one person or several people consisting in producing, administrating or transferring goods or performing services, regardless of this having or not a profitable purpose.

law limits the value of the rate set by the parties, which is the interest cannot exceed more than 50% of the legal interest level (art. 5 of the G.O. no. 13/2011). According to the law, the clauses which violate this limitation are null and void and the creditor loses his right to pretend legal interest. In all cases, the validity of the conventional interest level is determined by relation to the legal interest in force the on the contract signing date [art. 5 par. (3) of the G.O. no. 13/2011].

In the juridical relations with an alien status element, if the Romanian law is applied and the pay was stipulated in foreign currency, the legal interest is of 6% per year.

The interest is calculated starting with the day of remitting the interest (art. 2169 in the new Civil Code). According to art. 7 of the G.O. no. 13/2011, the anticipated pay of the compensatory interest is allowed, but for no more than 6 months. The interest thus received is not subject to restitution, regardless of the reference indices variation. The new Civil Code states as well, in art. 2170 that the anticipated pay of the interest cannot be made for more than 6 months. But in the vision of the common law, if one can determine the interest rate, the possible excesses or deficits are subject to compensation form one rate to another, for the entire period of the credit. The last rate is an exception, as it is always entirely won by the creditor. Thus, one can notice a lack of correlation between the dispositions of art. 7 of the G.O. no. 13/2011 and the stipulations of art. 2170 in the new Civil Code. Therefore, we suggest to the legislator to reformulate this regulation thus as to balance the legal dispositions in the matter.

According to the law, the compensatory interests can be capitalized and can make interests. The current account contract is an exception.[19]

The credit institutions and the non-banking financial institutions are subject to special regulations.

3. Conclusions

From the analysis made in this study, concerning the novelty aspects comprised in the loan contract in the light of the new Civil Code dispositions and of some special regulations, one can obviously notice a reconfiguration of this especially useful tool for civil relations.

Over the time and within the conditions imposed by the new economic and social conditions, the specialty doctrine and practice in the field stated some observations and proposals, now under the form of the juridical rule.

The new Civil Code mainly keeps the previous regulation, but also brings important changes that we aimed at emphasizing in the present study.

As a consequence, concerning the current juridical regime of the loan contract, we emphasize the following novelty aspects in Law no. 287/2009:

- the express regulation of the loan promise;
- within the conditions stipulated by the law, the loan contract, in both its forms, acquires the feature of enforceable title;
- the baille too can borrow the borrowed asset to third parties;
- for non-observance of the obligations concerning the use or the restitution, the bailee is responsible for the asset loss, including as a result of force majeure;
- the bailee lien is removed until all necessary and urgent payments generated by the asset maintenance;
- the court's right to decide an anticipated restitution of the asset is eliminated;
- local entities can make operations like crediting, other entities than those making such operations as a profession, without constituting the object of the special regulations existing in the field of credit and financial activities;

[19] Art. 2171 of the new Civil Code defines the current account contract as the contract by which the parties, called current account operators, bind themselves to register in an account the debts resulting from mutual remittances, considering them non-exigible and unavailable until the account is closed .

- the court's sovereignty is limited when setting the restitution term for the loan for consumption, term set by the law at 3 months only. The petition is solved urgently;

- new regulations in the matter of interest. The interests can be: compensatory and/or penalizing;

- the compensatory interest can be paid anticipatively, it can be capitalized and it can produce interests. Exception: the current account contract.

All these aspects are, in our opinion, advantages of the new regulation in the matter of the loan contract.

Besides the virtues of the new regulation, one can notice a lack of correlation between the dispositions of art. 7 of the O.G. no. 13/2011 and the dispositions of art. 2170 of the new Civil Code, and we suggest the legislator to restate this regulation in order to provide the balance of the legal dispositions in the matter.

Mainly, the new Civil Code, provides a proper regulation of the loan contract, managing to correlate the dispositions regarding this contract and the regulations of the general theory in the matter of obligations.

Thus, we conclude that the current regulation of the loan contract reflects the modernism of the new Civil Code, engaged on the road of juridical institutions reformation, in harmony with the realities and demands of the current Romanian society.

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CONSIDERATIONS REGARDING THE AMENDMENTS TO LEGISLATION ON CHILD PROTECTION THROUGH THE NEW CIVIL CODE

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Abstract
The new Civil Code came into force on 1st of October 2011, has brought some changes to the two main acts of child protection, namely Law no. 272/2004 on the protection and promotion of children rights and 273/2004 Law on the legal status of adoption.
These changes are not entirely beneficial, in our opinion, the purpose of this paper is to analyze and comment on articles that have been changed.
Will be analyzed in relation to guardianship matters, persons who may be custodians, when the measure of guardianship, who appointed guardian, the substantive adoption, consent to adoption, the date at which effects occur adoption.
Even if we agree that some changes were needed to ensure better protection of child rights, the proposed and introduced by the new Civil Code, which repealed the Family Code and numerous special laws (such as the two which form the subject of this analysis), not as a whole likely to achieve this goal, some of which are wrong in terms of legislative technique, others at odds with practical reality.

Keywords: *The child protection, adoption, interest of the child, guardianship, alternative protection*

Introduction

The field covered by this study is that of child protection as an institution belonging to family law, particularly important in the current context, importance and concern is apparent the legislature to change the main legislation governing the protection, namely the Law on protecting and promoting children's rights and the law on adoption procedure, recently amended by the same law, namely the new Civil Code.

In this paper we propose that objective analysis of the changes introduced in this area in the field covered by the two basic laws belonging package of laws protecting children, adopted in June 2004 and entered into force on 1 January 2005 and last amended by the October 1st, when the last regulatory occurred through a series of acts. Also point out that an important objective is the legal formulation of proposals to improve the civil code of conduct contrary to good legal relations having as subjects children with special about the child custody measure both parents (joint custody).

How to achieve the main objectives is the critical analysis legislative text, reference to the previous regulation and the oldest in the field, the study of comparative law and legal doctrine and analysis of judicial and administrative practice have been experienced.

To date, the date changes mentioned, few authors have expressed opinions on legal doctrine to these changes, with some articles published in professional journals in adjacent materials[1], and few

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[1] For example Emese Florian "Dissolution of marriage in the regulation of the new Civil Code", The Law Magazine no. 10/2011 or Bodoaşcă Theodore, "Some views on the common property of spouses acquired during the marriage, in light of the new Civil Code", The Law Magazine no. 10/2011, Veronica Dobozi "Vision medical assisted human reproduction in new Civil Code," Judicial Review Courier no. 10/2011, Milena Tomescu, "Loss of parental rights under the new Civil Code," Judicial Review Courier no. 10/2011 so on.

courses published after the entry into force of the new Civil Code[2], but special on the field not analyzed.

On the law relating to the protection and promotion of child rights

Of the Law on the protection and promotion of child rights, no. 272/2004 was repealed provisions of 40th articles, first paragraph, 41st and 42nd paragraph.

The 40th article, first paragraph refers to cases where guardianship is established, is repealed because the new Civil Code contains Book I (about people), Title III (Protection of individuals) a chapter on the guardianship of minors, the 110th article provides that "minor guardianship is established when both parents are, where appropriate, deceased, unknown, deprived of the exercise of parental rights or criminal penalty has been applied to prohibit parental rights, placed under judicial interdiction, legally declared dead or missing and if, on termination of adoption, the court decides that the guardianship is in the child interest". Even if nothing has changed in establishing guardianship cases, the legislature has deemed it appropriate to repeal this article. In fact, on several occasions, everything has changed the new Civil Code, the repeal of a law or code of legal rules and legal relationship that brought within its scope. This may justify, if the full repeal a legislative act, but not if some of its articles remain in being, to exist following chapters of laws, consisting of one or several articles, special laws do not define the institution that regulates or conditions that apply, etc.

Also, in the second Chapter of the 272nd Act were repealed both articles which settled the family environment and alternative child care. The first article related to the persons who may be tutors, and the second to the guardian's appointment. So if people can be tutors are, as before, the individual or husband and wife together, not been preserved the condition relating to residence in Romania. Therefore, an individual may be guardian, in the absence of express provisions, even if domiciled in another state. There will probably be called, unless a person established in the manner provided as a priority by the new Civil Code, with priority guardian residing in Romania, applying by analogy the regulation of international adoption as subsidiary to the internal one, but the law does not provide any binding in this sense, therefore remains a recommendation.

Has been also removed, the requirement to assess the moral and material conditions to be met by the guardian to receive a child care, which previously was the responsibility of the General Directorate of Social Assistance and Child Protection.

Given the possibility of appointing a guardian of the child's parents even, indeed, no such verification was necessary, since parents are the ones who know best which is the interest of their child.

The guardian' activity will be, however, checked under the new regulations, on the one hand by the family council, and secondly by the guardianship court on how to tutor exrcise their duties in accordance with the interests of the child. But in the event of his appointment by the court likely would impose such a check.

In the same vein, were repealed provisions of the 42nd article which regulate the appointment of guardians, the appointment by the court is only the exceptional situation, the 118th article, Civil Code expressly providing that "without an appointed guardian, the guardianship court appointed priority as guardian, if not opposed reasons, a relative or a close family friend of the minor' family, able to fulfill this task, taking into account where appropriate, personal relations, the near residences, the material conditions and moral guarantees that we have called the trustee".

Regarding the content changes from in these articles, we emphasize that because of arguments, we agree with the appointment of guardian by parent, first and only alternative to guardianship court. But it would be to inform people about these changes more as we believe that too

[2] Emese Florian, "Family Law", the 4th edition, CH Beck Publishing House, Bucharest, 2011, Dan Lupaşcu, Mihaela Crăciunescu Cristiana, "Family Law", Legal Universe Publishing, 2011, etc.

few parents know what alternative ways to protect their children are and anticipates the possibility of appointing a guardian, in the future.

On the law governing the adoption procedure

Regarding the second reference Act in the areas of child rights protection, no. 273rd Act from 2004 on the legal status of adoption, the new Civil Code also brought a number of changes. Thus, implicitly repealed and modified legal relations referred to the 1st article, 5-13, 16, 18th article, the second paragraph, the first thesis, 56th article, (1) - (4) paragraph, the 57th article, 59-63 and 65, with no given that two years before, this law has been amended once[3]. In addition to criticisms related to legislative instability in a procedure as complex and important as the adoption, the amendments to the Civil Code are largely criticism to.

The first article of the 273rd Act was repealed, although included the adoption definition, which was restored in the same form in the new civil code, without any change. Legislature's intent is clear from all the rules to regulate adoption in general in the Civil Code and procedural matters by the special Act. However, defining the procedure in the special Act governing it was not an aspect that had changed objectionable, in our opinion. It is recommended that a special Act defining the institution that governs, even of his first articles. In every piece of legislation that regulated the adoption, from the Family Code which repealed the provisions relating to adoption of the old Civil Code, this institution has been defined.

Second, the substantive conditions for the adoption validity regulated by the special Act, were repealed (5-13 article), which are currently regulated by the Civil Code, the second section of the chapter on adoption, restructured and reclassified in relation to the former regulation. Perhaps this repeal is made by the legislator desire to dedicate all the substantial aspects to the Civil Code and the procedural aspect to the special Act. A future step of the legislature is probably to settle the adoption procedure in the Code of Civil Procedure and fully repeals the special Act.

If the doctrine hitherto classified these conditions in substantial conditions and obstacles, the Civil Code classifies them now in requirements for persons who may be adopted, the persons who may adopt and consent. But the chapter on the conditions was not completely abolished, leaving the valid provisions of articles about the form of giving consent to adoption, in which case no longer justify maintaining the chapter title (it is actually three remaining articles into force of this chapter: the 14th article, the 15th article and the 17th article).

On the content of the substantive conditions, the new Civil Code has not resumed provided on the child's best interest, but it is recognized as a principle of adoption, which is why we do not believe that it will disrupt the action for revocation of adoption input where it is considered that this is detrimental to the interests of the child. Moreover, the absolute nullity of adoption is drawn so its conclusion in contravention of the form or substance, as well as its fictivity, being that done for a purpose other than the superior interests of the child care. We can say therefore that the best interest of the child in adoption procedure is a background implicitly condition in adoption. The other requirements of adoption remained the same, even if they were reversed and reclassified.

Also as a criticism of legislative technique, the legislature has expressly provided the impediment that two persons of the same sex cannot adopt together, provision unnecessary since the same code provides that two people cannot adopt jointly or simultaneously or successively, unless who are husband and wife, and the same-sex marriages are not allowed in Romania.

Even if the legislature had intended to only cover international adoptions (covered in a separate chapter of the Civil Code) this provision has no utility as on the substance, should be respected national regulations of the adopter and adoptee, and adoption by cohabitants is also prohibited.

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[3]273/2004 Act, republished in the Official Gazette, Part I, no. 788 of 19 November 2009, amended by 102/2008 Ordinance, approved with amendments by 49/2009 Act.

Thus, Law no. 273/2004 regulates in a chapter separate from national adoption procedure, international adoption procedure, supplementing its provisions with those of the law governing the relations of private international law, Law no. 105/1992. However, the provisions of this law, the new Civil Code in force only a few items left, taking most of the rules of private international law, including those relating to international adoption. With regard to determining the law applicable to the substance and form, 2607th article provides that the fund is established by the national law of the adopter, and one to be adopted. In addition, they are to meet the conditions that are required for both, established by each of the two national laws shown. Substantive conditions required for the husbands who adopt together, are those established by law that governs the overall effects of their marriage. The same law also applies if one spouse adopts the child of another.

Third, a substantive change is on the point at which take effect, the judicial decision which was declaration of adoption, this time being, after the entry into force of the new Civil Code, that the final remaining court decision which was declaration of, no longer, expecting when his remains irrevocable.

Fourth, also as a critical legislative technique was maintained chapter of the special law on the effects of adoption, although there is in force only article on the obligation to inform the adopted child of his adoption and a paragraph on the effects of the international adoption.

Fifth, a fundamental change is the possibility of forfeiture from parental rights of the adopter or adopters. While before, the special law provided that the adopter has to adopted child, natural parent's rights and obligations to his child, not provide the possibility of forfeiture from parental rights and the doctrine, the majority view was that the only sanction parents natural, and not adopters. In our opinion, the sanction must be applied equally to natural and adoptive parents, because the situation of the adopted child is the same to the adoptive parents and their relatives, and gives reasons for deprivation of parental rights are distinct from those leading to termination of adoption. On the other hand, the measure of forfeiture of parental rights is a provisional exercise of parental rights the court may restore the natural parents or adopted, while cessation of adoption is a final measure.

Many legal rules contained in the new Civil Code are the reference to the special law. Thus, after the general rule provides that information relating to adoption is confidential, the Civil Code provides in Art. 474 that "the manner in which the adoptee is informed of the adoption and the family of origin and legal status of information on adoption is regulated by special law," sending the whole article only, remained in force in the chapter on the effects adoption of special law.

Sixth, the same question of legislative technique, it is noted on the chapter concerning the termination of adoption, of which remained in force across two articles that cover aspects of procedure (citation, court communication). Defective formulation contained in the special law was removed by repealing the 60th Article, which referred to a declaration of invalidity and not to a nullity determination of the adoption, in an absolute void, the Civil Code correcting these provisions ("Adoption terminated by break-termination or cancellation after finding invalid"). However we disagree with the used terminology, the adoption by the break-termination or cancellation. It should apply by analogy the same terms that define how a marriage ends, since we are in the same branch of law governing the two fundamental institutions: marriage and adoption. Thus, we believe that the termination should be understood that adoption terminates upon death, break-termination for failure in the best interest of the adoptee or culpable acts described, and dissolution for the void, or relative nullity.

On joint custody

If pending the entry into force of the new Civil Code, Family Code provides that the dissolution of marriage or similar situations, the child will be assigned one of the parents, preserving the right for the other parent to have access to the child, as determined by decision court now, in accordance with civil Code (397 article), after divorce, parental authority is shared both parents, except where the guardianship court decides otherwise. From this rule there are exceptions, where

there are reasonable grounds, having regard to the interests of the child, the court may decide that parental authority is exercised only by a parent with the other parent right to supervise the growth and education of the child and to consent to its adoption.

This way of exercising parental authority is a legal novelty in our system, so that already sparked numerous discussions contradictory. In Europe is seen as an arrangement for the benefit of children, reducing tensions between the parents, following separation. It is said[4] that the removal of a parent by establishing unique custody would arise tensions, joint custody involves both parents and trains them in the period after divorce in child care and education of their children, remove emotional conflict, reduce costs, etc.

We could add another argument for joint custody, namely when there are more children - brothers ("couterini" and "cosângeni"), where both parents are able to grow them properly, is removed the possibility to be separated by their custody. The divorce caused enough suffering for children, no longer be added trauma of separation from siblings. Thus, instead of entrusting one child to mother and the other to the father, both children will be entrusted with both parents. Is a possibility that reflected the legislature but in another procedure - the adoption - in which is set that the brothers will be entrusted for adoption together, except where it would be in their best interests to be assign separately.

There are already several judgments in which parents were given joint exercise of parental authority, decisions which went to establish child residence with both parents equally. The practical exercise of joint custody is either the residence establishment, during half a year to one parent and half the year to the other parent, The practical exercise of joint custody is either the residence, during half a year to one parent and half the year to the other parent, but also may be sharing the week or another way. It is recommended that in each situation to determine the best way for children, in determining how to exercise parental authority shall have priority interests of the child and not those of the parents who are divorced. In support of this assertion, we quote the provisions of the 2nd article of the Law on protection of child rights, according to which any regulations adopted in respecting and promoting children's rights, "as well as any legal document issued or, where appropriate, completed in this area is subject to the priority interests of the child". This principle is required including the rights and obligations of the child's parents, other legal guardians and any person whom he has been legally entrusted. Best interests of the child principle shall prevail in all actions and decisions concerning children, whether undertaken by public authorities and private bodies, and in cases decided by courts. The provisions of this Article shall be corroborated with those in the art. 263 Civil Code concerning the protection of interests of the child.

Therefore recommended custody - even both parents, but taking into account in determining how to exercise parental authority of school or kindergarten child relationships of affection and friendship that has developed child with grandparents, other relatives, colleagues, friends, etc.

If the child/children has over 10 years of age, their hearing is also required when deciding which parent to exercise parental authority, but also on how to exercise joint custody despite the fact that new provisions governing mandatory listening child in all administrative or judicial proceedings concerning him.

If listening to children under 10 years is only optional, the child reaches that age is required. The child's right to be heard implies his right to request and receive any information, tailored to age and degree of maturity, the right to express opinion and this opinion be considered as rejected or view child make a different by an authority must be grounded.

[4] For more details see Bogdan Catalin, President of the Romanian Association for joint custody, about Proksch report on the benefits of joint custody and child on www.juridice.ro;

Conclusions

The article carried out an ensemble, not an exhaustive list of provisions of the new Civil Code concerning the protection of children, being analyzed in particular the amendments to the Law on protection of child rights, the law on adoption procedure and some aspects related to the joint exercise by parents of parental authority.

We believe that the subject would meet the relevant administrative and judicial bodies to resolve related proceedings involving family law that it involves minors.

Even if divorce proceedings by agreement between the spouses is not an exclusively judicial, the registrar or notary public keeps the same obligations in their work, namely the protection of interests of the children with information and consideration of their opinion.

The main problem might arise is related to education and civilization of our people, unusual, yet, on friendly terms with post-divorce, absolutely necessary in cases where there is natural or adopted minor children in the family.

Certainly law and administrative practice in the future will provide many topics for analysis, jutting out already the problem of impossibility to crossing national borders with the child / children without consent of the other parent, even during the exercise of parental authority is the parent who wants to travel the child abroad, the parents find an opportunity to tease each other, to the detriment of the child / their children.

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BUSINESS JUDGMENT RULE - EXONERATION OF LIABILITY CAUSE OF THE ADMINISTRATOR. COMPARATIVE LAW STUDY

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Abstract
Starting from the origin system- the American law, and from the principles of corporate governance which establishes it expressly, the study reveals the regulatory manner in Company law and also the implication of legal practice, of the "business judgment" rule. Seen from a double perspective: as a ground for exclusion of liability clause from civil liability of the administrator, but also as a counterweight to the diligence and prudence duty, the business judgment rule is analyzed in accordance with the legal liability falling within the administrator's duties, both by Law no.31/1990 and the New Civil Code. Discussing also by the standard for appreciating the prudence and diligence- the criterion of the good administrator- imposed by the Romanian legislation, compared with other countries, the paper approaches the manner for regulating the business judgment rule in American law, and the manner in which it has been transposed into the Romanian legislation, its application realm, the invocation method and the consequences of this rule on the civil liability of the administrator. This paper constantly refers to the legal practice solutions in common-law states, where the rule stems.

Keywords*: duty of diligence, duty of prudence, business decisions, no-reliance, duty to inform, duty to care in decision making.*

Introduction

Given the legislative reform in business law and adequacy to the European Union standards, the Romanian lawmaker amended the Law no. 31/1990 on trading companies, including the principles of corporate governance. In this context, the regulations on the administrator's status were revised, instituting a series of legal duties of prudence and diligence toward the company, by applying the business judgment rule.

The study focuses mainly on the role of the business judgment rule within the decision making process in which the administrator is involved and its effects regarding the civil obligations for the adopted decision. Thus for the exercise of the administrative duties of the trading company, the administrator is often faced with options, having to make that decision which, according to the information it holds and based on his own judgment appears to be more profitable for the company. If such a decision is made with the prudence and diligence consistent with the standards set by the Law on trading companies and the New Civil Code, the administrator will not be held liable. In this context the business judgment rule can be seen as a cause for exoneration of liability of the administrator, establishing a type of common error in which all the persons with the same status might find themselves, acting in similar circumstances.

For a better understanding of the operating mechanism of the business judgment rule, within the approach taken, the starting point was represented by the analysis of the content the duties of diligence and prudence, a legal obligation falling upon the administrator, according both to Law no. 31/1990 and to the New Civil Code. Such an analysis is required, firstly, because from the lawmaker point of view the business judgment rule is a counterpart for the duties of diligence and prudence, and secondly, whereas the duties of diligence and prudence require also a new objective evaluation criterion of the administrator, by reference to the standard of behavior of the "good administrator", criterion established both by law no. 31/1990 and by the New Civil code.

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Starting from the American dogma[1] according to which the duty of diligence holds three constituents: duty to monitor the business's activity, in general and of managers in particular, duty of inquiry and care required for decision making, we've tried to define the prudence and diligence concept, by identifying some correspondence of these three obligations in the Romanian legislation. At the same time, while bearing in mind that, currently, the Romanian jurisprudence hasn't offered many cases for the administrator's accountability for breaches regarding the duties of prudence and diligence, context in which the business judgment rule could be invoked as a cause of exoneration of liability, the study presents comparative jurisprudential examples of the common-law states. In an adjacent manner to this issue, the means by which can be claimed the business judgment rule as a cause for exclusion of liability in an eventual proceeding based on the liability of the administrator of the trading company for breaching the diligence and prudence duty evokes interest. The problem arises in the context of the system of origin (common law), the business judgment rule establishes a presumption of good faith when making a business decision, the tendency of the court being not to censor the merits of the latter. In Romanian literature, the problem has been subject to some doctrinal differences, being outlined two opinions. According to one opinion, the rule establishes the presumption of good faith of the administrator in the decision making process[2], in a contrary view[3], the rule doesn't impose in favor of the administrator a defense presumption with consequences in the probative plan. Although we believe that the business judgment rule imposes in favor of the administrator a defense presumption which can be rebutted by the corporate claimant, we believe however that the court should not supersede the administrators' decision and to examine the opportunity of the business decision, but only to verify the fulfillment of the requirements imposed by the business judgment rule, which means to verify if the decision was adopted after a preliminary inquiry and with the belief that the undertaken action was in the company's best interest.

1. Duty of prudence and diligence

Long disputed in the legislative forum[4], the duty of diligence and prudence of the administrator in a trading company has found a well deserved regulation, both within the body of the Law on trading companies no. 31/1990[5] and also in the New Civil Code[6]. Thus according to art. 144^1 paragraph 1 from the Law "*The members of the board of directors shall exercise their term of office with loyalty, in the company's interest*". The regulation, however, is not limited only to the members of the board of directors, but, it also considers the managers, respectively the management and the supervisory board from the dual system[7] of the joint-stock company, as well as any other

[1] M. Eisenberg, *The duty of care of corporate directors and officers*, (University of Pittsburgh Riview, 1990): 945.

[2] Radu N. Catana*, "*The diligence and prudence duty of the administrators in the context of law reform regarding the trading companies", *Pandectele Române* 3 (2006): 195-196.

[3] Lucian Bercea, " The business judgment rule: on the new regime of accountability of the joint stock company administrators*", Pandectele Române* 8 (2007): 47-48

[4] We say much disputed due to the inconsistency of the lawmaker who oscillated between legislative establishment or to suppress. Chamber of Deputies amended the provisions of the article, by removing the obligation of prudence and diligence so that on the date of enactment of Law no. 441/2006 during the meeting of October 31st, 2006, art. 144^1 paragraph 1, contained the following provisions "The members of the board of directors shall exercise their term of office with loyalty, in the company's interest". Through OUG no. 82/2007 the Government intervened, establishing the duty of diligence and prudence in its current form of the analyzed article.

[5] Law on trading companies republished in the Official Gazette no. 1066/17.11.2004, including subsequent amendments.

[6] Law no. 287/2009 on the Civil Code, republished in the Official Gazette. no. 505/15 July 2011 pursuant to Art. 218 of Law no. 71/2011 for the implementation of Law no. 287/2009 on the Civil Code (Official Gazette. No. 409/10 June 2011).

[7] According to art152, art. 153^2 paragraph 6 and art. 153^8 paragraph 3, that provide that art. 144^1 shall apply accordingly.

administrator, regardless of the company type where he exercises his duties which their position involves. With general applicability to any legal person, the new Civil Code provides the duties of diligence and prudence of the administrator of the legal person in accordance with art. 213 ("the members of the management of a legal person must act in its interest, with prudence and diligence required for a good owner").

1.1. The concept duties of prudence and diligence. The texts above mentioned have a dual role: as an establishment, as a source for the duties of prudence and diligence, but also as an objective criterion for evaluating the administrator in question, with specific reference to a standard conduct as a "good administrator".

Under the first aspect of the concept duties of prudence and diligence, in theory[8] it has been defined by reference to the obligation of loyalty, being considered as bipolar obligations. The loyalty duty implies the exercise of the mandate, without the involvement of the personal interest of the manager; on the contrary, by virtue of the prudence and diligence duty, the administrator must be involved in the activities of the company and must manage them as a good professional and based on profitability criteria.

In the American law, the duty of diligence concerns the administrator task to fulfill his mandate in good faith in a manner in which he considers to be appropriate for the company's interests and with prudence which would reasonably be expected from a good owner acting under similar conditions. The Spanish law establishes as falling in the administrator's duties the general duty of diligence, under which he performs his duty with the care of a tidy entrepreneur and a loyal representative.[9]

In terms of evaluation criteria the US law envisages the prudent owner, while the Spanish law envisaged the tidy entrepreneur. The English law[10] relates the standard of duty of diligence to the conduct a person that has the knowledge, the skills and experience should reasonably have from the moment it holds the position as an administrator.

Under the Romanian law, the standard for appreciating the manner of implementation of the duty of diligence is the one of the "*good administrator*". Until the amendment of the Law on trading companies, and the establishment of the *"good administrator"* criterion, the principle of aggravation of responsibility of the administrator was based on art. 1540 Civil Code from 1864 (currently repealed), under which the representative with pecuniary interest was responsible for failure of the mandate for any fault, negligence or imprudence, which was assessed in abtracto, in relation to the conduct of a good owner, honest and diligent, found under the same circumstances as the one incumbed upon the concerned administrator, criterion also undertaken by the New Civil Code. In art. 213 of the New Civil Code *"the members of the management of a legal person must act in its interest, with prudence and diligence required for a good owner"*. Thus we can state that: the criterion of the good owner used by the New Civil Code is similar to the criterion of the good administrator provided by the Law on trading companies.

This criterion for assessing the fault. according to art. 144^1 para.1 from the afore mentioned law, and also according to art. 213 of the New Civil Code, is nothing more but the lawmaker's desire to regulate the accountability of the administrator for the slightest fault – imprudence and negligence. But the accountability of the administrator for the duties of diligence and prudence is engaged in accordance with the predictability of the consequences of the administration act. Thus predictability is analyzed in relation to the good administrator model, respectively to an abstract person who has

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[8] Radu Catană, *quated work*, p. 189.

[9] M. Eisenberg, „The duty of care and the business judgement rule in american corporate law*"*, *Company, Financial and Insolvensy Review*, (1997): 185. ; L.F. De La Gandara, „Le regime de la responsabilite civil de l' administrateur selon la loi espanole sur les societes anonymes*"*, *Gazette du Paris*, (2000): 165.

[10] Art. 158 of Companies Law Reform Bill, November 2005, on www.dti.gov.uk/bbf/co-law-reform-bill/.

the knowledge, the experience and the skills of a good administrator under the same circumstances. If the abstract model of the good administrator should or could have foreseen the injurious effects of the management actions, then the liability of the administrator concerned shall be engaged[11].

1.2. The content of the prudence and diligence duty. The law on trading companies, as is the law of other states, limits itself to establishing the duties of prudence and diligence, without giving any details. Thus, the doctrine has the task to analyze the elements which constitute these duties.

According to the German doctrine[12], the duty of prudence and diligence provided by art. &93 para.1 AktG[13], contains three obligations. Therefore, the requirement determines the administrators to act in accordance to the legal norms and on the provisions of the constitutive act (legal obligation) and to exercise their mandate with conscientiousness and professionalism, based on adequate information (duties of prudence and diligence in the narrow sense) and to make sure that the other administrators or staff are fulfilling their own obligations (duty to monitor).

In the US[14] doctrine it is assessed that **the diligence has three constitutive elements: the duty to monitor the company's activity, in general and of the directors in particular (duty to monitor/oversight), duty to inquiry and the care required to make decisions**.

The same three requirements can be found in the Romanian legislation, as it will be shown in the following, and it outlines as we believe, a broader outline for the duties of diligence and prudence of the company's administrator. Thus, the duty to monitor the directors and the staff is established in several legal provisions. In this sense, art. 142 letter d) lists among the basic skills of the administrators' board, "duty to monitor the directors".

The duty to monitor doesn't necessarily involve a review of daily activities in a detailed manner, only a periodic inquiry being sufficient in order to indentify the significant issues related to the company's management.

Similarly the duty of monitoring must also span to the management bodies of the dual system of management of a joint-stock company. Thus, according to art.153^9 letter a) *"the supervisory board has the following main attributions : a) exercise the permanent control over the leadership". In agreement with this provision, art. 153^1 para.3 expressly establishes that "the management shall exercise their powers under the control of the supervisory board*". And according to art. 153^4, paragraph 3 of the Law " *the supervisory board may request to the management any information that it deems necessary for the exercise of its control attributions and may carry out appropriate check-ups and investigations".* At the same time, the law establishes also the responsibility of the administrators towards the company for the acts of the managers or of the staff. According to art. 144^2 paragraph 2 " the administrators shall be liable towards the company for the prejudices caused by the acts of the managers or of the staff, where the damage would have occurred if they had exercised the supervision by virtue of the duties which their position involve. The liability for failing to comply with the supervision of the managers and of the staff rests solely with the administrators from the unitary system for the joint-stock company management. In doctrine[15] it has been argued that such a liability is based on the administrator's fault regarding the duty to monitor (culpa in

[11] Radu N. Catană, *quoted work,* p. 193. The author lists several cases of Belgian jurisprudence where the administrator hasn't been held responsible. Thus, the administrators couldn't be held responsible even though their acts lead effectively to the cessation of payment of the company because at the moment when the decisions were made, the prospect of their catastrophic effect could not be foreseen by a prudent and vigilant individual. To the same extent, the act of the administrator can't be held culpable if the shareholders claim that he was supposed to take all the necessary precautions to avoid the harmful effects, but the effects could not be normally and rationally established before.

[12] H. Fleischer, *Handbuch des Vorstandsrechts*, (Munchen: C.H. Beck 2006): 237.

[13] Under the German law, &93 paragraph 1AktG applies both to the administrators from the unitary system and leadership (vorstand) and to the supervisory board (aufsichtsrat) from the dual system, according to &114 AktG.

[14] M. Eisenberg, *quoted work*, 945.

[15] Radu N. Catană, *quoted work*, 196.

vigilando), and not on the warranty idea, so that the plaintiff company must prove the fact that the administrators haven't fulfilled the supervision duties that were likely to avoid the harm brought to the company through the staff's acts.

Closely related to the duty to monitor, the administrator must be well informed also about the progress of the company. The duty to inquiry is mandatory and prior to taking any decision. The administrator's duty to inquire is also established in art. 143^1 paragraph 3 and art. 153^4, paragraph 3 of the Law. According to the afore mentioned texts, by virtue to the exercised control, as noted above, the administrators/members of the supervisory board are obliged to request to the management the information that it deems necessary. According to art. 143^1 paragraph 3 *" any administrator may ask from the manager information with regard to the operational management of the company. The manager shall inform the board of directors of the operations undertaken and on those had in view, on a regular and comprehensive basis"*. According to art. 153^4, paragraph 3 "*the supervisory board may request to the management any information that it deems necessary for the exercise of its control attributions and may carry out appropriate check-ups and investigations*".

At the same time, the directors/leadership members also have the correlative duty to inform regularly the board of directors/supervisory board regarding the company's activity. Therefore according to art. 144^2 paragraph 3 "*the managers shall notify the board of directors of all incongruities established while meeting their attributions"*. Correlatively art 153^4 paragraph 1 and 2 regulates the duty to inquiry of the supervisory board by the leadership on all the activities of the company and the modalities by which this information is made. Consequently, " *at least once in 3 months, the management shall submit a written report to the supervisory board with regard to the company's management, to its activity and its possible evolution"*. Besides the periodical information, *"the management shall communicate in due time to the supervisory board any information with regard to the events that might have a significant influence over the company's condition"*.

The lack of information or insufficient inquiry of the administrators for the undertaken management acts can seriously injure the company, engaging their liability for the lack or prudence[16].

Another obligation of the company's administrator is the duty to show care in decision making. By virtue of this obligation, the management decision must be motivated and preceded by effective discussions and debates within the management board respectively the supervisory board.

Also in the decision making process the corporate interest is most important, in the sense that it must be favorable, useful to the company and therefore to the shareholders. In other words, before adopting a decision regarding the company's management, the administrator must allow sufficient time and must have access to all relevant information, which should be provided in due time. Also at the time of the adoption of the decision, he must have acted in good faith, respectively with the belief that the actions are taken in the company's interest without entailing his personal interest[17].

Considering the relatively recent introduction in the legislation of the duty of diligence and prudence to which the administrators and directors are held against, respectively the management and

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[16] In the case of Smith v. Van Gorkom, the Supreme Court of Delaware found the directors' negligence – general manager who contracted the credit despite the reservations, given over the telephone, of the rest of the board members, on the possibilities of repaying the loan on time, and took the decision to commit in less than three hours, during a representation at the Chicago Lyric Opera. R.W. Duesenber „Duty of care, duty of loyalty and the business judgment rule", *Company Financial and Insolvency, Review* (1997): 486.

[17] Timisoara Court of Appeal, Commercial Division, decision no. 64/30 March 2010, the Judicial Courier 11 (2010): p 613, with note by C.B. Nasz. In this case, the corporate interest is not met, while the judicial transaction by which the chairman of the board of directors of a joint-stock company acknowledges and undertakes the obligation to pay an amount that exceeds not only the social capital of the legal person, but also the total capital, to another trading company, owned by him together with a 1st degree relative and whose manager is for approximately 10 years.

supervisory members, currently, the Romanian law hasn't given us case laws for the breach of the administrator's duty of diligence and prudence. Instead, theory jurisprudential examples were cited from the common-law states. Thus, it is considered to be a breach of the administrator's duty of diligence and prudence the action where the administrators concludes contracts under unfavorable conditions for the company without a prior inquiry regarding the market demand; engages the company in an unprofitable operation, operation which is instead profitable for a third party[18]; allows withdrawals from the liquid assets of the company, in order to pay for a contract which clearly was no longer carried out by the contracting partner[19], or confides the liquid assets to a bank whose bankruptcy is imminent. In the same context, of breaching the duty of prudence and diligence lies also the action o f the administrator which carries out groundless investments, concludes credit sales contracts, for long periods, bringing the company to cessation of payments, or doesn't take part in the company's activities (doesn't participate to the board of directors meetings, fails to act in case of nonpayment of a debt by a debtor, doesn't improve the services provided by the company).

However, even if a decision turns out to have negative consequences for the company, the administrator can't be held responsible for the prejudices, if he made the business decision after a prior inquiry and with the justified confidence that he acted in the company's interest. In this case operates the exemption case provided by art 144^1 paragraph 2 according to which the administrator doesn't breach the duty of prudence "if at the time he made that decision, he is reasonably entitled to consider that he acts in the company's interest and based on certain adequate information". This makes it possible for the administrators to adopt business decision, subject to certain conditions, without the fear of being held responsible towards the company.

Through such a regulation the lawmaker has implemented in the Romania law a rule "imported" from the English and American law – the business judgment rule.

2. The juridical nature of the "business judgment "rule in the American law and in the Romanian law.

Currently the business judgment rule is considered to be an integral part of the corporate governance principles, in the sense that the White Paper on corporate governance in South East, drafted under the aegis of the Organization for Economic Cooperation and Development (OECD) provides at pct.250 that : "*the notion of business judgment or an equivalent provision in the respective legal systems should be introduced in order to protect board members from being held liable for wrong business decisions".* "*The business judgment rule aims at granting board members and senior management wide latitude in deciding the business affairs of the company. They should not be held liable for the consequences of their exercise of business judgment – even for obvious mistakes – unless certain exceptions apply. These exceptions include fraud, conflicts of interest, acting outside the corporate purpose and failure to be sufficiently diligent and exercise due care in the basic activities of the board member's role (such as attending meetings, seeking to inform oneself and deliberating meaningfully before making important decisions".*

In the American law[20], where in fact it has its source, the position of the business judgment rule has been outlined in the sense that "*the business judgment rule which began as a minor exception, it is now a defense so consistent, that the only remaining challenge is to try to prove that*

[18] In this case, the liability of the directors has been held for negligence, given that they incurred a report on the securities which they bought giving the seller the possibility to repurchase them within 6 months at the original sale price, without any gain in the favor of the company from this transaction (case law Litwin v. Allen, 1940 New York Supreme Court, in R. Duesenberg, quoted work, p.200).

[19] O. Caprasse , *La responsabilite civile profesionnelle des administrateurs. Actualite du Droit*, (Liege, 1997): 486.

[20] D. Bazelon, „Client Aginst Lawyers*"*, *Harper`s Magazin* (1967): 104.

(it) doesn't cover quite all forms or corporate fraud". But even in this context, the juridical nature of the business judgment rule is controversial, facing two trends[21].

According to the first opinion, the business judgment rules is qualified as a standard for the administrator's liability, which requires an analysis, on behalf of the judge , of the business decision from two perspectives good faith and rational decision. Initially the rule could be rebutted only for cases such as fraud or self-interest, but currently, are accepted also the cases where duty of prudence and diligence are breached in a conscious manner. Thus, the plaintiff must demonstrate the breach of any one of the duties of the administrator (diligence, prudence and loyalty), and the judge may censure the administrator's decision through the triad imposed by the rule.

According to the other current, named the **abstention doctrine** the administrator's decisions are protected against judge censorship. Therefore, the authority of the administrators in corporate governance is absolute, and the court doesn't have the competence to impose its own decision to the administrator. The court may not rule on the merits of the decision, but can only review if the decision was made in bad faith or in the context of conflict of interests or failure to inform. Under this trend the business judgment rule establishes a presumption of good faith in decision making, without giving the courts the possibility to censure the background of the decision.

In the Romanian legal system, business judgment rule has a twofold purpose: exoneration of liability causes of the administrator/ manager of the trading company, and also a limit to the duty of diligence and prudence which incumbed upon them.

Mainly, it has the juridical nature of an exemption from liability cause of the administrators and directors for any decisions that may have harmed the company. Even if he adopted a harmful decision for the company the administrator, respectively the director shall not be held responsible for the harm done if he adopted the decision in the honest belief and excusable that he acted in the company's best interest and based on an informed basis. Consequently the rule doesn't impose in the favor of the administrator a presumption in defense, to be rebutted by the plaintiff (the trading company). On the contrary in the Romanian law, the administrator's position is opposite to that of the base system, having the obligation of proving effectively all the constitutive elements of this rule. In an eventual action for damages exerted by the company or by the shareholders, the administrator is the one claiming in its defense the business judgment rule, however proving that he acted on an informed basis and deemed to be in accordance with the social interest.[22]

Pursuant to art. 144[1], paragraph 2 of the law: *"the administrator, does not breach this obligation if ...."* the business judgment rule would be, more of a cause that relieves the illicit nature of the act. In other words, as a result for applying the rule, the administrator, respectively the director is not liable for adopting a bad decision that resulted in harm for the company, if the conditions provided by the legal text are met, namely: when adopting the decision, he considers that he acted in the company's interest and on an informed basis.

In an adverse opinion[23], was claimed that only in appearance, the rule relieves the illicit nature of the act and that in reality it has the value of cause acting on the subjective level, removing fault (guilt). Therefore, the text should be read as follows "the administrator does not culpably violate this obligation, if ...".

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[21] S.M. Bainbridge, „The Bussines Judgement Rule as Abstention Doctrine*"*, *Vanderbilt Law Review* 57, (2004): 102.

[22] On the contrary, Radu N Catana, *quoted work*, p. 195-195. The rule establishes the presumption that administrators have acted, or performed a physical act of management, only after an prior inquiry, and with the rational belief that the he act in the company's interests. To the extent to which, the company (shareholders) fail to prove the failure to meet one of the conditions for applying the presumption, the administrator shall not be held responsible, regardless of the finding of an injury suffered by the company or its shareholders.

[23] Motica I. Radu, Lucian Bercea, "From the business Judgment Rule to the business judgment rule: in search of a link", in *Ad. Honorem S. D. Cărpenaru. Selected legal studies*, (Bucharest: Publishing CH Beck, 2006): 119.

We believe that the subjective element plays an important role in applying the business judgment rule, so that when making a decision, the administrator should have only the **honest belief** that he acted in the company's best interest and based on an informed basis. He doesn't have to act effectively in the company's best interest, neither on an informed basis. In order to free itself from the liability, it is sufficient for the administrator to believe that he acted for the company's best interest and that the information on which his decision is based is real. From this point of view, applying this rule excludes making a decision which is deliberately erroneous which, through its gravity, can't characterize a person as diligent and prudent, so that it can't be regarded as a cause which excludes guilt. The rule and its exonerating effects are applied only in the case of culpa of levis and levissima when the administrator makes a decision.

Secondly, in the Romanian legislation, the business judgment rule was introduced as a counterweight to the administrator's duty to act with prudence and diligence provided by art 144^1 paragraph 1 from the Law on trading company and respectively art. 213 of the New Civil Code, and also for the settlement of the action for responsibility against the administrator and directors for the harm caused to the company (art. 155 Law no 31/1990, and art.220 New Civil Code). Thus, the administrator/director must not be absolutely prudent and diligent but, as diligent and as prudent necessary, such that when making a decision to be reasonably entitled to believe that he acted in the company's best interest and based on an informed basis. On the contrary, the administrator's prudence and diligence must be related to "measures concerning the company's management", that is, to the business management process in relation to which the business decision will be made. In this context, the administrator will be liable for the achievement of the duty of prudence and diligence both under common and special conditions of the business judgment rule.

3. The applicability of the business judgment rule under Romanian law

3.1. ***Application***. The scope of the business judgment rule, focuses on two issues, namely whether it is strictly limited to the joint-stock company, and which would be the persons that can claim the cause of exemption from liability.

Regarding the first issue, compared to including analyzed legal text in Chapter IV of Law no. 31/1990 on "Joint stock companies", the conclusion that the business judgment rule found its implications only in the field of joint stock companies, may be required. Related to the effect of the exemption from liability, we could say, with good reason that the company's administrators in a joint stock company are highly privileged in comparison to the administrators of the other type of trading companies. We believe however that the business judgment rule should benefit to the administrators of all trading companies, equally, without discrimination. Given the position of the administrator in a joint-stock company, net differentiated in terms of the legal regime of the liability, compared to the administrator of a general partnership or a limited liability company, *de lege ferenda* it is required the express settlement of the business judgment rule as a reason for exemption of liability also for the administrators of all the other types of companies.

With regards to the protected persons, the law itself solves this dilemma, stating explicitly who takes advantage of the business judgment rule. Thus, for the unitary system of management, the rule has effects on both on both the management, pursuant art. 144^1 paragraph 2, and on the directors pursuant the legal standard with reference to art. 152 which extend the implementation of the business judgment rule also on the latter ("the provisions ...art. 144^1 .... will apply also to the managers which are under the same situation as the administrators"). For the dual management system, by the legal standards with reference of art.153^2 paragraph 6 and art 153^8 paragraph 3 and the provisions of art. 144^1 the management board and the supervisory board are protected by this rule. In other words, from the exonerator effects of the business judgment rule can benefit both individual invested with executive and non-executive positions.

3.2. Conditions of applicability. The effect of exemption from liability of the rule occurs only to the extent to which the conditions provided by art 144^1 paragraph 2 from the Law are met, namely, when taking a business decision the administrator should have been entitled to consider that he acts in the company's benefit and based on an informed basis. The text examined establishes only the main criteria that are to be considered. In concrete, the requirements shall be assessed on a case by case basis, meaning any evidence can be considered as proof.

Firstly, there has to be a business decision, consisting in adopting or failure to adopt certain measures related to the administration of the company. For the concept of business decision a legislative definition can be found under art. 144^1 paragraph 3 "*a business decision shall be any decision to take or not take certain measures with regard to the administration of the company*".

When adopting a business decision, the managers must act within their given powers by law and by the constitutive act, the rule and its exonerating effect, not applying if the decision is made by exceeding the legal and statutory powers.

The business decision envisages "*measures regarding the administration of the company"*, namely the company management activities in the sense of ordinary measures, management, with which administrators are usually vested with. Thus, the question that arises is whether the decisions regarding the delegated powers under art. 114 of the law, fall within the provisions of the business judgment rule? Specifically, will the administrator be exonerated as a result of invoking the rule, when taking a wrong decision like changing the location of the registered office , changing the object of activity and increasing the registered capital? We, along with other authors[24], believe that for the case where the board of directors is empowered, by the constitutive act or by decision of the extraordinary general assembly, the powers regarding the revision of the company, the decisions made with the purpose of carrying out these duties, are not subject to the business judgment rule, and don't constitute decisions in the sense of art. 144^1 paragraph 3, because they go beyond the strict duty of administration of the company.

Also the rule finds no application in respect to the administrators who have not consented to the adoption of that certain decision, and who written down their objection in the register of the board of directors and notified the censors or the internal auditor and financial auditor, pursuant art. 144^2 of the Law. Their objection of these individuals to adopt a certain decision is equivalent with the absence of an unlawful act, which eliminates, *ab initio*, the application of the rule.

Secondly, the administrator, respectively the director, must adopt the decision with the excusable belief that he acted in the company's interest. Stating that " at the time of making the business decision, he (the administrator) is reasonably entitled to believe that he is action in the company's interest...", the business judgment rule establishes a common fault in which all persons with the same statute would find themselves, under the same or similar circumstances.

The rule claims that the administrator should be of good faith, respectively to honestly believe that he acts in the company's interest. Thus, the condition is not fulfilled of the administrator in question pursues a personal interest when making or omitting to make a business decision. In other words, the conflict of interest eliminates the applicability of the business judgment rule.

Thirdly, there should be an inquiry of the administrator, respectively director, appropriate and prior to the adoption of the decision. The rule is preceded by the establishment of the duty of prudence and diligence, which contains the duty of the administrator to inquiry and to request certain relevant information, to consult experts, to assign a preliminary term necessary for the decision making process, depending on the complexity of the decision.

At the same time, the inquiry must be sufficient so that it will give the administrator the possibility to appreciate if he acts in the company's benefit. Whenever there is an insufficient inquiry or the information was obtained from individual who do not have the necessary competence for

[24] Lucian Bercea, *quoted work*, 47-48.

offering that information, the rule finds no application, and the exonerating effect from liability doesn't occur[25].

Once those three conditions are met, the administrator, respectively the director, is not held liable for the harmful effects his decision has towards the company. In this sense a distinction should be made: for the decisions that are harmful for the company, but based on a proper prior inquiry and which are the result of a rational judgment, the administrator shall not be held liable, instead, he will be held responsible for any other harmful decision, taken without prior inquiry and judgment.

3.3. Juridical effects. The main effect the business judgment rule causes is the exemption from liability of the administrator, respectively of the director for any damages caused to the company through the adopted business decision. The rule is based on the common error mechanism where the administrator/director is found, when adopting a harmful decision, believing that he is action in the company's interest and basted on an informed basis.

Alternatively, the business decision cannot be censored, specifically judicially annulled. Therefore, the prejudice will be supported by the company on whose behalf the business decision was made, as loss caused by errors in management not imputable to the administrator. And in particular the shareholders are those who bear the losses caused by the business decision, because, by empowering the administrator, they assumed the risks involved with this choice.

Although the administrator is free from the liability for the harm caused to the company which he managed, the possibility to be dismissed, ad nutum, from his current position with the consequent impossibility of reintegrating in the same position.

Conclusions

However, although much disputed in theory[26], in terms of its regulatory purpose[27], the business judgment rule has established itself in the Romanian legislation, being essential for the business environment. In the absence of such a cause of exemption, if the administrator, you see experienced in any situation, with the possibility to taking personal responsibility for the damages the company, his activity and consequently the company's activity would be blocked.

In this sense, in theory[28] it has been stated that the meaning of "business judgment rule" is to allow the administrators to make decisions and to run affairs without the constant fear that he risks civil liability towards the company. Indeed, by virtue of this institution, the courts may be called rule upon the activities and managerial acts of the trading companies' administrators as long as there is no evidence that they have breached their duty of prudence and diligence or that they have acted in bad faith, in self-interest or on a groundless basis, without any rational support.

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[25] See the case Trans Union Corp. v. Jerome Van Gorkom, 488 A.2d 858 (Del. 1985), the Delaware Supreme Court. In this case, the Chairman of the Board has been charged with the fault that he limited himself, in a negligent manner, in achieving information only from an employee, about who knew or should have known, that he had interests in the transactions on which the administration was to decide (presented by R. Catana, *work quoted*, footnote 50).

[26] Lucian Bercea "business judgment rule: an impossible legal transplant" *Pandectele Române* 3 (2006): 201-208. The rule was described as incompatible with the Civil Code in force at that time, which instituted the principle of aggregation of damnum emergens with lucrum cessans (Art. 1084) and the principle of limitation of liability to the foreseeable harm (art. 1085), context in which the harmful outcomes of a business decision should be seen as predictable, and therefore as avoidable. It was also argued that it was difficult to accept the rule as an exemption of liability cause in a system where the administrators are responsible for culpa levis in abstracto.

[27] Within a year, both in the state of draft law as well as subsequently to its entry into force, the legal provision enshrining the business judgment rule has overlaid until final form, four regulatory options.

[28] Radu. N. Catana, *work quoted,* 198. The author concludes that without this protection, considered of common sense in the business environment, the companies would be unable to attract competent and motivated administrators.

Related however to the regulatory methods of the business judgment rule only in Company Law no. 31/1990, even though the duty of prudence and diligence is, as noted above, given a general term of applicability by the New Civil Code, we wonder to what extent, invoking this rule as a cause of exemption of liability would exceed the strict framework of a trading company. This is because the New Civil Code, even though it governs the duty of prudence and diligence as a legal obligation incumbed upon the administrator of any legal person, doesn't cover the situation of his exoneration of liability, art. 214 of the New Civil Code being incomplete in this matter. De *lege ferenda*, an express regulation it is required of the business judgment in the New Civil Code legal text, the more so since it represents a special law with general applicability in relation to the Law on trading companies which is a special law.

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NEW CONCEPTS IN ROMANIAN PRIVATE LAW: THE ENTERPRISE

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Abstract

The new concept of enterprise is laid down in new Civil Code in connection with another new concept: the professional (entrepreneur).

The old commercial terms, commercial acts and deeds and merchant, have been well represented in legal texts in comparison with present concepts. Our new code imported these concepts together with their weaknesses from the Italian and Quebec Codes. The short references within the Code to enterprise and professional put again the burden of clarification on the scholars' shoulders.

The law defines the professionals as the persons who carry on an enterprise and therefore the legislator pursues to the 'carrying on an enterprise" definition. Doing so, in fact the legislator leaves the enterprise concept undefined. The carrying on by one or more persons of an organised economic activity, whether or not it is "commercial" in nature, consisting of producing, administering or alienating property or providing a service, constitutes the carrying on of an enterprise.

The enterprise is a term long time connected with commercial and private law. All past decades, beginning with the old Commercial code, then socialist economy and post-communist era used intensively the concept of enterprise. The meaning of this term differed substantially in every decade.

Present notion need scientific scrutiny in order to crystallize a convergent approach.

In our paper we will consider the notion of enterprise starting from the past perception of this concept then we will try to observe the variety of enterprises under present law.

Keywords: *enterprise, professionals, new Civil Code, carrying on an enterprise, commercial law.*

Introduction.

Our research intends to observe the institutions of the New Civil Code, in force from 2011, in the commercial field. The new approach of the Romanian law, the unity of the private law, has a direct impact on the commercial law science. Scholars working in commercial field need to explain and apply the new regulation of the Civil Code.

The prominent concepts of the new code in commercial field are the enterprise and the professional (entrepreneur). New commercial law science has to assimilate and construe these concepts and to start building a new commercial doctrine.

The enterprise, as a concept, is connected in the new Civil Code with the concept of professional (entrepreneur). The legal definition of the terms is rather unclear for the enterprise. It is stated that the professional is the person/persons who exploit an enterprise.

The enterprise itself is not defined but the "exploitation of an enterprise" has a legal definition. This indirect approach makes more difficult to explain the enterprise as a concept. Simplifying the terms, the concept of professional doesn't need the enterprise concept in order to be fully determined. Professional means the person or persons who exercise in a systematic manner organised activities (economic ones, as the legal text renders).

Still, the notion of enterprise need scrutiny from scholars as an important concept directly linked with the new commercial law.

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The enterprise before the Civil Code.

The concept of enterprise was used intensively by the old commercial doctrine. Scholars from commercial science focused on three major types of objective commercial acts and deed: i) intercession in goods supply chains type, ii) enterprise type and iii) auxiliary type. Such distinction applied to commercial acts was well known and well accepted. Even so, the legal term of enterprise lacked of an explicit definition.

The enterprise knew a wide recognition as economic concept. Usually the enterprise is defined as a social body, an autonomous organisation of an activity using production factors (forces of nature, capital and labour) by the entrepreneur for the purpose of accomplishing economic activities. Economic dimension is stressed by the theory of production factors. The juridical dimension should be extracted from organised social group perspective. The old Commercial Code used intensely the concept of enterprise in order to define the commercial acts and deeds. Such specific organisations were translated entirely in commercial law field, without additional tests for particular circumstances. The concept of enterprise was used by the old Commercial Code in connection with two major types of activities, according to their subject: the manufacturing (industrial) enterprises which comprised of construction and manufacturing undertakings and service enterprises which included insurance and commissions, agencies and business offices, publishing companies, printing, library and art, insurance companies, businesses and warehouses docks deposit.

The enterprise was the core part of commercial acts that ensured the accession to merchant legal status.

Communist epoch, which was interposed between the two periods of application of the Commercial Code (1864-1948 and 1990-2011), used intensively the concept of undertaking (socialist) in order to explain economic operators based on state property that existed in the economy at that time.

Economic Law science that emerged at that time was dominated by principles of "state owned economy" totally obsolete in present. Ironically, the present voices advocating the disappearance of commercial law find perfect counterpart in those voices supporting in the past Economic Law instead of old, forgotten Commercial Law.

The enterprise knew a new recent legal recognition. The enterprise is an organised economic activity combining financial resources, workforce, raw materials, logistics and information resources, on entrepreneur's risk, in cases and condition laid down by the law[1]. This ordinance defines the term "entrepreneur" too, concept ignored by the new Civil Code, as "the individual who holds an economic enterprise." From the perspective of the new Civil Code the entrepreneur is professional in an individual form.

Given to the vocation of general applicable law of the Civil Code (true "civil constitution") we cannot support a definition of a general concept from the point of a special law, external to the code. As this ordinance is earlier and particular than present Code, the general vocation of the Civil Code requires the interpretation of its own concepts in accordance with its substance, without external support. It is up to implementing rules of the Civil Code to deal with accommodation of the new code with the body of existing legal system.

Starting from the legal term "exploitation of an enterprise"[2], we underline that *the enterprise is an organised activity aiming to produce or trade (administration or sale) goods or services (regardless of the final purpose of profit or non-profit).*

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[1] EGO (Emergency Government Ordinance) no 44/2008, regarding economic activities pursued by authorized natural persons, individual enterprises and family enterprises, amended by EGO no 38/2009 and EGO no 46/2011 published in Official Journal no 350 from 19.05.2011 (Art. 2 lit. f): "economic enterprise means economic activity pursued in an organised, permanent and systematic manner using financial resources, employees, raw materials, logistics and information technology on enterpriser's risk according with the law."

[2] Civil Code, Art. 3.

From this perspective the enterprise is a form of business organisation operated by a professional. Legal text reveals that the professional is the subject of law, the part of the legal relations governed by civil law (in the form of natural or legal person).

Subsequently the enterprise is not itself the subject of law but a type of business organisation. The professional exploits the enterprise established in a particular form of organisation he has chosen. In this context we can distinguish between individual and collective enterprises, including companies. The company is "the professional", in the language of the code, who operates a business that takes the form of a particular organisation (the enterprise). We can therefore talk about a company as a kind of enterprise, as an organisation, without referring to the legal entity itself (as subject) that have to be equated with the professional.

The features of the enterprise in Romanian Law.

Despite the fact the concept of enterprise doesn't have a clear explanation in Romanian Law we can extract the principal features of the concept according to the new code and the past doctrine the code based on.

Organising of the activity is the essential characteristic of the concept of enterprise. This concept accepts a multidisciplinary approach: economic, juridical and even technical. The organising of the activity feature has a predominantly economic background. Financial resources, work force, raw material, logistic information are features used to render a particular conformation to the enterprise.

The enterprise is a complex system with multidisciplinary dimensions that realizes a balance between internal and external factors in order to assure an optimal position in economic environment and a competition advantage for entrepreneur.

Particular activities are involved in the enterprise's goals. Therefore the enterprise intends to produce or trade (administration or sale) goods or services. The enterprise's goals are specific although the reserved activities are broadly enough to cover a large area of particular performances[3].

Dichotomy profit/non/profit. The concept of enterprise is a larger one than the previous approaches. The extension to the non-profit activities asks for a distinction between profit oriented enterprises and enterprises with non-profit goals. The first category covers the economic enterprises[4], commercial ones, and stays for the Commercial Law basis.

Individual and collective enterprises. An enterprise can be operated by a physical person as well as a legal person. Using this feature we can distinguish between i*ndividual and collective enterprises.*

Individual enterprises.

GEO no 44/2008 has already dealt with concepts like entrepreneur, enterprise, division of patrimony, etc. These concepts are used in a related form by the new Civil Code.

Authorized natural person (AFP) and sole member enterprise. Under abovementioned ordinance the authorized natural person is the person empowered to conduct any form of economic activity permitted by law, mainly using his workforce. APF regime governs this person's interaction with other types of undertakings as well as the registration and cancellation of this type of activity. According to updated regulation of AFP this entity may employ, as an employer, third party, based on individual employment contract concluded according to law[5].

[3] Italian Civil Code (Art. 2195) retains as commercial activities, those activities requiring registration in companies register: 1. industrial activities aiming goods production and services, 2. trading activities (intercession in provider – beneficiary of goods, 3. transportation on ground, water or air, 4. banking and insurance activities, 5. other auxiliary activities.

[4] Concept already in place in EGO no 44/2008.

[5] EGO no 44/2008 as amended.

AFP is responsible for his obligations up to his assigned patrimony, whether it was formed, and, in addition, with all his assets. The law used to distinguish by the status of merchant or the absence of such quality in the person authorized thereby, subsequently setting the occurrence of simplified procedure provided for in Law no. 85/2006 regarding the insolvency procedure. Currently this distinction by merchant status disappeared, AFP being subject of insolvency proceedings in any cases. Such enterprise wasn't awarded legal person status at the time it registers with the trade register.

Sole person enterprise, through its holding person, may employ third party based on individual employment contract, can work with other freelancers, entrepreneurs, individuals with other holders of individual enterprises or representatives of family businesses or other legal entity for performing economic activities. The natural person holding the individual enterprise is responsible for its obligations with assigned patrimony, whether it was formed, and, in addition, with the entire patrimony. In case of insolvency the individual enterprise will be subject to simplified procedure provided for in Law no. 85/2006, as amended[6].

Family undertaking. Although this enterprise is a collective one in logical view, given to the mandatory links between its members and the identical legal regulation source, it is natural to study this kind of enterprise along with the above types.

Family undertaking consists of two or more members of a family and is prohibited to it to employ third parties with employment contract. Family undertaking is established by concluding an agreement by writing, providing members full name, representative, date of preparation, participation of each member of the enterprise, conditions of participation, etc.

Like other forms of individual enterprise the family enterprise has not acquired the legal person status. Therefore the members of such enterprise can be hold responsible for the debts of enterprise. The law provide conditions and procedures applying when the family enterprises seize their operations and they are erased from trade registrar. Their winding-up (regarding assigned patrimony) is prescribed by law[7].

Collective enterprises.

Collective enterprises represent forms of economic organisation comprising of at least two members. This time the legal person status can be awarded to collective enterprises. Following such award the enterprise holds a separate patrimony. Lack of legal person status means an assigned patrimony only.

Even so, the legal regulations for juridical person are different in new Civil Code. Under past regulations the legal person status was awarded by authority only (by rendering a judgment or an administrative document). Nowadays the Code stipulates the essential elements for a legal person: distinct organization, assigned patrimony and legal purpose. Any entities which are complying with all these requirements are declared by law legal person.

Obviously all types of enterprises (individual and collective) satisfy these essential elements laid down for legal person. Nevertheless the law explicitly declare the individual enterprise lacks the legal person status. In these circumstances we can distinguish between legal person enterprise and non-legal person enterprise.

Simple association ("society"). Legal forms of association ("societies") are declared by law: simple society (venture), general partnership, limited partnership, limited partnership by share, limited liability company, joint-stock company, cooperative society and other types of companies that are regulated by law[8].

[6] EGO no 44/2008, Art. 26.
[7] EGO no 44/2008, Art. 33, 34.
[8] Civil Code, Art. 1888.

Among such forms simple society is basically an agreement, a joint-venture concluded by two or more associates. The lack of legal person status is an essential characteristic of this society because in the presence of that status the simple society evolved in a compulsory manner to other form of society.

Companies. Profit aimed activities are commonly subject to business in the form of a company. Setting up a company has a declared commercial purpose (for profit). In the view of the Civil Code companies are professionals and the organised form of activities (enterprise form) is chosen from the companies form prescribed by the law.

Companies remain the main part of the commercial law and the most advanced form of economic enterprises. Their regulation remains outside the Civil Code, being a special law, in fact the core of the new Commercial Law science.

Company types are fixed by Civil Code in line with the existed regulation of companies: general partnership, limited partnerships, limited partnership by share, limited liability company, and joint - stock company. The code forgets the limited liability company with sole associate, as the special Company Law Act does. Therefore this company will remain a subtype of limited liability company irrespective of its special characteristics. First of all this company doesn't employ an agreement of society (articles of association) due to the fact of sole associate involved in such undertaking. This situation means that the professional (the company as legal person) exploit in fact an undertaking with a sole associate, an individual undertaking, not a collective one. Still, the legal status of the company and the provisions placed in a special law (Company Law Act) determined us to keep this particular company (limited liability company with sole associate) among other companies and collective enterprises.

Cooperative society. Civil Code exposes among the types of „society" the cooperative society. In national law regulation of cooperative societies[9] replaced, in line with European regulations[10], the old form "cooperative organizations". Old dispute about merchant status of cooperative organizations now ceases to interest. Corporate form and character of collective economic enterprise are now specifically legal established[11]. Antithesis with companies shows that cooperative society is not a legal person with the exclusive purpose of self-profit. Specific to cooperative society is a broader scope that includes non-profit purposes - to promote members' interests, economic interests but social and cultural rights too - and adherence to democratic principles applied to decision making process. Cooperative society is subject to registration with trade register.

Other regulated legal person. The collective enterprises are not limited to legal types already exposed. Civil Code tries to maintain the list open so it declares the vocation of the law to add new type of society to the list. Already there are two types of different collective enterprises: *Economic Interest Group* (EIG*)* [12] and *Societas Europaea* (SE) [13]. Both types have an extensive European background fixed in specific Regulations of the European Council.

These types of companies, based on European regulations, have the same juridical form and implementation in all European states due to direct effect of a European regulation in internal law of

[9] Law no 1/2005, regarding settlement and operations of a cooperative society, amended, published in OJ 285 from 22.04.2011.

[10] Regulation of the Council no 1435/2003, published in OJ of EU no L 207 from 18.08.2003, p. 1-24.

[11] Civil Code, Art. 1888.

[12] Regulation of the Council no 2137/1985, published in OJ of EU no L 199from din 31.07.1985.

[13] Regulation of the Council no 2.157/2001, regarding the Statue of Societas Europaea.

a member state of the European Union. Still, Company Law Act (Romanian) adopted rules supporting direct effect of European regulation in our national law system[14].

Societas Europaea (SE) is a uniform company type designed for internal European market. From the perspective of our Civil Code SE is a collective economic enterprise

Collective enterprises types can be modified or supplemented by the parliament with new corporate creations.

More types of enterprises can be accounted even now but we try to remain behind the line drawn by profit purpose types. Passing this line we encounter many non-profit enterprises, usually situated outside the commercial law border. A new law branch, as "Law of the professionals" could account for a lot more enterprises.

Conclusions

The short references within the Civil Code to enterprise (and professional) ask for scientific scrutiny in order to crystallize a convergent approach.

First we observe de notion of "carrying of an enterprise" as carrying of an organised economic activity, whether or not it is "commercial" in nature, consisting of producing, administering or alienating property, or providing a service. These activities can be done by a sole person or by more persons.

We already have had a notion, enterprise, with some evident characteristic: involves one or more person, requests an organised activity, asks for specific activities to be done, and distinguishes between profit and non-profit end. All these are characteristics of the new notion of enterprise.

The differences between new and old concept (of enterprise) are significant. All past decades, beginning with the old Commercial Code, then socialist economy and post communist period used intensively the concept of enterprise. The meaning of this term differed substantially in every decade.

Present notion need scientific scrutiny under the present regulation, new Civil Code, in order to crystallize a convergent approach in the future.

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THE NEW CIVIL CODE - IDENTIFICATION OF THE LEGAL PERSON

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Abstract
The article presents issues related to the identification of the legal person in the New Civil Code and in the commercial law special regulations, namely the Law 26/1990 regarding the Commercial Register and the Law no 31/1990 regarding commercial companies. This study aims at identifying the areas where the commercial law, a law for the professionals in the field, has brought changes into the civil law as common law; therefore, this study is meant for academics and professionals in the field. One outcome of this study is the identification of new attributes such as: bank account, registration number for VAT purpose, telephone, fax, and equity, apart from the identification attributes included in the New Civil Code, such as: name, registered office and nationality, registration number and the unique registration number.

Keywords: *identification attributes, name, registered office, nationality*

1 GENERAL REMARKS

The meaning of the legal person[1] can be comprehensive only when it includes its identification attributes[2].The purpose of this study is to analyze the legal status of the identification attributes of the legal persons.

The list including the identification elements of the legal person may consist of: name, registered office, nationality, „firma" (Rom.) (the material media bearing the name), registration number with the Trade Register, bank account, equity, unique identification number, telephone, fax, e-mail etc. (sections 5 – 8 in this book). The more science advances, the longer the list becomes while the doctrine[3] tries to place them into categories according to their either general nature, applicable to all legal persons, or specific nature, typical of some legal persons only.

The New Civil Code regulates the identification of the legal person in art. 225-231; the identification attributes in the New Civil Code are: name, nationality and registered office; the list including the identification elements is not limited[4].

Taking into account that the Law no 71 of 3 June 2011 for the enactment of the Law no 287/2009 regarding the Civil Code[5] brought about changes in certain special laws like for instance the Law no 31/1990 regarding commercial companies and the Law no 29/1990 regarding the Trade

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[1] For the etimology of the word „personna", which in Latin means the word mark and the role of an actor in a play, see P.C.Vlachide „Repetiția principiilor de drept civil"– vol. I, (Bucharest: Europa Nova Printing House, 1994), 33.

[2] For the meaning of the phrase „identification of the legal person" and its importance in practice, see Gh. Beleiu „Dreptul civil român – introducere în dreptul civil. Subiectele" – (Bucharest: Şansa S.R.L. Printing House, 1992), 433 – 434.

[3] Gh. Beleiu „Dreptul civil român – introducere în dreptul civil. Subiectele", 436.

[4] According to art. 230, depending on the nature of the object of activity, we can have other identification attributes – besides nationality, name and registered office stipulated in 225 – 227 – such as: registration number in the Trade Register, unique registration number and **other identification elements**, under the law. See section 9.1 in this paper.

[5] Published in the Official Gazette no 409 of 10th June (2011).

Register, this article includes remarks about these and about the effects triggered by these corrections, namely, how the legal status of the identification attributes of the legal persons shall be interpreted, following the comparative reading of the laws in force.

The aim of this study is to identify how long the list including identification attributes can be and what may be the usefulness of this length from the point of view of: their listing in the New Civil Code; their blurred specifics related to inalienability of these attributes and their effects upon the dichotomy civil law/commercial law in the Roman private law.

In order to achieve this goal, the study starts from a presentation of the field of study, by combining the findings of the scientific research in civil law and commercial law; this article uses the solution adopted by the New Civil Code, namely to extend a range of provisions applicable in the commercial law into the civil law as well.

We believe that the originality of this work is both the comparative analysis of the law texts and the conclusions worded with an utmost general applicability (sect. 9.1-9.3).

2. NOTION AND USEFULNESS

„Identification" of the legal person means its particularization as a subject of law participating in legal relations in its own name.

Identification can be seen under two aspects: as **legal institution** including the totality of the norms that regulate the identification attributes and as **identification means**, namely: name, registered office, nationality etc.

The usefulness of the identification of the legal person stays in the valences present in: the legal capacity of the person (such as: nationality, registered office), in the jurisdictional competence (depending on the geographical location of the registered office), in the legal protection of the rights acquired (specialized records). The importance of the identification of the legal person therefore exceeds the civil law and acquires special connotation in the commercial law, competition law, intellectual property law, criminal law etc.

3. LEGAL NATURE OF THE IDENTIFICATION ATTRIBUTES. CHARACTERS.

The identification attributes of the legal person[6] are non-material personal rights[7].

Due to this feature, the identification attributes have the following legal characteristics:

- **erga omnes opposability**: as absolute rights, they can be opposed to any other right; all the other persons shall do nothing to violate these rights (negative obligation of not to do);
- **non-prescriptible**: they are non-prescriptible, in terms of extinction or acquisition, irrespective of the lapse of time;
- **personality**: they are closely connected to the person of the holder;
- **universality**: any legal person can exercise one's non-material personal rights deriving from the name, registered office, nationality etc.[8].

4. LEGAL PROTECTION OF THE IDENTIFICATION ATTRIBUTES

The civil law means to protect the identification attributes – non-material personal rights – is the civil action.

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[6] Like the identification attributes of the physical person.

[7] Gh. Beleiu „Dreptul civil român – introducere în dreptul civil. Subiectele", 433.

[8] Urs and S. Angheni „Drept civil – partea generală. Persoanele", vol. I, (Bucharest: Oscar Print Publishing House, 1991), 291.

Art. 231 in the New Civil Code includes a rule of law stipulating that any legal person, irrespective of its form, shall inscribe in all documents issued by it the name and the registered office, as well as any other identification attributes, under the law, under sanction of paying damages to the person affected. This provision shall be interpreted in the sense of the possibility to introduce a civil action by the legal person that is holder of an identification attribute and by third parties as well, to the extent to which they incurred damages as a result of the exercise of the rights by the holder legal person.

To note that, unlike the previous regulation, namely the Decree no 31/1954 which was limiting the applicable sanction to fines in favor of the state[9], the new regulation re-establishes the normal logics: the judge shall establish the sanction applicable depending on the seriousness of the offence.

The criminal protection of the identification attributes is ensured by the Law no 11/1991 regarding the countering of unfair competition; for instance, according to art. 5, the use of a company, logo, special designation or wrapping susceptible to produce confusions with the ones legitimately used by another trader shall be considered a crime (see section 5.4 in this paper).

5. NAME OF THE LEGAL PERSON

5.1. Notion:

Starting from the definition given in the legal literature to the name of the legal person[10], the name of the legal person shall be the word or the group of words by which a legal person distinguishes itself[11].

The name of the legal person can have various forms. Sometimes, it coincides with the name of the field in which the legal person is active, some other times, it can be the name of a physical person, a historical or political event, a symbol expressing a certain activity[12].

5.2. The right to a name

The name of a legal person is not merely a non-material personal right but an obligation deriving from the social function it fulfils[13]. These legal provisions include the rule to establish a name and the obligation[14] to have it registered, in other words, to make it public[15]. This obligation comes from art. 231 in the New Civil Code according to which all documents issued by the legal persons shall **include the name** and the registered office as well as other identification attributes.

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[9] According to art. 55 in the Decree no 31/1954, abrogated by the Law no 71/2011 for the enforcement of the New Civil Code „If the person who did the act with no right does not perform, by the deadline established by decision, the acts meant to re-establish the right affected, the court of law shall be entitled to make the person pay a fine per day of delay, in favour of the state ..."

[10] C. Stătescu „Drept civil", (Bucharest: Didactic and Pedagogical Printing House, 1970), 107.

[11] C. Bîrsan, chap. II in the paper: „Subiectele colective de drept în România", I.C.J.- High Court of Justice, (Bucharest: Academy Printing House, 1981), 41.

[12] C. Bîrsan „Subiectele colective de drept în România", 41.

[13] According to art. 226 para. 1 in the New Civil Code, „The legal person shall bear the name decided upon under the law in the articles of incorporation, corroborated with para. 2" When the legal person registers itself, it shall write its name in the public register".

[14] To clearly state the identificaton attributes is vital for distance contracts; in this respect, see the Governmental Ordinance 130/2000 which takes over the provisions of the Directive 97/7/CE of 20th May 1997 published in the Official Gazette no L144 of 4th June 1999, stipulating that the service provider shall state its name and geographic location (registered office) in order to ensure the proteciton of the consumers.

[15] Urs and S. Angheni „Drept civil – partea generală. Persoanele", 293.

In terms of non-material subjective law, the name included the following prerogatives of the holder legal person:

- to use that name which distinguishes the legal person in its concrete civil relations in which it takes part;
- to ask the others to distinguish it by its name;
- to ask in court the recovery of its name when its name has been affected[16].

The principle of legal symmetry shall apply in order to change the name, that is, the principle stating that only the one who decided upon the name can change it[17]. This principle appears as regulation by interpreting art. 228 in the New Civil Code according to which legal persons can change their **name** or registered office in compliance with the requirements stipulated by the law. The competent body shall be therefore the same body that decided upon the name, unless otherwise stipulated by the law.

5.3. Name and company

The doctrine in the field has formulated the opinion[18] according to which while the name is a general identification attribute of any legal persons, whether they may be public or private, the legal name is a specific name only for traders.

To note that, while „the name" is an extension of the physical person (corresponding to the „name" identifying a physical person[19]), the legal name distinguishes both the trader as a physical person and the traders as legal persons.

5.4. Legal name and logo

The Romanian term for "legal name", "Firma", is a homonym that can refer to several meanings: commercial name, commercial company and material media bearing the commercial name[20].

The Law 26/1990 regarding the trade register uses the first meaning of the term "firma", commercial name[21], with its functions[22]. Thus, according to art. 30 para. 1, "firma"/the legal name is its name or, as the case may be, the name under which a trader does trade and sign.

The logo is, according to the Law no 26/1990, the sign or name which differentiate a trader from another of the same kind (art. 30 para. 2). Since the wording in the law may cause confusions, the doctrine has proposed a definition of the logo as a sign or name distinguishing a sort of trade from another of the same kind[23].

The logo differs from the legal name by the following features:

- although it may have the same functions like the legal name, the logo increases potentials especially when it is not attractive or distinctive enough[24];

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[16] Gh. Beleiu „Dreptul civil român – introducere în dreptul civil. Subiectele", 437.

[17] Ibidem, 437.

[18] Urs and S. Angheni „Drept civil – partea generală. Persoanele", 293.

[19] G. Boroi, „Drept civil – partea generală. Persoanele", (Bucharest: All Beck Publishing House, 2001).

[20] L.N.Pîrvu and I.F. Simon „Legea privind registrul comerțului – comentarii și explicații", (Bucharest: C.H. Beck Publishing House, 2009), 214.

[21] Corresponds to the meaning given by art. 1 para. (2) of the Paris Convention for the protection of industrial property of 20th March (1883).

[22] For details on the functions of the „firma" as material media bearing the name of the company, see I. Băcanu „Firma și emblema comercială", (Bucharest: Lumina Lex Publishing House, 1997), 30-34.

[23] O. Căpățână "Societățile comerciale", 2nd edition, (Bucharest: Lumina Lex Publishing House, 1996), 278-279.

[24] I. Băcanu „Firma și emblema comercială", 29.

- while the legal name is a name[25] , the logo can be a drawing as well;
- the legal name is compulsory and unique while the logo is optional, a trader can have several logos;
- the legal name can be sold only together with the commercial assets including it while the logo can be transferred separately as well.

5.5. Protection of the legal name and of the logo

According to art. 30 para. 4 in the Law 26/1990 regarding the Trade Register, once the legal name and the logo are registered with the Trade Register, the trader acquires his right of exclusive use. As a result of lawfully making them public, the legal name and/or the logo can be used only by the trader who owns them.

The right to use the legal name and/or the logo can be acquired before registration: two or more traders can use the same legal name and/or logo but they do not enjoy special protection. Before registration, as a result of booking the legal name and /or logo in the legal names catalogue and logo catalogue, the trader does not immediately acquire the exclusive right to use it but only makes the used name temporarily[26] unavailable; because of this reason, the doctrine formulated the opinion according to which, irrespective of which of them is used, the legal name and/or the logo, it shall enjoy protection the one that applies for a proof of availability and books the identification attribute first. The temporary unavailability shall become an exclusive right of use from the moment when the judge delegated to the Trade Register gives a decision to the registration application[27]. From that moment on, therefore, the trader acquires a non-material subjective right over the legal name / logo, with prerogatives of the right to the name analyzed in the previous section of this paper.

The protection of the right of exclusive use over the legal name /logo is done as follows:

- By applying the provisions of art. 301 in the Criminal Code stipulating that the use of certain names in order to mislead beneficiaries shall be punished with a sentence to prison for 2 years or with a fine;
- According to art. 5 para. 1 letter a in the Law no 11/1991 regarding the countering of unfair competition, the use of a legal name in order to cause confusions because of its legitimate use by another trader shall be sanctioned as offence[28];
- The person incurring damages as a result of another person's using his legal name has civil possibilities available to protect the rights of his legal name such as: action for reasons of unfair competition; action for damages; action to force the defendant to stop using one's "firma" and the action for reasons of counterfeit, whose aim is to annul and de-register the company that undermined the rights of the claimant[29].

For the same protection of the legal name,[30] the legal names catalogue is a useful record since, according to art. 4 para. 1 in the Methodological Norms regarding the Trade Register, „the legal name shall remain unavailable for 2 years since its de-registering from the Trade Register. By

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[25] According to art. 30 in the Law 26/1990, the legal name shall be written, above all, in Romanian. By extensive interpretation, the same stays valid for the logo. In this respect, see L.N.Pîrvu and I.F. Simon „Legea privind registrul comerţului – comentarii şi explicaţii", 216-217.

[26] The booking lasts for 3 months. For comments see L.N.Pîrvu and I.F. Simon „Legea privind registrul comerţului – comentarii şi explicaţii", 219-220.

[27] Gh. Beleiu „Dreptul civil român – introducere în dreptul civil. Subiectele", 219.

[28] Ibidem, 218 – 219.

[29] I. Băcanu „Firma şi emblema comercială", 74 – 75.

[30] Regarding the contents of the legal name, in the case of the physical person traders and commercial companies, for the interpretation of the contents of these provisions, see L.N.Pîrvu and I.F. Simon „Legea privind registrul comerţului – comentarii şi explicaţii", 225-227.

exception, that legal name shall be available for the legal person that changed its name returning to its previous name booked for this purpose".

The same protection possibilities shall apply to the logo.

Some special situations regarding the legal name are generated by the rules applicable to legal person set up by the state, such as national companies, other commercial companies, autonomous operators etc. set up by legal documents (laws, governmental decisions etc.). The competent authority, prior to the issuing of the setting-up document, the availability of the legal name and of the logo of the new company should be checked[31].

5.6. The brand, identification attribute of the legal person

The brand, according to art. 3 letter a in the Law no 84/1998 regarding brands and geographical indications[32], with further modifications and completions, is a sign susceptible of graphical representation meant to differentiate products or services of a physical or legal persons from those belonging to other persons; brands can be: distinctive signs, such as words, including names of people, drawings, letters, figures, figurative elements, tri-dimensional shapes and especially, the shape of the products or of its wrapping, combinations of colors, as well as any combination of these signs.

We can conclude from the definition formulated that the brand can be confused with the legal name. In fact, although they may have similarities, their legal statuses are different[33].

We consider that, since they have the capacity to distinguish a trader from another trader, or to singularize a producer or a manufacturer[34], both the manufacturing brands and the commercial brands are identification attributes of the legal persons.

This conclusion is confirmed by the functions of the brand: to differentiate products, for competition, to guarantee quality, to organize the market, for monopole, advertising and consumer's protection[35]. Since the first function is, in our opinion, the closest related to the brand – an identification attribute of the trader, we shall analyze only this function.

The first aspect of the function of differentiation of the brand is the possibility to individualize the products of the producer-trader, thus protecting him against possibilities that his brand might be used by competitor-traders.

As a means to attract customers, to the extent to which it acquires a market value, the brand becomes a „reference" of the product sought for, while its connection with its origin tends to disappear. Thus, we reach the second aspect of the issue: the function of origin of the brand turns into a function of identification, a phenomenon caused by the de-personalization of industrial production[36]. Gradually, the brand stops being an indication of origin for the consumer and becomes a means of identification of the product. Thus, the function of differentiation of the producer becomes a function of differentiation or identification of products.

In our opinion, the brand remains an identification attribute of the producer (physical or legal person) despite the migration of its function from the identification of the person to the identification of the object of the activity of that person.

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[31] Idem, 220.
[32] Republished in the Official Gazette no 350 of 27th May (2010).
[33] L.N.Pîrvu and I.F. Simon „Legea privind registrul comerțului – comentarii și explicații", 221 – 224.
[34] Y. Eminescu, "Regimul juridic al mărcilor", (Bucharest: Lumina Lex Publishing House, 1996), 73 – 74.
[35] Idem, 23 – 30.
[36] Ibidem, 23 – 24.

6. REGISTERED OFFICE OF THE LEGAL PERSON

The registered office of the legal person is that identification means by which a certain location is indicated, under the law, with this significance[37]. It corresponds to what the residence is for the physical person[38].

6.1. Regulations regarding the institution of the registered office. Background.

Under art. 96 in the Civil Code, „the legal office of a legal person is where that legal person has the headquarters of its management" (abrogated by art. 49 in the Decree no 32/1954 for the enforcement of the Family Code and of the Decree regarding the physical persons and the legal persons). A similar regulation existed in the Law no 21/1924 regarding the legal persons (abrogated by Governmental Ordinance 26/2000 regarding associations and foundations, approved with modifications by the Law no 246/2005, published in the Official Gazette no 656 of 25th July 2009), and in art. 13 according to which „the legal office of a legal person is the main office of its management".

To note that this way of seeing the legal office in relation to the management and administrative office[39] was replaced by allowing the legal person to choose its legal office as it may wish with the obligation to write it in the articles of incorporation.

Thus, according to art. 39 in the Decree no 31/1951 (abrogated by art. 230 in the Law no 71/2011 for the enforcement of the New Civil Code), „the legal office of the legal person shall be established according to the document under which the legal person was set up or according to the statute". The freedom to choose is taken over by art. 227 para. 1 in the New Civil Code[40] according to which „the legal office of the legal person shall be defined according to the articles of incorporation or to the statute".

6.2. Legal status of the legal office

In terms of civil law, the right to a legal office as well as the right to a legal name is a non-material personal right. As an identification attribute of the legal person, the legal office has:

- „erga omnes" opposability (absolute rights, opposable to all); the legal person can ask all physical and legal persons to individualize it by its legal office;
- inalienability; the right to a legal office cannot be transferred by legal documents and its holder cannot give it up[41];
- non-prescriptible (manifested as extinctive)[42].

Classifying the right to a legal office as a non-material personal right does not limit the legal status of the legal office; it can be also classified from the point of view of other law branches. According to the commercial law, the right to a legal office gives the prerogative to use this office[43] (according to art. 74 in Law no 31/1990 regarding commercial companies, republished).

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[37] Gh. Beleiu „Dreptul civil român – introducere în dreptul civil. Subiectele", 438.

[38] G. Boroi, „Drept civil – partea generală. Persoanele", 391.

[39] This perception made some authors define the legal office of the legal person as the place where the management is. In this respect, see P. Anca „Organizaţiile socialiste ca persoane juridice în România", (Bucharest: Academy Publishing House, 1979), 106.

[40] According to which „the legal office of the legal person shall be established according to the articles of incorporation or to the statute".

[41] While the legal office is a tangible asset that can be transferred under legal documents.

[42] In this respect, see the staff of the Law Department of A.S.E. Bucharest, „Drept civil", vol. I, (Bucharest: Lumina Lex Publishing House, 2000), pg. 261.

[43] Urs and S. Angheni „ Drept civil – partea generală. Persoanele", 297.

6.3. Usefulness of identification of the registered office: commercial and fiscal uses

a) As an identification attribute of the legal person trader (although, according to the Law 26/90 republished, regarding the Trade Register, a registered office is also the place where the commercial activity takes place, both of the physical person trader and of the family-owned associations with no legal personality). The registered office must be established before the registering of the commercial company with the Trade Register, as a major requirement to register the new subject of law, registered then with the Trade Register and inscribed on all the documents issued by the commercial company. A combination of the identification function with the correspondence function is thus achieved[44].

b) As a starting point in **determining the applicable law,** the registered office is relevant both for **establishing the nationality of the commercial company** („lex societatis"), that is, belonging to a certain country, and for establishing the applicable law, according to the conflict law „lex loci actus", where the one undertaking the contractual obligation is the commercial company or, unless otherwise stipulated, the registered office is the place where a contract is executed, in cases where the one undertaking the obligation to execute it is the company itself („lex loci executions")[45].

c) From the point of view of the **process**, the registered office is useful to establish the **court competent to judge litigations** in which the commercial company is a party, the place where the proceedings documents shall be sent (subpoena, notifications), the place where advertising takes place (such as advertising during the insolvency procedure of the commercial company), and the place where a real estate enforcement procedure is performed. These three components are solved in the same way from the commercial and fiscal points of view.

d) In the **EU, in terms of recognition of the legal personality of commercial companies**, the doctrine has two theories regarding the registered office, the theory of registration (the registered office of a foreign commercial company is the place where the company was registered, like in Denmark, Great Britain, Ireland, the Netherlands), the theory of the actual office (aiming at protecting the local interests which considers that the registered office if the place where the core of the **major interests of commercial companies** is; recognized by France, Germany, Luxembourg, Portugal, Belgium, Spain, Greece)[46].

e) Corresponding to the function of place from which the management run the activity, the registered office is vital because it ensures a way to **find the managers of the commercial activity**, the „brain" of the commercial company. From this point of view, we understand the reluctance in the doctrine regarding the latest modification made to the Law 31/90 by the Law 441/2006 regarding the possibility to set up several commercial companies with the same registered office if certain express requirements are met.[47]

Regarding the actual nature, seen as the actual place to carry out the activity, we can notice a modification of the regulations regarding the fiscal domicile in the Code of Fiscal Procedures.

On the one hand, if there are no other possibilities to identify the fiscal domicile of legal person, the criterion : „**place where most assets are**" shall be applied (art. 31 para. 3 in the Governmental Ordinance 92/2003, republished in the Official Gazette no 513 of 31st July 2007). On the other hand, in case of associations and other entities with no juridical personality, the fiscal domicile is „**their registered office or the place where the main activity actually takes place**"

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[44] C. Haranga and I.N.Pîrvu, „Unele aspecte teoretice şi practice privind stabilirea sediului social al societăţii comerciale", in R.D.C. no 2/2008, (Bucharest: Lumina Lex Publishing House, 2008), 92.

[45] B. Ştefănescu and O. Căpăţână „Tratat de dreptul comerţului internaţional", (Bucharest: Academy Publishing House, 1987), 183.

[46] D. Şandru „Societăţile comerciale în U.E.", (Bucharest: University Publishing House, 2006), 18.

[47] C. Haranga and I.N.Pîrvu, „Unele aspecte teoretice şi practice privind stabilirea sediului social al societăţii comerciale", 91 – 104.

(art. 31 para.1 letter d). For physical person as well we can talk about „**address where they actually live**" (art. 31 para.1 letter a) where actually shall be interpreted as „address of the dwelling that a person **uses uninterruptedly for over 183 days during a calendar year**", with a few exceptions (art. 31 para.2)[48].

The reason of this clarification is, in the fiscal field as well as in this field, to enable the control of the tax-payers and the enforcement of the assets in case of default. In these cases, the registered office is less important (the office registered with the Trade Register), the actual office matters because it accommodates the financial and accounting documents to check and the assets to be enforced.

The provisions included in the Order no 419/2007 for the approval of the procedure to change the registered office (published in the Official Gazette no 473 of 13th July 2007), and for the approval of the form „Decision to register the registered office and the fiscal domicile "shall be interpreted in the same way; according to these, based on the application of the trader tax-payer who wants to change his registered office, the fiscal administration competence shall pass from one fiscal body to another, depending on the new registered office and fiscal domicile. There is a cause-effect relation between the two juridical institutions (registered office/fiscal domicile) but the fiscal domicile is not the same with the registered office.

6.4. Functions of the registered office

In time, the doctrine identified several functions of the registered office of the legal person.

Just like the domicile of a physical person, the registered office helps identifying the legal person[49].

Secondly, the registered office helps determining the competence of the courts or of the arbitrage, by determining the address to which the legal persons shall be sent subpoenas or where certain procedures shall be enforced[50].

At the same time, the registered office is interesting for the private international law since the registered office is a criterion used to establish the nationality of the legal person[51].

In the recent doctrine[52] the registered office is seen as the place where the mail is received and from where the executive management coordinates the activity for which the legal person has been set up.

6.5. Characteristics of the registered office of the legal person

Obligatory: any legal person shall have a registered office by which it singularizes itself in space as against other subjects of the law. The obligatory nature shall be seen as threefold: it is obligatory to establish the registered office since the moment when the legal person is set up (art. 227 para.1 in the New Civil Code), and it is obligatory to make the registered office public, which is done by registering the legal person[53].

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[48] S. Cristea „Comentarii la codul de procedură fiscală", (Bucharest: Dareco Publishing House, 2007), 142-150.

[49] C. Bîrsan, „ Subiectele colective de drept în România", 48-49.

[50] Ibidem, 49.

[51] Ibidem. For natioality as identification attribute of the legal person, see section 7 in this paper.

[52] C. Haranga and I.N.Pîrvu, „Unele aspecte teoretice şi practice privind stabilirea sediului social al societăţii comerciale", 91-104.

[53] Urs and S. Angheni „Drept civil – partea generală. Persoanele", 296.

Advertising is organized under the law; the legal effects of this institution shall become in force against third parties right after the registered office is lawfully established and this moment corresponds to the moment where the legal person acquires its civil capacity[54].

The third aspect is the fact that it is obligatory to include the registered office in the mail of the legal person, under art. 231 in the New Civil Code, „all documents, irrespective of their form, issued by the legal person shall include the **name and the registered office** ..."

Unique: any legal person shall have only one registered office; which does not exclude the possibility that the legal person may have one or several secondary offices.

Established: the registered office is clearly established and this results from the process of establishing it although during its activity, the legal person may change its registered office (according to art. 28 in the New Civil Code, the legal person may change its registered office or its name, under the law).

6.6. Classifications of the registered office

Depending on the criterion, we can have:

- Depending on the territory of the country, there are legal persons that have: a) their registered office in the country (in Romania) and b) abroad;
- Depending on its nature: a) common law registered office, which is compulsory, and b) conventional office (chosen) which is optional;
- Depending on its weight in the volume of the activity of the legal person: a) main office (concerning the entire activity or the overall activity) and b) secondary office (concerning a part of the activity)[55].

From the point of view of the commercial law, according to the special law on commercial companies, the difference between the main office and the secondary office acquires new juridical values.

6.7. Subsidiaries and branches

Upon the setting up of a commercial company, the shareholders can take into account, since the very beginning, the prospective to develop the activity of the company; that is, the possibility to expand the activity of the company in other towns or in the same town but in a new location. Such an expansion can be done by setting up new subsidiaries and branches with the same commercial activity like the mother-company.

In such cases, the Law no 31/1990, republished, stipulates the requirements to be met in order to set up such legal entities.

The subsidiary, according to art. 42 in the Law 31/1990, is a commercial company with legal personality set up by the primary company (mother company) that owns most of its equity. Thus, although it is a distinct subject of law, the subsidiary is dependent and placed under the control of the primary company.

As a legal person, the subsidiary takes part in the legal relations in its **own name**; by the legal acts of its representatives, the subsidiary acquires rights and undertakes obligations and commits its own liability.

The subsidiary is a form of company regulated by the Law no 31/1990, republished, and shall have the legal status of the form of company in which it was set up, even if the mother – company has another form.

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[54] C. Bîrsan, „Subiectele colective de drept în România", pg. 48.

[55] Gh. Beleiu „Dreptul civil român – introducere în dreptul civil. Subiectele", 438.

The branch, according to the Law no 31/1990, is a separate part of the commercial company with no legal personality. This sub-unit is provided with funds by the company in order to perform an economic activity included in the object of activity of the mother-company. The branch has certain autonomy within the limits defined by the mother-company.

Since it has **no legal personality**, the branch cannot take part in its own name in the legal circuit; the legal documents imposed by the activity of the branch shall be concluded by the representatives (representatives in charge) designated by the mother-company.

The legal status of the branch shall be transferred to any other secondary office, irrespective of its name (agency, representative office etc.), which the mother-company sets up and to which it gives the statute of branch.

The branch shall be **registered** before beginning its activity with the Trade Register of the county where it will operate. If the branch is set up in a town in the same county or in the same town as the mother-company, it shall be registered with the same Trade Register but as a distinct entity, separately.

The representative of the branch shall submit its signature with the Trade Register as requested under the law for the representatives of the company.

The other secondary offices (agencies, representative offices and other such offices) shall be mentioned only with the registration of the mother – company with the Trade Register where the main office is registered[56].

The provisions of the Law no 31/1990 republished, regarding the subsidiaries and the branches shall also apply to subsidiaries and branches set up by **foreign commercial companies in Romania.** These companies shall be entitled to set up subsidiaries and branches only if this right is recognized by the law governing their statute, and while the branches shall have foreign nationality (of the country in which they have been set up since they have their own legal personality), the subsidiaries shall have the nationality of their mother–company (since they have no distinct legal personality).

6.8. From the registered office to the professional office

According to the Romanian Civil Code, the identification attribute of the physical person – the domicile– corresponds to the registered office for the legal person[57].

This separation disappeared in the commercial law, according to art. 13 in the Law no 26/1990 regarding the Trade Register, the physical person trader shall also prove the registered office of his activity upon registration with the register.[58].

Art. 13 in the Law 26/1990 was implicitly modified by the Governmental Emergency Ordinance 44/2008 regarding the economic activities of the authorized physical persons, sole proprietorships and family-owned enterprises (published in the Official Gazette no 328 of 25th April 2008), which imposes on the traders physical persons to register with the Trade Register with jurisdiction over their **professional office**.[59]

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[56] S. Cristea „Dreptul afacerilor", (Bucharest: University Publishing House, 2008), 137 – 139.

[57] G. Boroi, „Drept civil – partea generală. Persoanele", 391.

[58] In the fiscal law, things are more complicated; the notion of domicile expands over the forms of carrying out the activity of the trader – physical person. For details, see S. Cristea „Comentarii la codul de procedură fiscală", (Bucharest: Dareco Publishing House, 2007), pg. 16 - 17.

[59] For details regarding the documents proving the data included in the registraton application, in the sense of the document attesting the rights of use over the professonal office, see L.N.Pîrvu and I.F. Simon „Legea privind registrul comerţului – comentarii şi explicaţii", 110.

By corroborating these provisions with the explanation of the notion of professional formulated in art. 8 in the Law no 71/2011 for the enforcement of the New Civil Code[60], we consider that, once this normative act is in force, the phrase "professional office" shall extend to all physical person or legal person professionals, so to commercial companies regulated under the Law 31/1990 as well.

7. NATIONALITY OF THE LEGAL PERSON

The registered office of the legal person is interesting for the international private law since it is one of the criteria used to establish the nationality of the legal person. According to this criterion, the legal person shall have the nationality of the country where it has the registered office.[61]

This principle is regulated also in the Law 31/1990 regarding the commercial companies, in art. 1 para.2 according to which „commercial companies residing in Romanian shall be considered Romanian legal persons".

This solution is a tradition in the Romanian international law which, being also governed by the Commercial Code, was taking into account the main office as identification factor for the nationality of a commercial company[62].

In case of legal persons of public law (state-owned) a similar provision is not needed since, by definition, they are Romanian legal persons. The equivalent of the citizenship – identification attribute of the physical person, is the nationality as identification attribute of the legal person.

8. OTHER IDENTIFICATION ATTRIBUTES

8.1. Bank account

Any legal person has a bank account in which it keeps its money and this account is designated by a symbol made of figures. The bank account is a means to identify the legal person in its relations involving its assets[63].

8.2. Registration number with the Trade Register

Following the application for registration with the Trade Register and its approval by decision of the delegated judge, a registration number in the Register is obtained.

Regarding opposability of registrations towards third parties, the law clarifies the general rule of the opposability as entering into force since the registration (art. 5 in the Law 26/1990), not since the data of publication of the data regarding registration in the Official Gazette[64].

This identification attribute given by the National Office of the Trade Register, a juridical institution subordinated to the Ministry of Justice, shall not be taken as the unique registration number allocated by the competent fiscal administration, as we shall see in the following section.

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[60] According to which: "The notion of «professional" included in art. 3 in the Civil Code shall include the categories of trader entrepreneur, economic operator, and any other persons authorized to perfom economic or professional activities, as these notions are stipulated by the law, upon the date when the Civil Code enters into force".

[61] See section 6.3. in this paper regarding the usefulness of the identification of the registered office.

[62] O. Căpățână "Societățile comerciale", 42.

[63] Urs and S. Angheni „ Drept civil – partea generală. Persoanele", 298.

[64] L.N.Pîrvu and I.F. Simon „Legea privind registrul comerțului – comentarii și explicații", 48-53.

8.3. Unique registration number

All legal persons that register with the Trade Register shall possess a unique registration number, allocated under the law, which shall be registered with the Trade Register. Commercial companies, national companies, autonomous operators, European companies residing in Romania, groups of economic interests, European groups of economic interests residing in Romania, cooperative companies, agricultural cooperative associations, loan cooperative associations, and their central units that have a legal personality shall obtain their unique registration number. This obligation refers both to traders and non-traders[65], and the provisions regarding the unique registration number included in the Law 26/1990 (art. 13 para.3, corroborated with art. 14 para.2 and art. 15 para.2) refer to entities with legal personality and entities that have no legal personality[66].

The unique registration number is a symbol made of figures that helps identifying the legal person in its fiscal relations and its relations regarding statistical records.

According to art. 72 para.1 in the Code of Fiscal procedure[67], any person or entity that is subject in a fiscal legal relation shall register itself and receive a fiscal identification number (usually, allocated by the relevant fiscal body subordinated to the National Agency of Fiscal Administration). The regulations include, for each category of tax-payer: the way to allocate the fiscal identification number, the obligation to submit the fiscal registration statement, and the deadline to submit the fiscal registration statement[68].

After the allocation of the fiscal identification number, the tax-payers shall write their fiscal identification number on invoices, letters, offers, orders and any other documents issued[69]. The documents submitted to banks, fiscal bodies and other public institutions, tax-payers and other interested persons, without the fiscal identification number of the issuing party inscribed shall not be considered as valid documents[70] (art. 73 Code of Fiscal Procedure).

8.4. Registration number for VAT purpose

It is the number allocated by the competent authorities of a Member State to the persons that have the obligation to register, or a similar registration number allocated by competent authorities from another Member State (for instance, the numbers issued in Romania have the prefix „R").

Starting with the 1st of January 2007, the registration number for VAT purposes allocated to legal persons and physical persons that have independent economic activities or are freelancers shall have the prefix „R", followed by the fiscal identification number allocated by the competent body[71].

8.5. Telephone, telex, fax

Although they may not be expressly identified in the New Civil Code, these identification attributes made of figures are the quickest identification means and the legal persons are registered with these symbols; this is a practice upon conclusion, modification and execution of contracts.

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[65] For instance, the group of economic interests.

[66] For instance, family-owned companies and sole proprietorships.

[67] Adopted by Governmental Ordinance 92/2003, republished in the Official Gazette no 513 of 31st July (2007), with further modifications and completions.

[68] S. Cristea „Comentarii la codul de procedură fiscală", (Bucharest: Dareco Publishing House, 2007), 51-53.

[69] Failure to comply with the obligation shall be considered as offence and shall be sanctioned with a fine according to art. 219 in the Code of Fiscal Procedure.

[70] S. Cristea „Comentarii la codul de procedură fiscală", 53.

[71] R. Bufan, M. Şt. Minea, „Codul fiscal comentat", (Bucharest: Wolters Kluwer Publishing House, 2008), 534 and 1316 – 1317.

We consider that these communication elements of the legal persons, and, in time, maybe some other documents that may be issued by legal persons as a result of commercial practices, are identification attributes corresponding to the list formulated in art. 230 in the New Civil Code[72].

8.6. Equity

The interpretation of the provisions included in art. 7, 8 and 15 in the Law no 26/1990 regarding the Trade Register means that irrespective of the kind of commercial company or traders legal person – set up by the state, the equity is another identification attribute they shall inscribe in all their documents.

As a sum of the contributions of its shareholders, the equity is an element that is considered to be the general pledge for the unsecured creditors and it shall be, therefore, known by third parties. The version: "subscribed and paid in capital" appears only in the case of legal persons set up as public limited company or limited partnership by shares.

9. Conclusions

We consider that what we have presented so far in the previous sections impose conclusions that are visible at least along three dimensions: the non-limited nature of the list including the identification attributes of the legal person (section 9.1), the blurring of the **inalienability** of the identification attributes as non-material personal rights, on the one hand, and of the **personality**, on the other hand, and possibly even of the **non-material** nature (section 9.2) and finally, „the provision" of the dichotomy: civil law- commercial law in the Romanian private law (section 9.3).

9.1. Non-limited nature of the list including the identification attributes

According to art. 230 in the New Civil Code[73] the list including the identification attribute is not limited.

Along with the attributes newly added and imposed by business practices, we consider it necessary to add another one, the email address.

Expansion of the e-commerce in today's world requires that one of the contact data of a businessman, and not only, should be one's email address. This is a combination of figures and letters by which a person can be identified.

An argument in favor of considering the email an identification attribute is art. 4 para.1, letter b in the Governmental Ordinance 130/2000, regarding the legal status of distance contracts[74], according to which: „the consumer shall be entitled to **notify in writing** the trader that he gives up buying, with no penalties, and without invoking a reason, within 10 working days from the receiving the product, or, in case of services, since the conclusions of the contract".

Unless expressly stipulated, we consider that the notification in writing shall be sent in electronic version, just as the offer and the acceptance have taken place, and the email address shall be the email address of the trader.

We consider that, *de lege ferenda*, it would be useful to include the registered office of the trader among the identification attributes to be sent to the consumer, at least from the point of view of

[72] The non-limited nature results from the use of the phrase „including other identification elements, under the law" in art. 230 in the New Civil Code.

[73] „depending on the specifics of the object of activity, the legal person can have other identification attributes as well such as: registration number with the Trade Register or another public register, the unique registration number and **other identification elements**, under the law" (art. 230 in the New Civil Code).

[74] Republished in the Official Gazette no 177 of 7th May (2008).

its importance for the competent court, in case of misunderstanding between the contracting parties (in terms of procedure).

9.2. Current status of inalienability, personality and the lack of financial contents of the identification attributes

While, by their nature, the identification attributes have appeared as non-material personal rights, we are witnessing nowadays a blurring of their non-transmittable nature in the business field. Since „everything" must be turned into cash as much as possible (which reflects the financial nature and the celerity), we can see that the identification attributes acquire the feature of **negotiability**. While the logo and the brand have formed themselves as legal institutions that can be transferred also separately from the business they come from[75], in time, the legal name can be also transferred with documents among living persons or mortis-causa, only accompanied by the business to which it belongs. Arguments for this are: the possibility to transfer the legal name to the trader physical person without changing the name included, with the condition to add the term "successor" by the civil name of the transferor (a) or the possibility to take over the business as sole proprietorship by the legal successor of the owner of the enterprise, with the condition to accept the succession within 6 months since the date when the owner passed away, and in this case, according to the Governmental Emergency Ordinance 44/2008, only the registration with the Trade Register and the authentic succession acceptance statement are needed[76] (according to art. 27) (b), or, in case of a limited liability company, according to art. 36 in the Law 26/1990 regarding the Trade Register, the legal name cannot include the name of one or several shareholders; unless otherwise stipulated, we shall interpret that, in the case of a business cession, along with the other elements, the transferee shall take over the previous legal name, and may add the term „successor", as previously stated under letter a above!

The personality of the name/legal name, of the logo, brand – as identification attributes considered as non-material personal rights – is increasingly blurred, as stated in the section dedicated to the brand, this reflecting less and less the personality of the trader and more and more the features of the product (merchandise). Another change in the personal and unique nature of the identification attributes is the Governmental Emergency Ordinance O.U.G. 44/2008 regulating the institution of the special-purpose assets by which we have a dual perception of the assets: civil assets of the person and distinctly, commercial assets – submitted as exclusive security for commercial debts[77].

The financial nature of the legal company, logo, brand – identification attributes of the legal person has been proved not only by their negotiability but also by their weight in the assessment of the business that are part of. The higher the value of a component, the more the value of the whole business – a guarantee to fulfill the contractual obligations undertaken – thus ensuring the protection of the creditors by „securing" the enforcement of debts.

9.3. Survival of the dichotomy civil law /commercial law in the Romanian private law

The cause that separated the civil law from the commercial law has not disappeared. Trade and traders have needed a specialized regulation although the doctrine formulated the opinion [78] that „differences from the civil law have never been in the contents but in nuances".

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[75] S. Angheni, M. Volonciu, C. Stoica „Drept comercial pentru învățământul economic", (Bucharest: University Publishing House, 2008), 77-78.

[76] S. Cristea „Dreptul afacerilor", (Bucharest: University Publishing House, 2008), 85.

[77] L. Herovanu „Dreptul român și patrimoniul de afectațiune" in R.D.- The Law Magazine no 6 (2009), 64 – 76, and also S. Cristea „Dreptul afacerilor", 82 – 83.

[78] P.C.Vlachide „Repetiția principiilor de drept civil", 25.

A legislative argument in maintaining commercial law is the Law no 71/2011 for the enforcement of the Law no 287/2009 regarding the Civil Code, in the sense of modifying some special commercial laws such as: the Law 31/1990 regarding commercial companies; the Law 26/1990 regarding the Trade Register; the Law 136/1995 regarding insurance and re-insurance in Romania; the Governmental Emergency Ordinance 86/2006 regarding the activities of insolvency practitioners etc. without abrogating them, as it happened with the 1887 "*Codicele de comerț*" (Business Code).

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"THE UNDERTAKING" AND "THE RELEVANT MARKET": KEY CONCEPTS IN THE ANALYSIS OF ANTICOMPETITIVE PRACTICES

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Abstract

The desire to maintain themselves on a particular market, at a higher level of profitability or at a reasonable level at least, can lead the undertakings to adopt an anticompetitive behaviour more easily. This may result from either the existence of anticompetitive agreements and concerted practices, or the tendency to abuse its dominant position which the undertaking has on a certain market.

"The undertaking" and "the relevant market" are the key concepts in the analysis of anticompetitive practices.

The active subject of anticompetitive practices is "the undertaking". This concept has a particular significance in the competition law, different from the common law. Competition rules apply to the conduct of undertakings and associations of undertakings so that the concept of undertaking makes it possible to determine the categories of actors to which the competition rules apply. However, the term undertaking is nowhere defined in the EU Treaties; as such, the concept has generated a complex body of jurisprudence.

"The market" is a term with pronounced economic resonances; synthetically, the market is the place where supply meets demand. In the context of the competition law, "the market" means "relevant market". The relevant market is the market of product/service in terms of demand and supply, and then superimposed on the geographic market.

The analysis of these key concepts necessarily entails the conceptual delimitation of the notions. On this purpose, the relevant legal provisions will be identified in the Romanian and EU law, together with the decisions of the European Court of Justice in this matter.

Keywords*: competition law, undertaking, relevant market, the market of the product, the geographic market.*

Introduction.

The purpose of this paper is the analysis of the notions "undertaking" and "relevant market" which represent key concepts in the analysis of the anti-competitive practices which can distort the competition. The undertaking is the active subject of the anticompetitive practices to which the competition law address, and the relevant market is the market on which the potential restriction of competition is analysed.

The study of these notions is important because the anticompetitive practices, which restrict natural competition, are practised, in most of the cases, by undertakings. As concerns the competition, the notion "undertaking" has a specific meaning, different from the common law.

The competition rules apply to the conduct of undertakings and associations of undertakings, so that the concept of undertaking makes it possible to determine the categories of actors to which the competition rules apply. However, the term "undertaking" is nowhere defined in the EU Treaties; as such, the concept has generated a complex body of jurisprudence, which has to be identified. "The market" is a term with pronounced economic resonances; synthetically, the market is the place where supply meets demand. In the context of the competition law, "the market" means "relevant market". The relevant market is the market of product/service in terms of demand and supply, and which is then superimposed on the geographic market.

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On this purpose, we will analyse the special significance of each of these two notions, "the undertaking" and "the relevant market", we will identify and analyse the main normative dispositions with regard to these aspects, both at national and European levels, and we will present more jurisprudential solutions of the European Law Court, from which are resulted the criteria that have to be taken into consideration for both the identification of un undertaking and the determination of the relevant market.

In comparison with other already existent specialty literature on competition law, the present paper intends to present the conceptual evolution of the analysed notions, paying special attention to the entities (including the ones without juridical personality or members of liberal professions) which can be qualified as undertakings as defined by the Romanian competition law.

Content.

I. Introductory aspects

The existence of a competitive and undistorted milieu is a fundamental condition for the existence of a functional market economy. Thus, it is necessary to protect the market against acts or facts that could lead to the restriction, distortion or even removal of the competition. Among these, the anticompetitive practices of undertakings are especially harmful, irrespective of the way in which they take place: anticompetitive agreements or the abuse of dominant position on a certain market.

The analysis of any anticompetitive practices begins necessarily with the identification of the active subject(s) of such practices and the verification whether or not the entities at hand represent an "undertaking" to which the competition rules address. In addition, due to the fact that undertakings act within a certain market, it is necessary to analyse the market in which competition takes place (the relevant market), in order to establish a potential competitive illicit.

II. The undertaking – active subject of anticompetitive practices.

II. 1. The settlement of the notion "undertaking".

In the European Union Law, The Treaty on the functioning of the European Union (EU Treaties/TFEU)[1], contains the primary legal regulation with regard to competition, which applies to undertakings and "associations of undertakings".

According to article 101 TFEU, "The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market". Moreover, any abuse of one or more undertakings of dominant positions within the internal market or in a substantial part of it should be prohibited as incompatible with the internal market in so far as it may affect the trade between the Member States (art. 102 TFEU).

However, EU Treaties does not define the concept "undertaking". This task was attributed to the European Commission and european courts, which have established a wider meaning of the concept of "undertaking", as it will be mentioned later.

In the Romanian Law, the common law regulations[2] define the undertaking as an activity organised in order to provide goods and services, not as a subject of right. In the context of the New Civil Code (NCC)[3], the undertaking is also regulated as an organised activity, and not as a subject of right, as it results from the dispositions in art. 3 NCC, because it is "exploited by a professional", and the "exploitation of an undertaking" is "the systematic exertion of an organised activity...".

With regard to the competition right, the Competition Law no. 21/1996[4] 2nd article, 1st paragraph defines the undertaking as a "private individual or a legal entity, of citizenship,

[1] Official Journal of the European Union C 83/1, 30.3.2010.
[2] O.U.G. nr. 44/2008.
[3] Law no. 287/17.07.2009.
[4] M.Of. no. 88/30.04.1996.

respectively nationality, Romanian or foreign", and in the 2nd art., 2nd paragraph, as representing " any economic operator who offers goods/services on market, as it is defined in the European Union jurisprudence". From the legal definition of the notion "undertaking" the following conclusions can be drawn:

- In the competition law, the notion of "undertaking" has a specific meaning, different from the one in the common Law.

- The conception of the notion in the definition is the subjective one, different from the objective one in the Romanian Law, because it regulates the undertaking as a legal entity/ subject of right and not as an organised activity, in the conditions in which the legal text stipulates purposely that the undertaking is a "private individual", "a legal entity" or an "economic operator".

- the way in which "undertaking" is defined is at least unusual in the Romanian law, because a concept is defined by means of jurisprudence

- in the conditions in which the legal definition from the national law refers expressis verbis to the European Union jurisprudence, the full understanding of the notion of undertaking imposes the presentation and the analysis of this jurisprudence.

II. 2. The European Union jurisprudence with regard to competition. A few defining notes of the concept of "undertaking".

At the level of the European Union, the first definition of the undertaking is to be found in Mannesmann Case[5]: the existence of an undertaking is given by the unitary organisation of personal, material and immaterial elements, attributed to a subject of autonomous right, and pursuing, in a lasting way, a given economic goal.

In the Polypropylene Case,[6] the Comission concluded that the "subjects of the European law of the rules of competitions are the undertakings, concept which is not identical with the problem of juridical personality in the sense of the commercial enterprises law or of the fiscal policy, however it refers to any entity engaged in commercial activities". In the same case, The Law Court regulated that "the subject of the competition rules is the undertaking, a concept that is not identical with the matter of the juridical personality used for the commercial or fiscal law. It can refer to any entity that performs commercial activities".

The sphere of the notion of undertaking was enlarged in the Hofner Case[7]: in the context of the competition law, the term "undertaking" covers any "entity that performs an economic activity, regardless of the juridical status and the way in which it is financed".

This is the decision which crystalised the concept of undertaking, the Court's jurisprudence being then constant, through the reconfirmation of the concept thus delineated in numerous subsequent causes, such as: Case Poucet and Pistre vs. Assurences Generales de France, C- 159-160/91; Case Sat Fluggesellschaft vs. Eurocontrol C-364/92; C-244/94, Federation Francaise des Societes dAssurence vs. Ministere de lAgriculture et de la Peche ; Case Pavlov, C- 180-184/98; Case Fenin vs. Comisia, T – 319/99; Case Cisal di Battistello, C-218/00; Case Aok Bundesverband, C-264/01; Decision of 11.07.2006, FENIN/Comisia, C-205/03; Case Cassa di Risparmio di Firenze SpA C-224/04; T-155/04, Selex Sistemi Integrati SpA vs. Comisia, decision of 12.12.2006.

Last but not least, it is worth mentioning that, in order to constitute an undertaking, the Court has regulated that it is necessary for the respective eentity to have decisional autonomy, to be able to establish freely the behaviour on a market, problem which arises especially in the case of the entities which belong to the same group (Case Begelin, C-22/71; Case Viho Europe BV vs. Comisia, C-73/95; Case Akzo Nobel, C-97/08).

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[5] Case Mannesman, C-19/61, decision of 13.07.1962. This case, like the other to which we refer throughout this paperwork are published on the website of the European Union Court of Justice, *www.curia.eu.int*.

[6] Case Polypropylene, 1986 , JO nr. L 230, 1988.

[7] Case C-41/90 Hofner and Elser vs. Macroton GmbH.

From the presented jurisprudence, we *draw the main defining notes of the concept of "undertaking"*: it will constitute an undertaking in the sense of the competition law any entity which: i) performs an economic activity, ii) the juridical status having no relevance, iii) the way of financing, whether public or private, having no relevance, and which iv) has an autonomous behaviour on the market.

i) Entity that perfoms an economic activity

Perfoming an economic activity represents the essential element that leads to the inclusion of the entity in the sphere of the "undertaking" concept.

But what precisely does an economic activity represent? In a jurisprudence that is remarkably constant, the economic activity was definied as being that activity consisting in offering goods and services on a market (e.g., Cases: Comisia vs. Italia C-118/85; Ambulanz Glockner C-475/99; Comisia v. Italia C-35/96; Penin v. Comisia C-205/03; Pavlov C-180-184/98), susceptible, at least in principle, to be done by an undertaking in order to make profit (C-67/96 Albany International; C-180-184/98, Pavlov), being irrelevant whether the entity, in fact, does not make profit or whether the entity is not configured for an economic purpose (C-155/73, Italia vs. Saachi).

Thus, the economic activity represents the essential criteria for qualifying the entity that perfoms it as being an undertaking.

The exertion of an activity that, in its nature, by means of the rules that it obeys and by means of its object, is different from the sphere of the economic activities, hinders the qualification of the entity that does it as an undertaking in the sense of the competition rules.

In this category are included, for instance: the activities which join the exertion of the prerogatives of the public power (in this sense, in Case Selex Sistemi Integrati SpA vs. Comisia[8], the European organisation regarding the control of the aerial navigation (Eurocontrol) was not qualified as undertaking, retaining that its activity, through its nature and objective, represents a prerogative of public power and it does not present an economic character which justifies the application of the competition rules) or activities which regard the administration of the public service of social security, together with those that aim at the system of health insurances or old age pensions (because they have an exclusively social character and are built on the principle of national solidarity, it does not represent an economic activity, and the organism commissioned to administrate them – the health insurance fund or the pension fund – cannot be qualified as undertaking, as they cannot influence the amount of the dues or the use of funds[9]).

ii)The legal status or form of the entity is immaterial.

The preoccupation regarding the activities of the entity, in consensus with the pragmatic vision and the economic objectives of the TUFE deprives of relevance the juridical status of the undertaking: the exertion of the economic activity can be performed both by a private individual and a legal entity, even by state organisms.

iii) The lack of relevance of the financing way, public or private.

The competition right does not contain special derogations in the benefit of the public undertakings, for the only reason that they are under the control of the state.

The different allotment, private or of the state, to the constitution of the capital of an undertaking cannot represent a criterion to lead to the inapplicability of the competition rules for a certain category of undertakings. In this sense, the article 106 TUFE establishes undoubtedly the application of the competition rules and the public undertakings, and the European law courts did not hesitate to declare them, having a character of principle, applicable[10].

iv) An autonomous behaviour on the market.

[8] Case Selex Sistemi Integrati SpA vs. Comisia, T-155/04, decision of 12.12.2006.

[9] Case Poucet et Pistre, C-159/91.

[10] Case C-41/90 Hofner şi Elser c. Macroton GmbH.

In order to be able to be qualified as an undertaking to which the competition rules address, the entity at hand has to have decisional autonomy, the ability to establish freely its behaviour on the market. In the absence of the decisional autonomy, situation which appears especially in the case of the enterprises that belong to the same group[11], the entity cannot be qualified as undertaking.

II. 3. The definition of the undertaking. Bearing in mind what has been exposed, we will define the undertaking as being any entity with decisional autonomy, irrespective of its juridical status and the way in which it finances, engaged in an economic activity (consisting in offering goods or services on a market), susceptible of making profit, even if the goal of the entity is not lucrative.

II. 4. Determining the sphere of the concept of "undertaking" in the Romanian Law.

In order to determine the categories of active subjects of the anticompetitive practices in the plan of the national legislation, we will distinguish between: private individuals (A), legal entities (B) and entities without juridical personality (C), following to establish concretely which entity precisely can be qualified as undertaking in the Romanian law of competition.

A. Natural persons.

i) In the old Commercial Code, a private individual acquired the quality of trader in the conditions of the 7th article, respectively if they fulfilled cumulatively the following conditions: to do objective acts of commerce; these acts to be done in behalf of its own; the performance of the acts of commerce are to have a character of profession[12]. As a consequence of the adoption of the New Civil Code (NCC), the Commercial Code is abrogated, and the notion of trader is not longer defined as such. The New Civil Code has radically modified the the overall conception of the subject, opting for a monist conception of regulating the rapports of private right, according to which the regulations regarding the commercial relations have been embodied in the Civil Code, the traditional division between civil rapports and commercial rapports was no longer maintained and there were consecrated differentiations of the legal system according to the quality of the professional, respectively non-professional of those involved in the compulsory juridical rapport.

In these conditions, the institution of the commerce acts and the institution of traders are to be reconsidered, having as basis the concepts of undertaking and professional.

According to the 3rd article, 2nd and 3rd paragraphs of the NCC, those who exploit an undertaking are not considered professionals; it constitutes the exploitation of an undertaking the systematic exertion, by one or more people, of an organised activity that consists in the production, administration or alienation of goods or in providing services, irrespective of its lucrative or non-lucrative goal. The notion of "professional" stated in the Civil Code includes the categories of trader, entrepreneur, economic operator, together with any other people authorised to engage in economic or professional activities, in the way in which these notions are declared in the law, on the date when the Civil Code was brought into force[13].

In the conditions of the competition right, because the competition rules apply only to the entitites with autonomy of decision that perform economic activities, as it has been shown, we will conclude that the private individual can be an active subject if they represent a private-individual professional who perfoms an economic activity.

In this context we can identify as "undertaking" in the sense of the competition rules: *the authorised private individual, the appointed person of the individual undertaking and the members of the familial undertaking*. The conclusion results from the provisions of the OUG nr. 44/2008, which stipulate that the private individuals can perform economic activities on the Romanian territory, in all domanins, professions, occupations or professions which the law does not forbid purposely for the free initiative, on the condition of registration and authorization, in the conditions of this normative act. The private individuals can take part in the economic activities as follows: i) individually and

[11] It will be analised *infra*, II. 4.

[12] St. Cărpenaru, *Tratat de drept comercial,* Ed. Universul Juridic, Bucureşti, 2009, p. 77-82.

[13] Art. 8 of Law no. 71/2011 (M. Of. nr. 409/10.06.2011).

independently, private authorised individuals; ii) as appointed entrepreneurs of an individual undertaking; iii) as members of a familial undertaking. In the conditions in which these people have as a declared purpose taking part in an economic activity, they represent undertakings in the sense of the competition right.

ii) *Other private individuals.* From those exposed in part i), it results that it represents an undertaking in the sense of the competition right the private individuals who perform economic activities, but who, at the same time, are subject to a legal regime of authorisation and registration. In the European Union jurisprudence, the sphere of the concept of "undertaking" has been extended beyond these limits, underlining that an inventor, private individual, constitutes an undertaking in the sense of the competition rules when, holding a patent license, commercialises his invention (Commision's decision from 2.12.1975 in Case 76/29/CEE AOIP vs. Beyrard).

Besides, an artist (opera singer) is assimilated to the undertaking, if he exploits commercially his performance (Comission's decision 516/78/516/CEE in Case Radioetelevisone Italian vs. Unitel Film und Fernesh Produktionsgessellchaft GmbH).

I appreciate that, in the hypothesis in which a private individual, even unauthorised and unregistered, could exert economic activities in an apt mannaer to restrict competition, he could be qualified as an undertaking being subject to the competition rules. Even if it is more likely that such situations may arise in connection with aspects that are related to the intellectual property, we cannot exclude them *de plano*, because, on the one hand, it would contravene the interpretation from the EU jurisprudence, and on the other hand, the conclusion is founded on the dispositions of the 2nd article from Law no 21/1996, which sends generally to "private individuals", without instituting the requirement of its authorization/registration.

iii) The members of the liberal professions. The directive 2005/36/CE of the European Parlament and of the Council from 7th September 2005 regarding the recognition of the professional qualifications defines the liberal profession as being any profession exercised on the basis of some corresponding professional qualifications, with personal title, on one's own liability and independent from the professional point of view, offering intellectual and conceptual services in the interest of the customer and public. In Romania, the liberal and conceptual professions enjoy special and distinct regulations, without the existence of a general definition and a regulation of them. The domamain is a vast one, comprising of one of the most varied professions/qualifications, such as: juridical (lawyers, notaries, bailiffs), economic (authorised accountants, chartered accountants, auditors, tax consultant, management consultants), medical (doctors, dentists, chemists, dental technician, nurses, midwives, psychologists, veterinarians) and technical (architects, technical experts, surveyors).

In the European law, the members of the liberal professions have been considered as representing undertakings in the sense of the competition law, because they perform an economic activity, offering services on the market for remuneration. The complex and technical nature of the services provided and the regulated character of the profession are not enough in orderer to exclude the qualification as undertakings[14]. In Wouters case, related to the profession of lawyer, the Court underlined that lawyers offer, for a remuneration, services of legal assistance, which consisted in the preparation of the notices, contracts and other documents, together with the representation and defence. In addition, they take financial risks afferent to the engagement in these activities, because, in case of an imbalance between income and expenses, the lawyer himself covers the deficit appeared. In these conditions, the lawyers engage in economic activity and consequently, establish undertakings, without having the complex and technical nature of the services that they provide and the fact they their profession is such regulated so that it can affect this conclusion. The conclusion has also been confirmed in the case of the liberal profession of architects[15].

[14] Case Wouters (J.C.J. Wouters, J. W. Savelbergh and PRICE Waterhouse), C- 309/99.
[15] Decision of 24.06.2004, JO L4, 06.01.2005, in the case of the liberal profession of architects from Belgium.

In the Romanian doctrine, the problem that the members of the liberal professions may be considered as undertskings in the sense of the competition right has not received unitary responses. Thus, it has been appreciated that it represents undertakings because they engage in an activity of an economic character, resulted from: the nature of the operations undertaken (offering the knowledge from different specialisations instead of some amounts of money), the nature of the goal (making profit), keeping minimal accountancy[16]. On the contrary, it has been considered that the lawyers, notaries, bailiffs, cannot represent an "undertaking", even if their activity is economic (providing services), because it is of civil and not commercial nature, conclusion presumed from the tax law, which in the case if these people, establishes the direct taxation and not the profit tax[17].

As far as i am concerned, I consider that the members of the liberal professions have to be considered as undertakings in the sense of the competition right, because all the conditions resulted from the European Union jurisprudence that qualify them as undertakings are fulfilled (it should not be forgotten that, in the legal definition of the notion of undertaking, the Romanian legislator refers purposely to the EU jurisprudence): they engage in economic activities, with an autonomous character of decision; the economic character of the activity done (in his special sense related to the competition) it results clearly from these circumstances that receiving a remuneration, an amount of money, is sought, for the specific pprovision offered on the market, and the economic activity the financial risk is taken.

In practice, the Romanian national authority, The Competition Council, has retained that the members of the liberal professions are considered undertakings as related to the competition right, retaining as principal argument the EU jurisprudence: "the complex and technical nature of the members of the liberal professions and the fact that their profession is regulated are not calculated to exclude their qualification as undertakings". Thus, the chartered accountant[18] or the dental technicians[19] have been assimilated to the notion of undertaking.

iv) The Wage Earners (employees). Many times, they perform, in fact, economic activities. Because the activity is performed by wage earners according to their employers' indications, without taking the financial risk of the business, we conclude that they cannot be qualified as an undertaking, because they lack the autonomous and decisional behaviour on the market[20].

v) The Intermediaries. There may be qualified as undertakings in the sense of the competitive rules only the *independent* intermediaries, because only they can freely determine their behaviour in the activities performed on the market, the typical example being represented by the agent in the case of signing an agency deal.

B. Legal Entities.

- *Commercial enterprises*; in the conditions in which they are started on the declared purpose of performing activities with lucrative goals[21], therefore they do an economic activity, oriented towards making profit, the commercial enterprises (irrespective of the juridical form in which it organises: enterprises with collective name, partnerships en commandite, enterprises with limited liability, joint stock companies) represent an undertaking in the sense of the competition rules.

- *The national companies, the national enterprises and the autonomous administrations* because they are subjects of autonomous right, which exert an economic activity, represent undertakings in the sense of the competition rules, because, as it has been shown, the way they finance is of no relevance, and the public undertakings are subject to the competition rules.

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[16] E. Mihai, *Competition Law*, Ed. All Beck, Bucureşti, 2004, p. 32.
[17] T. Prescure, *Curs de dreptul concurenţei comerciale*, Ed. Rosetti, Bucureşti, 2004, p. 183.
[18] Decision of The Competition Council, no. 47 of 02.11.2010, www.competition.ro.
[19] Decision of The Competition Council, no. 19 of 26.03.2018, www.competition.ro.
[20] Employees are not undertakings (Case Becu C-22/98 and Case Albany C-67/96).
[21] Art. 1 of Law no. 31/1990 (Republished in the Official Gazette no 1066/17.11.2004).

- *Economic interest groups and the European economics interest groups*[22], because they are constituded on the purpose of easing and developing the economic activities of their members and they pursue a patrimony goal, represent undertakings in the sense of the competition rules.

- *Corporations and the corporatist organisations* represent undertakings in the sense of the competition rules, because they do economic activities.

- *Credit institutions* have the quality of undertakings, because the economic character is the essence of their activities.

- *Non-profit organisations,* in principle*,* do not engage in economic activities, thus they cannot constitute undertakings. We take into consideration the patronal and *syndicate organisations*, together with the *associations, foundations and federations*. However, in the hypothesis in which the non-profit organisations perform economic activities, the European instances have qualified them as undertakings[23], conclusion to which we acquiesce. In addition, the conclusion is based on the Romanian law relating to the legal dispositions which regulate such organisations and allow them to perform certain economic activities.

Thus, the associations, foundations and federations[24] may start commercial enterprises and may perform economic activities, and the syndical and patronal organisations can set up commercial enterprises, insurance enterprises, together with their own bank[25]. In situations such as these, the economic character of the activity that is performed is obvious and it attracts the incidence of the competition rules. Behind the commercial enterprise there is the organisation at hand, which thus becomes apt for being qualified as subject of the competition right.

- *The authorities and the institutions of the public central and local administration* can be subjects in the rapports of the competition right in two situations: a) in the hypothesis in which, by means of the emitted decisions or by means of the adopted regulations, they intervene in the market operations, influencing directly or indirectly the competition[26]; in such a situation, they cannot be qualified as undertakings, because they act in exerting their prerogatives of public power, but represent the second big category of active subjects of the anti-competitive practices; b) in the situations in which they interneve directly in operations of market, as any undertaking, without exerting prerogatives of public power; in such a case, they can be qualified as undertakings. Such a hyphothesis exists in the case in which such authorities engage in an economic activity, as if the activity had been done by a private undertaking (e.g. building a football field, an ice rink etc., the access being allowd in return of a price).

- *Subsidiaries*. Because the subsidiary has a distinct juridical personality as compared with that of the parental company and it is a commercial enterprise which perfoms economic activities, they represent an undertaking in the sense of the competition rules.

The situation is not as simple as in the case in which the behavioral authonomy of the subsidiary on the market is affected. The problem may appear in the case of some existing anticompetitive agreements in the same group of enterprises, respectively between the mother enterprise and its filial/filiale, respectively if "the relationships between them are so close that it would be realistic to be regarded as a single undertaking"[27]. The European instances treated the problem from the perspective of the concept "a single economic unity". The Court has stated that the notion of undertaking, placed in the context of the competition, has to be understood in the sense that it designated an economic unity, even if from a juridical point of view this economic unity is

[22] Law no. 161/2003 (M. Of. no. 279/21.04.2003).
[23] Cases C-209/1978 – C-216/1978 and C-218/1978 Heintz Van Landewyck SARL ş.a vs. Comisia.
[24] According art. 47-48 of OG no. 26/2000 (M. Of. no 39/31.01.2000).
[25] Art. 25 and 62 of Law no. 62/2011 (M. Of. no. 322/10.05.2011).
[26] Art. 2 and 9 of Law no. 21/1996.
[27] Wish, Richard, *Competition Law*, ed. 4, Ed. Butterworths, London, 2001, p. 72.

constituted from more private individuals or legal entities[28]. The different undertakings which belong to the same group constitute an economic entity and thus a single undertaking, unless the enterprises at hand establish autonomously their behaviour on the market[29]. The behaviour of a subsidiary can be imputed to the mother- enterprise especially when, although it has distinct juridical personality, this subsidiary does not decide autonomously the behaviour on the market, but applies, basically, the instructions that it is given by the mother-enterprise, taking into consideration, especially, the organisational, economic and juridical boundaries that unite the two entities[30]. In the particular case in which a mother-enterprise possesses 100 % of the capital of its subsidiary, there is a relative presumption according to which the respective mother-enterprise exerts effectively a decisive influence over the behaviour of its subsidiary[31].

Thus, it results that, according to the "a single economic unity" theory, in order to qualify the subsidiary as undertaking, we have to relate to the degree of economic-financial and decisional autonomy of the subsidiary compared to its founder: it will represent an undertaking if the subsidiary could exert an autonomous, independent behaviour on the market; on the contrary, in the case in which the subsidiary has an absolute economic dependence on the mother, its existence within the group of enterises representing a mere internal organisation of the tasks, it is obvious that it cannot be characterised as an undertaking to which the competition rules address, because it does not have decisional autonomy.

In the hypothesis in which the mother-entersprise does not have the totality of the allotments of the subsidiary, then it has to be demonstrated that the first is able to influence tha attitude of the second one. I consider that an affirmative response results from the collaboration of more factors such as: the mother-enterprise controls the leading of the subsidiary the profit is taken by the mother-enterprise, the subsidiary acts accoding to the instructions of the first.

The "one single economic entity" theory has an important juridical consequence, in the aspect of the liability: in the absence of the decisional autonomy of the subsidiary the liability of the breaking of the competition rules will entail the mother-enterprise[32].

C. The Entities without juridical personality.

The French doctrine recognises the qualification as undertaking to which the competition rules[33] address of the entities without juridical personality, if they meet the essential requirement of the economic activity by means of offering goods and services on a market.

On a national scale, the doctrinal opinions are divergent as regards the branch. In an opinion, it has been appreciated that such entities are undertakingss, to the extent to which it would be ascertained that, de facto, they have benefitted from sufficient economic and functional autonomy in order to adopt an anticompetitive behaviour of their own[34]. On the contrary, in different opinions it has been appreciated that the sucursale cannot be qualified as undertakings in the competition law, because "they do not have a will distinct from that of the primary undertaking that created them,

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[28] Decision of 14.12.2006, Confederación Española de Empresarios de Estaciones de Servicio, C-217/05; Decision of Case Akzo Nobel vs. Comisia, C-97/08; Decision of 1.07.2010, in Case Knauf Gips vs.Comisia, C-407/08.

[29] Decision of 30.09.2003, Michelin/Comisia, T-203/01.

[30] Decision in Case Imperial Chemical Industries/Comisia C-48/69; decision Geigy/Comisia; decision of. 21.02.1973, Europemballage and Continental Can/Comisia, 6/72; Case Centrafarm C-15/74; Case Bodson v. Pompes Funebres C-30/87; Case Armando Alvarez SA vs. Comisia, T-78/06, decision of 16.11.2011.

[31] Decision of Case AEG-Telefunken/Comisia; Case Armando Alvarez SA vs. Comisia, T-78/06, decision of 16.11.2011.

[32] Case Akzo Nobel, C-97/08; Case Armando Alvarez SA vs. Comisia, T-78/06, decision of 16.11.2011.

[33] Riplet, G.; Roblot, R., Vogel , L., *Traite de droit commercial*, Ed. 18, L.G.D.J; Paris, 2001, vol. I, p. 690; Gavalda, Christian; Parleani, Gilbert, *Droit des affaires de l'Union Européenne*, ed. 4, Litec, Paris, 2002, p. 285; Boutard-Labarde M. – Ch., Canivet G., *Droit francais de la concurrence*, LGDJ, Paris, 1994, p. 230; Vogel, Louis, *Droit europeen de la concurrence*, LawLex, Paris, 2006, p. 129.

[34] E. Mihai, *op.cit.*, p. 35.

being mere doers of the mandatory directives for the subordinated unity from the system"[35] or because "it cannot have its own liability nor a competitive position distinct from that of the enterprise to which it belongs".[36]

As far as I am concerned, i appreciate that the analysis has to be conducted distinguishing between the two hypotheses in which the branch can act: a) the branch acts as an entity *within* the group of enterprises, and the activity of the group is susceptible to enter the sphere of the competitive illicit. In such a hypothesis, the double subordination, economic and juridical, of the subsidiary to the parent enterprise in the Romanian law demonstrates the lack of decisional autonomy of the subsidiary in the economic activity that is performed, conditions in which we cannot classify it as representing, distinctly, an undertaking to which the competition rules address. In the same sense another argument *a fortiori* pleads, detached from the "one single economic entity" theory, exposed previously: if a subsidiary –legal entity apt to exercise, by its own, dinstincly, economic activities autonomously – it will not be qualified as undertaking in the condition in which it does not have autonomy from the parent enterprise, all the more reason why this conclusion is imposed in the case of the subsidiary, totally dependent, economically and juridically, on the enterprise that created it; b) the subsidiary acts *without* the group of undertakings, analysis to which the circumstance obliges me, although in isolation, however the Commission has established as addressee of its decision a subsidiary (the Commission's decision from 9th June 1972, in Raymond-Nagoya Cause, 72/238/CEE; in this case, the subsidiary had signed a licence contract).

In the Romanian law, from this perspective, the subsidiary cannot be qualified as representing an undertaking, because it does not have juridical personality, thus it does not have capacity for use, and, consequently, it cannot issue juridical documents in behalf of its own.

De lege lata, I consider that, in the Romanian law of competition, the entities without juridical personality cannot be qualified as undertakings, because, as i have shown, the Law no. 21/1996 regulates the undertaking as subject of right, and not as an organised activity, considering as undertakings only the private individuals or the legal entities.

III. Relevant market.

III. 1. Notion. **The importance of defining the relevant market.**

"The market" is a term with pronounced economic resonances; synthetic, the market is the place where supply meets demand. In the context of competition law, *"the market"* means *"relevant market"*.

In competition law, concept of the market has a specific meaning, justified by the premise of competition: rivalry of undertakings can exist only in a given market. The existence of any distortion of competition can not be analyzed abstract or at a global level, but by reference to a determined market, because in the game of competition, rivalry implies undertakings with similar activities (the competition between a bookseller and a seller of cosmetics is not possible, because products are offered to different customers). As such, in the context of competition law, "the market" has a specific significance: it means "relevant market". Equally, the specialized literature uses the terms as"marche concernee", marche en cause", or "relevant market"[37].

The determination/the defining of relevant market is very important in analysis of anticompetitive practices.

Sanctioning the anticompetitive agreements refers to those agreements, decisions and concerted practices which have as their object or effect the prevention, restriction or distortion of the competition. Assessing these anticompetitive effects usually involves defining the relevant market

[35] Căpățînă, Octavian, *Dreptul concurentei comerciale. Concurența patologică. Monopolismul, op.cit.,*p. 60.

[36] T. Prescure, *op.cit.,*p. 183.

[37] Jones, Alison; Sufrin, Brenda, *EC Competition Law, Text, Cases & Materials*, Oxford University Press, 2008, p.350; Gavalda, Christian; Parleani, Gilbert, *Droit des affaires de l'Union Européenne*, Litec, Paris, 2002, p. 289

and proving the fact that the agreement would have a negative effect on competition. Agreements which have as their object the prevention, restriction or distortion of competition, are not subject of this rule. In their case, defining the relevant market is not a precondition for finding the infringement of competition rules. Defining the relevant market will be required later to determine the turnover of the undertaking concerned, in order to implement the fine prescribed by law.

Sanctioning an abuse of dominant position occurs only in the case of dominant undertakings. An undertaking can be considered as dominant if it has a significant market power, if its market position enables it to behave independently of its competitors, of its customers and ultimately of its consumers. To determine the market power of the undertaking and whether or not it has a dominant position, firstly, the relevant market in which it holds a dominant position must be defined.

Also, defining the relevant market provides for the competition authority the information necessary that allows to close an investigation at an early stage. In this way, there can be identified those agreements which don't have a significant impact on competition or those situations in which the undertakings will not have substantial market power. Defining the relevant market is also important to determine whether the market share of an undertaking is lower or higher than the thresholds set for certain block exemptions.

Defining of relevant market is important, because undertakings claim the existence of a larger market and thus to reduce their market share.

In 1997, stressing that such aims to ensure greater transparency to understand how to interpret and apply the rules of competition, the European Commission published *Commission Notice on the definition of relevant market*[38]. Commission stresses that the relevant market is determined by analysis of two aspects: the product market and geographic market. In our national law, The Competition Council issued *Instructions on the relevant market definition*[39], which have similar prescriptions.

The relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use. *The relevant geographic market* comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those area.

III.2. The criteria for defining the relevant market.

a. The relevant product market.

The relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use

The keyword is *substitutability*: to be included in the same relevant market, products must be sufficiently similar to constitute a real choice for consumers.

Substitutability of products must be determined from a double perspective: demand substitution and supply substitution.

Demand substitution.

The assessment of demand substitution entails a determination of the range of products which are viewed as substitutes by the consumer. From this point of view, the relevant market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use. Products must be sufficiently similar to constitute a real choice for consumers.

[38] J.O. no. C 372 /1997, http://eur-lex.europa.eu/.
[39] M.Of. no. 553/05.08.2010.

Products considered interchangeable between them not must be identical; it is sufficient to constitute a real alternative, satisfying consumer needs and desires. The degree of substitutability between products should be a reasonable. In the case Continental Can[40], the Court stated that it is sufficient a reasonable substitutability, without difficulty, from products to achieve the same purpose. To assess the degree of substitutability between products may be considered as criteria: characteristics, price and use of products.

- ”characteristics”: Similarity of products’ characteristics (such as physical nature, form, structure / composition, technical properties), usually, justifies the presumption that mutual substitution is possible and that so the products are substitutes (e.g. wooden furniture and plywood).

- ”price”: The price is very important in the analysis of products’ substitutability. Commission adopted SSNIP test - "Small But Significant Increase in prices and no transitory"-, also known as the "hypothetical monopolist test”. Conceptually, this approach means that, starting from the type of products that the undertakings involved sell and the area in which they sell them, additional products and areas will be included in, or excluded from, the market definition depending on whether competition from these other products and areas affect or restrain sufficiently the pricing of the parties' products in the short term. The question to be answered is whether the parties' customers would switch to readily available substitutes or to suppliers located elsewhere in response to a hypothetical small (in the range 5 % to 10 %) but permanent relative price increase in the products and areas being considered. If substitution were enough to make the price increase unprofitable because of the resulting loss of sales, additional substitutes and areas are included in the relevant market. This would be done until the set of products and geographical areas is such that small, permanent increases in relative prices would be profitable.

-”use”: If products can be used for the same purpose, they are interchangeable.The Court decided that glass packaging and metal packaging are interchangeable[41].

In case law, were considered non-substitutable, for example, bananas[42] with other fresh fruit, fixed and mobile telephony[43].

Supply substitution.

Supply-side substitutability may also be taken into account when defining markets in those situations in which its effects are equivalent to those of demand substitution in terms of effectiveness and immediacy. This means that suppliers are able to switch production to the relevant products and market them in the short term without incurring significant additional costs or risks in response to small and permanent changes in relative prices. When these conditions are met, the additional production that is put on the market will have a disciplinary effect on the competitive behaviour of the companies involved. Such an impact in terms of effectiveness and immediacy is equivalent to the demand substitution effect.

These situations typically arise when companies market a wide range of qualities or grades of one product; even if, for a given final customer or group of consumers, the different qualities are not substitutable, the different qualities will be grouped into one product market, provided that most of the suppliers are able to offer and sell the various qualities immediately and without the significant increases in costs. In such cases, the relevant product market will encompass all products that are substitutable in demand and supply, and the current sales of those products will be aggregated so as to give the total value or volume of the market. The same reasoning may lead to group different geographic areas.

[40] Case C- 6/72.
[41] Case United Brands, C- 27/76.
[42] Case United Brands, C- 27/76.
[43] The Competition Council, decision no. 27/11.03.1999

b. The relevant geographic market.

The keyword for defining the relevant geographic market is *homogeneity*.

According to *Commission Notice on the definition of relevant market* and *Instructions on the relevant market definition* of The Roumanian Competition Council, *t*he relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those area.

The approach in geographic market definition might be summarized as follows: it will take a preliminary view of the scope of the geographic market on the basis of broad indications as to the distribution of market shares between the parties and their competitors, as well as a preliminary analysis of pricing and price differences at national and Community or EEA level. This initial view is used basically as a working hypothesis to focus the Commission's enquiries for the purposes of arriving at a precise geographic market definition.

The reasons behind any particular configuration of prices and market shares need to be explored. Companies might enjoy high market shares in their domestic markets just because of the weight of the past, and conversely, a homogeneous presence of companies throughout the EEA might be consistent with national or regional geographic markets. The initial working hypothesis will therefore be checked against an analysis of demand characteristics (importance of national or local preferences, current patterns of purchases of customers, product differentiation/brands, other) in order to establish whether companies in different areas do indeed constitute a real alternative source of supply for consumers. The theoretical experiment is again based on substitution arising from changes in relative prices, and the question to answer is again whether the customers of the parties would switch their orders to companies located elsewhere in the short term and at a negligible cost.

If necessary, a further check on supply factors will be carried out to ensure that those companies located in differing areas do not face impediments in developing their sales on competitive terms throughout the whole geographic market. This analysis will include an examination of requirements for a local presence in order to sell in that area the conditions of access to distribution channels, costs associated with setting up a distribution network, and the presence or absence of regulatory barriers arising from public procurement, price regulations, quotas and tariffs limiting trade or production, technical standards, monopolies, freedom of establishment, requirements for administrative authorizations, packaging regulations, etc. In short, the Commission will identify possible obstacles and barriers isolating companies located in a given area from the competitive pressure of companies located outside that area, so as to determine the precise degree of market interpenetration at national, European or global level.

The actual pattern and evolution of trade flows offers useful supplementary indications as to the economic importance of each demand or supply factor mentioned above, and the extent to which they may or may not constitute actual barriers creating different geographic markets. The analysis of trade flows will generally address the question of transport costs and the extent to which these may hinder trade between different areas, having regard to plant location, costs of production and relative price levels.

c. Other criteria.

- *Potential competition*. Undertakings are subject to three main sources or competitive constraints: demand substitutability, supply substitutability and potential competition. From an economic point of view, for the definition of the relevant market, demand substitution constitutes the most immediate and effective disciplinary force on the suppliers of a given product, in particular in relation to their pricing decisions. A firm or a group of firms cannot have a significant impact on the prevailing conditions of sale, such as prices, if its customers are in a position to switch easily to available substitute products or to suppliers located elsewhere. Basically, the exercise of market

definition consists in identifying the effective alternative sources of supply for the customers of the undertakings involved, in terms both of products/services and of geographic location of suppliers.

The third source of competitive constraint, potential competition, is not taken into account when defining markets, since the conditions under which potential competition will actually represent an effective competitive constraint depend on the analysis of specific factors and circumstances related to the conditions of entry. If required, this analysis is only carried out at a subsequent stage, in general once the position of the companies involved in the relevant market has already been ascertained, and when such position gives rise to concerns from a competition point of view[44].

- *Temporal aspect.* In specialised literature, temporal aspect is considered by some authors as criterion to defining the relevant market. Thus, it is stressed that: " a market can evolve a cyclic manner, according to time periods"[45], or " the markets have a temporal element, meaning that a firm may have market power at a certain time of year, when competition from other products is reduced, as these products are only available seasonally"[46].

In my opinion, temporal aspect is related to product/services and, consequently, it leads to defining the relevant market of product (for example, the fact that certain fruits or vegetables are available only in certain periods of the year), thus it is not a criterion what must be considered separately to determine the relevant market.

Conclusions.

"The undertaking" and "the relevant market" are the key concepts in the analysis of anticompetitive practices.

The active subject of anticompetitive practices is "the undertaking". This concept has a particular significance in the competition law, different from the common law. In the context of the competition law, the term "undertaking" covers any entity that performs an economic activity, regardless of the juridical status and the way in which it is financed. Different from the common law, In Roumanian Competition Law, undertaking is a legal entity/ subject of right and not an organised activity.

"The market" is a term with pronounced economic resonances; synthetically, the market is the place where supply meets demand. In the context of the competition law, "the market" means "relevant market". The relevant market is the market of product/service in terms of demand and supply, and then superimposed on the geographic market. A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use. The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those area. The relevant market within which to assess a given competition issue is therefore established by the combination of the product and geographic market.

Future research would involve: identifying difficulties in establishing the autonomous behaviour on the market, the cases in which the behavioral authonomy of the subsidiary on the market is affected; identifying the relevant market in special cases (captive markets and market infrastructure).

[44] *Commission Notice on the definition of relevant market* and *Instructions on the relevant market definition of The Roumanian Competition Council*, *cit. supra.*

[45] Fuerea, Augustin, *Business Community Law*, Universul Juridic, Bucharest, 2006, p. 272.

[46] Craig, Paul; Grainne de Burca, *EU Law*, Oxford University Press, 2003, p. 1261.

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SOME CONSIDERATIONS REGARDING THE JURIDICAL REGIME OF THE ACCESSION

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Abstract:
The juridical institution of the accession derives its origin from the norms of the Roman private law that consecrated the criteria according to which a property is defined as being principal or accessory. In agreement with these criteria - of a patrician origin - a property was considered to be principal when it did not lose its individuality after the accessory was incorporated to it. This rule was taken over by the Romanian legislator since 1864. But, once the new Civil Code was adopted in 2011 a redefinition of the criteria concerning the two properties was specified: the most valuable property will be considered as principal; this redefinition will become the law for the mentality of a whole social category.

Keywords: Roman private law, accession (*lat. accessio*), Ancient Civil Code, New Civil Code, criteria of classifying the principal property and the accessory.

Introduction:

The main concern of this essay is about the juridical institution of accession (*accessio)* from the moment it was consecrated in the Roman juridical texts up to the moment when the Romanian law-maker adopted a New Civil Code. This juridical institution supposes the absorption of the accession by the principal property or, from this point of view the Romanian New Civil Code brings forth certain new elements concerning the accession, establishing new ways of defining the principal and the accessory property. This new element is very important, as the owner of the principal property will get - by virtue of accession - the ownership over the accessory asset. A deeper analysis of the provisions of the New Civil Code points to a certain alienation from the ancient Romanian juridical tradition - that was taken over by the provisions of the Civil Code adopted in 1864 - although the juridical form of its specificity was maintained in the chapter about the accession. Consequently, the factors determining a certain juridical regulation were changed.

The research envisaged by this essay raises a series of fundamental questions: which were the reasons that imposed the change of the factors determining the content of a juridical norm or, whom does this modification serve to? At the same time, our approach to the problem will prove its utility by underlining the aim of the new legislative policy in the domain of accession.

The analysis of the objectives in view is divided into four sections. The first section of the essay will deal with the Roman private law which had established the accession in agreement with the old Roman conception about ownership. The second section will devote to the analysis of certain norms from Andronache Donici's Juridical Manual, „Amendments to the Law" and from Calimah's Code, as to notice the modifications appeared, in the feudal age, in this domain. The third section will analyze the way in which the accession and the specification were defined in certain codes adopted in

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the modern and contemporary periods. The fourth section deals with the present juridical regulations, that is, with the Romanian New Civil Code. On this occasion, one can notice that the norms of the present regulations go toward another end meant to reflect the mentality of the important owners of capital.

The adoption and enforcement of the New Civil Code, on October 1, 2011, is an important event as the new juridical regulation includes both the latest legislative innovations in the domain of the civil law as well as the results of the theories formulated by the specialized juridical literature. Yet, the researchers of the juridical phenomenon did not insist on the factors that determined the appearance and evolution of the juridical profile of the accession.

I. The accession in the Roman private law

The millenary evolution of the Roman private law is due to several elements. One of them is the ownership together with all the aspects it involves. The Roman jurisconsults sanctioned, to the lesser details, the juridical institution of ownership and, implicitly, the ways of acquiring it, as they understood the fundamental importance of how to protect ownership. It appeared to be a really necessary measure as the numerically larger the population and the more intricate and complex social relationship, the more the Romans were forced to conclude juridical agreements with the inhabitants of the cities, inclusively; that was the moment which generated the possible appearance of a new chapter in the Roman private law: the law of nations[1] to which the juridical institution of accession is owed.

In the everyday language, accession was given the sense of adjunction or mixture[2]. Nevertheless, the Roman jurisconsults envisaged this modality for obtaining the ownership. In their view, the accession meant the incorporation of the accessory thing into the principal thing, with no possibility for the latter to lose its own identity. In other words, the accessorial thing had to have the same fate as the principal thing in agreement with the rule of *accesorium sequitur principale*[3]. This modality was sanctioned by the Roman juridical texts for those situations in which the accession meant the unification of two immovables, of a movable with an immovable or of two movables. If speaking about the first situation, one can easily notice that the alluvion[4] and the strip of land torn off by the waters[5] can be considered accessory thing as reported to the riparian territory of the owner, which is considered to be the principal thing. In the case of the unification of a movable with an immovable the *superficies solo cedit* rule is applied, in the virtue of which the owner of the ground

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[1] Aurel N. Popescu, trans., *Gai Institutiones* (Bucureşti: Editura Academiei RSR, 1980), 141-142; Vladimir Hanga, trans., *Iustiniani Institutiones* (Bucureşti: Editura Lumina Lex, 2002), 64-74.

[2] Ioan Nădejde şi Amelia Nădejde Gesticone, *Dicţionar latin-român complect pentru licee, seminarii şi universităţi* (Iaşi: Editura „Viaţa Romînească", 1927), 6; C. Accarias, *Précis de droit romain*, tome premier (Paris: Librairie Cotillion, 1891), 634; Constantin St. Tomulescu, *Drept privat roman* (Bucureşti: Tipografia Universităţii, 1973), 185.

[3] I. C. Cătuneanu, *Curs elementar de drept roman* (Cluj-Bucureşti: Editura „Cartea Românească", 1927), 246; D 6. 1. 23. 4-6; D 41. 1. 26. 1.

[4] „But, in agreement with the same law, it can also be ours whatever is added by alluvia; alluvion is another natural mode of acquisition. Alluvion is an addition of soil to land by a river, so gradual that at a particular moment the amount of accretion cannot be determined; or, to use the common expression, an addition made by alluvion is so gradual as to elude our sight." - *Gai Institutiones* II. 70.

„Moreover, soil which a river has added to your land by alluvion becomes yours by the law of nations. Alluvion is an imperceptible addition; and that which is added so gradually that you cannot perceive the exact increase from one moment of time to another is added by alluvion." - *Iustiniani Institutiones* 2. 1. 20.

[5] „Accordingly a parcel of your land swept away by a river, and carried down to mine, continues your property." - *Gai Institutiones* II. 71.

„If, however, the violence of the stream sweeps away a parcel of your land and carries it down to the land of your neighbour it clearly remains yours; though of course if in the process of time it becomes firmly attached to your neighbour's land, they are deemed from that time to have become part and parcel thereof." - *Iustiniani Institutiones* 2. 1. 21.

will get the estate for the building, irrespective of the fact that the building was erected with foreign materials[6] or by another person[7]. In case of the unification of two movables, the accessory thing will be incorporated to the principal thing so as to become its integrant part[8] even if the latter is less precious[9]. Later, together with the assertion of the school of Proculus, the Romans admitted that the picture painted on another's canvas can be considered as principal, because the painting made by a notable painter cannot be incorporated as an accessory to a less valuable painting[10] although, with no canvas the painting could not exist. This instant will become crucial in the evolution of the private law, as it is the first step in achieving a profound turn in the physiognomy of the juridical institution of accession.

II. Accession in the ancient Romanian Law

This juridical institution is often to be traced back to the origins of the ancient Romanian law. Among these, only the „Amendments to the Law", Andronache Donici's Juridical Manual and Calimach's Code are to be mentioned.

With the exception of the first regulation, the others define both the accession relatively to immovables and movables. To adopt the Juridical Manual of Andronache Donici and the Code of Calimach is considered to be an important step in the history of the Romanian law because, according to the French law, the chapter concerning accession will include dispositions specific to other juridical situations, as specification and mixture.

The „Amendments to the Law" regulates only that clause which refers to the unification of a movable with an immovable, borrowing from the Roman law the *superficies solo cedit* rule, because „any one who builds a house on an another's land on his own account, in as far as the wood and expenses are concerned, that person shall know that he is the one to administer the land and the house, as written in the law which says that the upper ones will be victorious over the lower ones"[11]. The same law will be taken over by the provisions of the Juridical Manual of Andronache Donici[12]

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[6] „If a man builds upon his own ground with another's materials, the building is deemed to be his property, for buildings become a part of the ground on which they stand." - *Iustianiani Institutiones* 2. 1. 29.

[7] „Again, a building erected on my soil, though the builder has made it on his own account, belongs to me by natural law; for the ownership of a superstructure follows the ownership of the soil." - *Gai Institutiones* II. 73.

„On the other hand, if one man builds a house on another's land with his own materials, the house belongs to the owner of the land." - *Iustiniani Institutiones* 2. 1. 30.

[8] Paul Frederic Girard, *Manuel élémentaire de droit romain* (Paris: Librairie Arthur Rousseau, 1924), 342.

[9] „On the same principle, the writing inscribed on my paper or parchment, even in letters of gold, becomes mine, for the property in the letters is accessory to the paper or parchment." - *Gai Institutiones* II. 77.

„Writing again, even though it be in letters of gold, becomes a part of the paper or parchment, exactly as buildings and sown crops become part of the soil, and consequently if Titius writes a poem, or a history, or a speech on your paper and parchment, the whole will be held to belong to you, and not to Titius." - *Iustiniani Institutiones* 2. 1.33.

„The canvas belonging to me, on which another man has painted, e. g. a portrait, is subject to a different rule, for the ownership of the canvas is held to be accessory to the painting: **a difference which scarcely rests on a sufficient reason.**" - *Gai Institutiones* II. 78.

„**Moreover, anything which is written on my paper or painted on my board, immediately becomes mine; although certain authorities have thought differently on account of the value of the painting; but where one thing can not exist without the other, it must necessarily be given with it.**" - *Iustiniani Digesta* 6. 1. 23. 3**.**

[10] „Where, on the other hand, one man paints a picture on another's board, some think that the board belongs, by accession, to the painter, others, that the painting, however great its excellence, becomes part of the board. The former appears to us the better opinion, for it is absurd that a painting by Apelles or Parrhasius should be an accessory of a board which, in itself, is thoroughly worthless" - *Iustiniani Institutiones* 2. 1. 34.

[11] Andrei Rădulescu et al., *Îndreptarea legii* (Bucureşti: Editura Academiei, 1962), 290.

[12] See the provisions of paragraph 2 title XXVI according to which „if someone will build a house on another's land, or build in the underground without any previous convention with the owner of the land, or will build something over another's building, then the owner of the land will become the owner of the built things."

and that of the Calimach's Code[13] in which there is establish the law according to which the owner of the land shall also become the owner of the building. The same ancient Roman rules will be applied in the case of the unification of two immovables[14].

The accession whose object deals with two movables is regulated in a very strange manner by the Code of Calimach, which will later be included in the content of the Romanian Civil Code that entered into force in 2011. According to this pattern, if any one has been working with another's materials and will mix his own materials with the other one's, he will not acquire the ownership over those things because, then when those things would be brought back to their initial status, each owner will regain his own thing or, the owners of those things will share them as co-owners, on the condition that the one whose things have been joined be retained or left to the other person. By an attentive analysis of these dispositions, one can easily notice that unlike the norms of the Roman private law which established different juridical situations[15], the same regime is supposed to be applied to more juridical institutions. This error is due to the fact that the Roman juridical texts considered them to be natural modalities for acquiring the ownership[16], while the members of the commission that drafted the dispositions of the Calimach Code erroneously considered that accession, mixture and specification will be submitted to the same juridical regime. These are the reasons why the fourth chapter of the Section concerning the real rights of the Calimach Code was entitled „Obtaining the ownership over properties through increase or addition" and title XXVI th of the "Juridical Manual" of Andronache Donici was entitled "On whatever is acquired beyond a natural equitableness."

Another novelty brought by this regulation is that of specification, in the chapter about accession. At a closer analysis one can notice that these dispositions are originated in the Institutions of Justinian which adopt an extra solution to the one suggested by Gaius - a jurisconsult devoted to

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[13] In agreement with art 562 of the Calimach Code „if someone will willingly build with another's materials on his own land, then the building will remain his as mentioned in the rule: the building is submitted to the land it has been built on." In agreement with art 563 of the Calimach Code: „on the contrary, if someone with his own materials built something on another's land, then that building will be due to the proprietor of the land, in conformity with the following law: the buildings are subject to the place they have been built on."

[14] Pragraph 1 of title XXVI-th of the Andronache Donici's "Juridical Manual"; art. 551 and 552 of the Calimach Code - Constantin Hamangiu, *Codul general al României. Volumul I. Codurile* (București: Editura Librăriei Leon Alcalay), 1907.

[15] Valerius M. Ciucă, *Lecții de drept roman*, volumul I (Iași: Editura Polirom, 1999), 270.

[16] „The natural reason is also resorted to in other cases. On a change of species, also, we have recourse to natural law to determine the proprietor. Thus, if grapes, or olives, or sheaves of corn, belonging to me, are converted by another into wine, or oil, or (threshed out) corn, a question arises whether the property in the corn, wine, or oil, is in me, or in the author of the conversion; so too if my gold or silver is manufactured into a vessel, or a ship, chest, or chair is constructed from my timber, or my wool is made into clothing, or my wine and honey are made into mead, or my drugs into a plaster or eye-salve, it becomes a question whether the ownership of the new product is vested in me or in the manufacturer. According to some, the material or substance is the criterion; that is to say, the owner of the material is to be deemed the owner of the product; and this was the doctrine which commended itself to Sabinus and Cassius; according to others the ownership of the product is in the manufacturer, and this was the doctrine favoured by the opposite school." - *Gai Institutiones* II. 79.

„When a man makes a new object out of materials belonging to another, the question usually arises, to which of them, by natural reason, does this new object belong – to the man who made it, or to the owner of the materials? For instance, one man may make wine, or oil, or corn, out of another man's grapes, olives, or sheaves; or a vessel out of his gold, silver, or bronze; or mead of his wine and honey; or a plaster or eyesalve out of his drugs; or cloth out of his wool; or a ship, a chest, or a chair out of his timber. After many controversies between the Sabinians and Proculians, the law has now been settled as follows, in accordance with the view of those who followed a middle course between the opinions of the two schools. If the new object can be reduced to the materials out of which it was made, it belongs to the owner of the materials; if not, it belongs to the person who made it. For instance, a vessel can be melted down, and so reduced to the rude material – bronze, silver, or gold – of which it is made: but it is impossible to reconvert wine into grapes, oil into olives, or corn into sheaves, or even mead into the wine and honey out of which it was compounded." - *Iustiniani Institutiones* 2. 1. 25.).

the old patrician traditions - who promoted the idea that the newly obtained things belongs to the owner of the material. Since the social conflicts appear at the level of the juridical regulations, inclusively, the Justinian theory was taken over by the ancient Romanian law referring to specification[17], although the solution adopted by the members of the commission drafting the Calimach Code established the fact that the artisan will acquire the ownership over the material used in order to obtain a certain property[18].

III.Accession in the Ancient Romanian Civil Code

The three hypotheses of accession are also met with in the provisions of the ancient Romanian Civil Code. If, in the case of the natural accession to immovables, the ancient Roman conception was taken over completely, the substance of the artificial accession to immovables includes, for the first time, provisions regarding the possibility of the landowner to oblige the person who had built on his land to pull the building down[19]; this fact enables the builder to recuperate the ownership of the building materials, because, as long as the union exists, the right over the accessory thing is frozen. This situation is far from being accidental, as the law-maker adopts similar rules with regard to the accession to movable property as well, rules that allow the owner of these things to require the separation and the restitution, in case they are more valuable than the principal property[20]. Under these conditions, a serious violation from the finality in view was noticed, although the Romanian law-maker of 1864 established the criteria meant to make a distinction between the principal thing and the accessory one, according to the French model. Therefore, in conformity with art 567 and 569 of the French Civil Code of 1804 - whose content has been taken over by the Romanian law-maker[21] - it is considered to be principal that thing for whose usage, ornament or completion the unification with the other thing whose value is higher was necessary[22]. Nobody denies the usefulness of these regulations, but can we still speak about accession in case its thing is more valuable than the principal one, and consequently, its owner can claim it?

Analyzing the way the laws were adopted at the beginning of the XIX th century, the ancient Civil Code of 1864 erroneously[23] considered specification close to accession; in this way the concept referring to value plays an important role as, contrary to the Roman juridical texts, the artisan will acquire the ownership over a newly created thing then when the manual labour would greatly exceed the value of the used materials, even if that thing can or cannot resume its initial state[24]. So, beginning with this period we are the witnesses of a new wave of thinking in the domain of the ownership, thinking that will extend greatly in 2011, the year of the implementation of the New Romanian Civil Code.

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[17] According to paragraph 5 of title XXVI of the Juridical Manual of Andronache Donici „when another's materials enter the composition of a thing[...] which cannot be separated without spoiling the material, then after paying for the materials, they remain to the owner of the land; yet, if the materials can be restored to their initial state, then the effort vanishes [...]".

[18] Art. 561.

[19] According to the provisions of art 494 paragraph. 1 of the Ancient Romanian Civil Code, if the buildings and the works have been made by a third person with his own materials, the landowner has the right to keep them or to oblige that person to take them away."

[20] Art. 506 of the Ancient Romanian Civil Code.

[21] Art. 505, 507.

[22] According to the provisions stipulated by art 507 of the Ancient Romanian Civil Code, if out of the two things united as to form one single thing none of them can be considered an accessory to the other one, it is considered as principal the one having a higher value. In case the value of the things is almost equal, the one whose volume is bigger will be considered the principal.

[23] Contrary to the French and Roman law-makers the Italian law-maker of 1942 mentions the specification alongside with other different modalities of acquiring the ownership.

[24] Art.508, 509 of the Ancient Romanian Civil Code; art 940 of the Italian Civil Code of 1942.

IV. Accession in the New Romanian Civil Code

The entering into force of the New Romanian Civil Code of 2011 stands for the materialization of the practices introduced by the Romanian law-maker in 1864. It is a certain fact that the effects of this policy will be also noticed in the domains of accession to immovable, adjunction and specification as mentioned by the provisions of the section devoted to the accession to movable.[25]

The new provisions concerning the artificial accession to immovable are definitely diverting from the ancient Roman regulations, as - by the provisions of art 581 and 584 of the Civil Code - they offer the possibility to the author of the work - irrespective of his good or bad faith - to buy the construction - at the request of the owner - at the price it could have if the construction had not been built. This situation is mentioned in a around about way by the provisions of art 584 paragraph 3 of the New Civil Code[26] that establishes the juridical regime of the useful adjunct work. It goes without saying that similar provisions will be applied in the case of autonomous works regulated by the provisions of art 581[27] and 582[28] of the New Civil Code; both laws stipulate similar provisions. This time, as usual, the economic reasons are considered more important that the final aim the juridical institution of accession had in view.

Moreover, it is not clear why the bad-faith author can derive profits from buying an immovable property at the market price it might have had if that construction had not been built.

The provisions referring to the accession to movable visibly estrange from the provisions of the Ancient Romanian Civil Code and from the norms of the Roman private law because, in case of the adjunction of two movable things, their owners can ask for their separation if by the separation the prejudice suffered by the other proprietor could be bigger than a tenth of the value of his own property. On the other side, in case this is not possible, the Romanian law-maker applies the rules from the domain of specification, according to which, depending on the value of the labour work or of the materials, the property will belong to the artisan or to the owner of the materials.

After a deep analysis of these provisions, one can notice that in the virtue of an old Roman mentality, accession will operate in favour of the owner of the more valuable thing (a trader) or of the one who produced it (the artisan).

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[25] Book III (On Goods), title II (Private Property), chapter II (Accession), section IV of the New Romanian Civil Code.

[26] Irrespective of the good or bad faith of the author of the work, if its value is high, the ownership of the real property can oblige the author to buy it at the price the immovable would have been estimated at if the construction had not been done.

[27] „When the author of the autonomous work, having a lasting character over the immovable of someone else, is of good faith, the owner of the real property has the right to:

a) ask the court to register him in the land register as the proprietor of the work, if paying, according to his choice, the value of the materials and of the manual labour to the author of the work or the extra value added to the construction by improving it;

b) to ask the court to oblige him to buy the immovable at the price it might have had if the work had not been done."

[28] „(1) When the author of the autonomous work having a lasting character over the immovable of someone else is of bad faith, the owner of the immovable has the right to:

a) ask the court to register him in the land register as the proprietor of the work if paying, the author of the work according to his choice, half of the value of the materials and of the manual labour or of the extra value added to the construction;

b) to ask to court to oblige the author of the work to pull the construction down;

c) to ask the court to oblige the author of the work to buy the immovable at the price might have had if the work had not been done.

(2) The demolition of the work is done with observing the legal provisions in the domain, on the expense of its author who is at the same time obliged to repair all damages which also include the fact that the construction has not been used."

V. Conclusions

Society is the place where the interests of different social categories come into conflict, and the results of this conflict are more often than not reflected into the content of the juridical norms which represent the interests of the dominant class. The same conclusion is reached when analyzing the modality of how the juridical institution of accession developed. We do neither reprove the present material conditions that determine certain juridical regulations nor the usefulness of these regulations, because various social categories are interested to impose their own interests as juridical norms. Unfortunately, on this occasion, the representatives of these categories want the standardization of certain juridical aspects as to be able to find new juridical procedures meant to satisfy their own interests, even if they evidently depart from the real functions of accession. Given these realities, for maintaining the equilibrium between the law principles and the juridical institutions it is necessary the redefinition of the criteria according to which the property can be principal or accessory and it is useful to create new juridical institutions able to allow a harmonious inclusion of the new procedures of the juridical system.

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THE COMMERCIAL POLICY OF THE EUROPEAN UNION - PART OF THE WORLD TRADE ORGANIZATION POLICY

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Abstract
The common commercial policy is a pillar for the external relations of the European Union. It is based on a set of uniform rules under the Customs Union and the Common Customs Tariff and governs the commercial relations of the Member States with Non-EU Member Countries. The EU has evolved during the process of globalization by aiming for the harmonious development of world trade and fostering fairness and sustainability. It actively encourages the opening of the markets and the development of trade in the multilateral framework of the World Trade Organization (WTO). At the same time, it supports developing countries and regions through bilateral relations with a view to involving them in world trade using preferential measures.

Keywords: *The common commercial policy; European Union; World Trade Organization; Member States; globalizations*

1. Preliminary considerations

Article 206[1] of the Treaty on the Functioning of the European Union (TFEU) provides that, "by establishing a customs union", the European Union is contributing "to the development (...) of world trade, the progressive abolition of restrictions on commercial international trades and direct external investments, and to the lowering of taxes and other barriers". It should be noted that the customs union, as stage of economic integration has been accomplished since 1968, being the result of the suppression of all customs duties between Member States of the European Community at that time, of the elimination of quantitative restrictions for intra-Community trade and not least, of the progressive implementation of a customs tariff[2], common in relation with third countries.

The common commercial policy (CCP) is one of the policies laid down since the establishment of the European Economic Community, being regulated even in the Treaty of Rome in 1957[3]. The purpose of this policy was and still is to contribute to the integration of national markets into a single market. This common commercial policy has been conceived because the free movement of goods and services in the European Union "could not be achieved through different national policies generating negative outsourcing"[4].

The fact that this policy is carried out by reference to principles and objectives of the Union's external action, must be taken into consideration. There is an exclusive[5] competence of the Union within CCP, meaning that the right of legislative initiative belongs exclusively to the European Union, so this field is one of those where Member States have agreed that, once they acquire the statute of membership, they have to give up their power to legislate. We should also mention that Member States can act within this trade policy only if they are expressly authorized by the Union institutions. Thus, we consider useful to present in short, the fields reserved for the European Union and those for which Member States are competent. In this respect, we take into

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[1] Former art. 131 of the Treaty on European Community (TEC).

[2] By establishing the common customs tariff, the free trade area has been transformed into the customs union.

[3] The Treaty establishing the European Economic Community (TCEE), which entered into force in 1958.

[4] Adrian Dobre, *"The European Union's common commercial* policy*"*, Legal Universe Publishing House, Bucharest, 2010, p.71.

[5] Under article 3paragraph (1) letter e) TFEU.

consideration, first, art. 207[6] TFEU, that we can consider the "core text"[7], in terms of explicit powers. According to the article cited, the scope of exclusive competence of the EU common commercial policy is extended, namely: changes in tariff rates, tariff and trade agreements on trade in goods and services, commercial aspects of intellectual property, foreign direct investments, uniformity in measures of liberalization, export policy and measures to protect trade (especially dumping and subsidies). It results from the text analysis that the free movement of persons, in their capacity as traders, is not included in the scope of exclusive competence, which leads us to appreciate that the Union can not conclude international agreements which do not have as exclusive object, the commodities. The trade liberalization is not limited, naturally, only to goods. Services may be taken into consideration by the common commercial policy, being, thus, within the exclusive competence of the Union; however, as outlined in the specialized literature, "in the agreements negotiated, the services are considered commodities"[8].

Without going into further details, we notice that the doctrine in the field mentioned has identified, in addition to this exclusive jurisdiction, also the possibility of implicit powers of the Union, taken from art. 207 TFEU[9]. The issue of implicit powers of the Union arose at the same time with the gradual development of the secondary legislation in the common commercial policy. Regulations, directives and decisions may give rise to restrictive common legal rules that could be implemented only if Member States kept the freedom to negotiate. Considering, however, that the legislative harmonization is still partial, the possibility of concurrent jurisdictions for states and the Union, in matter of negotiating, should be analyzed. The more difficult is to determine parts of an international agreement which correspond to a complete harmonization within the Union, the more complex the situation is. In notification no. 1 / 94, of 15 November 1994, the European Court of Justice (ECJ)[10] refers to the obligation of Member States to cooperate, as shown in article 10[11] of the Treaty establishing the European Community. According to the Court, "as the object of an agreement or a convention falls, partly, within the competence of the Community and, partly, within the competence of Member States, it is important to ensure a close cooperation between state and Community institutions, both in the negotiation and conclusion process, as well as in fulfilling their commitments. This obligation of cooperation stems from the requirement of a cooperative international unit representing the Community"[12]. The duty of cooperation, says the Court, is particularly imposed in the case of agreements, as those annexed to the Agreement of the World Trade Organization (WTO). Thus, in the absence of close cooperation, in the situation where a Member State had, within its sphere of competence, to be duly authorized to take retaliatory measures, but it considered that they were ineffective if they were adopted in the areas covered by The General Agreements on Trade in Services (GATS[13]) or by Trade Agreements on Intellectual

[6] Former art. 133 TEC.

[7] Christian Gavalda, Gilbert Parleani**,** „*Droit des affaires de l'Union européenne*", 6e édition, Litec, Paris, p. 60.

[8] Augustin Fuerea*,* "*European Business* Law*",* second edition, Legal Universe Publishing House, Bucharest, 2006, p. 64.

[9] Christian Gavalda, Gilbert Parleani**,** *op. cit.,* pag. 60-61.

[10] Currently, after the entry into force of the Treaty of Lisbon on December 1st, 2009, the new name of the ECJ is the Court of Justice. This, together with the Tribunal (T) and the Civil Service Tribunal (CST), are forming the European Court of Justice (ECJ).

[11] The current article 4, paragraph (3) of the Treaty on European Union (TEU). According to the article, "Under the principle of loyal cooperation, the Union and Member States respect and assist each other in carrying out tasks which are resulting from the Treaties. Member States shall take any general or specific measures to ensure the fulfillment of obligations under the Treaties or resulting from the acts of Union institutions. Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardize the attainment of its objectives".

[12] Section 108 of Approval no. 1 / 94.

[13] The *General Agreement on Trade in Services.*

Property Rights (TRIPS[14]), that state does not have, under the Community / EU law, the power to take retaliatory measures in the field of trade in goods, whereas in any case, this matter falls within the exclusive competence of the Community / Union. On the contrary, in the absence of the same close cooperation, if the Community / Union obtains the right of retaliation in the area of goods, but it is considered unable to exercise it, the Union becomes unable to take legal retaliatory measures in the areas covered by GATS and TRIPS, this responsibility falling within the jurisdiction of states.

Regarding this issue, article 207 TFEU, in paragraph (6) provides that the exercise of powers conferred on the Union, in the common commercial policy field "does not affect the delimitation of competences between the European Union and Member States and does not involve the harmonization of laws, regulations and administrative provisions of Member States insofar as the Treaties exclude such harmonization".

The role of the Union institutions within the common commercial policy is provided in the very Treaty on the Functioning of the European Union, in paragraphs (2) and (3) of article 207. So, we keep in mind that in the case of negotiation and conclusion of agreements with one or more third countries or international organizations, the following procedure provided in article 218 TFEU is applied: the Council is authorizing the opening of negotiations, is adopting negotiating directives, is authorizing the signing of agreements and is concluding them. The Commission is giving recommendations to the Council for a decision authorizing the opening of negotiations. The negotiator's appointment or the appointment of the chief of the negotiating team falls within the same competence of the Union. Throughout negotiations, the negotiator may receive directives from the Council. It should be noted that negotiations are conducted in consultation with a committee appointed by the Union Council. The decision authorizing the signing of the agreement and, where necessary, its provisional application before its entry into force is adopted by the same Council, but at the negotiator's proposal. The Council adopts the decision regarding the conclusion of the agreement, after consulting the European Parliament. The latter issues its approval within a time limit which the Council may set depending on the urgency of the matter. In the absence of a notification elaborated within that period, the Council may decide. It should be noted that for the conclusion of an agreement, the Council can authorize the negotiator to approve, on the Union's behalf, modifications to the agreement if it provides that these modifications must be adopted, under a simplified procedure or by a body set up by that agreement. The Council may attach specific conditions to such authorization. During the procedure, the Council decides by qualified majority. Also, we mention that a Member State, the European Parliament, the Council or the Commission may obtain the approval of the Court of Justice, on the compatibility of an agreement complying with provisions of the Treaties. In the case of a negative notice of the Court, the agreement can enter into force after its amendment or after the review of Treaties.

There is however provided, an exception to this procedure, in article 207 paragraphs (3) - (6) TFEU. Unlike the usual procedure, in this case, the Commission is the one which shall make recommendations to the Council, authorizing it to open the necessary negotiations. The Council and the Commission are responsible to make sure that the agreements negotiated are compatible with internal Union policies and rules. These negotiations are conducted by the Commission, in consultation with a committee specially appointed by the Council to assist it in this mission, and complying with directives that the Council might give. The Commission shall report regularly to the European Parliament, on the progress of negotiations. For the negotiation and conclusion of agreements with one or more third countries or international organizations, the Council decides by qualified majority. For the negotiation and conclusion of agreements on trade in services and commercial aspects of intellectual property, as well as in foreign direct investments, the Council shall act unanimously where such agreements include provisions for which unanimity is required, for the adoption of internal rules. The Council shall also unanimously decide for the negotiation and

[14] The Agreement on Trade-Related Aspects of Intellectual Property Rights.

conclusion of agreements in the following areas: trade in cultural and audiovisual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity; trade in social, education and health services, where these agreements risk seriously disturbing the national organization of such services and prejudicing the responsibility of Member States to deliver them. The negotiation and conclusion of international agreements in the field of transport are covered by article 218 TFEU.

2. The European Union strategy for a competitive common commercial policy

On October 4, 2006, the European Commission presents to the Council, European Parliament, Economic and Social Committee and Regions Committee, a Communication entitled "Europe's competitiveness in a globalized economy"[15]. The document aims to present the contributions that trade policy has in stimulating the economic growth and the creation of jobs in Europe. There are explained the ways in which, in a world economy that rapidly turns, can be achieved "a more comprehensive, integrated and forward-looking trade policy that contributes more to European competitiveness"[16]. The need to adapt the tools of EU trade policy to new challenges in establishing new partnerships is emphasized, and all to make sure that Europe remains opened to the world, but that other markets too remain opened to Europe. The Communication mentions also the existent relationships between policies applied in the Union, on the one hand and the extra unional space, on the other hand. Globalization has resulted, among others, in removing the distinction between internal and external policies, this aspect having a major influence on the external competitiveness of the European Union. Given these issues, the Commission presents an analysis of the grounds of trade policy and EU competitiveness, proposing also a number of steps to follow in order to implement a series of priorities to cope with globalization. Faced with these challenges, the European Union should strengthen competitiveness on the basis of transparent and efficient rules. In this respect, according to the Commission, the Union's competitiveness depends, first, on the existence of "sound national policies, namely"[17]: competitive market to promote competitiveness of European enterprises; economic openness (as opposed to protectionism, the opening to trades and international investments leads to competitive pressures that are profitable for innovation, new technologies and investment[18]); social justice (the Union must deal with the impact of opening markets, especially by accelerating the structural change resulting from the phenomenon of globalization). Also, the European competitiveness lies in the opening of markets, which requires that the trade policy focuses on the following: non-tariff barriers, access to resources and new sectors of growth, intellectual property rights, services, investment, public markets and competition.

To achieve these goals, the Commission proposes an action program for the revival of external competitiveness of the European Union which is structured on two pillars, namely: the internal pillar and the external pillar.

A. The internal pillar. Starting from the reality according to which European companies should benefit from the EU competitiveness, citizens should acquire a number of advantages, and the Lisbon strategy represents the cornerstone of EU competitiveness. The European Commission presented in May 2006, the Communication entitled "A project for citizens", in which it proposed a thorough examination of the single market in order to ensure competitiveness of companies through diversification, specialization and innovation.

According to the Commission, the developing process of EU policy must take into consideration its ability to meet existing challenges worldwide. A special importance is attributed to

[15] COM (2006) 567 final (not published in the Official Journal of the European Union) - available on the website: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0567:FIN:FR PDF.

[16] COM (2006) 567 final, p. 2.

[17] http://europa.eu/legislation_summaries/external_trade/r11022_fr.htm.

[18] *Idem*.

developing an international legal tool or a coherent European tool to conduct international and bilateral cooperation. Given the effects of the markets opening, the Commission and Member States must ensure that European citizens[19] benefit of special import prices. The common customs system should also be modernized, being proposed in this respect, the revision of the Customs Code and the introduction of electronic customs systems (e-customs).

B. The external pillar. Externally, the Union must commit itself to accept and implement the "multilateralism"[20], which provides the means to eliminate barriers to trade, in a stable and sustainable manner. An important role is attributed to the relationship that the European Union must develop with the World Trade Organization. Consistent with the idea promoted by the Communication, the Commission considers that the Union should promote the trade liberalization in bilateral relations, through free trade agreements, highlighting that such agreements have the advantage of being able to cover areas not regulated by an international legal instrument or by WTO.

The Commission considers that transatlantic trades are the core of EU bilateral relations, especially in overcoming global challenges. Meanwhile, China is a very important partner, offering opportunities of economic growth and jobs.

The aspects referring to efforts of intellectual property rights are not omitted; these efforts should result in the conclusion of bilateral agreements, in particular, asserts the Commission, with Russia, China, Korea, Mercosur, Chile, Ukraine and Turkey.

The market access strategy (strategy dating from 1996, but that is to be renewed), as well as the trade defense instruments are also brought into discussion; the public markets of third countries should be opened to European suppliers.

Another important document for our analysis is another Communication of the European Commission, namely the "External Dimension of the Lisbon Strategy for Growth and Employment"[21], presented on 16 December 2008. The Communication has as objective to provide better opportunities for EU companies in third countries and brings together external and internal policies. At the same time, the Communication is the first annual report on the access to markets, offering a perspective on the main existing barriers. Removing barriers will require, according to the Commission, "a strong expression, in one voice, of European commercial interests. The success of EU actions will continue to depend largely on the seriousness of the commitment of all stakeholders"[22]. Removing barriers to trade requires a coherent and targeted action. "The European Union must use all these tools strategically and ensure a better integration of foreign policy agenda for trade-offs and win-win solutions for all parties involved. The regulatory cooperation offers further benefits not only in terms of access to markets, but also in areas such as consumer protection, improving environmental standards and the collection of basic information needed to develop legislation and to reduce the cost of enterprises"[23]. The Communication defines ways to remove the regulatory barriers and to improve the access to markets, to generate economic growth and create jobs. These efforts must be followed by further development of the Lisbon Strategy for Growth and Employment after 2010.

In summarizing the main steps of the European Commission, to relaunch the common commercial policy, in the context of the Union strategy for Europe's competitiveness, one can not omit the Communication of 18 April 2007 entitled "Global Europe: a stronger partnership to deliver

[19] COM (2006) 211 final.

[20] http://europa.eu/legislation_summaries/external_trade/r11022_fr.htm

[21] COM (2008) 874 final (not published in the Official Journal of the European Union), available on the website http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0874:FIN:RO: PDF

[22] COM (2008) 874 final, p. 15.

[23] *Idem.*

market access for European exporters"[24]. The Communication conclusions underline that "a stronger partnership for better access to the market is an essential component of the Global Europe strategy and a significant contribution to the Lisbon agenda for growth and employment. European companies - from strong global companies to large SMEs and developing SMEs- are struggling to succeed on global markets. A strong market access policy is a key function of the common commercial policy and a key area where the European Union can deliver real economic benefits for its Member States and for the European citizens and businesses. The European Union policy of 1996 should be strengthened and adapted to the changing global economy where markets to which we pursue to have access and barriers that prevent this are changing"[25]. At the end of the document, we find several proposals of the Commission, of which we mention the following: establishing a stronger relationship between the Commission, Member States and EU companies, in order to directly support businesses in overcoming specific difficulties that they are facing with, when they have access to third country markets, in a manner and framework consistent with the commercial reality; decentralizing the current system and encouraging the local initiative in third countries, by establishing local teams of EU market access which include representatives of delegations of the Commission, of embassies of Member States and of business organizations; restoring the database on the European Commission's market access; improving efficiency and transparency in the Commission's analysis of complaints about trade barriers, including a new streamlined system for registering complaints, etc.

3. The place and role of European Union's common commercial policy in relation to WTO

Established in 1995, as successor of the General Agreement on Tariffs and Trade (GATT), the World Trade Organization aims to liberalize trade in goods and services worldwide. In retrospect, we see that, immediately after the Second World War, negotiations were launched, among other things, on establishing a United Nations institution dedicated to trade on the one hand, and to the lowering of customs barriers, on the other hand. In this respect, Havana Charter was signed in 1948 and it provided the establishment of a World Trade Organization; the Charter had never entered in force because of the failure of many countries (especially the U.S.) to ratify it. However, in October 1948, 23 states signed the General Agreement on Tariffs and Trade, Agreement which was aiming at reducing tariffs. It should be mentioned that this agreement has never been established as an international organization. During 1947-1994, the main activity of the GATT was to organize multilateral trade negotiations for global trade liberalization. Since the entry into force of the GATT and up until the establishing of the WTO, there were eight rounds of negotiation. The first five rounds, conducted between 1947 and 1967, had been focused specifically on the suppression of quantitative restrictions and on reducing tariffs.

At the moment of conclusion of the Treaty establishing the European Economic Community[26], Member States[27] had already been bound by the General Agreement on Tariffs and Trade. "They could not evade the existing obligations to third countries, as consequence of an act passed between them. The intention of Member States to meet commitments of the General Agreement was manifested, in particular, in art. 110[28] of the Treaty establishing the European Economic Community (TCEE), containing an affiliation to Community objectives of the General Agreement, and in art. 234[29] paragraph (1) which provided that rights and obligations arising from

[24] COM(2007) 183 final (not published in the Official Journal of the European Union) – available on the website: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0183:FIN:RO:PDF

[25] COM (2007) 183 final, p. 10.

[26] 1957.

[27] France, Germany, Italy, Netherlands, Belgium and Luxembourg.

[28] The current art. 206, the Treaty on the Functioning of the European Union (TFEU).

[29] The current art. 351 TFEU.

agreements concluded before the entry into force of the Treaty, in particular from the multilateral agreements concluded with Member States, were not affected by the Treaty provisions. The Community has assumed, gradually during the transitional period, and totally at the end, pursuant to article 111[30] and article 113[31] of the Treaty – the specific competences of the tariff and trade policy. By entrusting those duties to the Community, Member States were expressing their will to subject it to contractual obligations, under the General Agreement. Since the entry into force of the EEC and, in particular since the implementation of the common external tariff, the transfer of power, occurred between Member States and the Community, has resulted in different ways, under the General Agreement and has been recognized by other contracting parties. In particular, from this period, the Community, acting through its own institutions, has become a partner in tariff negotiations and part of agreements of any kind, concluded under the General Agreement, in accordance with article 114[32] of the EEC Treaty providing that tariff and trade agreements "are concluded on behalf of the Community"[33]. Since the Community has assumed, under the EEC Treaty, powers previously exercised by Member States in applying the General Agreement, the provisions of this agreement have the effect of creating obligations for the Community.

Thus, with the ruling by the Court of Justice of the European Community, in the case *International Fruit*[34], the European Economic Community and now, the European Union, became party of the GATT. As a consequence, the Community is a founding member of this international organization, which is the WTO.

As it can be observed, the European Union played an important role in the negotiations on trade liberalization, especially in the Doha Round, which began in 2001. The purpose of those negotiations was to reduce tariffs and remove other barriers to the world trade. "The Doha negotiations were slowly advancing. Persistent differences between rich and poor countries were emerging, on the mutual access to markets and on the much discussed issue of agricultural subsidies. Many crises appeared during negotiations. (...) The European Union was actively involved in order to make of Doha Round a success"[35]. The Union believes that the WTO system based on rules constitutes a guarantee of legal certainty and transparency in the carrying out of international trade. The WTO sets rules under which its members can defend themselves against unfair practices like dumping, whereby exporters compete with local rivals. Also, the WTO provides the legal framework for solving disputes.

Assuming that trade rules are multilateral, but the trade itself is bilateral, the European Union, in addition to its participation in the Doha Round and previous rounds of negotiations in the WTO, has developed a network of bilateral trade agreements with countries and regions around the world. The Union has also concluded partnerships and cooperation agreements with countries of the Mediterranean Basin and Russia and other republics of the former Soviet Union. On the contrary, the Union has not concluded specific trade agreements with its major trading partners among the developed countries, like USA and Japan. Trade relations with them are based on WTO mechanisms, although in some sectors, there are many agreements between the EU and the two countries. The WTO framework also applies to trades between the European Union and China, which joined the organization in 2001. Currently, China is the second commercial partner of the Union, after the United States of America[36].

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[30] Currently, repealed by the Treaty of Maastricht in 1992.
[31] The current art. 207 TFEU.
[32] Currently, repealed by the Treaty of Maastricht.
[33] ECJ Judgement of 12 December 1972, International Fruit, Joined Cases 21 - 24/72.
[34] Cited above.
[35] http://europa.eu/pol/comm/index_ro.htm
[36] According to http://europa.eu/pol/comm/index_ro.htm

By Decision 94/800/CEE[37], the following multilateral agreements and acts were approved on behalf of the Community, regarding the share of competence of the European Community:

- the Agreement establishing the World Trade Organization;
- the General Agreement on Tariffs and Trade in 1994 (which also included the one in 1947);
- the Agreement on agriculture;
- the Agreement on the application of sanitary and phytosanitary measures;
- the Agreement on textiles and clothing;
- the Agreement on technical barriers to trade;
- the Agreement on measures relating to investment and trade relations;
- the Agreement on anti-dumping measures;
- the Agreement on customs evaluation;
- the Agreement on pre-shipment inspection;
- the Agreement on rules of origin;
- the Agreement on import licensing procedures;
- the Agreement on subsidies and countervailing measures;
- the Agreement on safeguard measures;
- the General agreement on services (GATS);
- the Agreement on trade related aspects of intellectual property rights (TRIPS), including trade in counterfeit goods;
- the Agreement on trade in civil aircraft;
- the Agreement on public procurement;
- the International Agreement on the dairy sector[38];
- the International Agreement on beef[39].

The main objectives of the European Union activity in the World Trade Organization are: "the opening of markets for goods, services and investments in accordance with clear rules and consistent with a timetable, to enable their implementation in all countries; the transformation of the World Trade Organization into a more open, more accountable and more effective entity, by engaging in discussions with other groups and organizations; totally including developing countries in the decision-making process within the World Trade Organization, helping them, thus to integrate into the world economy[40].

4. Conclusions

The core material for the common commercial policy is given by articles 3 and 207 TFEU. The first confers exclusive competence on the European Union, while the second provides that "the common commercial policy is based on uniform principles, particularly in regard to changes in tariff rates, tariff and trade agreements on trades in goods and services and commercial aspects of intellectual property, foreign direct investments, uniformity in measures of liberalization, export policy and measures to protect trade, such as those to be taken in the event of dumping or subsidies".

We mention that Romania, as Member State, with absolute rights and obligations of the European Union from January 1st, 2007, must know and comply with the Union provisions, in matters of common commercial policy, mainly by undertaking not to implement divergent policies

[37] Council Decision 94/800/EC of 22 December 1994 concerning the conclusion, on behalf of the European Community, regarding matters within its competence, of agreements reached during the multilateral trade negotiations in the Uruguay Round (1986-1994), published in the Official Journal of the European Community L336 / 1 of December 23, 1994.

[38] Repealed in 1997.

[39] *Idem.*

[40] ***,*"Trade and Development* Policy*"*, the European Institute of Romania, series Micro monographies - European Policies, 2005, p. 11.

from those of the Union, unless it is authorized, expressly for this purpose, by European Union institutions.

The new priorities of the European Union's common commercial policy are necessary to relaunch European competitiveness and to identify opportunities created by international openness. These new perspectives are included in several action programs initiated by the European Commission. The common commercial policy will be able to meet the objectives of growth and employment from the Lisbon Strategy, while facing the challenge of globalization.

In **conclusion**, we maintain the assertion that, currently, the World Trade Organization is the core of the international system based on rules governing the world trade.

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SEVERAL OBSERVATIONS REGARDING THE REGULATION OF THE CONTRACT OF PARTNERSHIP IN THE NEW CIVIL CODE

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Abstract

Following the model of the Italian Civil Code, of the Civil Code from Quebec, the Swiss and the Dutch ones, the new Romanian Civil Code has adopted the monist conception of regulating the private law relationships, gathering in the same normative act traditional civil law dispositions as well as dispositions that are specific to the commercial relationships among professionals.

In this regulating context, one of the fundamental changes the new Civil Code brings is the unification of the legal regime applicable to civil and commercial contracts, with all the consequences that derive from this new legislative approach.

This fundamental modification is first determined by the profound change of the character of social, economic and juridical relationships, by the change of the cultural level of the Romanian society, by the closeness of the two branches of civil and commercial law and, last but not least, by the evolution of the business environment.

In this line of thought, we can identify important changes in the matter of the contract of partnership which, as regulated by the new Civil Code, constitutes the common law both for the simple partnerships (former civil societies) as well as for the commercial companies, to which the special legislation still in force in the matter still applies.

In this study we aimed at analyzing the general common features of all associative forms listed by art. 1.888 Civil Code and the new elements in the matter, with critical observations where needed, which take the form of a comparison with the specific legislation in the field from the Civil Codes that served as a source of inspiration for the Romanian legislator.

Keywords: *monist conception, contract of partnership, simple partnership, commercial companies, liability.*

1. Introduction

The adoption of a new Civil Code in our country was not only desirable, given the long period of time that passed since its latest regulation in 1864, that became rigid and obsolete, but also an imperative of the Romanian society in its entirety. The evolution of domestic economic, legal and social relationships, the exigencies of international exchanges as well as the European tendencies of a adopting a common contract law dictated not only a terminological modernization of the Civil Code, but also the modernization, even the fresh articulation of certain institutions or the adoption of some new ones, able to cope with the new realities.

Several attempts to re-codify and rearticulate the Romanian Civil Code have existed even before the 1989 Revolution[1], but they only materialized in 2009, through the adoption of the new Civil Code[2], that entered into force on October 1st 2011, drawing heavily on the Civil Code of Quebec[3].

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[1] Marian Nicolae and Mircea-Dan Bob, "La recodification du droit civil roumain en quête de modèle," *Studia Iurisprudentia* 2 (2008), accessed on January 25, 2012 at http://studia.law.ubbcluj.ro/articol.php?articolId=123.

[2] The new Civil Code was adopted by Law 287/2009 regarding Civil Code, published in the Offical Gazette no. 511 from July 24, 2009 modified and completed by Law 71/2011 for the enforcement of Law 287/2009 regarding Civil Law, published in the Official Gazette no. 409 from June 10, 2011.

[3] For similarities between the two Civil Codes, from Romanian and from Quebec, see Iolanda Boți and Victor Boți, "Codul civil din Quebec: Sursă de inspirație în procesul de recodificare a dreptului civil român," *Studia Iurisprudentia* 1 (2011), accessed on January 25, 2012 at: http://studia.law.ubbcluj.ro/articol.php?articolId=367.

The main modification of the new Civil Code resides in the unification of the private law norms (civil, commercial and family law) and their inclusion in a single normative act.

The monistic conception of regulating the private law relationships and the unification in a single legislative body of civil law and commercial law relationships constitutes therefore the central element of the new normative act. An important part of commercial legislation has thus been absorbed in the Civil Code; however, this absorption did not lead to the disappearance of commercial law as a law branch[4].

Unlike its Quebec relative, the Romanian Civil Code fails to include commercial companies in its sphere, providing only a short enumeration of these in art. 1.888 Civil Code, but further regulated by Law 31/1990 regarding commercial companies.

Under this regulation background, the contract of partnership is treated by the Civil Code as a common basis both for the constitution of commercial companies, which are still subject to special regulations, as well as for simple partnerships (whose regulations constitute the common law for all business forms) and other associative entities enumerated by art. 1.888 Civil Code. Art. 1.887 Civil Code also stipulates that "the hereby Chapter constitutes the common law in the matter of companies".

The contract of partnership has thus been given a new, modern and necessary regulation, the old (civil) contract of partnership included in the 1865 Civil Code being obsolete and unable to cope with the needs of modern society.

As far as civil partnerships set up based on the old Civil Code are concerned, in agreement with art. 139 line 1 of Law 71/2011 regarding the enforcement of the new Civil Code, these may transform at any given time into any of the partnership structures enumerated by art. 1.888 Civil Code or regulated by other special normative acts, with the observance of their conditions.

In the present study we aimed at analyzing several aspects related to the regulation of the contract of partnership contained in the new Civil Code: the classification of partnerships, the means of gaining legal entity, the form of the contract of partnership, the social contribution, the relationship between the shareholders and the partnership as well as the relationship between shareholders and third parties, on one hand, and the relationship between the partnership and third parties, on the other hand, culminating with the termination of the contract of partnership due to its nullity.

2. Regulation of the contract of partnership

The Civil Code defines the contract of partnership as the contract by which "two or more individuals are mutually bound to cooperate in order to conduct an economic activity and to contribute to it by monetary or asset contributions, scientific knowledge or services, in view of sharing the benefits or make use of the profit that might exist". The definition given by art. 1.881 line 1 Civil Code for the contract of partnership is school-like and very didactic, making reference to all the characteristic elements of association: *affectio societatis*, the contributions of the shareholders and the means of contributing, as well as the sharing of the benefits resulted from the commonly conducted activity.

The 1864 Civil Code used to define the contract of partnership in a more simplistic manner, but also containing all the three elements that are characteristic to a company: *affectio societatis* ("two or more individuals agree to share…"), the contribution ("to make a joint contribution") and the splitting of benefits ("in view of sharing the benefits that might derive").

The definition provided by the new Civil Code is similar to the definition found in the Civil Code from Quebec, where art. 2186 line 1 stipulates: "a contract of partnership is a contract by which the parties, in a spirit of cooperation, agree to carry on an activity, including the operation of

[4] For arguments in this sense, see Stanciu D. Cărpenaru, "Dreptul comercial în condițiile Noului Cod civil," *Curierul Judiciar* (2010), accessed on January 25, 2012 at: http://curieruljudiciar.ro/2010/11/09/dreptul-comercial-in-conditiile-noului-cod-civil.

an enterprise, to contribute thereto by combining property, knowledge or activities and to share any resulting pecuniary profits[5]".

The quality of shareholder can belong to any individual or legal entity[6], unless the law stipulates otherwise. The partnership may be formed between spouses or between spouses and other individuals[7]. The common property may constitute contribution only with the express agreement of the other spouse. (art. 1.882 line 1 corroborated with art. 349 line 1 Civil Code), under the sanction of relative nullity stipulated by art. 347 line 1 Civil Code.

Besides the specific elements for the validity of the contract of partnership (*affectio societatis*, the shareholders' contributions and the sharing of the profits resulting from the common activity), the contract of partnership must also comply with the general fundamental conditions any contract must observe (the contracting parties should have full ability of exercise, the agreement should be validly expressed, the object must be determined, legal and in agreement with public order and morality, and the cause should be legal and moral).

3. Forms of partnerships

According to art. 1.888 Civil Code, depending on their form, partnership may be:

a)simple;
b) in participation;
c)general partnership;
d) limited partnership;
e)with limited liability;
f) joint stock;
g) limited partnership on shares;
h) cooperatives;
i) other types of company specifically regulated by law.

According to art. 1.887 line 2 Civil Code „the law may regulate other types of partnerships depending on the form, nature or business purpose". The partnerships set up based on special laws are still subject to them with regard to regulation (art. 138 of Law 71/2011 for the enforcement of the new Civil Code).

In the legal practice, the contract of partnership is to be met in various fields of activity: commercial companies[8], agricultural societies[9], professional societies of lawyers[10], notaries public[11], doctors or pharmacists[12], court executors[13], architects[14], associations in view of building residential buildings[15] etc.

4. The legal status of the partnership

Based on the new dispositions (art. 1.881 line 3 Civil Code) the partnership may be set up with or without legal entity. In order to gain legal personality, the shareholders must agree, either

[5] "Le contrat de société est celui par lequel les parties conviennent, dans un esprit de collaboration, d'exercer une activité, incluant celle d'exploiter une entreprise, d'y contribuer par la mise en commun de biens, de connaissances ou d'activités et de partager entre elles les bénéfices pécuniaires qui en résultent".

[6] Eugeniu Safta-Romano, "Unele aspecte mai importante ale contractului de societate civilă," *Dreptul* 2 (1992): 29; Dan A. Popescu, *Contractul de societate* (Bucureşti: Lumina, 1996), 150.

[7] Florin Moțiu, *Contractele speciale în noul Cod civil* (Bucureşti: Universul Juridic, 2011), 215.

[8] See Law 31/1990 regarding commercial companies.

[9] See Law. 36/1991 regarding agricultural companies.

[10] See Law 51/1995 regarding the organization and exercise of the lawyer's profession.

[11] See Law 36/1995 – The Law of public notaries and notaries' activity.

[12] Gov. ordinance no. 124/1998 regarding the organization and functioning of medical cabinets.

[13] Law 188/2000 regarding the organization and functioning of the activity of court executor.

[14] Law 184/2001 regarding the exercise and organization of the profession of architect.

[15] Dumitru Macovei, Iolanda-Elena Cadariu, *Drept civil. Contracte* (Iaşi: Junimea, 2004), 249.

using the contract of partnership or a separate act, on the constitution of a legally distinct partnership, in compliance with the law. In this instance, the partnership may only be set up in the form and under the conditions stipulated by the special law that grants it legal personality.

The simple partnership has no legal personality (art. 1.892 line 1 Civil Code). In the event the shareholders opt for a legal personality for their simple partenership, they may modify the contract of partnership, case in which they will expressly mention the legal form of the new entity and will harmonize all the clauses of the contract with the provisions of the applicable law.

The legal status of the partnership is gained only through registration in the Trade Register, starting with the date of incorporation, unless the law stipulated otherwise.

5. The form of the contract of partnership

Ad probationem the contract of partnership must be in written form, except for the cases when the law requires the written form for its validity itself. Thus, the contract of partnership must be done in writing, *ad validitatem,* when it serves as a basis for the creation of a company with legal personality (art. 1.884 line 2 Civil Code), otherwise the contract is sanctioned with absolute nullity. In this particular case, the contract of partnership should expressly indicate the shareholders, their contributions, the legal form, the object, the name and the address of the company. If the associates or some of them contribute with real estates, the contract of partnership must be authenticated, the dispositions of the land book register being also applicable.

The authentic *ad validitatem* form of the contract of partnership is also stipulated by art 5 line 6 of Law 31/1990 regarding commercial companies as modified by art. 10 of Law 71/2011 for the enforcement of the Civil Code. According to this article, the contract of partnership must be authenticated when:

a) among the assets contributed to the social capital there is a real estate asset;
b) when a general partnership or a limited partnership is set up;
c) when the joint stock company is set up by public subscription.

The Civil Code largely regulates the simple partnership, this form of partnership constituting the common law with regard to partnerships, the rules stipulated by the Civil Code for this partnership being also applicable to the other business forms.

6. The social contribution

The shareholders are bound to contribute to the formation of the partnership's social capital in the form of money or assets. In exchange for the contribution made, the shareholder receives shares in proportion to the contribution, unless the law or the contract of partnership stipulates otherwise.

The shareholders may also contribute with services or specific knowledge, in exchange for which they are entitled to take part in the share of benefits, losses and the decisional process in the company.

The obligation to make a contribution is valid for all shareholders, none being validly exempted from this obligation. The value of the contributions needs not be equal and nor the contributions should be of the same nature[16].

In case of cash contributions, in case of faulty non-execution, the shareholder owns statutory interest from the due date[17], as well as default interests.

Similar dispositions are to be found in Law no. 31/1990 regarding commercial companies, which stipulates, in art. 65 line 2, the obligation of the shareholder who is late in contributing with the social capital to compensate for the damages thus caused and the obligation to pay legal interest from the day the payment should have been made.

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[16] Stanciu D. Cărpenaru, *Drept comercial român* (Bucureşti: Universul Juridic, 2008), 165; Dan Chircă, *Drept civil. Contracte speciale* (Bucureşti: Lumina Lex, 1997), 276.

[17] Liviu Stănciulescu, *Drept civil. Partea specială. Contracte şi succesiuni* (Bucureşti: Hamangiu, 2006), 174.

Similar provisions were mentioned in the 1864 Civil Code in art. 1504 line 1.

If the shareholder's contribution consists of an asset, it may be brought to the partnership either as property or by constituting another real right on it, or by constituting a right of use only. When the contribution consists in the transfer of the property right or any other real right on the asset, the shareholder's liability for the contribution is similar to the seller's liability towards the buyer, while in the event the contribution only has a right of use, the shareholder's liability is similar to that of the lender to the lessee.

In all situations the contribution is made by the transfer of the right on the asset and to the partnership and by delivering it in a good state of functioning for the use of the company.

According to art. 1.899 Civil Code the contribution under the form of services or specific knowledge is owed continuously for the duration the shareholder is a member in the company and takes place by the shareholder's performance of concrete actions and by making available for the partnership certain information in order to accomplish its goal, in the manner and under the conditions set forth in the contract of partnership.

7. The relationships between the shareholders and the partnership

The relationships between the shareholders and the partnership, as well as those between the partnership and third parties, must be regulated based on the general principle of good faith[18] established by art. 14 line 1 Civil Code, both regarding the exercise of rights and the execution of correlative obligations.

Art. 1903 line 1 Civil Code expressly stipulates the non-competition obligation on the part of the shareholders against the partnership, its breach triggering the culpable shareholder's liability and the obligation to pay for the damage thus caused. The shareholder must therefore refrain from conducting, either on his/her own name or on behalf of any other individual, a competing action or any other action that might cause damage to the partnership and to its interests.

In the event the shareholder bound to contribute with assets, services or specific knowledge to the partnership, he/she cannot take part on his/her own or on somebody else's account in an activity meant to deprive the partnership of these assets, services or specific knowledge.

The shareholder is entitled to use social assets only in the interest of the partnership and in agreement with their destination, without hindering the rights of the other shareholders. The use of social assets for one's own interest or the interest of somebody else may be done only with the express written consent of the other shareholders and, in the contrary case, the liability being not only to pay for the damage caused to the partnership, but also to return all the benefits resulting there from.

The shareholder may not have access to the monetary funds of the partnership in excess of a limit fixed for the needs of the partnership, the contract of partnership mentioning the right of the shareholders to take certain sums of money from the partnership for their personal needs.

In the event the shareholder incurred certain expenses to the interest of the partnership out of his/her own pocket, the shareholder is entitled to the reimbursement of the sums paid. The shareholder is also entitled to be compensated for the obligations or liabilities assumed while acting in good faith for the partnership's interest.

8. The relationships of the partnership with third parties

Art. 1.919 Civil Code, through its marginal note the „representation in justice", stipulates that the partnership is represented by its administrators with a right of representation or, in the absence of formal appointment, by any of the shareholders, except for the case when the contract of partnership indicates a right of representation for only some of them.

[18] See also Francisc Deak, *Tratat de drept civil. Contracte speciale* (Bucureşti: Actami, 1999), 474.

We believe that this article applies to all situations when the partnership enters legal relationships with third parties, the partnership being represented in all situations by its administrators or, in the absence of an appointment, by any of the shareholders, except for the above-mentioned situation.

9. The relationships of the shareholders with third parties

Social creditors will draw their debts from the shareholders' common assets. To the extent in which these assets are not enough to meet the creditor's demands, each shareholder will be personally liable in proportion to his/her contribution to the social patrimony.

With regards to the personal creditors of one of the shareholders, they will first draw their debts from the own assets of that particular shareholder and, to the extent these are not enough, they will be able to claim title on the debtor's assets brought as contribution to the partnership or to split the shareholders' common assets and attribute to the debtor shareholder its part of the community, having as consequence the loss of the quality of shareholder. (art. 1.920 line 1 Civil Code).

Art. 1.921 Civil Code validates the public transparency of the quality of shareholder. Thus, this article regulates a similar liability with that of a genuine shareholder for any individual who claims to be an associate in the partnership or who deliberately creates confusion to this purpose. Liability is only triggered against the third parties who actually were misled by the alleged shareholder. This article basically enforces the Roman principle *error communis facit ius.*

In order to trigger the liability of the false shareholder, the following conditions must be met:

a. the third party should have acted in good faith on the date the legal relationship was established (meaning that the third party who knew or even suspected the quality of the alleged associate will bear the risk of contracting a non-associate);

b. by his/her action, the alleged associated must have created to the third party a "convincing display"; the "convincing display" will be decided upon by the court *in concreto* from one case to another, taking into consideration the third party's experience and the concrete circumstances in which the alleged shareholder acted;

c. the alleged shareholder must have acted with the intent of misleading with regard to his/her quality. We believe that this condition springs from the use by the legislator of the word "deliberate" (art. 1.921 line 1 Civil Code refers to "any individual who claims to be an associate or who deliberately creates for third parties a convincing display…"). In other words, in this particular situation we speak about a third party's consent vitiated by willful misrepresentation

With regard to the partnership as distinct identity from the person of the alleged shareholder, it is not liable against the misled third party unless it provided sufficient reasons for the third party to consider the alleged associate as a real associate or, having knowledge on the misguiding actions, failed to take reasonable steps to prevent the misleading. The partnership's liability is therefore not triggered unless a fault or complicity to the willful misrepresentation committed can be associated to it.

The liability of the occult associate is regulated in a similar way with the liability of the apparent associate (art. 1.922 Civil Code).

The shareholders, regardless of the fact whether they are administrators or nor, are jointly and subsidiary liable in relationship with the partnership for all the damage incurred by third parties following the breach of interdiction to issue financial instruments (under the sanction of absolute nullity).

10. Termination of the contract of partnership as a result of the partnership's nullity

Besides the general nullity that deprives the contract of partnership of legal effects following the breach of certain validity conditions common to any other contract, the Civil Code also regulates a special nullity that arises exclusively as a result of a breach of the imperative dispositions applicable to the contract of partnership. The nullity of the partnership, as it is stipulated by art.

1.932-1.936 Civil Code is an express nullity that arises only under situations specially stipulated by law. For the other situations when an imperative norm contained in the chapter dedicated to the contract of partnership is breached and when the sanction of nullity does not result expressly and explicitly, the Civil Code introduces a new sanction (much debated on and denied after the code was enforced), namely to consider the contractual clause contrary to the imperative norms as not written (see for example, art. 1.902 line 5 and art. 1.910 line 5 Civil Code).

After thorough analysis of the chapter dedicated to the contract of partnership, we notice that the actual nullity of the contract of partnership (and, implicitly, of the partnership) intervenes only in a special case, namely when a partnership with legal personality is set up and the contract fails to comply with the provisions required by art. 1.884 line 2 Civil Code[19]. In such a situation, under the sanction of absolute nullity, the contract of partnership must be concluded in written form and must comprise mentions related to the shareholders, their contributions, the legal form of the partnership, the purpose, the name and its address.

Another case of nullity of the contract of partnership (only that this time we speak about a general nullity that is applicable to other legal operations) is the one stipulated by art. 1.882 Civil Code with the marginal note "Validity Conditions", which draws on art. 349 Civil Code which, in turn, draws on the sanction stipulated by art. 347 line 1 Civil Code. Corroborating the three legal texts mentioned above there results that the sanction of nullity (this time relative nullity) of the contract of partnership arises if one of the spouses, an associate in the partnership, contributes with a commonly held asset without the prior express consent of the other spouse.

Another situation when the contract of partnership is sanctioned with nullity (a nullity indicated by a special law and not in the Civil Code chapter dedicated to the contract of partnership) is when the nature of the asset brought as contribution to the constitution of the company imposes a certain form of the contract of partnership, that was breached. Art. 1.890 final thesis of Civil Code is relevant to this sense. This article needs however be corroborated with art. 5 line 6 of Law 31/1990 regarding commercial companies as it was modified by art. 10 of Law 71/2011 for the enforcement of the Civil Code, according to which the contract of partnership must be authenticated when among the assets contributed to the social capital there is a residential building. The same article of the companies' law stipulates the sanction of nullity for breach of authentic form when a general or limited partnership is set up or when the joint stock company is set up by public subscription.

The other cases of nullity expressly stipulated by the Civil Code chapter dedicated to the contract of partnership refers to legal acts that are subsequent and exterior to the contract of partnership, concluded by the shareholders or the partnership in conditions other than those required by law and which require a validly signed contract of partnership. The dispositions of art. 1.908 line 3 Civil Code are dedicated to this aspect, which, under the sanction of absolute nullity, forbid the shareholder to warrant personal liabilities or a third party's liabilities with social rights, without the prior consent of all the other shareholders. In this case, nullity targets the legal act by means of which the warranty was constituted, which is not legally binding, and not the contract of partnership in itself.

Another case of nullity that is extrinsic to the contract of partnership is the one regulated by art. 1.923 Civil Code with the marginal note "The interdiction to issue financial instruments", when absolute nullity targets both the legal acts concluded to this purpose and the financial instruments issued.

With regard to the regime of partnership nullity, we notice that this is a special one, with derogation from the general regime of the common law nullity. Thus, while the absolute nullity regulated in the general part of the Civil Code may be invoked by any interested party and even by the court and cannot be removed through confirmation, the nullity in the matter of the contract of

[19] See also Cristian Gheorghe, „Nulitatea contractului de societate şi nulitatea persoanei juridice în noul Cod civil", *Dreptul* 6 (2010): 61.

partnership will be covered in the event the cause of nullity was removed before conclusions are drawn in front of the judge. The court required to assess or declare the nullity is bound to inform the parties on the possibility to modify the contract of partnership and set a reasonable period of time for this remediation, even if the parties disagree (art. 1.933 line 2 Civil Code).

We notice that the rules applicable to the partnership nullity are laxer, more flexible in general, being taken from the commercial law, the legislator's intention being that of saving the contract of partnership and not that of ruling it out.

It is worth mentioning the fact that these laxer rules only apply in case of the nullity of the contract of partnership and not in the other cases of nullity that relate to acts that are subsequent and extrinsic to the contract of partnership (the constitution of warranties without the agreement of the other shareholders, the issuance of financial instruments).

Another derogatory rule from the general regime of nullity targets prescription; in the matter of the contract of partnership, the prescription period for nullity, even absolute nullity, is within the general term of 3 years (except for absolute nullity for an illicit purpose of the partnership – art. 1.933 line 3 Civil Code).

The legislator also makes a derogation from the general rules of nullity with respect to the effects of nullity, meaning that this time nullity is not retroactive and the partnership ends from the date of the final court decision assessing or declaring the nullity (nullity therefore produces *ex nunc* effects and not *ex tunc* effects). As a result, the good faith third parties are not affected by the nullity of the contract of partnership, the legal acts concluded before remaining valid.

In the case of the relative nullity of the contract of partnership due to the vitiation of consent or incapacity of a shareholder, the regularization of the company has priority.

The Civil Code also regulates liability for the loss caused by the assessment or declaration or partnership nullity. The compensatory action has a prescription period within 3 years from the final court order assessing or declaring nullity.

In the event that nullity was covered as a result of a disappearance of the nullity clause, the compensatory action is prescribed within 3 years, calculated from the date nullity was covered.

11. Conclusions

We may state that, through the regulation of the newly adopted Civil Code, the contract of partnership has been brought to life once again, after a long hibernating period due to the obsolete approach of the 1864 Civil Code. The new approach is a modern, flexible one, meant to allow the enforcement of these provisions and associative norms of exercising a profession, in agreement with the European regulations in the field.

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GENERAL CONSIDERATIONS OF JUDICIAL WILL REGARDING ITS LIMITS IN ECO – ECONOMICAL CONTRACTS

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Abstract:
After a brief study of the contract legal concept we attempted to examine the essential elements of the contract - the agreement of will between parties.
The autonomy theory of will - which legally promoted contemporary, the concept of freedom of contract, we will analyze the concept in question, both over time and in last centuries when transformations of freedom of contract and contractual law have been most reliable, amplifying the ambiguity of the meaning of contractual freedom in the Romanian legal order and the number and diversity of doctrines that were interested in freedom of contract become substantial.
Economic and social realities experienced significant changes, which made the autonomy theory of will first to be put in question and then challenged, attempting to detect the judicial construction of the contract.

Keywords*: will, contract, autonomy, theory of will, limits*

Introduction:

In front of uncertainties and increasing complexity of the world, every individual should aspire to an additional awareness, wisdom in understanding its environment, in the sense that every manager of human organizations must be able to develop "intelligent actions" to cope with the complex systems of nature and especially of society.

This paper is devoted to a particular actual topic and represents now one of the most effective means of solving the eco- economic issue. The topicality of the issue results from the major tasks currently undertaken by the law science in order to address the issue concerning the protection of eco-economy.

Man needs a more environmental action. This can only be the result of everyone's will and this requires the development of individual consciousness.

If plants and animals adapt to the conditions offered by the environment, man has imposed its own will, adapting it to his needs and to those of society. As long as his interventions have not passed a certain threshold, below which the system had its own capacity to redress the ecological balance, there was no sign disturbing the relationship between the man as "exploiter" and the environment.

Man through his economical activity must resize his strategy for an environment close to equilibrium, in order to correct imbalances through a conscious activity.

The time has come to understand that man and societies are part of the biosphere and that they show and addiction to the resources it offers. Therefore degradation of the biosphere will have adverse consequences on the human species.

,, The will is the most important factor because it can dominate any other factor, provided it be reconciled with the life program; no hereditary influence, no pressure from the environment, nothing is more powerful than the will!''(Edgar Cayce).

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In human mental processes, the will have a special place, but it is not a separate process. It is always linked to thinking, representation, memory, learning, perception, sensation and attention.

Using the maximum principle of will autonomy as the freedom of the conventions, the traders did proceed to the formation of rules to facilitate their work, to increase speed and safety of the commercial operations.

In this sense, the modern contracting techniques have replaced the older modalities, creating standard contracts for form and general conditions for the fund.

The paper contains:

A true market economy, without any doubt, is supported in a considerable measure, by the regularity and fairness of legal relations between the partners within the extensive and complex process of production and circulation of goods, in the large field of services, with the purpose to satisfy the people's needs.

Such a fundamental goal can be achieved only if supported, especially the main act of birth, and fighting to achieve or to end those relationships – the civil contract.

An important legal instrument within the economic life, the ***contract*** has been known since ancient times. It became known on the territory of our country at the end of the eighteenth century and the first half of next century, by the Romanian rule; in the area of the former gold mines of Dacia during Trajan rule, at Alburnus Maior, around 50 coated tablets were discovered, out of which 25 were retained, and they were published in 1873 by the famous historian Theodor Momsen in his work, "Corpus inscriptiorum latinarum".

They contain the text of some civil contracts, unique in the world through the original conception in the art of writing.

„***The Contract***" of the Romanian law and the Greek„ ***synallagma"*** (today translated within the concept of synallagmatic contract) represents the origin of the great multitude and variety of contracts in the modern market economy.

The Middle Age Law developed the field by restricting the ancient contract formalism, and by approaching the priority related to the „ the free expression of human will "and by customizing commercial contracts compared to the civil ones .The Contract did not loose its importance not even today. It is the main source of obligations, offering the means to achieve the stability in human relations within the circulation of goods and values.

A significant Latin adagio, "*contractus legem ex conventione accipiunt* "(Contracts receive legal sanction from the agreement of the parties) highlights ***the parties' legal force*** materialized in this important legal document.

The basis of the contract - the theory of autonomy of will. Following the developments that have occurred since the late nineteenth century, political, economic and social realities have changed. The theory of the autonomy of will came into conflict with these facts, therefore, was put into question and even challenged. This is why attempts were made in order to find another basic concept of the contract. It was searched within the space of legal positivism doctrine. Thus, the following was proposed: the contract theory – objective legal situation; the theory grounding the common good contract and equity or the principles of social utility and commutative justice.

The contractual solidarity belongs to the same field, grounding the contracts and its effects on the relationship of solidarity between the parties, which work together to achieve common objective consisting of the sum of their contractual interests. The contractual solidarity agreement has significant consequences, from pre-contractual stage and then throughout its execution.

None of these theories is unanimously accepted. Therefore, this study concludes with the proposal to be built an eclectic theory, and from the contract's basic concept the following cannot miss: the will of the contracting parties, the solidarity relations arising between the parties due to contractual interest of each party, but undertaken by the other party, and the positive law, meaning the state norms which are imperative in this field.

The psychology represents the science that provides data and information needed in order to create the legal will. These data show a high degree of generality, of schematics and mobility, in order to be introduced in the middle of the, moving fluidity of life"[1].

In the field of Law, the role of the will has a double meaning on the one hand, the general will of the whole society or social groups, due to certain common interests, which tends to formalize through state activity, creating the state law, and on the other hand, the individual will expressed through law enforcement[2].

The **legal is part of** the components of legal consciousness.

Consequently, the **legal will** represents an attitude expressed by the subject by right, in order to participate to the completion of legal documents, where elements that lead to *decision making to have such a conduct*, are included.

The autonomy of will in the legal sense is identified with the principle of legal freedom [3].

The autonomy of will theory, inspired by the individualism that strongly marked philosophical thinking of the past centuries was transformed by the current realities in a real myth or dogma, as many authors deny to this theory the possibility to realize and to set the basis of the contractual freedom, due to the restrictions this freedom has suffered or it is still subject to.

Historically analyzing the concept of "autonomy of will", the Roman law did not know a principle of autonomy of will, as Roman law was strictly formalist, and therefore the existence of autonomy of will could not be recognized, without observing its external forms, in order to generate legal effects.

An idea supporting the existence of self-expression was promoted at the end of the late nineteenth century and it was produced as a direct result of the occurrence of the first signs of threat of its main consequences – contractual freedom – consisting of the development of new types of contract, different from the classic ones, as contracts of adhesion[4].

The classical contract considered in drafting the French Civil Code of 1804 representing an operation where "two persons with the same legal and economic power expose and discuss in a free debate their claims which they oppose, as they make concessions to each other and concluded an agreement where all terms are the wise and true expression of their common will", was followed by the emergence of a category of contracts of adhesion, drafted unilaterally by one party only, as defined by „ the unilateral will contract determining the economy of the contract where one of its elements, the adhering party's will, intervenes only to give legal efficacy of this unilateral will"[5].

For the undefined contracts when they were recognized as binding, "their legal value was resulting not from the fact that they represented agreements of will, but from the fact (independent of them) that a party had already performed a service, as they were relying on the principle of unjust enrichment and not on the *common will"*.

The Will is subject to the law, because it could not be included within the counter-law or defiance of morality. The formalism specific to the Roman law was continued within the Roman and Germanic Law dominated by culture although its concrete manifestations suffered some changes[6].

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[1] Tr. Ionascu, op.cit., pg. 261.

[2] I. Dogaru, Drept civil. Idei producatoare de efecte juridice /Ideas leading to legal efefcts, Ed. All Beck, Bucuresti 2002, pg. 740.

[3] A se vedea, J. Carbonier, Droit civil, Tome premier, PUF, 1955, p. 140; C. Hamangiu, I. Rosetti-Balanescu, Al. Baicoianu, op. cit, p. 91.

[4] V. Ranouil, L'autonomie de la volonte: Naissane et evolution d'un concept, Travaux de l'Universite de Paris, II, 1980. p. 656.

[5] G. Berlioz, *Le contract d'adhesion,* Ed. LGDJ, 1973, P.13 in Pascal Lotriec p. 60.

[6] R. Tison, op. cit. p.17-19. Thus, manifestations of „fides facta", „festuca" and „vadium" They were borrowed from the ancient French law, but in the same time they were replaced with the shake of hand and oath – gestures which still exist today, but without the same juridical content.

The principle *„solo consensus obligat"* didn't have the juridical valences that we give it nowadays. It didn't assign the autonomy of will – this matter having its origin in the practice of cannon law, which legalized the practice of the ***promissory oath***[7]**.**

The principle„ *solo consensus obligat"* rather represents the evolution from Roman Law formalism to the „Christianization of the law and of convention"

From the religious promissory oath to the secular one, there was just a step, apparently made by Grotius[8].

The same principle became to be used in order to explain the contract termination if promises were not kept; thus, the rule „ *solo consensus obligat"* will explain not only the ***contract conclusion or establishment*** , by also its achievement, regardless it was a named one or not.

The will was considered the unique source of justice. The Contract is not only a source of rights and obligations, but it also refers to the idea of justice, because only the contract by self-approved limitation – ensures the freedom of conscious will.

The contract is generally above the law, so the law cannot cut individual freedom, but as far as it facilitates to freedom of others.

The theory regarding the autonomy of will represent the basis of economic and political liberalism, and on the legal plan it determined the principle of contractual freedom. In these conditions, the western societies were less developed and the stated, minimally conceived, did not intervene in social-economical issues.

Briefly, the principle of contractual freedom can be concentrated in a few ideas: the basis of the binding force of contracts represents the will of the parties, the parties are free to determine the content and form of contract, the contract is binding for the parties and considered the „law of the parties"; the effects of the will agreement do not extend to the third parties, as that did not participate to the establishment of the legal relation[9].

According to the Civil Code, individuals or legal entities have the right to conclude contracts freely. The principle of the contractual freedom will be thus materialized.

The Civil Law recognized the **contractual freedom –** when interpreting the legal papers, the inner will of the contracting parties will prevail, the ***autonomy of will*** being very important.

In Commercial Law, the declared will prevails, by using written or printed documents, frame agreements. The Romanian Constitution does not expressly guarantee as a fundamental right or as a fundamental freedom or as a constitutional principle, the contractual freedom.

Any analysis of this concept comes against the trivialization of the notion itself referring to contractual freedom, by its metaphorical use and very rarely clarified by the consequences of the autonomy of will.

The Contract is the main source of obligations. Its importance as a means of establishing the various relationships between individuals and legal entities will be present in all fields, from the simplest needs of people, up to the professional business activities.

A contract is considered as concluded when the will is expressed by complying with the conditions of substance and form required by law, by making reference to the specifics of each contract.

The essential factor is the conclusion of the agreement of the parties – **the legal will.** The contractual freedom will be expressed from the perspective related to the form, within the rule regarding the consensus of the conventions, according to which in order to validate such a

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[7] R. Tison po. Cit. p. 19, by which God was conventionally valued in a double role.

[8] Grotius, *Le droit de la guerre et de la paix, t.II, cap. XIII, Du sermet,* Paris 1865, in the sens that the contribution of Grotius led to the secularization of natural law during his time and it was essential, see E. Gounot – *Le principe de l'autonomie de la volonte en droit priv*e, Dijon, 1912, p.3.

[9] Constantin Acostioaei, Note de curs - Elemente de drept pentru economişti/ Law elements for economists, Ed. All Beck, Bucharest 2004, p. 162.

convention, all you need is the agreement of the parties, unless we are talking about real or formal contracts and the obligations will be performed as undertaken, („pacta sunt servanda").

The basis of the principle of contractual freedom can be found in the so-called theory regarding the autonomy of will formulated by the French jurist Charles Dimonliu, who, in its drafting, took into consideration the necessity of finding some solutions for conflicts or laws of the province appeared in the 17th century France[10].

As the human will is free, the contracting parties, exclusively by their will cand give birth to a contract, took into consideration.

As a philosophical argument of this theory, it was said that "when people assume obligations through a contract, they limit their freedom by their own will… therefore individual will has its own power creating obligations from itself, not from the law and in this sense it is creative[11].

If discussing about the contractual freedom represents a sensitive step, even a risky one, the obligation to approach at least the most visible layer, remains legitimized not only theoretical, ethnically, but especially in a connotative and psychological plan: as long as the Romanian Constituent Party seems to have ignored this freedom, to talk about it largely represents to make it familiar.

Romanian specialized legal literature gives us some brief definitions of the concept of *contractual freedom* involving the same coordinates: contractual freedom is an abstract possibility circumscribed by the legal framework for both natural and legal persons, on the one hand in order to concluded contracts, meaning to engage in creating a contractual relationship, the contract establishing the actual content of this report, and on the other hand not to conclude a contract, meaning to refuse to engage in a determining contractual relationship.

Professor I.Albu considers[12] that contractual freedom represents „ the possibility of legal and natural persons, according to the law, to create contracts and to establish their content".

Another Romanian authors[13] argues „ that contractual freedom can result in the possibility to create a contract according to the parties' will, but also by refusing to concluded a contract". If any contract is justified by itself and the obligation arises from the parties' will, it is normal that they can determine the content[14] and the expression form of their legal will.

The most important field of application of the principle regarding the autonomy of will is therefore the contractual aspect, where we deal with two types of contracts: named or unnamed. This classification is very important from the viewpoint of the study, because contractual freedom is much higher in the unnamed ones. If within the named contracts the will of the parties is limited by other legal provisions, within those unnamed, the parties are free, with even the duty, to provide and detail the terms they desire.

The legal will and its limits within a contract.

Although the theory regarding the autonomy of twill theory could impose an absolute contractual freedom this has not happened and being limited all the time. In the Romanian law, the Civil Code provides no derogation by convention or private provision from ***public order and morals***. The freedom of the parties is thus limited and their will must violate the above-mentioned legal texts. This is considered as the great principle of autonomy of will[15].

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[10] I. Filipescu, *Drept internațional privat/ Private International Law,* Ed. Procardia, Buharest1993, p.88

[11] L.Pop, *Teoria Generala a Obligațiilor/General Theories of Obligations, Tratat,* Ed. Chemarea, Iași, 1994, p.31.

[12] I. Albu, *Libertatea contractuală/Contractual freedom,* Revista Dreptul nr. 3/1993, Buc, p.29.

[13] Gabriel Olteanu, *Autonomia de voință în dreptul privat/ Autonomy of will in private law,* Ed. Universitaria, Craiova 2001, p. 49.

[14] L. Pop, *Tratat de drept civil. Teoria generala a obligațiilor/General Theory of Obligations, Ed. Chemarea Iaşi 1994, p. 60.*

[15] C.Hamangiu, I.Rosetti-Balanescu, AL. Baicoianu, op. cit., p.30.

Mandatory rules. Depending on the conduct prescribed by law legal rules and devices are binding. The rules entities can not deviate from, being thus subject to such sanctions are imperative, and the onerative rules are those norms requiring a particular conduct or those prohibitive when they ban something[16].

Public order. Public order is defined in the Romanian law as: the political, economic and social order as regulated by the Constitution. Briefly, the public order is the state public policy [17].

The limitations to the autonomy of the will can be change in the same time with the change of the political opinions of the law making authority, and the breach of the imperative provisions which establish the political, economic and social order will be sanctioned with the absolute nullity.

Good Morals. In the Civil Code, the Romanian law making authority used the word "good morals". In this name were included the rules regarding the actual morals and also those regarding the public morals.

The good morals represent a new limitation of the freedom related to legal papers. An immoral or illicit cause has as a result the nullity of the civil legal paper, as it happened in the following cases:

- a decision[18] of the former Supreme Court established that, in the case when, contrary to the social life rules, a contracting party took advantage of the other party's ignorance or constraining state, in order to obtain benefits that are disproportionate compared to the performance the latter received, the respective convention cannot be considered as valid, as it was established on an immoral cause.

- when the applicant has followed the conclusion of the legal act with a manifestly immoral purpose, the reimbursement of the provided services is not accepted;

- the amounts requested by a Belgian surgeon in order to be sent to the Attending Physician cannot represent a remuneration, but a fee that the surgeon pays to the person helping him to have a patient. Such a practice was considered by the court as having an immoral cause, as its purpose was to introduce in such a profession a commercial spirit and consequently the amount of 20,000 Belgian francs was returned to the patient[19].

The autonomy of will in commercial contracts

In commonly used and simple commercial contracts, negotiation lacks completely. Currently, the commercial activity is described by the true expansion of the adhesion contracts. The stronger partner eliminates from the beginning the possibility of negotiation, the other party having only the freedom to accept or not the contract.

For the sale-purchase contracts, the general practice in the traders' activity is to display the price of the good, the buyer having no choice but to accept it. (Retail). In these cases, the autonomy of will is limited by "take it or leave it"".

The adhesion contracts can be also found in the insurance field, in the banking activity, in transportation or in electric and thermal energy supply contracts.

A specific enforcement of the principle related to the autonomy of will from a commercial point of view, is the principle of free competition. This consists of the freedom provided to the economic agents to freely use the means and methods to win and maintain the clients[20].

Some authors have used in order to define this attitude of the economic agents, the notion of *competitive conduct*[21].

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[16] A se vedea N. Popa, Teoria generala a dreptului/General Theory of Law, Ed. Actami, Bucuresti, 1996, p.172.

[17] C.Hamangiu, I.Rosetti-Balanescu, AL. Baicoianu, op. cit., p.91.

[18] Tribunalul Suprem, S.Civ., decizia nr. 73/1969, in RRD, NR. 7/1971, p. 112, cu nota de N.Cosma.

[19] Civ. Bruxelles, 25 aprilie 1931, Pas., 1931, II, p. 98 in J.Falys, op. cit., p. 200.

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[21] C. Barsan, A. Ticlea, V. Dobrinoiu, M.Toma, Societatile comerciale/Trading companies, Casa de editura si presa Sansa SRL, Bucuresti, 1993, p.198.

Among the limitations brought to the free competition we can find[22]*:*

- The conditions to maintain an economic balance for the companies;
- The economic orientation and the protection as measures apparently complying with the principle of free competition, such as commercial standardization and urbanism which often marks onerous operations favoring some players on the economic market.
- Conventions to limit competitions.

Although the human being permanently evolves and gains rights and freedoms, almost in the same rhythm, if not faster, obligations are being imposed to him, and these are limiting is will and capacity to act. He has to respect not only the objective laws of nature, but also the norms of the society he lives in, the rights, aspirations and freedoms of the collectivity hosting him[23]. More than that, the alarming signals come from the planet which he populates, from the changes of the environment he lives in, and from the self-destruction risk. Therefore, beyond the daily, common rights and obligations, the right to a healthy environment and especially the obligation to respect and protect the environment and to develop a green economy represent the only rules capable to help the species survival and more than this, the planet survival.

Conclusion:

As the economic and social evolution is more and more far from the principles of the old civil codes, we can wonder if the principles governing the legal document, especially the contract, are still up-to-date and consequently applicable.

In this paper I tried to underline the need to maintain the principle of autonomy of will and contractual freedom in question, as research topics for jurist, with the personal hope, which totally lacks fantasy, to bring a plus of consistency in the awareness of contractual freedom within the legal culture of the Romanian Law system, as well as in the French system; systems where the actual distances in the contractual freedom prove their incapacity to remove the convergences of the same field as traditionally imposed in a legal freedom space drafted by the Civil Codes and consolidate Modern Constitutions.

The recommendations set forth in the article will allow the development of certain directions in science, law and practice. This, at its turn will lead to the revision of the traditional general view on contractual, including the environmental reports.

In addition to the fact that in doctrine and practice a clear idea about the specific environmental reports will be outlined, as elements of distinct branches, this will represent a first-step in the consecration of a difference in the procedure for examining complaints and disputes related to environmental issues dealing with the environmental damage.

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THE PENALTY CLAUSE. CONVENTIONAL WAY OF ASSESSING DAMAGES

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Abstract
Penalty clause is one of the most important and frequent changes by convention of the parties of the legal status of contractual liability. The parties may agree on the amount of damages, before the damage, by a clause in the contract contents or a separate convention, in case of failure, improper performance or delayed performance of the contractual obligations by the debtor. The purpose of this research is to analyze the concept and advantages of inserting the penalty clause in contracts. Also the study aims to delimitate the penalty clause of other similar institutions.

Keywords: *penalty clause, contract, contractual liability, pledge, alternative obligation*

Introduction:

Penalty clause has its origins in the principle of contractual freedom. According to this principle, the parties are free to sign any contracts and to determine their content within the limits imposed by law, public order and ethics. (Art. 1169, The New Civil Code). Thus, the free will of the contracting parties remains sovereign and values as law.

The contractual liability issues as penalty clause inserted into contracts is of perennial novelty, the contracting parties being free to assess their compensations by agreement. The Penalty clause has a contractual nature. Thus, as a convention, it must meet the conditions of validity required by law.

The legal contractual nature of penalty clause creates the possibility of the parties to modify and even to terminate it by mutual agreement. Therefore having a a legal and contractual nature, the penalty clause should be inserted in a contract embodied in written form.

The Parties, in performance of the contract concluded between them, have the whole interest to provide shelter for any damage likely to suffer as a result of non-performance or defective performance of the obligations incumbent upon the other party engaged in the same legal agreement

The paper includes:

Defining penalty clause of the 1864 Civil Code **and the New Romanian Civil Code.**

The main legislative guidelines regarding the penalty clause, which resulted in doctrinal and jurisprudence interpretations, were the provisions of the old Civil Code from 1864, Articles 1066 to 1072.Penalty clause has been defined by the old Civil Code in art.1066 as *"Penalty clause is that by which a person, to give assurance for the performance of an obligation, binds to give a something in case of failure by his party. "*

The new Civil Code enshrines the legal institution of the penalty clause in art. 1538 - 1543, defining the penalty clause (Art. 1538 Paragraph 1) in the following terms: *"penalty clause is that by which the parties stipulate that the debtor is committed to a particular benefit for non-performance of his primary obligation."*

Advantages and disadvantages to incorporate the penalty clause in contracts.

The Penalty clause provides the advantage of allowing the parties and not the court to choose the amount of compensation in case of a damage suffered, thus the parties shall be from the

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beginning aware of what and how much it shall cost if they do not meet their obligations, in this point of view it not being only a mechanism of defense against harmful consequences of a default, but also coercion, both legal and moral, without leaving the parties in hope that they will not pay or will pay much less for "breaching" the contract.[1]

Within the contractual relationship, throughout the contract or by a separate agreement, after the conclusion of a contract, but before the default, the parties have the opportunity to determine the amount of damages due by the debtor as failure to perform his contractual obligations.[2]

Also, in the assumption of inserting a penalty clause in contracts, the injured party is exempt from a long, costly and uncertain legal procedure. It can thus be avoided a trial between the contracting parties to establish the due compensation for the damage caused to the creditor by non-performance of the contractual obligations.

The creditor receiving penalty clause is exempt from the requirement to prove the injury suffered by willful misconduct of the main obligation. This clause gives the creditor the option between forced execution in nature of the main obligation and forced execution of the penalty clause. The choice shall be made by the creditor and is not within the debtor's freedom of choice.[3]

Therefore, the parties are free of any evidence to the existence and extent of the injury and thus of the amount of damages owed by the debtor. The creditor must prove only the non-performance, the defective performance or late performance of the contractual commitments undertaken by the debtor.

In the event that the indemnity established is less than the actual injury, the liability of the debtor is reduced by effect of the penalty clause.[4]

We may conclude that the usefulness of the penalty clause, expression of the principle of contractual freedom, results from exempting the parties of any evidence on the existence and extent of the damage and the amount of damages owed by the debtor, and in avoidance of a possible legal dispute between the parties covering the settlement of the damages owed by the debtor to the creditor as a result of the damage caused.

Nevertheless the Penalty Clause has drawbacks. Thus, the debtor of the obligation performed improperly can be determined either for economic reasons or because the creditor's bad faith to set very high amounts in the penalty clause which can lead to unfair situations with injurious effects on him if the clause is enforced.[5] Likewise, if the amount determined by penalty clause is too small, it gives the debtor a means or reason to deliberately evade the execution of duties. This finding is particularly applicable when the penalty clause is less than the benefit that the debtor gets from non-performance of the contract.[6]

Delimitation of penalty clause from similar institutions.
Penalty clause and pledge

The pledge contract is a contract under which the debtor or a third party submits to a creditor or a third party a movable good, tangible or intangible, to secure the fulfillment of obligations. [7] In

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[1] Dascălu D.N., *Issues of Penalty Clause in Civile Contracts from the Perspective of the New Civil Code*, Acad. Andrei Rădulescu Institute of Legal Research of the Romanian Academy, Law, State of Law and Juridical Culture, Annual Scientific Paper Session, May 13, 2011, Bucharest, p.464.

[2] S. Angheni, *The Penalty Clause in Civil and Commercial Law*, Oscar Print Publishing House, Bucharest, 1996, p.14.

[3] Turcu I., *Laws Commented on, The New Civil Code, Law no. 287 / 2009, Book V. On Obligations, Art. 1164-1649, Comments and Explanations*, C.H.Beck Publishing House, Bucharest 2011, p.633.

[4] Weill A., quoted by Bârsan C., în *The Penalty Clause in International Commercial Contracts* by Babiuc V., Rucăreanu I., Bârsan C., Sitaru D., Turcu N.- Seclaman, World Institute of Economy, Bucharest, 1985, p.39.

[5] Sângeorzan D.E., *Practical Comments, Civil Liability in Civil and Commercial Matters*, Hamangiu Publishing House, Bucuresti, 2009, p.113.

[6] *Ibid,* p.114.

[7] M.N.Costin, C.M.Costin, *Civil Law Dictionary from A to Z*, Hamangiu Publishing House, Bucharest 2007, p.487.

the old regulation, namely the Civil Code of 1864, the pledge agreement was defined as "Pawn is a contract whereby the debtor delivers the creditor a movable good for debt security" (Art. 1685).

Under the new regulations, Art. 2480 of the New Civil Code stipulates that pledge may relate to tangible goods or securities issued in the materialized form.

Regarding the subject of penalty clause**,** Art. 1538 Paragraph (1) of the New Civil Code provides: "penalty clause is that by which the parties stipulate that the debtor is committed to a particular benefit for non-performance of his primary obligation." This benefit may consist of a sum of money or other goods.[8]

A first difference between penalty clause and pledge is that, for the penalty clause, the object on which it was agreed as its object remains in the possession of the debtor, while the pledge is usually with dispossession. Thus, according to Art. 2481 of the New Civil Code: "The pledge is constituted by delivering the property or title to the creditor or, where appropriate, keeping it by its creditor, with the debtor's consent, to ensure the claim." So, the pledge agreement remains a real contract, its establishment taking place at the time of handing the good or title to the creditor, or when the creditor shall have it in possession, for holding it in order to guarantee the obligation.[9]

Pledgee is a poor owner of the good given in pledge in favor arising three rights for him: *the right to own the good, the right to claim the good pledged to third parties the right of preference.*[10]

Art 2483 and Art. 2484 of the New Civil Code expressly enshrine the right of the pledgee to own the good pledged.[11]

Right to claim the asset from third parties (the prerogative of tracking the pledged asset) is also enshrined in Art. 2486 of the New Civil Code which provides that: "Subject to rules regarding the acquisition of movable property by possession of good faith, the pledgee may request reimbursement of the asset it holds, unless the asset had been taken over by a or senior mortgage lender or the takeover occurred in the procedure of forced execution." So, when the asset pledged is no more in the possession of the pledgee, he may request restitution from the one who holds it, except for the cases: a) the conditions relating to the acquisition of mobile assets by possession in good faith are met (Articles 937-939 of the New Civil Code), b) those in which the property was taken over by a senior mortgage lender, c) those in which the takeover occurred in forced execution proceedings.[12] Therefore, the prerogative of tracking consists of the opportunity of the pledgee to claim reimbursement of the asset from any person who would hold it.

The right of preference. In relation to unsecured creditors, the right of preference grants creditor the possibility to be paid with priority of the price of the pledged asset and subsequently capitalized. The right of preference stems from the essence of any real right and the right of pledge is an ancillary real right together with the mortgage, privileges and the right of retention.

Therefore results *a second essential difference* between penalty clause and pledge**.** The creditor of the obligation with penalty clause is an unsecured creditor, which comes in competition

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[8] Adam I., *Civil Law. Obligations. Contract.*, C.H.Beck Publishing House, Bucharest, 2011. p. 709.

[9] *Juridical Instruments, New Civil Code, Notes, Correlations, Explanations*, C.H. Beck Publishing House, Bucharest, 2011, p.886.

[10] Găina A.M., *Real Estate Warranties for Execution of Civil and Commercial Obligations*, Universul Juridic Publishing House, Bucharest, 2010, p.63.

[11] In Art. 2483 the New Civil Code provides that: "Owning the asset by the pledgee should be public and unequivocal. When to third parties is created the appearance that the debtor owns the asset, the pledge cannot be opposed to them", and Art. 2484 of the New Civil Code: "With the approval of his debtor, the creditor may exercise detention through a third party, but this detention does not provide ownership of the pledge until the moment he receives the document acknowledging the pledge."

[12] See: *Juridical Instruments, New Civil Code, Notes, Correlations, Explanations*, C.H. Beck Publishing House, Bucharest, 2011, p.887.

with the other creditors of that debtor [13], not being the holder of a real right over the property subject to penalty clause and not having tracking right and right of preference on the asset.[14]On the other hand, the pledgee being the holder of a real right over the asset that is subject to a pledge agreement acquires the three powers, namely, the right to own the asset, the right to claim the asset pledged to third parties the right of preference.

A third difference between the object of the the penalty clause and that of the pledge is that for pledge the object of pledge may be proposed for sale with the purpose of sufficiency for creditor or may be turned over to the property of creditor by the decision of Court. In the case of the penalty clause, the size of the actual damages sought by the lender has no meaning.[15]

Delimitation of penalty clause from alternative obligation.

According to art. 1461 Paragraph 1 of the New Civil Code, "The obligation is alternative when it covers two main benefits, and the performance of one of them releases the debtor from all obligations."

(2) The obligation remains alternative even if, at the time it is born, one of the benefits is impossible to be executed.

Article 1462 (1) Choosing the benefit which will discharge the obligation lies with the debtor, unless it is expressly granted to the creditor.

(2) If the party to which the choice of the benefit is borne does not express its option within the term granted for this purpose, the choice of the benefit shall be borne to the other party.

Art. 1463 The debtor cannot perform, nor can he be constrained to execute a part of a benefit and a part of another.

Art. 1464 The debtor who has the choice of benefit, when one of the benefits has become impossible to be executed even by own fault, is required to execute the other benefit.

(2) If, in the same case, both benefits become impossible to execute, and one's impossibility is due to the fault of the debtor, he is bound to pay the amount of benefit that has last become impossible to be executed.

The alternative obligation assumes that its object consists of two or more benefits, of which, upon selection of one party (the debtor, except when expressly provided that the choice is of the creditor and the situation when, upon maturity, the debtor does not opt), performance of one benefit leads to extinguishing the obligation.[16]

The alternative obligation is characterized by the fact that there is one and the same obligation which consists of two or more main benefits, of which only one must be executed by the debtor to be entirely free of the debt assumed.[17]

Plurality exists, but only subject to the object of the obligation, not in terms of its execution because the execution of one of the benefits has the effect of extinguishing the obligation. The alternative character of obligations with plurality of objects can be determined by the existence of the conjunction "or" between the benefits that the parties determine to be owed by the debtor. It follows that, *in obligatione,* the debtor owes the creditor two or more benefits, and *in solutione* is bound to perform only one of them.[18]

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[13] S. Angheni, *The Penalty Clause in Civil and Commercial Law*, Oscar Print Publishing House, Bucharest, 1996, p.16.

[14] Adam I., *Civil Law. Obligations. Contract.*, C.H.Beck Publishing House, Bucharest, 2011, p. 71.

[15] S. Angheni, op. cit., page 17.

[16] Boroi G., C.A. Anghelescu, *Civil Law Course, General,* Hamangiu Publishing House, Bucharest, 2011, p.73.

[17] L.Pop, *Regulation of the Penalty Clause in the Writs of the New Civil Code*, in "Dreptul" Magazine, no. 8/2011, p.19.

[18] Pop L., *Civil Law Treaty. The Obligations. Volume I. General Juridical Regime,* C.H.Beck Publishing House, Bucharest, 2006, page 205.

For the penalty clause obligations, there are actually two distinct obligation relations, even if the penalty clause agreement is ancillary to the main obligation.[19] Therefore is penalty clause an alternative obligation? The answer can only be negative. The convention which stipulates that penalty clause does not give the debtor a genuine choice between the main obligation and the ancillary one, essentially subsequent and conditioned by default of the primary obligation, but reinstates to him an unique and determined benefit. The penalty clause is in the range of responsibility, punishing non-performance of an obligation, not the obligation itself.[20]

If an *obligation is accompanied by a penalty clause* we are in the presence of two distinct obligations, a principal one and an ancillary and conditional, which expires when the main obligation expires, or *for alternative obligation* failure to execute one of the benefits that are object to it does not have a result in its expiry, it continues to exist as a rule, as pure and simple obligation.[21]

The alternative obligation is therefore an obligation with multiple benefits, one of the benefits having to be executed, upon choice of both parties or one of them, this performance leading to settle the obligation, while the *for the obligation with penalty clause*, there actually are two separate obligation relations, even if the penalty clause agreement is ancillary to the main obligation.[22]

The alternative obligation is distinct from the penalty clause. This is not object of the obligation and is a way of assessment of the damage suffered by the creditor by non-performance according to the title of his claim.[23]

According to Art. 1538 Paragraph (3) of the new Civil Code "the debtor cannot be unbound offering the compensation agreed upon." Thus, *the penalty clause debtor* has no right of option, does not have the possibility to choose and cannot be released from obligation only by performing the main obligation, not being able to provide the penalty clause in return. The debtor *of the obligation with penalty clause* has two contractual obligations, namely *a main obligation* which consists of the obligation to perform the in-kind benefits undertaken and *an ancillary obligation* consisting in payment of money or other benefits set out in the penalty clause. Or, *in the case of alternative obligation,* as explicitly stipulates Art. 1462 Paragraph (1), the debtor has the choice of benefit, unless the creditor had expressly been granted the choice between the two obligations. "Choosing the benefit which will discharge the obligation lies with the debtor, unless it is expressly granted to the creditor. (Art. 1462 Paragraph 1 of the new Civil Code).

The creditor of an *obligation with penalty clause* cannot claim payment instead of the main obligation as long as it is possible to execute in-kind the main obligation. However, in case of non-performance, the creditor can ask for either the in-kind forced execution of the main obligation, or the penalty clause (Art. 1538 Par. 2 of the new Civil Code). Therefore for the creditor there can be the choice of option provided that the main obligation had nor been performed.

While any of the benefits of *alternative obligation* can be executed directly, *the penalty clause* is an indirect execution.[24] In the case of *alternative obligations,* the execution of one of them is sometimes independent of any fault of the debtor, for the obligations to which a *penalty clause* is associated enforcement of this clause is subject to the debtor default for non-performance of the main obligation.[25]

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[19] S. Angheni, *The Penalty Clause in Civil and Commercial Law*, Oscar Print Publishing House, Bucharest, 1996, p.17.

[20] I. Deleanu, S. Deleanu, *Considerations on the Penalty Clause* in "Pandectele Romane", no. 1 / 2003, p.116.

[21] L.Pop, *Regulation of the Penalty Clause in the Writs of the New Civil Code*, in "Dreptul" Magazine, no. 8/2011, p.19.

[22] Adam I., *Civil Law. Obligations. Contract.*, C.H.Beck Publishing House, Bucharest, 2011, p. 718.

[23] Almăşan A.*, Pluralist Obligations*, C.H.Beck Publishing House, Bucharest, 2007, p.12. Almăşan A.*, Pluralist Obligations*, C.H.Beck Publishing House, Bucharest, 2007, p.12.

[24] Almăşan A.*, Pluralist Obligations*, C.H.Beck Publishing House, Bucharest, 2007, p.13.

[25] Deleanu I., Deleanu S., *Considerations on Penalty Clause*, in Pandectele Române, no. 1/2003, p.116.

Penalty clause and optional obligation

The obligation is optional when has its object is one main benefit of which the debtor may be released by executing another predetermined benefit. (Art. 1468 Paragraph 1 of the new Civil Code). The debtor is discharged if, without fault, the main benefit becomes impossible to be executed. (Art. 1468 Paragraph 2 of the new Civil Code)

Voluntary obligation is characterized by the uniqueness of the object of obligation: the benefit which the debtor undertakes is unique. The creditor may require the debtor to execute only the benefit which alone is subject to the obligation. The creditor may therefore only require its execution. The debtor is obliged to execute only one benefit, with choice for the debtor to get unbind by performing another determined benefit.

The other determined benefit the debtor may execute is a *"choice" (in facultate solutionis)*. Therefore: if the main benefit becomes impossible to be performed without fault of the debtor, he shall be freed of obligation; if the main benefit disappears by fault of the debtor, the creditor is only entitled to damages according to general rules.[26]

Therefore, there is only one obligation which "in obligatione" has only one object, and "in solutione" has two objects, the faculty of paying by execution of the other benefit belongs solely to the debtor. Rather, in the case of *obligation with penalty clause* we have two distinct obligations, each with its specific object, the right of choice belongs exclusively to the creditor and is subject to unlawful non-performance of the benefit subject to the debtor's principal debt.[27] "In case of non-performance, the creditor may either request forced in-kind execution of the main obligation, or the penalty clause." (Art. 1538 Paragraph 2 of new Civil Code).

The penalty clause acts as a penalty and is within the reach of the creditor in case of failure or improper performance of contractual obligations of the debtor, while the faculty of the debtor of the *voluntary obligation* is a way of release within the reach of the debtor.

Conclusions

Inserting the penalty clause in contracts remains a challenge for theorists and especially for law practitioners. In the event the contractual debtor does not perform the obligation undertaken, his contractual partner is therefore entitled to obtain the damages under the penalty clause without any claim to prove the existence of the loss and its size. It is sufficient that the parties will have agreed that non-performance or delayed performance of the obligations undertaken cause damage and will have added value to remove, on this plan, any subsequent judicial investigation.

In our study, I tried to stress the need and usefulness of inserting this type of clause in contracts following that in the presence of such clause, the parties to be able from the beginning to determine the amount of damages due to non-performance, poor execution or delayed execution of contractual obligations.

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[26] See: *Juridical Instruments, New Civil Code, Notes, Correlations, Explanations*, C.H. Beck Publishing House, Bucharest, 2011, p.543.

[27] L.Pop, *Regulation of the Penalty Clause in the Writs of the New Civil Code*, in "Dreptul" Magazine, no. 8/2011, pag.19

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LIBERTIES - LEGAL ACT OF UNILATERAL OR BILATERAL TRAINING

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Abstract
We analyzed liberality, special institution of civil law substantially in two particular aspects: legal document formation legal act unilaterally and bilaterally band.
Every human life is a complex and irreversible phenomenon, which they flow, limited in time, involve many connections with other beings, interfering various rights and obligations, concessions and compromises in the most varied forms.
Within this complex phenomenon are inherent and legal operations are intertwined in the thread everyday life, day after day.
Legal acts are governed by common rules, essential and generally applicable, on unilateral expression of will, the conditions of formation of the agreement will, in respect of conditions of life imperative, the form you need to put the act .
Human freedom is expressed through law. But what is really important, lies in the fact that human beings can not be taken away freedom of choice to discern between good and evil, between normal and abnormal. Each person in relation to choice of law can have consequences.

Keywords: *liberality, will, unilateral, bilateral, civil act.*

Introduction

Liberality is primarily a legal act.

In the following we intend to analyze this special institution of civil law substantial under two particular aspects: the legal act formation legal act unilaterally and bilaterally formation.

In the general context of the study we specify that the Civil Code of 1864 was not true of general rules of civil act. A indirect regulation of legal act concept could be found in Title III of Book III of the Civil Code, "About contracts or agreements".

In doctrine, civil act has been defined generally as a manifestation of the will made with the intention to produce legal effects, that is, born, modify or extinguish a specific legal relationship[1]

A) Juridical act - manifestation of will

In addition to the classical definition of the legal act, pointing out that "the legal act is a manifestation of will - unilateral, bilateral or multilateral committed with intent to establish, modify or extinguish, according to objective law, legal relations, provided that the existence of this intention to produce legal effects depend on itself (sn) [2]".

The civil legal act, has the following elements:

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[1] See G. Boroi, *op, cit*., p. 185; see V.V. Popa, *op. cit.,* p. 62.

[2] See M. Mureşan, *Civil Law. General part,* Cordial Publishing, Cluj-Napoca, 1994, p. 106.

- a manifestation of the will (which may come from one or more individual or legal entities)[3]

- manifestation of will is expressed with the intention to produce legal civil effects[4]

- the pursued legal effects may consist in giving birth, modify or extinguish a specific civil legal relationship

We mention that the term "act" can have two meanings: legal operation (*negotium iuris*) or document acknowledging the manifestation of will, meaning the material support notifiying or rendering the legal operation (*instrumentum probationis*)[5].

In relationship with the planned, existence of this effect, particularly on the one hand, acts committed with intent to produce legal effects, that is civil legal acts and on the other hand, acts committed without intention to produce legal effects, but shall take effect under the law, that is legal acts *(stricto sensu)*[6].

We mention that particular importance present the classification of legal acts according to their volitional nature in the events, or natural facts, and actions, or voluntary acts, "because only if the latter, law will assign legal relevance to the will."

Events are those surrounding reality changes that occur beyond the control of the individual, but born, alter or extinguish concrete legal relations under the law[7].

Therefore, civil acts include actions which manifest the intention of the author, in the meaning of birth, alteration or extinction of specific civil legal relations.

Consequently, the volitional character, different legal acts (events and actions) committed without intention to produce legal effects[8].

In the national doctrine of legal act is studied in the two forms already established (unilateral legal act and contract), unlike the French theory that divides legal documents: contracts, unilateral legal acts and legal acts of collective[9].

The category of collective legal acts consists of : collective unilateral acts (such as majority decisions - acts of will that precede a common final) and collective agreements (eg collective agreements)[10]. Unilateral legal act is a manifestation of a (single) will, in order to produce legal effects[11]. As the result of a single legal will, unilateral act is likely to produce legal effects in itself, not being conditioned by the consent of another person[12].

As regards the issue concerning the quality source of obligations of the unilateral act, in doctrinal and jurisprudential plan, have emerged two tendencies:

- first, he deems the unilateral legal act a source of obligations only in cases prescribed by law;

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[3] See Şt. Răuschi, Civil law. The general part. Individual. Legal person, Foundation House "Chemarea" Publishing , Iaşi, 1993, p. 75.

[4] See P.M. Cosmovici, Civil law. Introduction to Civil Law, All Publishing House, Bucharest, 1994, p. 95.

[5] See Pop, Gh. Beleiu, *op. cit.*, p. 187.

[6] *Stricto sensu,* legal fact only means individual actions that produce legal consequences by effect of law against the will of the perpetrator, and natural facts, see RI Motic, Mihai Gheorghe, Introduction to the study of law, Alma Mater Publishing House, Timisoara, 1995, p 201 et seq.

[7] See E. Lupan, M. Răchită, D. Popescu, Civil law. General Theory, Babes-Bolyai University, Cluj-Napoca, 1992, p. 114.

[8] Volitional nature it is of essence of civil act in an area where "right it is a world of finalities, the civil act it is set to reach participants predilect instrument to legal circuit realization of subjective interests protected by the law" see St.. Rausch, op. cit., p 75, T. Pop, Romanian Civil Law. General Theory, Lumina Lex, Bucharest, 1993, p 119.

[9] According to the art. 1166 of the New Civil Code, "contract is the agreement of wills between two or more persons intended to constitute, modify or extinguish a legal relationship."

[10] See J. Four, J.L. Aubert, E. Savaux, *op. cit.,* (2006), and 416 and seq..

[11] See E. Chelaru, *op. cit.,* p. 100.

[12] See N. Popa, General Theory of Law, All Beck Publishing House, Bucharest, 2002, p 276 et seq.

- the second most recent, which includes the unilateral legal act, part of obligations sources category whenever there is a firm promise that does not require acceptance for.birth.

Between civil legal act and manifestation of will can be establish the following correlation: if any legal act is a manifestation of will, "not every manifestation of will is a legal act"[13].

Consequence of individual action and beyond its, legal acts take effect in the classification of concrete material situation, in the general and abstract pattern of law.

Legal facts, broadly, are situations which the rule of law assigns in precisely defined circumstances, legal relevance, for the purposes of generation, variation or settlement of legal relations[14]. The concept of legal fact is identical with the source of the legal ground. In the limited sense, the legal fact means only individual actions that produce legal consequences by effect of law against the will of the perpetrator, and natural facts[15].

B) Legal will in unilateral legal acts

The term "unilateral act" is established and used whenever it is a legal document expressing the unique will of its author's[16]. Therefore, unilateral legal act is a manifestation of a will to produce legal effects[17]. In the the above conditions, is likely that unilateral legal act to produce legal effects itself unconditionally by consent of another person. Worth mentioning that french doctrine distinguishes between unilateral legal act and unilateral commitment, placing the two concepts in a similar relationship to that of agreement - contract. Therefore, in the accordance with art. 1101 of French Civil Code, the contract is defined as a "generating convention obligations" unilateral commitment is a specie of unilateral legal act which results in the birth of obligations on its author[18]. National doctrine, has an original vision of the unilateral legal act institution. As "a specific procedure for creating private norm" unilateral legal act is defined as "a unilateral declaration will be issued for the purpose to generate, modify or extinguish a civil institution, or in order to find acceptance"[19]. It follows that unilateral legal acts are susceptible of classification as they have or do not need to produce specific effects of an acceptance from another person unilateral acts statute and non statutory unilateral acts. Statuary unilateral act is characterized by that "manifestation of will is sufficient to generate a set of legal relationships, which will apply to the issuer"s will, act being born valid and effective without the need for acceptance from another entity "[20]. In terms of potestative rights theory, the doctrine considers that exercise of the potestativ right only depend on unilateral will of its owner, who, by the exercise of this right, will get new legal effects in the relation to a specific new legal situation[21]. Similarly, the classical doctrine has opined for the impossibility of unilateral will of generating an obligation on the promissory and benefit of the others. In support of the above

[13] See I. Dogaru, *op. cit.*, 2005, p. 6.

[14] See R.I. Motica, Gh. Mihai, Introduction to study law, Alma Mater Publishing House, Timisoara, 1995, p 201.

[15] See G. Boroi, *op. cit*., p. 43; E. Chelaru, *op. cit.,* p. 100.

[16] See M. Avram, Unilateral act in private law Hamangiu Publishing, 2006, p 18.

[17] According to the art. 1324 of the New Civil Code, "is the legal document that requires only unilateral expression of will of its author." According to the art. 1325 of the New Civil Code, "If not otherwise provided by law, the laws relating to contracts are properly applied unilateral acts".

[18] See M. Avram, Some theoretical and practical aspects of unilateral voluntary act Romanian law and Community law, Annals of University of Bucharest: Rosetti, 2003, p 49.

[19] See M Avram, *op. cit.*, p. 18.

[20] See P. Vasilescu, *op. cit*., p. 155.

[21] See L. Pop, *op. cit.,* p. 136; I. Deleanu, Parties and third parties. legal effect and enforceability of relativity, Rosetti House, Bucharest, 2002, p 212.

has argued with the symmetry principle of civil legal acts, whereby a legal act may be revoked or modified under similar conditions it was concluded[22]

C) Foundations of unilateral act in the private law

Unilateral legal act has its source in the definition of the legal act in general and it is based on will"s subjects, which aim to create certain legal effects[23]. In the doctrine, will"s role within legal act was the subject of controversy, since "you can not ignore the fact that positive law determine to what extent, this will create subjective rights and obligations"[24].

In this context we show that, in civil act theory a particular importance has the classification of legal acts according to their volitional nature in the events, or natural facts, and actions, or voluntary acts, "because only in the latter case the law assigns legal relevance to the will ". We remind that the events are those changes of surrounding reality that occur beyond the control of the individual, but born, alter or extinguish concrete legal relations under the law[25].

For example, are included in the category above: human birth, resulting in the appearance of a new entity; reaching the age majority and gaining full legal capacity; passage of time in consequence of acquisition or extinction of rights, natural catastrophes and disasters, legal with the effects related[26]. Human actions are omission or commission facts, committed with or without the intention of producing legal effects, appointed in the doctrine and the notion of legal facts stricto sensu.

Human action involves a subset depending on the legality or illegality of the action. Lawful facts, which do not affect the rule of law and social values, and enforceable in the power of legal rules are: business management, undue payment or unjustified enrichment[27].

Illegal acts, offenses and quasidelictele, although voluntary acts, it will take effect from the power of their author, but by law.Note that the scope of civil legal acts include actions which the author will be manifested in the sense of birth, alteration or extinction of specific civil legal relations. Volitional nature is what distinguishes civil legal act other legal acts committed without intention to produce legal effects[28]. In this context, we remind that the majority of the doctrine has civil legal act defined as the manifestation of will made with the intention to produce legal effects, that is, born, modify or extinguish a specific legal relationship[29]. Note in conclusion that the foundation the unilateral legal act is his volitional character. In other words, the civil act is "the predilect instrument offered to the participants to achieve their subjective rights and interests protected by law"[30].

As a result of a single legal will, unilateral act is susceptible to produce legal effects itself unconditioned by the consent of another person. More precisely, unilateral legal act is a manifestation of a will in order to produce legal effects[31].

The recognition of unilateral legal act as a source of civil obligations meets the draft of European Code of Contracts which stipulates that the promise made with intent to be bound linking

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[22] Therefore, those original author will unilateral legal act may thus be revoked the discretion of it at any moment.

[23] According to the art. 1325 of the New Civil Code, "If not otherwise provided by law, the laws relating to contracts are properly applied to unilateral acts".

[24] The foundation of the legal act under private law is different in comparison with public law, see M. Avram, op. cit., (2006), p 12.

[25] See O. Ungureanu, *op. cit.,* p. 103.

[26] See E. Poenaru, Introduction to civil law. General Theory. People, Publishing Dacia Nova Europe, Lugoj, 2001, p 93.

[27] See P.M. Cosmovici, Civil. Introduction to Civil Law, All Publishing House, Bucharest, 1999, p 68.

[28] See M. Muresan, Civil. Part general, Cordial House, Cluj-Napoca, 1994, p 106.

[29]See Tr Ionaşcu, legal elements will, in the Treaty of civil law, vol I, Part General, Publishing House, Bucharest, 1967, p 258.

[30] See T. Pop, Romanian Civil Law. General Theory, Lumina Lex, Bucharest, 1993, p 119.

[31] See D. Cosma, General theory of civil act, Scientific Publishing House, Bucharest, 1969, p 14.

its author[32]. As already mentioned, the french doctrine distinguishes between unilateral legal act and unilateral commitment, placing the two concepts in a similar relationship agreement - contract. Therefore, unilateral commitment is a specie of unilateral legal act which has results in the birth of obligations on its author[33]. In conclusion, having the origin in unilateral will of the author, the obligations of the legal act could be revoked at its sole discretion at any moment. Similarly, after the death or incapacity of its author, the commitment will become null and void by suppressing the will that is "the only support of the obligation"[34].

D) The particularities of will in legal acts of bilateral formation

The study of free will can not be complete without taking into account the particularities of liberal manifestation in bilateral legal acts. Therefore we consider it necessary to present some considerations on the implications of subject-domain analysis of contracts. In support of the above, we consider the fact that the New Civil Code has provisions common to both donation and will (art. 984-1010). Therefore, are covered with institutions such as: capacity in the liberalities area (art. 987-992) fideicomisare substitutions (Art. 993-1000); liberties treatment (Art. 1001 to 1005), reviewing the conditions and tasks (articles 1006 - 1008) etc[35]. Classical, the contract is based on the principle of autonomy, that contractual obligation is based exclusively on the will of the parties, the will that is the source and dimension of all rights and obligations created by the very expression of its free and aware manifestation[36]. Principle is based on natural liberty, fundamental attribute of every human being and the will was the main source of rights and obligations, recognizing thus the ability of individuals to be bound by the will, and only to the extent they wish, no contradiction idea of man's natural liberty[37].

In the above context, the individual is not bound by the obligations he did not assumed, especially since those might be injust, but instead he is bound to execute all obligations to which he has subscribed freely. According to the concept, to be free means, first and foremost, all self-limitation of our freedom by the contracts we have concluded in the absence of constraints or external influence. Therefore, the contract has become the main source of law, drawing on the strength from the agreement of will necesarry to its conclusion[38]. According to this, marriage is not the result of law, but a tacit agreement between the spouses, legal succession reflects a silent testament of the deceased, citizenship is in turn the result of a contract between individual and state.

Source of rights and freedoms in the state, liberal contract allows individual setting of fair and useful relationships between community members.According to the ideas of the great french thinker,

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[32] See M. Abram, Some theoretical and practical aspects of unilateral voluntary act Romanian law and Community law, Annals of University of Bucharest: Rosetti, 2003, p 49.

[33] See H., L. and J. Mazeaud and F. Chabas, Lessons of civil law. Obligations. General theory, Montchrestien, Paris, 1991, p. 359.

[34] See St.. Rausch, Civil. The general part. Individual. Legal person, Chemarea Publishing, Iasi, 1993, p 75.

[35] According to the art. 985 of the New Civil Code, "The donation contract through which, with the intent to gratify a party, named donor dispose irrevocably by the a good in favor of the other party, called the donee."

[36] See P. Vasilescu, Relativity civil act. Highlights for a new general theory of private law act, Rosetti House, Bucharest, 2003, p 15.

[37] According to art. 989 of the New Civil Code, "Under penalty of absolute nullity, the person who dispose need to determine the beneficiary of the liberality or at least provide criteria for the beneficiary to be determined after the liberality void. Person which do not exist at the date of liberality can receive a gift if it is made to someone able, with the latter task to give to the client object of the liberality soon as possible. Under penalty of absolute nullity, the person who dispose can not let a third party, beneficiary right to appoint or establish the liberality its subject. However, distribution of assets transferred by related persons designated by the testator may be left to the third party. It is valid the liberality made by the person who dispose of an designated person, with a task on behalf of a person chosen either gratified or a designated third party, itself, also by the the person who dispose ".

[38] See J.J. Rousseau, *Du contrat social,* Editura Flamarion, Paris, 1992, p. 34.

the individual is the best judge of his needs, and since he can manifest freely his will, he will conclude only those contracts that protect his interests. Likewise, any obligation imposed is unjust, disregarding the interests of the debtor (State lead but only one insurance policy frameworks needed to satisfy individual interests, market forces, supply and demand by adjusting production of goods) and therefore the contract is above the law, which plays a secondary, complementary, covering only those issues which the parties have not considered.

Therefore, promoting individual interest could only lead to satisfying the public interest, perceived as the sum of individual needs[39]. We mention that all civil laws are based on inspired napoleonic principle of autonomy of individual will.

In addition to the principles, theory of nullity abolishes the effects of the legal act arising from a legal will altered by vices of consent, as "freedom of contract is the legal corollary of freedom understood as the product of conscious and free will, a social reverberation of this will"[40].Note that the drafters of the Civil Code of 1864 only partially joined the independent nature of individual will.From the analysis of art. 969 Civil Code, conventions are viewed as private law of the parties, but only subject to compliance with state law. Therefore, the contract draws its binding force from the outside of the norm. Therefore, the parties will, through conditioning, receives a secondary role[41].

To the theory of "justice and equality", opposes the reality of social inequality. Therefore, meeting individual free wills on contractual plan will oppose the need of the accumulation and appropriation for human beings, seeking the social utility and profitability of the legal documents that adhere. Contract will be self-conscious and rational and therefore a source of law (consent, as an externalized the will must not be expressed flawed and knowingly)[42].

The corrupted contractual will is considered that there is no occurrence at the time of consent. The indifference of ground of the contract, essentially expresses that the product of independent will can not be censored [43]. We remind in this context that internal will (of each contracting party) creates rights and thus "externalizing will is logic condition of delivery of the contract, as long as it remains in itself, will not disclosing valences nomothete"[44].

In unilateral legal acts (will) the liberal intention can not be based than the one will of the person who dispose..In donation agreement araises the question: liberal intention animus donandi is only the will of a partie (the donor) or donee too (for the contract is an agreement of wills)?On the question above, we will make several considerations.

The liberal Intention is born of donor initiative and after the contract is concluded, it becomes irrevocable.Therefore liberal intention is characterized first and foremost by manifestation of the will of the donor, without which that would not exist. It is defined as the donor intended to confer to the donee without seeking or obtaining the equivalent of consideration he made.

But because it is expressed in a donation contract, the agreement of the parties is essential for the valid formation of the contract. The agreement of wills, involves two distinct persons which have mutual intention to make or accept a liberality. The valid conclusion a donation requires the acceptance from the gratified. As a consequence, for liberal intention to take effect, it is subordinated to the act of acceptance of the gratified. According to the art. 1013 of the New Civil Code, "Offer of donation may be revoked while bidder was unaware by the acceptance address. Incapacity or death of tender attracts caducity of.acceptance Offer can not be accepted after the death of her recipient. But inheritors can communicate the acceptance address made it. Offer of donation made to a person

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[39] See J. Goicovici, Formalism and substantial freedom of contract, in Studia Babes-Bolyai University, Cluj-Napoca, no. 2-4/2002, p 111 et seq.

[40] See P. Vasilescu, *op. cit.*, p. 34.

[41] See O. Ungureanu, *op. cit.*, p. 114.

[42] See D. Chirica, Principle of contractual freedom and its limits in terms of the sale, in DRC no. 6/1999, p 45-49.

[43] See I. Albu, contract and contractual liability, Dacia Publishing House, Cluj-Napoca, 1994, p 27

[44] See P. Vasilescu, *op. cit.*, p. 35.

without legal capacity will be to accepted by legal guardian. Offer of donation made to a person with limited legal capacity may be accepted by the latter, with the consent of legal protector ".

"The liberal intention has not such existence on legal stage, unless the donation it is accepted by the donor without his consent it has no legal a value.Only through acceptance by the beneficiary, will give legal value to the *animus donandi* of the donor.

Study of donation agreement, concerning the wills of the parties is interesting because it raises a problem relatively overlooked by specialists: the intention *animus donandi* belongs exclusively to donor? and if so, when the donor and donee are concurring wills?

Conclusion

In conclusion of the analysis of particularities of liberal will, generally and mortis causa especially we appreciate that a clear dissociation between the will for the cause of death - generosity and willingness to cause of death - substitute a person can not be achieved, for which it follows to take into account under both aspects.

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PARTICIPANTS IN INSOLVENCY

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Abstract
The article examines the officials and other participants in insolvency. The main purpose of the insolvency procedure is to cover all the debts of the debtor side, in favor of his creditor side.
The most important regulations regarding this issue consist in Law no. 85/2006, according to it in the insolvency procedure are to be appointed the following officials: insolvency courts of justice, insolvency judge, receiver, liquidator. All these officials have to act in celerity, in order to promptly perform acts and operations provided by law and to respect and provide other participants' rights and obligations.
My article present in the beginning the insolvency courts of justice, their material and territorial competence and the procedure rules. Next chapters are dedicated to the insolvency judge, receiver and liquidator and analyze the following issues: their appointment, their powers, their auxiliary officials and their ceasing of the powers. Some regards on the British law and French law are also included. The next chapter is dedicated to the participants to the insolvency procedure: the creditors general assembly, creditors committee and special administrator, followed by conclusions and recommendations.

Keywords: *insolvency, judge, receiver, liquidator, creditors general assembly.*

Introduction

My paper work is about the participants in insolvency, about the authorities and persons taking part in such procedure.

The companies have a very important role in the economy of a nation. They represent the force that sustains the economy, the bases for the future development and a source of stability. Any massive decline of one the companies could produce a "chain reaction" and could compromise the national economy. For these reasons, based on legal previsions, it is extremely important to avoid the bankruptcy of such companies and its consequences. Thus, it is very important for each legal system to adopt a clear and efficient legislation in this matter. It is also important to create and maintain a mechanism to supervise and prevent the insolvency of the companies. When insolvency of a company appears, it is thus important to know the parties, persons and authorities involved in.

The purpose of this paper is to realize a detailed analysis of the participants in insolvency, their duties and powers. The analysis of this issue will help the persons involved in such procedures or which are about to be involved to have a concrete image of all the applicable laws regarding the participants in insolvency. The narrow meaning of the concept of participants in an insolvency includes the bodies and the parties. The bodies appointed to enforce the proceeding are: legal courts, bankruptcy judges, trustees in bankruptcy and liquidators. The parties in insolvency are: the debtor and the creditors.

Taking into consideration its collective nature, other stakeholders take part in the insolvency proceeding: creditors' general meeting, creditors' committee and the special administrator.

This issue, based on present regulation, was analyzed before, but this paper tries to add different regulations in other European legal systems, so it is my duty to create a proper and a most accurate image of different legal reglementation regarding the participants in insolvency.

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Paper content

Chapter 1: Introduction. Overview

The insolvency proceeding is a complex procedure whose accomplishment requires the intervention of parties or bodies compelled to or interested in participating in such procedure in order to solve the situations caused by the lack of the debtor's cash flow so that his payables to creditors be covered.

The people working together as part of the insolvency procedure in order to attain its goal are called participants.

As rightly emphasized in the legal literature, the concept of participants in a civil trial differs from the content of the same concept in the civil law. While in the civil law, participants are only the subjects of the legal civil relationship, in a civil trial, the participants are the bodies and people summoned to contribute to the progress of the civil trial. In the insolvency proceeding, by overlaying the scopes of the two concepts, we can notice that, for the purpose of the civil law, participants will mean the debtor and the creditor.

As understood from the above, the broader meaning of participants in a civil trial encompasses all the official or private subjects who actually take part in the activities of the insolvency proceeding. For this purpose, the participants include: the parties, the judicial bodies and other participants.

The narrow meaning of the concept of participants in an insolvency includes the bodies and the parties.

The parties in insolvency are:

a) the debtor – the private law natural or legal entity who is among the entities stipulated in art.1 of the law and who is undergoing insolvency

b) the creditors

The law distinguishes among various creditor categories, defining them as follows:

A *creditor* is a natural or legal entity holding a right of creditors against the debtor's property and who has expressly requested the court that its receivables be recorded in the definitive receivables table or in the consolidated receivables table and who can duly prove its receivables against the debtor's property (art. 3 point.7 of the law).

A *creditor who is entitled to request the commencement of insolvency* means a creditor whose receivables against a debtor's property are certain, liquid and have been claimed for more than 90 days. The creditors, including the state-owned entities, may request the commencement of insolvency only if, after settling any mutual debts, the amount owed to them exceeds the amount stipulated by point. 12 (art. 3 point 6 of the law).

A *creditor entitled to participate in the insolvency proceeding* means such creditor who has formulated and has been partially or fully admitted a petition for the recording of the receivables on the debtor's list of creditors and who has the right to participate and vote in the creditors' meeting, including to vote for a legal reorganization plan endorsed by the bankruptcy judge, to be appointed as a member of the creditors' committee, to take part in the distribution of the funds collected as a result of the debtor's legal reorganization or of the debtor's property liquidation, to be informed or notified on the progress of the procedure and to participate in any other proceeding regulated by this law. The debtor's employees have the capacity of creditors *entitled to participate in the insolvency proceeding* without having to submit personally a statement of claim (art. 3 point 8 of the law).

The bodies appointed to enforce the proceeding are: legal courts, bankruptcy judges, trustees in bankruptcy and liquidators.

Taking into consideration its collective nature, other stakeholders take part in the insolvency proceeding: creditors' general meeting, creditors' committee and the special administrator.

As we have talked about the parties earlier herein, we will continue by presenting the categories of the bodies that implement the insolvency proceeding and of the other participants.

Chapter 2: Bodies implementing the insolvency procedure

Subchapter 1: Preliminary Explanations

The nucleus of the matter is article 5 and subsequent articles of Law no. 85/2006, according to which the bodies implementing the insolvency proceeding are:

- the legal courts (regulated by the provisions of art. 6-8 of Law no. 85/2006);
- the bankruptcy judge (regulated by the provisions of art. 9-12 of Law no. 85/2006);
- the trustee in bankruptcy (regulated by the provisions of art. 19-23 of Law no.85/2006);
- the liquidator (regulated by the provisions of art. 24 and 25 of Law no. 85/2006).

In the *French law*, the bodies implementing this procedure are:

- the legal courts;
- one or more *juges-commissaires*;
- the public ministry;
- the legal agent;
- one or more trustees in bankruptcy;
- the liquidator.

In *the British law*, the bodies implementing this procedure are:

- *the Court*;
- *the administrator*;
- *the official receiver*;
- *the administrative receiver*;
- *the supervisor or nominee*;
- *the liquidator* or *provisional liquidator*;

Subchapter 2: Legal courts

A. Preliminary explanations

Law no. 85/2006 consecrates the traditional concept according to which the main part in implementing collective proceedings is played by the legal courts. During the proceeding, certain disputable aspects may occur (having a litigation nature), which may require the trial of the case under contradiction circumstances, and the only authorities able to intervene and order over such disputes are the legal courts. According to the law, the legal courts entitled to implement the insolvency procedure are the tribunal (as a first instance) and the court of appeal (as an appeal instance).

B. The tribunal

a) Principles

The law grants full authority to a tribunal; thus, according to the provisions of art. 6 of Law no. 85/2006, „*all the proceedings required by this law, except for the appeal stipulated by art.8, shall fall under the responsibility of the tribunal under whose jurisdiction the debtor's registered office is*

located...", as registered with the Trade Registry or with the agricultural company registry or with the registry of associations and foundations and shall be exercised by the bankruptcy judge.

Therefore, the bankruptcy judge has the authority of trialling both main requests and ancillary or incidental petitions: intervention requests[1] or injunction reliefs[2]. The purpose of granting full authority is that of making effective the principle of celerity of insolvency proceedings and of ensuring continuity in the completion of the procedures required by insolvency.

b) Authorities

b.1. venue of the court

By analyzing the provisions of art. 6 of Law. 85/2006, the first instance venue is the tribunal, irrespective of the value of the creditors' receivables (less than 500,000 RON or more than 500,000 RON). Such provisions have a special nature and derogate from the general matter provisions (art. 2 letter b of the Rules of Civil Procedure), according to which the tribunals trial as first instance the civil lawsuits and claims whose subject-matter exceeds 500,000 lei (RON). Therefore, if the receivables value is 500,000 RON or less, the venue of the court authorized to settle the case is the tribunal and not the city court, as required by the general regulations.

b.2. jurisdiction of the court

According to art. 6 of Law no. 85/2006, the sole criterion to determine the jurisdiction of the court (and of the insolvency department – if such department has been created) is the debtor's head office, as registered with the Public Registers.

The jurisdiction of the court is determined on the day the court is informed by means of a petition for an order of relief so that, even if the debtor changes its registered office during the proceedings to the jurisdiction of another tribunal, the original tribunal (where the debtor had its original registered office) shall have the authority to settle the case (according to the provisions of art. 6 par. 3 of the Law no.85/2006).

Should a debtor under insolvency proceedings be a subsidiary of a trade company, the jurisdiction of the court shall be the tribunal under whose jurisdiction the company is registered, as, according to art. 42 of Law no. 31/1990, such subsidiary is a legal entity.

The situation is different for a branch of a trade company. In this case, as a branch is not a legal entity, the jurisdiction of the court is the tribunal where the parent-company is registered, as the debtor in such a case is the latter and not the former.

b.3. functionality of the court

Law no.85/2006 does not require the establishment of a dedicated insolvency department within a tribunal, but, where such department exists, „*it is the one authorised to carry out the proceedings stipulated by this law*".

[1] Bucharest Court of Appeal, 5th Commercial dept., decision no. 276/2007, published in C.A.B., Anthology,1, 2007, page199.

[2] Bucharest Court of Appeal, 5th Commercial dept., decision no. 1088/2007, published in C.A.B., Anthology,1, 2007, page210.

c) Proceeding rules

The proceeding rules established by Law no. 85/2006 are aimed at making effective the celerity principle and have mainly a derogatory nature from the common law (The Rules of Civil Procedure) in terms of subpoenas and the communication of the proceedings documents, namely:

- subpoenaing the parties, as well as communicating any proceeding documents, summons and notifications are carried out by the Insolvency Proceedings Bulletin, except for the following cases (when the provisions of the Rules Of Civil procedures apply):
- participants having their registered office or residence abroad (art.7 par.1 thesis 2);
- communication of the proceeding documents which precede the commencement of the proceedings and the notification concerning the commencement of the proceedings (art.7 par.3);
- first subpoena and the communication of the proceeding documents to the parties against whom a lawsuit is filed, by virtue of law no. 85/2006, after opening the insolvency proceedings (art.7 par.3 ind.1);
- the creditors having submitted requests for the admission of receivables, who are supposedly aware of the hearing date and, therefore, will not be subpoenaed (art.7 par.7);
- in the litigation proceedings regulated by Law no. 85/2006 shall be subpoenaed as parties only the entities whose rights or interests are referred to the bankruptcy judge to be settled, under contradiction circumstances; in any other cases shall apply the provisions of the Rules of Civil Procedure on the non-litigation proceedings, to the extent to which they do not violate any express provisions of this law (art. 7 par. 2);

The notifications, except when they are the responsibility of other bodies enforcing the procedure, shall be carried out by the trustee in bankruptcy or liquidator, where appropriate (art. 7 par. 6).

Should the debtor be a company traded on a regulated market, the bankruptcy judge shall communicate the order forrelief to the Securities National Commission (art. 7 par. 4).

B. The Court of Appeal

a) Authority

According to the provisions of art.8 of Law no. 85/2006, the court of appeal is the venue authorized to trial the appeal filed against the decisions passed by the bankruptcy judge.

b) Proceedings rules

The law sets deadlines and special proceedings, which are derogatory from the relevant common law, concerning the trial of the appeal:

- the appeal deadline is 7 days after the decision has been communicated, unless the law specifies otherwise;
- the right of appeal against the decisions of the bankruptcy judge is to be held only by the participants in the proceedings in the cases and under the conditions provided by law; the creditors who have not applied for a statement of affairs do not hold such right; on the other hand, the creditors who have applied for a statement of affairs and their application has been rejected are entitled to such right;
- the appeal shall be trialed by specialized panels no later than 10 days after the files was registered with the court of appeal;
- the subpoenaing of the parties in the appeal and the communication of the passed decisions shall be carried out according to the provisions of the Rules of Civil Procedure;

- by derogation from the provisions of art. 300 par. 2 and 3 in the Rules of Civil Procedure, the decisions of the bankruptcy judge cannot be suspended by the appeal court, unless the appeal concerns:
- the decision rejecting the debtor's contestation, filed by virtue of art. 33 par.4;
- the judgment whereby it has been decided to enter the simplified proceedings;
- the judgment whereby bankruptcy has been decided upon, passed according to art. 107;
- the judgment settling the appeal against the plan of distributing the funds obtained following liquidation and collection of the receivables, filed by virtue of art. 122 par.3 of the law.
- for all the appeals filed against the decisions passed by the bankruptcy judge as part of the proceedings a single file shall be constituted.

Subchapter 3: Bankruptcy judge

All the proceedings concerning insolvency falling under the authority of the tribunal, according to Law no. 85/2006, are exercised by the bankruptcy judge. Thus, such judge plays the main role in applying the insolvency proceedings.

A. Capacity of bankruptcy judges

The bankruptcy judges have the legal capacity of a judge – a court judge. Bankruptcy judges have a public position of general interest and they organize and run the entire insolvency proceeding, from its opening to its closure. Therefore, to fulfill their duties, bankruptcy judges do not act as representatives of the creditors' or debtors' interests. They act as judges, their orders are binding for all the participants in the insolvency proceedings.

In the French law, such a judge is called a *juge-commisaire* and is appointed by the tribunal (several *juges-commisaires* may be appointed if necessary)[3].

***B.* Appointing bankruptcy judges**

According to art. 9 of Law no.85/2006, the assignment of the cases whose subject-matter is the proceedings stipulated by this law to the judges appointed as bankruptcy judges is carried out randomly and computer-based in compliance with the provisions of art. 53 of the Law no. 304/2004 on judicial organization[4], republished.

C. Duties of bankruptcy judges

The main duties of bankruptcy judges are regulated by art. 11 of Law no. 85/2006, namely:

a) the justified order for relief and, where applicable, for bankruptcy, both within general and simplified proceedings;

b) consideration of debtor's appeal against the creditors' first claim for the commencement of proceedings; consideration of creditors' opposition to the commencement of proceedings;

c) the appointment justified by the judgment for an order for relief of a temporary trustee in bankruptcy or, where applicable, of a liquidator, among the compatible insolvency practitioners having submitted an offer for this purpose to the case file, who will manage the proceedings until his/her confirmation or replacement by the creditors' meeting or by the creditor holding at least 50%

[3] Dominique Legeais, *Droit commercial et des affaires*, pct. 813.
[4] Published in the Official Gazette no. 576/29th June 2004.

of the receivables; the determination of remuneration in compliance with the criteria set by the law on insolvency practitioners, as well as of their obligations for such period. The bankruptcy judge shall appoint the temporary trustee in bankruptcy or liquidator requested by the creditor who has submitted the petition for the commencement of proceedings or by the debtor, if such petition has been filed by the latter. Should the party having submitted the petition for an order for relief not request the appointment of a trustee in bankruptcy or liquidator, such appointment shall be performed by the bankruptcy judge among the practitioners who have submitted offers in the case file. In case of a file merger, the debtors' petitions shall be considered based on the value of receivables or on the debtor's petition, if there is no petition filed by a creditor;

d) the confirmed appointment, by means of a conclusion, of the trustee in bankruptcy or liquidator designated by the creditors' meeting or by the creditor holding at least 50% of the receivables, as well as the acknowledgement of the fee agreed upon. If there are no appeals against the creditors' meeting decision or against the decision of the creditor holding at least 50% of the receivables, such acknowledgement shall be performed in council chambers, without subpoenaing the parties, no later than 3 days after the creditors' meeting decision or the main creditor's decision was published in the Insolvency Proceeding Bulletin;

e) the replacement on solid grounds and by means of a conclusion of the trustee in bankruptcy or liquidator;

f) the consideration of the petitions requesting the removal of the debtor's right of running his business;

g) the consideration of petitions for personal liability for the members of management who have contributed to the debtor's insolvency, according to art.138, the intimation of the investigating bodies concerning the offences stipulated by art. 143-147;

h) the consideration of actions filed by the trustee in bankruptcy or the liquidator for the cancellation of some fraudulent documents and of some estate-related establishments or transfers preceding the commencement of proceedings;

i) the consideration of the appeals of the debtor, the creditors' committee or any other stakeholders against the measures taken by the trustee in bankruptcy or liquidator;

j) the admission and approval of the reorganization plan or, where applicable, the liquidation plan, after it has been voted by the creditors;

k) the settlement of the petition of the trustee in bankruptcy or |the creditors' committee to discontinue the reorganization and bankruptcy procedures;

l) the settlement of the contestations submitted against the reports of the trustee in bankruptcy or liquidator;

m) the consideration of the action for the annulment of the creditors' meeting decision;

n) the delivery of the judgment on the decision of closing the proceeding.

The bankruptcy judge is not the debtor's manager under insolvency. The management duties belong to the trustee in bankruptcy or liquidator or, exceptionally, to the debtor itself if such debtor has not been deprived of the right to manage his property.

According to art.11 par. 2 of the law, the duties of the bankruptcy judge are restricted to the judicial control of the activity of the trustee in bankruptcy and/or the liquidator and to the judicial processes and petitions related to the insolvency proceedings. The management decisions may be controlled in terms of opportunities by the creditors, through their bodies.

In order to fulfil its obligations, a bankruptcy judge may ask for the opinions of experts in various fields. Such experts may be appointed, by means of a conclusion, by the bankruptcy judge upon the proposal of the trustee in bankruptcy or liquidator. Such experts are entitled to receive a remuneration whose value shall be determined by the bankruptcy judge, by means of a conclusion; such remuneration shall be paid out of the debtor's estate or, in the absence of liquidities, out of the fund stipulated by art.4 par. 4 of Law no.85/2006.

D. Decisions of the bankruptcy judge

The decisions of the bankruptcy judge shall be definitive and enforceable as of the day they have been passed. They can be appealed (art.12 par.1). By derogation from the provisions of art. 300 par. 2 and 3 of the Rules of Civil Procedure, the decisions of the bankruptcy judge shall not be suspended by the appeal court unless in case the appeal concerns:

a) the sentence whereby the debtor's contestation is rejected, filed by virtue of art. 33 par.4;
b) the judgment whereby it has been decided to enter the simplified proceedings;
c) the judgment whereby bankruptcy has been decided, passed according to art. 107;
d) the judgment settling the appeal against the plan of distributing the funds obtained following liquidation and cashing the receivables, filed by virtue of art. 122 par. 3 of the law.

The bankruptcy judge is authorized to pass successive resolutions in the same file. This status quo does not lead to incompatibility, according to the provisions of art. 24 par.1 of the Rules of Civil procedure, unless there is a case of retrial after the resolution was written off during appeal. (art. 12 par. 2 of Law no. 85/2006).

A. Cessation of the duties of the bankruptcy judge and the specialist personnel appointed by the former

The duties of the bankruptcy judge shall cess as of its replacement, as well as in case of closure of the insolvency proceedings.

a) replacement of the bankruptcy judge

Unlike the old regulation (law no.64/1995), Law no.85/2006 does not regulate the conditions in which the bankruptcy judge may be replaced. Nevertheless, in practice, the question of replacement may occur in case of incompatibility (other than that stipulated by art. 12 par.2 of Law no.85/2006), abstention or recusal. We believe that in such a case a new bankruptcy judge will be appointed randomly and computer-aided in compliance with the provisions of art. 9 of Law no. 85/2006.

b) closure of proceedings

According to art. 136 of the law, upon the closure of the proceedings, the bankruptcy judge, trustee/liquidator and all other participating entities are relieved from any duties and responsibilities regarding the proceeding, the debtor and his estate, the creditors,, security holder, the partners and shareholders.

Should the bankruptcy judge have been assisted by experts, their duties cess in the same manner. We believe that, as the appointment of experts was carried out by the bankruptcy judge, their duties may cess also by their replacement by the bankruptcy judge or by their removal.

Subchapter 4: Trustee in bankruptcy

A. Capacity of a trustee in bankruptcy

An important role in the insolvency proceeding, along with the bankruptcy judge, is played by the trustee in bankruptcy. The trustee in bankruptcy is *the compatible natural or legal entity practising insolvency, duly authorised and appointed to perform the duties required by law during the observation period and during the reorganisation procedure* (art. 3 point 27).

According to the provisions of art. 19 par. 5, the trustee in bankruptcy, a natural or legal entity, including its representative, shall have the capacity of an insolvency practitioner. The legal

status of insolvency practitioners is regulated by the Emergency Government Order no.86/2006 on insolvency practitioners[5].

B. Appointing a trustee in bankruptcy

The trustee in bankruptcy shall be appointed in compliance with the provisions of art. 19 of the law.

B.1 the process of appointing a temporary trustee in bankruptcy

The person who wants to be appointed as a trustee in bankruptcy in an insolvency file shall submit in advance a documentation including:

- the proof of their capacity of insolvency practitioners;
- copy of the professional insurance policy;
- bid of taking over the position of a trustee in bankruptcy in the relevant file.

Among these people, by means of the judgement for the commencement of the general proceeding, the bankruptcy judge shall designate one of the bidders as a temporary trustee in bankruptcy, and by means of the judgement for the commencement of simplified proceeding, the bankruptcy judge shall designate a temporary liquidator. For the temporary appointment of the trustee in bankruptcy, the bankruptcy judge shall take into consideration all the submitted offers, of the petitions submitted by the creditors and, where applicable, by the debtor, if the first petition belongs to the debtor.

Therefore, when the first petition is formulated by the debtor, the latter may propose a trustee in bankruptcy. The creditors, by means of their petition submitted to the court, have the same possibility of proposing a trustee in bankruptcy. Should the holder of the first petition not propose a trustee in bankruptcy, the bankruptcy judge shall appoint a temporary trustee in bankruptcy among the bidders. Should no insolvency practitioners have submitted any offer to the file, the bankruptcy judge shall appoint temporarily, until the first creditors' meeting, an insolvency practitioner selected randomly out of the Table of the National Union of Insolvency Practitioners (art.19 par.1).

B.2 the procedure of appointing a temporary trustee in bankruptcy

Upon the recommendation of the creditors' committee, during the first creditors' meeting or later, the creditors' holding at least 50% of the total receivables may decide upon the appointment of a trustee in bankruptcy/liquidator, determining their remuneration (art.19 par.2). The creditors may decide to acknowledge the trustee in bankruptcy who has been temporarily appointed by the bankruptcy judge or may appoint another insolvency practitioner.

Should one of the creditors hold more than 50% of the total receivables, such creditors may decide upon the appointment of a trustee in bankruptcy and set their remuneration without consulting the creditors' meeting. In such case, such creditor may also acknowledge the person that has been temporarily appointed by the bankruptcy judge or may appoint another insolvency practitioner.

The creditors' decision or the decision of the creditor holding more than 50% of the total receivables concerning the acknowledgement of the temporary trustee in bankruptcy /liquidator appointed by the bankruptcy judge or concerning the appointment of the trustee in bankruptcy /liquidator (who is another insolvency practitioner than that temporarily appointed by the bankruptcy judge) may be contested by the creditors only on grounds of unlawfulness. Such contestation shall be formulated and submitted to the file no later than three days after any of the decisions mentioned above has been published in the Insolvency Proceeding Bulletin.

[5] Published in the Official Gazette no. 944/22.11.2006, approved by Law no. 254/2007 (Official Gazette no.507/30.07.2007).

All the contestations shall be settled simultaneously and urgently by the bankruptcy judge by means of a conclusion which may order the following:

- reject all contestations and appoint the designated trustee in bankruptcy/liquidator acknowledged by the decision of the creditor(s) holding more than 50% of the total receivables;
- admit the contestation, in which case the meeting of the creditors/ the creditor holding more than 50% of the total receivables shall be requested to designate another trustee in bankruptcy /liquidator;

If within three days after either of the decisions mentioned above has been published in the Insolvency Proceeding Bulletin no contestation is formulated, by means of a conclusion, the bankruptcy judge shall appoint the trustee in bankruptcy proposed by the creditors or the creditor holding more than 50% of the total receivables.

By means of a conclusion, upon the appointment of the trustee in bankruptcy (who is another insolvency practitioner than that temporarily appointed), the bankruptcy judge shall order the cessation of all duties of the temporarily designated trustee in bankruptcy.

In order to protect the debtor's and creditors' interests, the law requires the trustee in bankruptcy to have concluded a professional liability insurance which he shall show before his appointment and keep it, without reducing the insured amount directly or indirectly. In case of violation of these obligations, the trustee in bankruptcy shall be removed and shall pay potential damage (art.19 par.9).

In the *British law*, as part of the *administrative receivership*, the „administrator receiver" is designated by the creditor among the insolvency practitioners. The creditor designates such receiver by means of a document that is binding provided that the designated receiver accepts such position. Such acceptance shall be given until the end of the working day following the day when the designated receiver received the appointment document. In the old regulation, a designated receiver could be replaced by the creditor having appointed him. Nowadays, a receiver's replacement may be ordered only by the court[6].

As part of the procedure called *administration*, the administrator is a person appointed in compliance with sch B1 of the Insolvency Act 1986, in order to manage daily activities, business and assets of the companies. Such administrator is an *officer of the court* and is appointed among the insolvency practitioners by the court, the majority creditor, by the company or its managers.

In the *French law,* according to needs, one or more trustees in bankruptcy may be appointed, whose duties are determined by the court and may consist of assisting the debtor in managing the company or even in administering it, fully or partially.

C. Duties of the trustee in bankruptcy

According to art. 20 of Law no. 85/2006, the main duties of a trustee in bankruptcy, for the purpose of this law, are:

a) to examine the debtor's economic status and the documents submitted in compliance with art. 28 and 35 and to draw up a report whereby either the simplified proceeding or the continuation of the observation period as part of the general proceeding is proposed, then to submit the report to the bankruptcy judge within a period set by the latter, which cannot exceed 20 days after the trustee in bankruptcy has been appointed;

b) to examine the debtor's business and draw up a detailed report on the causes and circumstances leading to insolvency, by mentioning the people to which such insolvency may be imputed, as well as on the existence of the conditions leading to their liability, in compliance with art. 138, as well as on the real possibility of debtor's actual business reorganization or on the reasons which do not allow such reorganization and to submit the report to the bankruptcy judge within a

[6] Roy Goode, *Commercial law*, page 847.

period set by the latter, which cannot exceed 40 day after the trustee in bankruptcy has been appointed;

c) to draw up the documents stipulated by art. 28 par. 1 if the debtor failed to fulfill their relevant obligation within legal deadlines, as well as to verify, correct and supplement the information in the relevant documents, when they have been presented by the debtor;

d) to develop the debtor's business reorganization plan based on the content of the report mentioned in letter *a* above and in the terms and conditions stipulated by art. 94;

e) to supervise the operation of debtor's estate management;

f) to manage fully or partially the debtor's business; if partially, such management shall be performed in compliance with the express requirements of the bankruptcy judge concerning his duties and the terms of payment out of the debtor's account;

g) to convene, chair and ensure the secretariat of the creditors', shareholders', partners' meetings or of the meetings of the debtor's members who are legal entities;

h) to file actions for the annulment of the fraudulent documents concluded by the debtor to the damage and prejudice of the creditors' rights, as well as of some property related transfers, of business operations concluded by the debtor and of some securities granted by the latter which will supposedly damage the creditors' rights;

i) to inform immediately the bankruptcy judge if they find that the debtor has no assets or that such assets do not suffice to cover administration expenses;

j) to maintain or terminate some contracts concluded by the debtor;

k) to check the receivables and, where applicable, to formulate objections to such receivables, as well as to develop receivables tables;

l) to collect receivables; to follow the collection of receivables concerning the debtor's property or the amounts transferred by the debtor before the commencement of the proceeding; to formulate and support claims for the collection of the debtor's payables, even by means of attorneys;

m) provided that the following are endorsed by the bankruptcy judge, to conclude transactions, bankruptcy discharges, to discharge fidejussors, to wave security interests;

n) to inform the bankruptcy judge about any matter that may require settling by the latter.

By means of a conclusion, the bankruptcy judge may set for the trustee in bankruptcy any additional duties to those mentioned in art. 20 par. 1, except for the duties which the law requires as the authority of the former.

The trustee in bankruptcy shall be remunerated for the performance of his duties. Such remuneration shall be determined by the bankruptcy judge by means of the order for relief which may be later amended by creditors..

In addition to the duties above, the trustee in bankruptcy shall submit on a monthly basis a report including the description of how they have fulfilled their duties, as well a rationale for the expenses spent to manage the proceeding or for any other expenses made out of the funds in the debtor's property, including their remuneration, as well as of the method such remuneration has been calculated.

To exercise his duties, the trustee in bankruptcy is entitled to designate certain experts (art.23). The appointment and remuneration of experts shall be submitted to the approval of the creditors' committee, and, should the remunerations of such people be paid of the liquidation fund, the appointment and the remuneration shall be approved by the bankruptcy judge.

In the *British law*, the concept of a trustee may have two meanings, each for a different procedure:

a) administrative receiver, who is appointed for a creditor's interest;

b) administrator, appointed in the procedure of *administration*;

a) What is characteristic for the procedure performed by the administrative receiver is that such procedure has the legal status of a judicial enforcement and not of a collective insolvency procedure. According to law, an administrative receiver shall ensure with priority the covering of secure party creditors. His main obligation is to serve the interests of the *debenture holder* who has appointed him, and his main duty is to make sure that the payables of the debtor appointing him are paid, either by liquidating debtor's assets and distributing the collected price to the creditor, or by managing the business, collecting the profit and distributing it to the creditor. Therefore, even if such receiver acts on behalf of the debtor, his duties are subordinated to the creditor's interests[7].

The administrative receiver holds two kinds of powers: i) powers *in rem* and ii) *agency powers*. The powers *in rem* have their source in the securities accompanying the credit and include the right of possessing and collecting the fruit and of using the assets constituting the security. Carrying out such powers in not influenced in any way by the order for relief.

By virtue of his managing powers, the administrative receiver may run the debtor's business, may hire or lay off employees, may conclude or terminate debtor's contracts. Such powers cess on the day of the order for relief[8].

b) The administrator's legal status is more similar to the status of the trustee in bankruptcy in our law system. The main difference from the administrative receiver is that the administrator is appointed to represent the debtor and to serve his interests and the interests of the creditors' group, who shall be consulted before his appointment. The proceeding carried out by the administrator (called „administration") has the following characteristics: transparency, responsibility and collectivity and may have two forms: rescue or asset liquidation and distribution of price. The objective to be achieved by the administrator is, in the order of priority[9]:

- rescuing the company;
- recovering some receivables in an amount for the group of creditors that is greater than the amount should the liquidation have been applied, without a preceding administration;
- liquidation of company's assets in order to ensure the payment for one or more secure party creditors or priority creditors.

The effect of this procedure is the discontinuity of the judicial enforcement on the debtor's real property or debtor's rights of claim[10].

The powers of the administrator are identical to those of the administrative receiver (in rem and managing), which have been mentioned above; furthermore, the administrator may remove or appoint directors and may convene the creditors' general meeting.

D. Contestations against the measures taken by the trustee in bankruptcy

The measures taken by the trustee in bankruptcy when carrying out his/her duties may be contested in compliance with art. 21 of Law no. 85/2006. The law acknowledges the locus standi of suing in making the contestation:

a) natural person debtor;
b) special administrator of legal entity debtor;
c) creditors;
d) any other stakeholder.

The contestation shall be registered no later than 3 days after the report by the trustee in bankruptcy to the bankruptcy judge and shall be trialed no later than 5 days after its registration, in

[7] Roy Goode, *Commercial law*, page 845.
[8] Roy Goode, *Commercial law*, page 847.
[9] Roy Goode, *Commercial law*, page 851-0852.
[10] Roy Goode, *Commercial law*, page 852.

chambers by subpoenaing the claimant, the trustee in bankruptcy and the creditors' committee. Upon the claimant's request, the bankruptcy judge may suspend the enforcement of the contested measure.

The bankruptcy judge cannot cancel by default the measures taken by the trustee in bankruptcy which have not been contested, if such measures have been taken in compliance with the law. However, if such measures are unlawful, taking into consideration the role of the bankruptcy judge, in accordance with art. 11 par. 2 of the law, such judge shall have the obligation to cancel any unlawful measure taken by the trustee in bankruptcy, even if such measure has not been contested by the parties entitled to do it.

E. Replacing the trustee in bankruptcy

The trustee in bankruptcy may be replaced by the bankruptcy judge at any stage of the proceeding, on solid grounds in compliance with the provisions of art. 22 of the law. The replacement of the trustee in bankruptcy may be ordered by default or upon the request of the creditors' committee. The replacement shall be ordered by means of a conclusion which, in order to ensure transparency and prevent abuse, shall be explained. The conclusion whereby replacement is ordered shall be passed urgently in Council Chambers by subpoenaing the trustee in bankruptcy and the creditors' committee.

In *the British law*, the replacement of the trustee in bankruptcy may be ordered by the court upon the former's request or following the request of a creditor or partner/shareholder of the debtor company, when the administrator has acted or is acting or intends to act wrongly, so that to damage the claimant's interests[11].

F. Sanctions that may be applied to the trustee in bankruptcy

In order to make effective the principle of celerity of deeds and operations concerning the insolvency proceeding, the law requires that, if the relevant practitioner refuses his appointment as a trustee in bankruptcy or, once he has been appointed in such capacity, he fails to fulfil or delays the fulfilment of his duties stipulated by law or set by the bankruptcy judge, such trustee in bankruptcy may be fined with a judicial fine by the bankruptcy judge.

F.1 Refusal of appointment

An insolvency practitioner designated for the case may refuse the appointment; for this purpose, such practitioner shall communicate the refusal to the court no later than 5 days after the appointment notification. Failing to communicate his refusal timely, without solid grounds, shall be sanctioned by the bankruptcy judge with a judicial fine ranging between RON 500 to 1000. In such case of refusal, a new insolvency practitioner shall be appointed, in compliance with art. 19 of the law.

F.2 Failing or delaying the fulfillment of duties

Should the trustee in bankruptcy, by fault or bad faith, fail to fulfill his duties or delay same fulfillment, such trustee may be sanctioned by the bankruptcy judge with a judicial fine ranging between RON 1000 to 5000. Should damage have been caused following the failure or delay of duty fulfillment, upon the request of any stakeholder, the bankruptcy judge may force the trustee in bankruptcy to pay damages.

For the enforcement of the fines and damages, the provisions of art. 108 ind.4 and ind.5 of the Rules of Civil Procedure shall apply.

[11] Roy Goode, *Commercial law*, page 853-854.

Subchapter 5: Liquidator

A. Capacity of liquidator

An important role in the insolvency proceeding is played by the liquidator. For the purpose of Law no. 85/2006 (art 3 point 28), the liquidator is a natural or legal entity practicing insolvency and being duly authorized, appointed to run the debtor's business and carry out the duties required by law for both the general and simplified bankruptcy proceeding.

B. Appointing the liquidator

According to the provisions of art. 24 of Law no. 85/2006, the liquidator is appointed following the same rules as the trustee in bankruptcy, the provisions of art. 19 of the law applying appropriately.

The law allows that a formerly designated trustee in bankruptcy be appointed as a liquidator.

On the day the liquidator's duties have been set by the bankruptcy judge, the mandate of the trustee in bankruptcy cesses.

B. Duties of liquidator

According to art. 25 of Law no. 85/2006, the main duties of a liquidator are:

a) to examine the business of the debtor undergoing the simplified procedure against the actual status and drawing up a detailed report on the causes and circumstances leading to insolvency, by mentioning the people to which such insolvency may be imputed, as well as on the existence of the conditions leading to their liability, in compliance with art. 138, and to submit the report to the bankruptcy judge within a period set by the latter, which cannot exceed 40 day after the liquidator has been appointed, provided that such report was not drawn before by the trustee in bankruptcy;

b) to run the debtor's business;

c) to file actions for the annulment of the fraudulent documents concluded by the debtor to the damage and prejudice of the creditors' rights, as well as of some property related transfers, of business operations concluded by the debtor and of some securities granted by the latter which will supposedly damage the creditors' rights;

d) to apply seals, list assets and take appropriate measures for their preservation;

e) to maintain or terminate some contracts concluded by the debtor;

f) to check the receivables and, where applicable, to formulate objections to such receivables, as well as to develop receivables tables;

g) to follow the collection of receivables concerning the debtor's property resulting from assets or amounts transferred by the debtor before the commencement of the proceeding; to collect receivables, to formulate and support claims for the collection of the debtor's payables, even by means of attorneys;

h) to receive payments on behalf of the debtor and record them in the debtor's property account;

i) to sell assets from the debtor's property, in compliance with the provisions of this law;

j) provided that the following are endorsed by the bankruptcy judge, to conclude transactions, bankruptcy discharge, to discharge fidejussors, to wave security interests;

k) to inform the bankruptcy judge about any matter that may require settling by the latter;

l) any other duties set by the bankruptcy judge by means of a conclusion.

The liquidator shall be remunerated for the performance of his duties. As for the trustee in bankruptcy, such remuneration shall be determined by the bankruptcy judge by means of the order for relief which may be later amended by creditors.

In addition to the duties above, on every proceeding hearing, the liquidator shall submit a report including the description of how he has fulfilled his duties, as well a rationale for the expenses spent to manage the proceeding or for any other expenses made out of the funds in the debtor's property. The report shall contain the activities performed every month or for a few months.

To exercise his duties, the liquidator is entitled to designate certain experts (art.23 and 24 of the law). The appointment and remuneration of experts shall be submitted to the approval of the creditors' committee, and, should the remunerations of such people be paid of the liquidation fund, the appointment and the remuneration shall be approved by the bankruptcy judge.

D. Contestations against the measures taken by the liquidator

The measures taken by the liquidator when carrying out his/her duties may be contested in compliance with art. 21 par.2 and art. 24 of Law no. 85/2006. The law acknowledges the locus standi of suing in making the contestation:

a) natural person debtor;
b) special administrator of legal entity debtor;
c) any of the creditors;
d) any other stakeholder.

The contestation shall be registered no later than 3 days after the report by the liquidator has been submitted to the bankruptcy judge and shall be trialed no later than 5 days after its registration, in chambers by subpoenaing the claimant, the liquidator and the creditors' committee. Upon the claimant's request, the bankruptcy judge may suspend the enforcement of the contested measure

The bankruptcy judge cannot cancel by default the measures taken by the liquidator, which have not been contested, if such measures have been taken in compliance with the law. However, if such measures are unlawful, taking into consideration the role of the bankruptcy judge, in accordance with art. 11 par. 2 of the law, such judge shall have the obligation to cancel any unlawful measure taken by the liquidator, even if such measure has not been contested by the parties entitled to do it.

E. Replacing the liquidator

The liquidator may be replaced by the bankruptcy judge at any stage of the proceeding, on solid grounds in compliance with the provisions of art. 22 par. 2 and art. 24 of the law. The replacement of the liquidator may be ordered by default or upon the request of the creditors' committee. The replacement shall be ordered by means of a conclusion which, in order to ensure transparency and prevent abuse, shall be explained. The conclusion whereby replacement is ordered shall be passed urgently in Council Chambers by subpoenaing the liquidator and the creditors' committee.

F. Sanctions that may be applied to the liquidator

As for the trustee in bankruptcy, the liquidator who refuses the appointment or fails to fulfill or does not fulfill his duties appropriately may receive a fine in compliance with the law.

In order to make effective the principle of celerity of deeds and operations concerning the insolvency proceeding, the law required that, if the relevant practitioner refuses his appointment as a liquidator or, once he has been appointed in such capacity, he fails to fulfill or delays the fulfillment of his duties stipulated by law or set by the bankruptcy judge, such trustee in bankruptcy may be fined with a judicial fine by the bankruptcy judge.

F.1 Refusal of appointment

An insolvency practitioner designated for the case may refuse the appointment; for this purpose, such practitioner shall communicate the refusal to the court no later than 5 days after the appointment notification. Failing to communicate his refusal timely, without solid grounds, shall be sanctioned by the bankruptcy judge with a judicial fine ranging between RON 500 to 1000. In such case of refusal, a new insolvency practitioner shall be appointed, in compliance with art. 19 of the law

F.2 Failing or delaying the fulfillment of duties

Should the liquidator, by fault or bad faith, fail to fulfill his/her duties or delay same fulfillment, such liquidator may be sanctioned by the bankruptcy judge with a judicial fine ranging between RON 1000 to 5000. Should damage have been caused following the failure or delay of duty fulfillment, upon the request of any stakeholder, the bankruptcy judge may force the liquidator to pay damages.

For the enforcement of the fines and damages, the provisions of art. 108 ind.4 and ind.5 of the Rules of Civil Procedure shall apply .

Chapter 3: Other participants in the insolvency proceeding

Besides the bodies authorized to enforce the procedure, who have been analyzed above, other participants in insolvency are the creditors' general meeting, the creditors' committee and special administrator.

Chapter 4: Conclusions

The purpose of the insolvency proceeding is the establishment of a collective procedure to cover the liabilities of the debtor undergoing insolvency, by paying the debtor's payables to the creditor(s), which shows the concern of the lawmakers for ensuring the protection of creditors' interests.

Among others, the insolvency proceeding is a legal and collective procedure, as shown in the chapter on the characteristics of the insolvency proceeding. Therefore, all deeds and operations involved in the insolvency proceeding are regulated by the law and are performed under judicial control by the bodies authorized to enforce them (legal courts, bankruptcy judge, trustee in bankruptcy and liquidator). Taking into consideration its collective nature, other stakeholders participate in the insolvency proceeding (creditors' general meeting, creditors' committee and special administrator).

Conclusions

We believe that the new regulations on insolvency should greatly emphasize the efficiency of this procedure, mainly conditioned by the quick performance of the process stages. The repeated legislative reforms have shown care for speed, for shorter solution periods, but, at least so far, they have not proven efficient enough, as the proceedings are carried out over long period of times – years. These procedures modified and gave more powers and duties to the participants, being more clear and concrete.

The efficiency of the procedure may also be given by the advantages, but especially by the disadvantages it generates to the debtors and creditors (for creditors – the possibility of a compulsory payment of a legal security, stopping of the calculation of any interests, increases and penalties, the possibility of maintaining some ongoing contracts, contrary to the creditors' interests, the debtor's discharge of debts, and for the debtors – the interdiction of a repeated reorganization application,

removal of debtor's right to administer his assets, possibility of forcing the debtor to submit a legal security for provision of services).

The soundness, transparency and efficiency of these regulations will ensure the stability and dynamics necessary to the business environment, will encourage trade in good faith and will deter the ill-meaning traders, will allow for a safe circulation of capital and will prevent financial blockages.

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UNDER THE NEW CIVIL CODE: THE SALE CONTRACT IS TRANSLATED PROPERTY OR CREATOR ONLY OF OBLIGATIONS?

LIVIU STĂNCIULESCU*

Abstract

According to art. 1650, paragraph. 1, of the Civil Code, "The sale is the contract that the seller transmits or, where appropriate, seek to transmit the property of an asset to the buyer, for a price which the buyer is obliged to pay"

The dispositions of the 2011 civil code suggests that compared to the time of transfer of ownership, the contract may have different legal nature: creative translative property or obligations.

Thus, transfer of ownership may be immediately and in this case, as occurs or may be postponed (conclusion of the contract) and in this case, is an obligation of the seller. For example, art. 1674 of Civil Code states that "the property is" shifting "by right to the buyer" and "General Provisions" of art. 1672. paragraph 1 and art. 1673. paragraph 1 of Civil Code provides that "The seller is obliged to transmit the buyer the ownership of the sold property ".

Please note that until the appearance of the Civil Code 2011, the sale was widely known as "translational property" and a possible shift in the category of contracts creating obligations would produce important consequences for the concept (and related institutions).

On the background issues above, we consider that the presentation of opinions and arguments in their support could be beneficial.

Keywords: *seller, property transfers, ownership, obligations, contract*

a) Transfer of ownership: the right or the responsibility of the seller?

The sale (that any legal act) legal effect, designed to enforce their interests. As derived directly from the contract (of law) or to the parties, the effects of the contract is divided into: effects of legal and personal effects. Thus, the sales contract has a double effect: the transfer of ownership from the seller to the buyer and the creation of obligations (to the parties).

Given the text of the law, that "the seller shall provide or, where appropriate, the buyer is obliged to send a good property" (Art. 1650 para. 1 Civil Code) would seem that the legislature in 2011 is only concerned with time transfer of ownership

Without diminishing the role of time in which ownership is transferred from seller to buyer, at least as important to consider and determine the real spring that goes right to the buyer.

Clarification inconsistency is justified by the New Civil Code provisions. Thus, according to art. Paragraph 1650. A Civil Code, "the seller send" or seller "is obliged to submit property" (a transfer of ownership means that person is a seller's obligation), in turn, according to art. 1674 Civil Code, "property is shifting the right buyer at the time of conclusion" and art. Paragraph 1683. 3 Civil Code, "property is shifting the right buyer at the time of acquiring the property by the seller" (transfer of ownership is done right, the effect of the agreement will, even when the seller becomes the owner after the contract).

Next, we present briefly the transfer of ownership characteristics in the contract of sale, both in terms of mechanisms that produce it, but the implications when it is done.

b) Property transfers: legal (automatic, instant abstract)

Translative property contracts, representative doctrine is unanimous in assessing that the transfer of ownership takes the law (by agreement of wills, the contract itself, the source of the transfer).

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Thus, in the opinion permitted national appreciated that, "In contracts which have as their object or another translation as real property, property or right is transmitted by operation of contract" (sn), thus the transmission of ownership is achieved "automatically and ex law.[1]"

Likewise, "even if the parties by their will postpone the transfer of ownership to a date other than the conclusion of this transfer will be all automatic" (sn)[2].

In the same context, but in another opinion stated that "the sale is in essence a contract translative of property so sold property transfer is done right, by contract[3].

Consequently, the seller has an obligation to transfer the property because, once the property transfer contract law, without the intervention of the parties[4].

Transfer of ownership occurs as, although it was agreed that when the transfer is delayed (Art. 1683 para. 3 Civil Code). In short the difference between the transfer of property and obligations of the parties is the difference between the obligations of giving and doing[5].

Also indicated that the transfer of ownership is made instantly (totally healthy), that is inconceivable to understand a possible "transfer rate" of ownership[6].

We appreciate that misunderstandings New Civil Code, reported the matter of ownership transfer mechanism should be attributed to different situations and without coordination of these laws.

Opinion that in any case, there is no question about a contract of sale otherwise (than already known) and therefore, according to the concept enshrined in national and European doctrine, the transfer of ownership in the contract of sale always operates of law (whether time coincides with the conclusion of the contract or transfer was postponed by the will of the parties or the law)[7].

In conclusion, the "displacement" effect property is a legal contract and the seller has two obligations (personal) main teaching work and guarantee customer.

c) When transferring ownership.

In terms of his conduct in time when transfer of ownership is important (to be defined and in no way confused with the source, spring transfer law).

Transfer of ownership at the time the contract.

Usually, the transfer is done right at the time of conclusion of sale. It says so on the immediate transfer of ownership. According to art. 1674 Civil Code, "property is shifting the right buyer at the time of conclusion, even if the property was not delivered or was not yet paid the price."

Postponing the transfer of ownership after the contract end sale at a later date can be operated with the law.

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[1] See L. Pop, Talk about some clarification of their obligations covered by the law no. 8 / 2005, p. 56-57.

[2] "The sale gives rise only to the requirements of teaching work sold, which is but one to make, and not one to give, subsequent transfer of ownership", see D. Chirica, special contracts. Civile and commercial Rosetti House, Bucharest, 2005, p. 74-75.

[3] See F.l. Moțiu, Special Contracts, Legal Universe Publishing, Bucharest, 2011, p. 59.

[4] The European doctrine established, the value that transfer work widely sold is not "an obligation lies with the seller, because it is done by simple effect of the contract, that is, abstract manner, without any formality and, in principle, instantly" (sn), see Ph. Malaurie, L. Aynès, P.Y. Gautier, Droit civil. Les contrats speciaux, Defrenois, Paris, 2007, p. 161, J. Huet, Traité de droit civil. Les principaux contrats spéciaux, LGDJ, Paris, 2001, p. 179; A. Benabent, Droit civil, civils et Les contrats speciaux comerciaux, Montchrestien, Paris, 2008, p. 94.

[5] See G. Boroi, A.C. Anghelescu, civil law course. The general part. Hamangiu Publishing, Bucharest, 2011, p. 156.

[6] See D. Chirica, op. cit. (2005), p. 40.

[7] Given that ownership is an abstract, we ask the question: How should the legislature understand the actual transfer of ownership by the direct seller?

Likewise, time delay and the parties may transfer agreement at a later date will. They have the right to postpone the moment of transfer of ownership because "time is not of public order"[8].

If the sale of future goods, transfer of ownership operates only when they were executed (if things are to be made, the next crop, etc.).

Also, "when the sale is to such goods, including goods from a limited kind, the property is transferred by the buyer on their individualized teaching, counting, singing, printing, measurement or by otherwise agreed or required by the nature property "(Article 1678 Civil Code).

When concluding the contract the Seller is not working, own health is shifting the right buyer at the time of acquiring the property by the seller (Art. 1683 para. 3 Civil Code).

Likewise, the sale in installments, "the buyer acquires ownership of the final installment payment on the price," even if the thing was delivered terminates the contract (art. 1684 and art. 1755 Civil Code). In this case, the automatic transfer of ownership and abstract character remains[9].

According to art. 119 of Law no. 71/2011 formalities necessary for enforceability reserve property advertising applies to contracts concluded before the entry into force of the New Civil Code, "if the subject property did not become enforceable against the previous law."

Finally, by the will of the law, "real rights on buildings included in the land is acquired, both between parties and against third parties" only upon entry in the land (Article 885 Civil Code). Thus, the sale agreement marks the only time of registration of transfer of immovable property (not the transfer itself, which takes place by agreement of wills).

In conclusion, according to the New Civil Code, the sale of property, transfer of ownership from the seller when the buyer is after the conclusion of the contract and the time overlaps effective against third parties.

d) Another thing selling is prohibited or valid?

By its nature, the sale is "translational property" because the work transferred ownership from seller to buyer. So to achieve the transfer of ownership, the seller must hold the right alienated[10]. Per a contrario, if the seller does not own, cannot sell (on the principle that gave Quod nemo non habet). Thus, "Nothing seems more obvious and common sense than the fact that nobody can send more rights than he himself"[11] (sn).

Based on the foregoing, ownership of the seller is a requirement for the validity object. Although legal abnormal operation, sale by a non-proprietary work is common in practice is known as "selling another thing." The most common are cases of fraudulent operations (eg a third party sale or sales work the same good to multiple buyers), the work sold to a third party without bad faith (in the hope that it will acquire and transmit property later in time[12]) or retroactive loss of the right (following the cancellation or acquisition of property resolution act).

In our legislation, the sale is not expressly banned another work and therefore the situation is subject to general principles governing conventions (general theory of contract)[13].

Please note that previous national doctrine, under the empire of the Civil Code of 1864 acknowledged that "the sale of another work" void contract (for non-requirement of validity of the object).

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[8] In the French doctrine speaks of bringing forward the time of transfer of ownership of property to be purchased later, see A. Benabent, civil Drpoit. Les contrats speciaux civils et commerciaux, Montchrestien, Paris, 2008, p. 95-97.

[9] See D. Mainguy, Contrats speciaux, Dalloz, Paris 2008, p. 123.

[10] See Fr. Deak, civil law treaty. Special contracts, Actami Publishing, Bucharest, 1999, p 56.

[11] See D. Chrică, op. cit. (2005), p. 71 ff.

[12] For example, the sale by one spouse without the consent of a common good spouse or a spouse possessing, selling to a co-owner of an undivided ownership so good.

[13] Unlike French law, in that art. 1599 Civil Code provides that sales other work is zero.

The new Civil Code challenged "sale of another work" by the provisions of art. paragraph 1683. One that "if the conclusion of the contract on an individual item determined, it is owned by a third party, the contract is valid" (sn).

In these new conditions, requiring a reconsideration of the institution "another sale work", for which thus arises a natural question: sale of another work or not valid?

From the outset we must stress that we appreciate the provisions of art. 1683 of the New Civil Code, at least for the fact that they have reopened the issue of sale of another work (properly unresolved previous regulations).

Please note that the doctrine of recent French ban on the sale is estimated that another work is fully justified in the case and immediately transfer the property. Otherwise, the parties postponed the transfer of ownership to a later conclusion of the sale, "prohibition loses its opportunity.[14]"

In agreement with the current design, we consider that the seller should not always ownership at the time the contract. It is sufficient that the requirement of ownership to be fulfilled at the time of transfer to the buyer the right (which can be time the contract or a later time set by law or will of the parties - art. 1674 Civil Code). For this reason, the sale of future goods, the sale of such goods, the sale on time, etc., could not pronounce the nullity of contracts.

Trying to answer the question above, we must distinguish between two situations, as: the property buyer is shifting (right) with the contract or transfer of ownership is postponed. In the first case, the transfer of ownership takes place in time the contract if the seller has no ownership, contract of sale is sanctioned by nullity (for non sold work requirement).

Given the above, the sanction applicable to differ, as the parties were in error or have been informed (about the ownership of the seller).

When the parties (or at least the buyer) were in error, believing that the property belongs to the seller sold[15] it was accepted that the sale is canceled (relative void) for error on the essential quality of the seller (owner of the work considered sold). In this situation, we can say that the seller apparently acted as an owner.

Relative nullity of the sale may be made only by the purchaser, by the action (if the price was paid) or an exception (if the price was not paid).

The seller cannot rescind the contract under any circumstances, even if in good faith, because the error does not make void the falls on the person with whom contracted[16].

No real owner can request cancellation, the third to the contract, but may bring an action to recover possession[17]. In this case, non-exercise claim action can be interpreted as "ratification of sale by owner" (Art. 1682 para. 2 Civil Code).

But if, meanwhile, became the owner seller work (after the sale), no buyer cannot rescind it. The obligation to guarantee the seller for eviction and remain in a situation where the buyer has not requested or required prior to cancellation, is the true owner crowded.

Note that, if the property is alienated in the public domain of the state or territorial administrative units, the contract is absolutely null in all cases, even if the buyer was in good faith (art. 136 of the Constitution).

When the parties knowingly entered into the contract (there was bad faith), knowing that the thing sold is the property of another person (and therefore the error is no longer an issue), it was

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[14] This is the reason why French law tends to limit the scope of nullity domenuiul established by art. 1599 French Civil Code, see F. Collart Dutilleul, Ph. Delebeque, Contrats civils et commerciaux, Dalloz, Paris 2001, p. 117-119.

[15] See R. Sanilevici, I. Macovei consequences sale solutions work in the light of other legal practice in DRR no. 2 / 1975, p. 33 and practice: C.S.J., v. Civil Code, in December. no. 132/1994, the Law no. 5 / 1995, p. 77.

[16] According to art. 1212 Civil Code, "The victim of an error which is not otherwise entitled to the requirements of good faith."

[17] See T.S., v. Civil Code, in December. no. 2257/1967, in C.D. 1967, p. 83.

considered that the sale transaction is a purchase of another speculative work, that is absolutely illegal and therefore null (under art. 1236 par. 2 and art. 1238 par. 2 Civil Code)[18].

Note that, since the absolute nullity may be invoked by any person in this situation, the true owner may invoke the nullity, even if not attended the conclusion of the Convention. Over all the above, do not forget that according to the spirit of the Civil Code the legal act is presumed to be valid and the invalid is an extreme sanction, which operates only when the legal act cannot be preserved in any way.

In the second case, the transfer of ownership (and work) is postponed to a time after the conclusion of the contract if the seller has not become the owner of the work, the contract of sale is sanctioned by rescinded (for failure to obtain work and to "ensure "thus, transfer of ownership to the buyer - art. 1683 par. 4 Civil Code).

Appreciated that the new vision of the Civil Code in this field, enter the direction of European doctrine. For example, the recent French doctrine, selling work of another, is considered restrictive, appreciating that "there selling work to another, shall, be exposed to the crowed buyer made a true owner who exercises the claim" (sn). To do this, "should result in a sale of property right transfer, opening and a true owner's claim"[19].

Moreover, all the French doctrine is admitted that the sale of another work "cannot be canceled when the seller, even if no owner of the work, is its apparent owner, as if the heir apparent" (sn). In this case, "the sale is valid on two conditions: good-faith purchaser (he ignores the fact that the seller was not the owner) and common error (everyone thought so): error facit jus communis (common error is the source of law) [20]".

Consequently, under the new Civil Code requirement seller of property owner has suffered an attenuation conditional for delay transfer of the right (by the will of the parties or the law). In this case, it is accepted that, and can contract valid conclusion by a non-proprietary vendor.

Can be thus concluded by a non-proprietary valid sale and future assets, such sales, sales of individual assets determined (acquisition condition subsequent work), etc.

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[18] The contract vendor fraud law by owner, with the complicity and in any case, the risk of the purchaser, is a typical case and void, see Fr. Deak, op. cit., p. 42 and practice: Tribe. Constanta County, v. Civil Code, in December. no. 778/1987, in R.R.D. no. 2 / 1988, p. 69 70.

[19] To do this, "should result in a sale of property right transfer, opening and a true owner's claim" see Ph. Malaurie, L. Aynes, PY. Gautier, civil law. Special contracts, Wolters Kluver, Bucharest, 2007, 124.

[20] See Ph. Malaurie, L. Aynes, PY. Gautier, op. cit., p. 126-127.

THE CONTRACTS AS VIEWED BY THE CIVIL CODE

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Abstract
The law no.287/2009 regarding the Civil Code, the law no.71/2011 for applying the Civil Code and the G.E.O no.79/2011 for modifying and completing the law no.71/2011 all conduct to the terminological leveling in the contracts field, assigning them the name of civil contracts or just contracts. The same regulatory documents, appertaining in terminis to the economic/commercial/ remunerative oriented activity, acknowledge the distinguishing characteristic of the merchant-proffesional, of the commercial enterprise and therefore of the contracts regarding the economic activity. The Civil Code becomes the frame-law in the contracts field and attempts to compile an inventory of the contracts defined by the law, inventory in which the prevailing role is held by the contracts specifically related to the commercial activity. The intent of this study and its goals are to prove that, in spite of the terminological offensive - expression of the homogeneous regulation of the Private Law, the Civil Code not only does not eliminate the Commercial Law as a sefl-contained filiation of the Private Law, but assimilates it and allows to be contaminated by it. This happens because the Commercial Law sprung from a reality - the commercial activity - and it will perish alongside this reality, which is never going to happen. Today, more than allways, the Commercial Law has become the foundation of the Civil Law in regard to obligations and this study intents to prove this.

Keywords: *contracts, Commercial Law, merchant-proffesional, commercial enterprise, the contract as a source of obligations*

INTRODUCTION

1. Terminological unity . In line with the recently adopted system intended for the unity of the private law regulations and noting certain "regrettable" omissions of the legal terminology, the Romanian lawmaker passes the following corrections in Act No. 71/2011 - art. 8 para.2 :

In all current laws, the terms "commercial acts" and "commercial deeds" respectively are replaced by the term "production, commerce or service provision activities".

Unfortunately, we witness a lawmaker's increased "vigilance", who, at the time prior to the effectiveness of the New Civil Code, discovers and "remedies" other faulty terminological "discrepancies", deciding on the following:

Art. VII of the Government's Emergency Ordinance No. 79/2011 for the regulation of certain measures necessary (our underline) for the effectiveness of Act No. 287/2009 on the Civil Code:

On the effectiveness of Act No. 287/2009 on the Civil Code, republished, the term "commercial contract" or "commercial contracts" is replaced by the term "civil contract" or, as the case may be, "civil contracts", whereas the term "contracts or commercial acts" is replaced by the term "contracts".

The lawmaker's "rigor" is exemplary. It has determined some doctrine specialists speak of a "cleansing of the legal vocabulary" and an "excommunication" of the commerce- and commercial law-related concepts[1].

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[1] Turcu, Ion – "Noul Cod civil. Pe cine incomodează existența dreptului comercial?"/"The New Civil Code. Who Is Bothered by Commercial Law?" – www.juridice.ro.

We have called it terminological offensive and our opinion is, nonetheless, that the undertaking lacks efficiency as the legal area and legal institutions it is based on do not disappear by way of a mere "reform" of the legal language.

Back to our topic, we notice that, *de lege lata* (the law as it exists), one cannot speak but about civil contracts and/or contracts. Given the aforementioned arguments and those we are about to elaborate hereunder, we believe there are still commercial contracts or, to be strictly compliant with the provisions of art. VII of the Government's Emergency Ordinance No. 79/2011, there are contracts on the commercial activity.

1. The topic of this article is contracts. The study aims at highlighting the New Civil Code vision on contracts.

2. The importance of the article consists of its novelty as it is, to the best knowledge of its author, the first to approach the topic of the New Civil Code on contracts.

Its pursued goals are as follows:

- present an overview of the New Civil Code on contracts, underlining that this vision is intended to ensure the regulatory unity of the private law;
- highlight the fact that the New Civil Code is based on a coherent structural vision with novel elements as compared to the former regulatory system, that fill certain gaps and consecrate, from a legislative point of view, a series of doctrine and jurisprudence solutions in the area of contracts;
- expose the drawbacks of this vision, the failures of the monist conception in the area of contracts;
- underline the specificity of commercial activity contracts, highlight the comprehensiveness of the special legislation that is the core matter of these contracts, a legislation that preponderantly lies outside the code and that alleviates the all-comprehensive ambition of the New Civil Code of being the framework law on contracts.

3. The means to reach these objectives mainly resides in the critical analysis and systemic interpretation of the provisions of the New Civil Code, as well as those of the relevant special laws on contracts. Equally, the relevant doctrine on the matter, both consecrated ad recent one, will be considered. Also, it will be taken into account that no references to the internal jurisprudence will be possible, given the recent effectiveness of the New Civil Code.

4. To the best knowledge of the author, there are no studies that cover the entire area this article refers to. There are specialized works (articles, volumes) dealing with this issue in a fragmented manner: specificity of contractual obligations, of obligations undertaken by professionals, autonomy of commercial law, existence of a real law on professional contracts.

CONTENT

A. CONTRACTS IN THE NEW CIVIL CODE

2. The contract as a source of obligations

In line with art. 1164 of the New Civil Code, the obligation is a rightful connection by virtue of which the obligor has to perform for the obligee, and the latter is entitled to the owed performance.

The above-mentioned article means real progress as compared to the former Civil Code, which did not provide a definition for the term "obligation", such definition being imposed by the doctrine and consolidated by jurisprudence.

Art. 1165 of the New Civil Code lists the sources of obligations: contract, unilateral document, business administration, enrichment without just cause, non-owed payment, illicit deed, as well as any other document or deed that the law relates the birth of an obligation to.

This regulation performs a systematization of the sources of obligations, not far from those already consecrated by the doctrine under the former regulation: the legal document, legal and illegal deed. Moreover, art. 1165 of the New Civil Code refers to "other" documents and deeds that the law relates the birth of an obligation to. A normal question is raised in relation to these "other" documents and deeds that the law could set forth at a given time as sources of obligations. Why are these expressly laid down and what are the arguments based on which they cannot be a sub-category of those referred to in the article body? At the time of this present analysis, we could not find a satisfactory answer to these questions.

For lack of any textual arguments, this reference appears to be superfluous; however, we will wait for it to pass the test of time.

Back to our discussion on the contract, mention must be made of the lawmaker's firm option in favour of the term "contract" detrimental to the term "convention". On a legislative level, there is a distinction between the two notions in the French law (art. 1101 of the French Civil Code), however, in the Romanian law, despite the opinions on the doctrine, there is no such legislative distinction, the terms being actually synonymous.[2]

Art. 1166 of the New Civil Code defines the contract as an agreement based on the free will of two or more parties to it with the intention to establish, change or cease a legal relation. The definition is approximately similar to that in the former art. 942 of the Civil Code, with the addition of the intention to change an existing legal relation.

Mention must be made about the relation between the contract and the civil legal document. The latter is an institution defined as a manifestation of the will of one or more persons, done for the purpose of establishing, changing, transmitting or ceasing rights and obligations. In this context, the legal document, where the emphasis is placed on the volitional and intentional aspect (unlike the legal deed) is the gender, whereas the contract is the species. Hence, any contract (uni-, bi- or multi-lateral) is a legal document, but not all legal documents are contracts. Given this aspect, one should notice that the New Civil Code consecrates the institution of the unilateral legal document and determines its legal regime in Book V, Title II, Chapter II.

3. The Civil Code as the framework law of contracts

Art. 1167 of the New Civil Code stipulates, in para. 1, that all contracts shall comply with the general rules and regulations in Chapter I, Title II, Book V; however, para. 2 of the same article stipulates the derogation regime applicable to certain contracts of the Code or in special laws.

Hence, this article establishes the vocation of the New Civil Code as a framework law of contracts.

It also establishes, together with art. 1168, three applicability principles concerning all contracts:

1. all contracts shall comply with the general rules and regulations in this chapter;

2. certain contracts (special ones, in our opinions) shall be applied particular rules and regulations laid down in the New Civil Code and special laws;

3. contracts that are not regulated by law (traditionally known as "non-regulated contracts") shall be applied the provisions of this chapter and, if these provisions are not sufficient, the special rules (our mention: in the Code or special laws) concerning the contract that the non-regulated contracts are mostly similar to.

This latter assumption is, in our opinion, a typical case of *analogia legis*.

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[2] Adam, Ioan – *Drept civil. Obligațiile. Contractul/Civil Law. The Obligations. The Contract*, (C. H. Beck Publishing House, Bucharest, 2011) , 6-7.

As far as contract classification is concerned, we note that art. 1171 – 1177 of the New Civil Code propose various contract categories, however, as concerns the above-mentioned matter, , i.e. the vocation of the New Civil Code of representing common law, it necessary to make a conceptual determination of the special contract institution and that of "non-regulated contracts" (particularly known as "non-regulated contracts").

3.1 Special contracts

The doctrine is unanimous[3] in acknowledging the "bridging" role that special contracts play between the general theory of obligations (that determines the abstract civil contract unconnected to reality) and the individual civil contract as an agreement of free will between certain parties, with a specified content.

Equally, as resulting from art. 1167 para. 2 of the New Civil Code, special contracts are applied the special legal rules stated for each special contract type, which rules are laid down in the Code or special laws. This provision stands for the accurate application of the *specialia generalibus derogant* legal principle.

As a matter of correlation, in considering the vocation of the common law New Civil Code in the area of contracts, we should emphasize that this regulation will apply whenever there is no specific regulation of special contracts and validity, interpretation and performance of special contracts respectively.

The category of special contracts stands for, just as the entire area of commercial law, some sort of "laboratory" where legal regulations and principles and legal institutions are applied, forged and perfected. This "laboratory" that is connected to the economic and social reality to the highest of levels gives rise to novel legal constructions and techniques most often materialized in contracts failing to comply with traditional patterns, that are innovative and push the boundaries of the legal sphere.

To the extent the solutions resulting from this alchemy are validated in practice, they become popular and represent a premise for reflection that can become materialized in legislative terms and often influence various areas of activity.

In that respect, it has been fairly underlined, we believe, that "a tendency in the contemporary law is noted, that of elaborating *transversal* rules that apply to special contract categories (our underline), in particular goods and services provision contracts"[4]. In that respect, "the common consumer protection or free competition concerns..."[5] were mentioned.

3.2 Regulated and non-regulated contracts

As far as non-regulated contracts are concerned, that are designated by the lawmaker in art. 1168 of the New Civil Code as "contracts not regulated by law", one can note that the New Civil Code limits itself to mentioning them without defining them, thus persisting in the tradition of the former Civil Code and failing to take up the example of art. 1107 of the French Civil Code.

It has been stated[6] that this category of "non-regulated contracts was eventually consecrated in Justinian's time, opening a new specific action – *prescriptio verbis*. They were divided in four categories: *do ut des, do ut facias, facio ut des, facio ut facias".*

As these contracts, though regulated by the parties, stay non-regulated in relation to the legal categories, they were considered actual legal fictions.[7]

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[3] Cărpenaru, Stanciu- introduction *to Contracte civile şi comerciale – cu modificări aduse de Codul civil 2009/Civil and Commercial Contracts – As Amended by the 2009 Civil Code*, done with Stănciulescu, Liviu and Nemeş, Vasile, (Hamangiu Publishing House, Bucharest, 2009) , 1 and Moțiu, Florin – *Contractele speciale în Noul Cod civil/Special Contracts in the New Civil Code*, II edition, (Universul Juridic Publishing House, Bucharest, 2011) , 17.

[4] Moțiu, Florin – quoted work, 18.

[5] ditto.

[6] Deleanu, Ion – *Ficțiunile juridice/Legal Fictions*, (All Beck Publishing House, Bucharest, 2005) , 66.

Most contracts falling under this category are typical of the commercial activity, being determined by the countless facets of such activity, as well as the parties' intention to build conventional instruments characterized by a certain level of diversity and flexibility, in order to respond to the most complex of requirements.

The existence of non-regulated contracts is not excluded from the legal relations between non-professional natural individuals either; however, their numbers are visibly lower, given, on the one hand, the overall low percentage of contracts entered into as to these legal matters and, on the other hand, the aim concerning the civil circuit security these are involved in, materialized in resorting to legislatively consecrated forms they can enter into.

Regulated contracts are those whose content is laid down in the provisions of the Civil Code and/or other special laws. The main special contracts are sale and purchase as an instrument for economic exchange, mandate, lease (or sale of use) and general contractor agreement as an instrument of service provision.

Regulated contracts are the lawmaker's exclusive attribute as their creation is not possible by the parties' agreement based on their will. The parties only have the possibility to enter into individualized special contracts, adapted to their needs, which contracts are, however, subject to the special rules in the Code and/or special laws, and, as to their general conditions – they are subject to the general conditions in the Code.

Non-regulated contracts are those beyond legal regulation, though, in terms of the legal conditions, they are legally executed. This is the reason why they have been classified to fall under the category of legal fictions: they are legal documents that meet the validity-related legal conditions, comply with public order and mores, but which the law does not "know" and regulate, however, having no reason to challenge them.

The content of these non-regulated contracts is the parties' exclusive attribute, an expression of the principle of freedom to contract, and serves their actual needs. A recent example in the commercial law is the reservation contract or, in the real estate field, the construction contract, the latter being a *mixtum compositum* between the general contractor agreement and the bilateral promise of sale and purchase.

The issue that non-regulated contracts raise is related to the applicable legal regime. However, the problem that an authority summoned to settle a dispute based on such a contract faces is, above all, an issue concerning contract qualification.

This involves an analysis of the contract content, the parties' converging/common/real will and then the contract qualification. In other words, in order to determine whether it is a non-regulated contract or not, one needs to interpret the contract and determine the unquestionable difference between them and between special or regulated contracts.

Often this is rendered difficult by the name the parties give to their contract, a name which could point to its classification in this or that category of regulated contracts or that, on the contrary, could create a first similarity (identity) with a regulated contract, contradicted, on a more careful analysis, by the *sui-generis* non-regulated content of the contract.

Nonetheless, the person interpreting the contract should not leave out the application of the interpretation rules laid down in art. 1266-1269 of the New Civil Code.

Once a contract classification in the non-regulated category is done, the applicable legal regime is the one laid down in art. 1168 of the Code: the rules first to be applied are the general rules on contracts, the rules laid down in Book V, Title I, Chapter I, and, should these not be sufficient, the special rules applicable to the contract the non-regulated contract resembles the most.

[7] ditto.

4. Contract categories established by the New Civil Code

Section 2 of Chapter I, Title II, Book V, deals with "various contract categories" with no enunciation by the lawmakers of the criteria they consider when elaborating such taxonomy.

One should note that the Code does not provide a classification that exhausts the criteria that it was constantly based on, and, from this perspective, it is not that distinct from the former provisions of art. 943-947 of the Civil Code.[8]

Art. 1171 differentiates, by content, between synallagmatic and unilateral contracts.

A contract is synallagmatic when it includes mutual and independent obligations, and is unilateral unless it does so, even if its performance involves obligations resting upon both parties.

The ambiguous wording of the legal text results in the conclusion that a contract is synallagmatic whenever it gives rise to mutual and independent obligations, both parties concomitantly having the capacity of obligee for the other party's obligation(s) and obligor to its own obligation(s).

An interesting emphasis was placed in the doctrine in connection with the synallagmatic contract, asserting that this is a redundant construction, given the etymology of the term "synallagmatic" – from "synalagme", meaning *contract* in Greek. [9]

Art. 1172 differentiates, by the purpose pursued by the parties, between onerous contracts and gratuitous contracts.

A contract is onerous if both parties aim at getting some advantage in exchange for the undertaken obligation.

On the contrary a contract is gratuitous if a party aims at providing a *benefit* (our italics) to the other party, without getting any advantage in exchange.

We estimate that, whereas the lawmaker does not made any legal differentiation between "benefit" and "advantage", the use of the two terms, that are within the same semantic sphere, is not inspired and leaves room for speculation. We believe that the lawmaker had the possibility to choose either of the two terms and use it exclusively in order to escape all ambiguity.

Art.1173 differentiates, by the certainty or uncertainty of provision extent at the time of contract execution, between commutative contracts and random contracts.

A contract is commutative if, at the time it is entered into, the existence of the parties' rights and obligations is certain, and the consideration is determined or determinable.

A contract is random if, by its nature or the parties' will, it gives at least one party the chance of a benefit and simultaneously exposes it to a loss, which gain or loss are dependant on a future uncertain event.

Art.1174 differentiates, by the manner of formation, among consensual, solemn and real contracts.

A contract is consensual if it is formed by the mere parties' will.

A contract is solemn if its validity is subject to fulfilling certain formalities laid down by law.

Finally, a contract is real contract if the remission of the assets is necessary for its validity.

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[8] A classification of contracts can be found in, *exempli gratia,* Stătescu , Constantin and Bîrsan , Corneliu – *Drept civil. Teoria generală a obligațiilor/Civil Law. General Theory of Obligations* , IX edition,(Hamangiu Publishing House, Bucharest, 2008) , 22-37.

On categories of contracts not included in the New Civil Code, see Turcu , Ion – *Vânzarea în Noul Cod civil/Sale in the New Civil Code*, (C.H. Beck Publishing House, Bucharest, 2011) , 78-84.

[9] Piperea, Gheorghe – "Concepția monistă a Noului Cod civil , între intenție și realitate sau Despre Noul Cod (civil) comercial"/"The Monist Vision of the New Civil Code, between Intention and Reality or On the New Commercial (Civil) Code in *Noile Coduri ale României – Studii și cercetări juridice/The New Codes of Romania - Legal Studies and Research*, (Universul Juridic Publishing House, Bucharest, 2011) , 36.

In the case of solemn and real contracts, the form prescribed by the law, and the provision of the asset respectively, are prerequisites for contract validity; failure to comply with the same results in absolute nullity.

However, mention must be made of the fact that, by art. 1260 of the Code, a solution is legislatively consecrated that long ago found its settlement in the doctrine and that was applied as a matter of jurisprudence. This article introduces the institution of *conversion of the null contract* and stipulates in para. 1 that an absolutely null contract shall still have the effects of the legal document the legal content and form requirements are fulfilled for.

The second paragraph of the same article includes however an alleviation of the conversion process, providing prevalence to the parties' contrary will.

Thus, it is stipulated that the provisions of para. 1 shall not apply if the intension to exclude the conversion application is stipulated in the contract affected by nullity or unquestionably results from the purposes pursued by the parties on contract execution.

Art.1175 defines the adhesion contract and comes to cover, from a legislative perspective, a doctrine and jurisprudence creation resulting from a reality where such contract type has become very common.

A contract is an adhesion contract if its core clauses are imposed or elaborated by, for or following the instructions of either party whereas the other party is left with the sole possibility of accepting them as such on a "take it or leave it" basis.

As far as this contract type is concerned, the free will of either party, usually the one in an inferior financial or economic position is limited to *adhering or not adhering to* a contract with predefined clauses that it does not have a possibility to negotiate.

Art.1176 defines the framework contract as an agreement which the parties agree to negotiate, enter into or maintain contractual relations whose core elements are determined by.

It is worth noting that this contract type stipulates only the core elements of the contractual relations and that the means to implement the framework contract (in particular, term, volume of performance and, if applicable, price thereof) is indicated by subsequent conventions.

One should note that this contract type has been taken up in the domestic legislation following the pattern of framework contracts commonly used in international law, in complex and long-term operations, such as double-entry records, international economic cooperation, complex exports.

The doctrine[10] underlines the following:

"Framework contracts are of a nature similar to predefined clauses compared to subsequent special classes, i.e. the latter relate to the former, framework contracts containing coordination and harmonization clauses of the subsequent clauses with a view to reaching their joint economic goal.

Secondly, framework contracts contain clauses whose subject matter is an ***in contrahendo*** obligation, i.e. the contracting parties' obligation to enter into the mentioned special contracts, unlike the latter whose subject matter are an obligation to give, do or not do, as the case may be."

Finally, **art.1177** deals with the contract entered into with consumers, but it limits itself to mentioning it, without defining it, with a referral to the special legislation outside the Code and only as a supplementation of the Code provisions.

5. Freedom to contract and good faith as fundamental principles of contract execution and performance

We have reviewed the principles that, in our opinion, govern civil law and contracts.

[10] Sitaru , Dragoş-Alexandru – *Dreptul comerţului internaţional. Tratat. Partea generală/International Commerce Law. Treatise. General* , (Universul Juridic Publishing House, Bucharest, 2008) , 439.

The principle of freedom to contract has been included among the principles governing contracts, and the principle of good faith was included among the general principles of civil law.

If we are to resume the discussion on these two principles, we do it to highlight the fact that they are distinctly evoked by the Romanian lawmaker in the area of contracts, in Section 1 – General Provisions, which leads us to the conclusion that they are considered of utter importance in said area.

Art. 1169 of the Code enunciates the freedom to contract principle, its content and limitations of its application. This principle will be the subject matter of subsequent elaboration.

In reality, Art. 1170 of the Code establishes the good faith obligation that rests upon the parties in the pre-contract stage, on contract execution and performance, stating the prohibition to stipulate any clause that could remove or limit said obligation.

One can thus note the legislative evolution from the presumed good faith, express in *bona fides praesumitur*, to the good faith that the lawmaker imposes to the participants in the civil circuit.

It is easily noticed that the lawmaker limits himself/herself to evoking good faith, without defining it, though the issue of the concept identity has been the object of doctrine concerns. In that respect, the works of the Henri Capitant Association are worth mentioning, that focused on good faith and took place in Paris in 1992 and 1994.

To summarize, without any claim of providing a definition herein, it has been shown that good faith, regarded as a general clause, involves a psychological and intellective notion, i.e. that it represents unawareness of a fact or circumstance, the erroneous conviction that a subject has taken up.[11]

The same author has shown that good faith is a purely moral concept, a rule of conduct in line with loyalty and honesty.[12]

The role of good faith has been summarized as follows: a rule of conduct in contract formation, corrective in contract performance and complementary in identifying the obligations undertaken by the parties (e.g.: obligation to inform).[13]

We believe that, in establishing such an obligation, which is salutary nonetheless, the Romanian lawmaker of 2009-2011, should not have relied, in an area as technical as that of contracts, on such a hard-to-define construction that anyone is convinced of knowing, yet that each interprets at will.

It would have been auspicious if, and our belief is that it will be established as such, at least in the area of contracts, good faith had been adjoined by, at least, merchants' equity and honest and practices.

B. CONTRACTS CONCERNING COMMERCIAL ACTIVITIES

1. Terminology rationale

We stated in the abstract our firm belief that commercial law should stand as an independent branch of private law, even in light of the abrogation of the 1887 Commercial Code and the lawmaking unity via the New Civil Code.

We support the idea that this branch of the law includes the totality of laws concerning the legal regime of professional merchants and commercial companies, as well as legal documents that professional merchants enter into within their commercial activity.

We equally support the idea that the legal documents that the professional merchants enter into are commercial legal documents, and the overwhelming percentage in their economy is represented contracts.

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[11] Alpa, Guido – *Diritto giurisprudenziale* , excerpt – www.altalex.com.
[12] ditto.
[13] ditto.

We would unhesitatingly continue to use the term "commercial contracts" should there not be a prohibition placed by art. VII of the Government's Emergency Ordinance No. 79/2011, that abolishes it *in terminis*, replacing it with term of "civil contracts" or, simply, "contracts".

However, as the commercial area further preserves its identity, focused on commercial activity, in considering the connection between the contracts entered into by professional merchants and the commercial activity within which it is concluded, we believe that this contract category has a special name and status and such contracts may be named, with maximum legal accuracy and in compliance with the lawmaker's terminological prescriptions, **commercial activity contracts**.

2. Criteria for differentiating commercial activity contracts

The problem that needs to be solved mainly in relation to these contracts is that of the criteria of differentiation from other civil contracts.

We estimate that, on characterizing the commercial nature of a contract, the following requirements must be simultaneously met:

a . the contract should be entered into professional merchants or at least one contracting party should be a professional merchant;

b . the contract should be entered into in connection with the operation of a commercial undertaking, and the performance of an economic activity respectively;

c . the contract should be onerous in nature, and pursue the goal of providing an advantage (profit) to the contracting professional merchant.

Hence, in an attempt to outline a *definition*, we state that a commercial activity contract is a contract entered into two or more parties, among which at least one is a professional merchant, that concerns one or several operations connected to the commercial activity and by which the professional merchant aims at obtaining profit.

3. Peculiarities of the legal regime of commercial activity contracts

The general rules are those laid down in art. 1166-1168 of the New Civil Code.

A close analysis of the area of obligations requires, however, revealing a series of peculiarities that the New Civil Code still preserves as concerns legal relations among professionals.

Similarly, peculiarities of commercial legal relations can be identified, extended in the New Civil Code and the legal relations among non-professionals.

3.1 Rules borrowed from commercial law and extended throughout the civil law

3.1.1 Formation of distance contracts, contracts between remote parties or *inter absentes* contracts

The mechanism was consecrated by the former 1887 Romanian Commercial Code in art. 35-39 and became popular because "in the relations among merchants, the variety of concluded contracts and the requirements for business rapidity most often require the conclusion of contracts between parties that are located in various places and communication between them is done by correspondence (...)" [14]

As constantly underlined in the doctrine[15], though the former Commercial Code mentions conclusion of contracts "between remote parties", in reality, what is of interest is not the distance separating the contracting parties, but the non-concomitance of the manifestations of their will, the interval of time when the agreement by will is done.

[14] Cărpenaru, Stanciu – *Tratat de drept comercial român/Romanian Commercial Law Treatise*, II edition (Universul Juridic Publishing House , Bucharest , 2011) , 466.

[15] ditto.

It is noted that the New Civil Code takes up this mechanism of the former Commercial Code in art. 1182-1203 and extends it to all contracts, regardless of the capacity of the contracting parties, thus acknowledging that it has proved viable in time and confirmed in practice.

The New Civil Code consecrates, in art. 1186 para. 1, the theory of acceptance, which implies that a contract is entered into at the time and place where the acceptance reaches the offerer even if he is not aware of the acceptance due to reasons that are not imputable to him.

Justly, it was noticed in the doctrine[16] that the Enforcement Act No. 71/2011 establishes in art. 106 that the provisions of art. 1186 para. 1 of the New Civil Code do not apply to contracts if the offer to contract was sent before the effectiveness of the Civil Code. This is how the incidence of the *tempus regit actum* principle is acknowledged.

It is worth noticing that para. 2 of art. 1186 extends, throughout the civil contracts area, the application of the former art. 36 of the Commercial Code, known in the doctrine as a legal basis of the "simplified contract", and "order followed by immediate implementation" respectively.

Art. 36 of the Commercial Code stipulates that, when the party making the proposal requests the immediate implementation of the contract and a previous acceptance response is not requested or necessary, given the nature of the contract, then the contract was perfect as soon as the other party started its implementation.

Art. 1186 para. 2 of the New Civil Code refers to performing a "conclusive document or deed" and its meaning of offer acceptance, regardless whether the offerer becomes aware of it or not, the acceptance significance being determined based on: the content of the offer (here it is worth noting the perfect resemblance to art. 36 of the Commercial Code); the practices consolidated between the parties; general practices; nature of the business (identical to art. 36 of the Commercial Code).

3.1.2 Determination of the place for obligation fulfillment

This is the subject matter of art. 1494 of the New Civil Code that extends the provision of art. 59 of the Commercial Code to the entire area of contracts, previously applied only to commercial obligations.

Thus, the determination of the place where the payment will be made will comply with the terms and conditions of art. 1494 of the New Civil Code only if the parties do not have an express provision at hand in that respect or if the payment place cannot be agreed due to the nature of the performance as per the contract, practices between parties or general practices.

We estimate that the assumption in the text concerning "under the contract" is redundant, being covered by the initial assumption "unless stipulated otherwise".

The following seems to us a more accurate wording: "whenever the parties have not agreed otherwise as in the following provisions, as well as if the payment place cannot be agreed due to the nature of the performance as per the contract, practices between parties or general practices, the obligations shall be performed as follows ...."

It should be noted that the Romanian lawmaker determines the place of contract performance (i.e. payment place) depending on the nature of the obligation. For obligations consisting of sums of money, the lawmaker establishes the portability principle, the payment place being the obligee's domicile or headquarters as of the date the contract is entered into.

For obligations consisting in delivery of a defined individual thing, the payment place is that where the thing is located as of the date the contract is entered into.

[16] Popa, Cornel; Frangeti, Ruxandra – "Reguli specifice aplicabile raporturilor între profesionişti conform Noului Cod civil"/"Specific Rules Applicable to Relations between Professionals under the New Civil Code" - www.noulcodcivil.ro.

For the remaining obligations, the payment place is defined according to the principle of the obligee's capacity to approach the obligor at the obligee's headquarters, it being the obligor's domicile or headquarters as of the date the contract is entered into.

As a matter of novelty, the second paragraph of art. 1494 of the Code identifies the solution of a problem that, in practice, could result in additional costs and could burden the obligor of the payment obligation. This is the case where any party changes, after contract conclusion, its domicile or headquarters designated as place where the payment will be made. The above-mentioned legal provision establishes an equity criterion, i.e. obliges the parties responsible for such a change to incur the additional expenses caused by performance at the new location.

3.1.3 Regime of interests in case of pecuniary obligations

Art. 1535 of the New Civil Code extended to the civil matter the principle established by art. 43 of the former Commercial Code, i.e. the legal accrual of interests as of the due date in the case of exigible pecuniary obligations. The article characterizes the interest as deferred interest, stipulates that its level may be agreed by the parties, and, unless they do so, the interest shall be the one that is stipulated by law and exempts the obligee from any prejudice.

Moreover, as a matter of novelty, para. 1, final thesis, art. 1535 of the Code prohibits the obligee to prove that the prejudice incurred by the obligee by late payment would be lower than the one resulting from the calculation of conventional or legal interest.

It is worth noting a new provision in para. 2 of art. 1535 :

If, before the due date, the debtor owed interests higher than the legal interest, the deferred damages are owed at the level applicable before the due date.

We believe the provision to be useless, falling under the assumption laid down in para. 1 of the same article, in case the parties agreed on the interest level in the contract respectively. The only utility of the text is that of interpreting it as a possibility provided to the parties to set forth deferred interests whose value is higher than that of legal interest.

With regard to the elaboration of the above-mentioned legal provisions, one may consider they govern both the legal relations that professionals are parties of, and those that non-professional are involved in.

It should be noted that, in correlation to the provisions of art. 1535 of the New Civil Code, the Government's Ordinance No. 9/2000 was amended by the Government's Ordinance No. 13/2011 on the legal remuneration and penalty interest for pecuniary obligations, as well as for the regulation of financial and fiscal measures in the banking field.

3.1.4 Interest capitalization or anatocism

This is applicable to all contractual relations as the provisions of art. 1489 para. 2 of the New Civil Code make no distinction depending on the capacity of the participants in these relations.

This article shall be supplemented by the provisions of the Government's Ordinance No. 13/2011 that, as shown previously, amend the Government's Ordinance No. 9/2000 on the level of the legal interest on pecuniary obligations.

3.1.5 Solidarity of joint obligors

With regard to this rule, derived from the former art. 42 of the 1887 Commercial Code, the doctrine opinions differ. Some authors believe this rule is maintained only for obligations contracted while performing the activity of an undertaking.[17]

On the contrary, other authors[18], whose opinion we agree with, believe that the provisions of art. 1446 in the New Civil Code, though they set forth *in terminis* the solidarity between the joint

[17] Popa, Cornel; Frangeti, Ruxandra – quoted article.

obligors of an obligation contracted during the activity of an undertaking, should be extended to non-professionals as well by virtue of the principle provisions of art. 3 para. 1 and 3 of the Code that stipulates "the general unity of application of the Civil Code".

It has been argued, in a just manner nonetheless, we believe, that this vision should concern the entire legal relation as "the differentiated application, for each part of the rules, is not even possible as long as the purpose was the unity of the private law"[19]. The presumed solidarity of joint obligors should extend to non-professionals as well in compliance with art. 3 para. 3 of the New Civil Code.

Anyway, the area of application of the presumed solidarity is much enhanced as compared to art. 42 of the Commercial Code, even if the professionals' category extent that exceeds that of merchants should be considered.

3.1.6 Cumulated penalty and direct, precise and unchanged performance of obligations

This is a novel rule added by art. 1539 of the New Civil Code and, though it is not a creation of the commercial law, it should be firstly signaled in considering its novelty in the area of contractual obligations, as well as in considering that it is a rule applicable to all contractual obligations that both professionals and non-professionals participate in.

3.2 Rules typical of the legal relations between merchants, that are taken up from the New Civil Code

3.2.1 Grace period

Art. 44 of the former Romanian Commercial Code stipulates that, as to commercial obligations, the judge cannot grant an obligor the grace period laid down in art. 1021 in the former Civil Code.

This prohibition was rigorously maintained until the abrogation of the Commercial Code, with the only derogation provided by the Government's Ordinance No. 5/2001 and the Government's Emergency Ordinance No. 119/2007.

Thus, art. 6 para. 2 and 3 of the Government's Ordinance No. 5/2001 on the procedure of demand for payment and art. 10 para. 1 and 3 of the Government's Emergency Ordinance No. 119/2007 on the steps for fighting the late performance of payment obligations resulting from commercial contracts, stipulate that the judge, finding the request grounded, will issue the ordinance of demand for payment, and payment ordinance respectively, which will indicate the payment due date.

However, we estimate that these two legislative instruments did not influence the rule laid down in art. 44 of the former Commercial Code as they were stated for two special procedures, which were brief, where the investigation of the receivables right was exclusively done based on written documents.

In common law litigations, where decisions were made that enjoyed the *res judicata* (matter judged) status, the provisions of art. 44 of the Commercial Code were fully incident, that prohibited grace periods, and the application of such rules was confirmed even in the trial-related matter, art. 720_8 of the Civil Procedure Code expressly consecrating the enforceability of court decisions made in the first instance in commercial cases.

[18] Săuleanu, Lucian – "Specificul obligațiilor asumate de profesioniști în contextul dispozițiilor Noului Cod civil" – „Specificity of Obligations Undertaken by Professionals under the New Civil Code" - www.juridice.ro.

[19] ditto.

3.2.2 Prohibition of dispute and obligation extinction by the obligor before an obligation assignee

The rule laid down in art. 45 of the former Romanian Commercial Code concerning the prohibition of dispute and obligation extinction by the obligor in the assignment of a right deriving from a commercial deed, which rule characterized the area of commercial obligations, is no longer found in the New Civil Code.

3.3 Rules typical of the legal relations among merchants, applicable in contractual relations among professionals only

3.3.1 Determination of the price among professionals

Art. 1233 of the New Civil Code stipulates that, when a contract entered into among professionals (our underline) does not define the price or does not indicate a means to define the same, it is presumed that the parties considered the common price in the field for the same provisions under comparable circumstances or, for lack of such a price, a reasonable price.

This article is remindful of art. 40 and art. 61 of the former Commercial Code that, in similar circumstances, referred to the "real price" or "current price", agreed on the basis of the stock market level or the relevant lists of prices where the contract was entered into.

However, the current regulation no longer takes up the parties' possibility provided by art. 61 para. 2 of the former Commercial Code, i.e. determination of the price by a third party (arbitrator) designated by the parties either by contract or after contract execution and seems to have submitted the determination of the price not agreed by the parties by contract to the court or arbitration tribunal.

4. Commercial activity contracts set forth in the New Civil Code

An overview of Title IX, Book V, the New Civil Code, finds that it considers a high number of special contracts, serving as an actual list thereof. Our intention is not that of providing an interpretation of these contracts, but an analysis of their structure and the significance of said structure.

Two conclusions emerge, *prima facie,* in connection with this title on special contracts:

The first conclusion: despite the outstanding number of special "regulated" contracts that it refers to, Title IX does not claim to be exhaustive as it concerns "various" special contracts.

Relating the name of this Title of Book V to the provisions of art. 1167 para. 2 of the Code, the conclusion is that, *de lege lata*, there are two systems that regulate the special contracts: the New Civil Code and special laws.

The second conclusion: given the non-comprehensive inventory of the special contracts regulated by the New Civil Code, the most overwhelming part is covered by contracts that are traditionally considered commercial contracts, that we designate, due to legislative limitation reasons, commercial activity contracts.

Thus, out of a total of 20 special contracts (guarantees excluded) laid down in the Code, at least 15 essentially concern commercial activities whereas only 4 are civil in nature: loans among non-professionals, life annuities, maintenance, games and gambling as activities unauthorized by the competent authorities.

The remaining special contracts either essentially concern commercial activities (supply, contracting, transport, shipping, consignment etc.), or are traditionally very common in the area of commercial activity (sale and purchase, exchange, lease, company etc.).

Given the circumstances, even without considering the special contractual legislation outside the Code, that is almost exclusively related to commercial activity, we can speak of a real "commercialization" of civil law, a contamination thereof, that not only fails to justify the existence

of commercial civil law as a species of civil law[20], but, on the contrary, it reverses the gender-species relation between commercial law and civil law.

Once again, we deal with the terminological constraints imposed by Law No. 71/2011 and the Government's Emergency Ordinance No. 79/2011 as concerns the terms "commerce", "merchant" and "commercial" and we limit ourselves to stating that such strong penetration of civil law by the commercial law, and the extension of the application sphere of such a great number of commercial law institutions to all types of legal relations (thus involving non-professionals) stands, in fact, for the victory of commercial law.

5. Commercial activity contracts that are not laid down in the New Civil Code, set forth in special laws

We have previously presented an inventory of the major special contracts/and areas of commercial law where such contracts regulated by special laws are entered into.

We added here transports that, in doctrine, are even the object of a legal sub-category – law of transports, maritime commerce – still under the incidence of the non-abrogated part of the 1887 Commercial Code, financial derivatives (with *futures*, *options*, *forward* contracts) etc.

The legal regime of these special contracts, just as in the case of those set forth by the New Civil Code, is that stipulated by art.1167 para.2 of the Code: these contracts are subject to the special legislation that consecrates them.

These legal provisions are meant to clarify a dilemma raised in relation to special contracts not laid down in the New Civil Code: what is their fate? Not being in the Code equals failure to exist?

Based on the very title of Section II, Title II, Book V, the New Civil Code – Miscellaneous (our underline) contract categories – and also considering the provisions of art.1167 para.2 of the Code, results in the idea that failure to include a multitude of mostly commercial special contracts in the Code does not deny their existence, on the contrary, it acknowledges it, determines they are subject to the legislative instruments that consecrate them and, thus, confirms the incapacity of the Code itself to create a complete inventory thereof, hence the failure of the tendency to integrate and the much praised unitary regulatory system.

6. Several final reflections on commercial activity contracts

These contracts, being specially laid down in the New Civil Code and the special commercial laws, are *special* or *regulated* contracts.

With reference to them, an author [21] justly signaled that "they are creators of the common law; the latter is not rigid, it grows every day based on doctrine and jurisprudence, as well as some special regulations for certain contracts, that are later generalized by contractual practices as well, that become abstract. Thus, certain principles (the principle of consensus), certain techniques (contract for a third party's benefit, subcontracting) or certain concepts (the creating drive of appearance in law, abuse of law, good faith, obligation to inform) are generalized."

We find a simple, but essential mention necessary: the contracts that set the tone and stimulate the evolution of common law concern the commercial activity.

In reflecting on the ample nature of this area and the vast and extremely technical set of issues it gives rise to, an idea was proposed, i.e. configuring a new branch of civil law, namely the law of professional contracts.[22] It remains to be seen whether such vision passes the test of time, gathered

[20] Piperea, Gh. – homonymous article **Curierul judiciar** issue 7-8/2011.

[21] Moțiu , Florin – quoted work, 17.

[22] Piperea ; Gheorghe – *Introducere în Dreptul contractelor profesionale/Introduction to the Professional Contracts Law*, (C.H. Beck Publishing House , Bucharest , 2011).

around the new concept of "professional" and the variety of contracts that "operating an undertaking" involves.

Conclusions

1. The article follows two major directions:

a. The vision of the New Civil Code on contracts, with focus on the following:

- the contract as a source of obligations;
- the New Civil Code as a framework law in the area of contracts;
- regulated and non-regulated contracts and their legal regime;
- categories of contracts laid down in the New Civil Code;
- the freedom to contract and good faith as fundamental principles of contract execution and performance.

b. Commercial activity contracts with focus on:

- criteria for differentiating these contracts from other contracts;
- definition of commercial activity contracts;
- peculiarities of the legal regime of these contracts;
- commercial activity contracts laid down by the New Civil Code;
- commercial activity contracts not stipulated by the New Civil Code, but regulated by special laws;
- place and importance of this contract type within the overall area of civil contracts.

The core result of this undertaking is outlining the vision of the New Civil Code on contracts, its pros and cons, as well as focusing on the specificity of commercial activity contracts and the influence they exert on all civil contracts.

2. The estimated impact will be:

- on legal professionals to whom it will provide a general overview on the New Civil Code vision, benefits and drawbacks thereof;
- on decision-makers that will consider potential future remedies on a legislative level;
- last, but not least, legal theoreticians who will find in this article reasons to debate the justness and timeliness of the Romanian lawmaker's option for the private law regulatory unity system.

3. The author's belief is that future research in the analyzed area will concern the vocation of the New Civil Code as a framework matter on contracts, the determination of the specificity of commercial activity contracts, making a list of such contracts (stipulated in the New Civil Code and special laws), as well as the determination of their compatibility with the New Civil Law regime.

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ONE CANNOT BE TRIED FOR THE SAME DEED TWICE

NICOLAE GRĂDINARU[*]

Abstract
The principle of applying a single sanction for a single wrongful act.
This principle involves the application of a single penalty for a single wrongful act; who has ignored the rule of law his conduct will meet once for illegal acts, violation of law for a corresponding one legal sanction.
It does not preclude the simultaneous existence of several forms of legal liability for the unlawful act committed by the same person, when the same act is violated several rules of law.
Article 4 of Protocol 7 of the Convention enshrines the "right not to be tried or punished twice", known as traditional „ne bis in idem": "Nobody can be tried or punished by the criminal jurisdiction of the same State for an offense for which has already been acquitted or convicted by a final decision under the law and penal procedure of that State. (...)"
In two cases this will expose the principle settled by the European Courts non bis in idem.

Keywords: *liability, wrongful act, offense, conviction, final decision.*

Introduction

Legal order is not based solely on coercion, but rather its essential feature is that it requires primarily through voluntary compliance with the rules of law, and this aspect is the legal responsibility.

In general sense, responsibility is seen as an obligation to bear the consequences of breaches of rules of conduct and therefore violates or ignores when responsibility.

Legal liability is also seen as a constraint on state power exercised by the individual, as a response to breaches of law, thus making him suffer the consequences of his act default (to repair the damage caused, to undergo a criminal or contravention etc.).[1]

In conclusion, it appears that the complex social relationship of which is the determination of liability under it is that which violates a rule of law, called the action illegal and the penalty is the means by which coercion is performed.

Legal liability is circumscribed branches of law and is linked to other specific rules of each of these branches. Thus, criminal liability shall commit a criminal offense specific, with guilt as provided by law, a penalty called punishment, administrative liability and administrative deviation are characteristic specific penalty, liability for damages available through material creates an obligation, etc. Legal liability principles guiding ideas are those that find their expression in all the rules of law governing the various forms in which that principle is presented.

It envisages common features of all cases of legal rules governing the conditions, how involved various forms of legal liability.

The principles

Of the principles enshrined in the legal literature and results of rules of law include:

a) The principle of employing only legal responsibility under the law.

The principle of legality is a fundamental principle of criminal law. In the area of criminal liability, this rule expresses the principle by which the whole activity of criminal liability of those who violated the law by committing crimes, based on the sole legal basis. The legality of criminal

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[1] M. Eliescu - Tort civil liability, Academy Publishing House, 1972, pag. 8-31.

responsibility involves the legality of conviction and the legality of criminal sanctions: "*nullum crimen sine lege*" and "*nulla poena sine lege*".

However, we believe that the legality principle applies to all forms of legal liability, as in every branch of law and the legal liability of any form of legal penalties may be imposed only for illegal acts, whether of crime or civil illegal administrative irregularities.

b) The liability for the acts committed by guilt

This principle requires that any matter of law can be punished only when he is guilty and only within the limits of his guilt. Legal liability occurs because a matter of law failed to comply with legal rules of conduct prescribed for the conduct of several possible just chose the one which violates social interests protected by legal rules. By law, society condemns those of its members who conduct contrary to its interests, and the perpetrators know that their conduct contrary to these interests.

Under this principle, the liability comes only material facts of conduct that is unlawful for the legal facts. It does not affect people's ideas, embodied in acts of conduct, according to the Roman maxim: "*de internis non judiciat praetor*".

The idea of guilt illegal act involving the author's attitude to decide its own behavior and consciousness through the act of violation of its legal norms of conduct.

In principle, tort liability for acts committed by guilt, but, in the Romanian law the presumption of innocence operates illicit offender so that guilt must be proven by the injured party, or by the prosecution for criminal liability. However, the law governing the presumption of guilt in some cases the responsibility of individuals, such as presumption of guilt of the parents for their minor children's actions, which will still protect from liability if they prove that they could prevent injurious act.

c) The principle of personal responsibility

According to this principle sanctions effects occur only on the person who has violated the legal standard, committing the unlawful act.

The extent of liability is determined by personal circumstances of the offender, which is assessed on the occasion of determining the penalty.

There are exceptional cases expressly provided by law, vicarious liability occurs when - liability objective, indirect, such as liability of principals for the acts of servants, and artisans of primary school pupils and apprentices for the acts or facts parents for their minor children.[2]

In the case of joint liability, it operates several subjects in person, so the injured can be compensated by any of them, and thus recovered the entire loss, as one who will rise to full compensation for the injury to be able to recover through an action for recourse against the other co-debtors more than what he paid as due to himself, according to his degree of guilt.

d) The principle of accountability for speed

The achievements of legal liability largely depends on the extent and speed of implementation of the principle, which expresses the requirement for accountability to be appropriate, such as failing to produce the effects of repressive and preventive - Educational.

Sanction is the reaction of society through state coercion against illicit act, so it is necessary for punishment to occur in a short time after the date of the deed, as if the coercion does not occur promptly, not longer obtain desired aims, either in the offender, or in relation to society.

Undoubtedly, the timing punish the perpetrator causes a feeling of insecurity in interpersonal relations and social ones, and a sense of confidence in the ability of institutional factors required to ensure law and order[3].

As is known, accountability is not only educative effect, but also lead to restoring the rule of law, impaired by committing illegal acts, and the passage of time can lead to the loss of evidence or

[2] Gh. Mihai, R.I. Motica - Optima justice, ALL Beck Publishing House, Bucharest, 1999, pag.201.
[3] Gh.Mihai - Argumentation and interpretation in law, Lumina Lex Publishing House, Bucharest, 1999.

to determine the real impediments to actually establish the actual state . Therefore, by law, often set time limits for implementation or prescription of the penalty.

e) Principle "*non bis in idem*"

The principle of applying a single sanction for a single wrongful act.

This principle involves the application of a single penalty for a single wrongful act, one that has ignored the rule of law his conduct will meet once for illegal acts, violation of law for a corresponding one legal sanction.

It does not preclude the simultaneous existence of several forms of legal liability for the unlawful act committed by the same person, when the same act is violated several rules of law.

For example, according to art.208 of the Criminal Code, making a movable possession or detention of another person without consent constitutes theft and is punishable by law, intervening criminal liability and, on the other hand, civil law, that protects the holder's ownership, the entitlement to restitution and compensation for damage to property which constitutes a civil penalty.

So the same offense in violation of a rule violation and a rule of criminal law and civil penalties for each branch of law whose rules were ignored accumulate on this path several will and forms of legal liability.

Another example, by committing a traffic offense on the road, but the author be liable for civil criminally liable if he committed a civil wrongful act of another person causing harm. Thus, the violation by the same unlawful conduct as a rule of criminal law and a rule of civil penalties for each branch of law whose rules were ignored accumulate.

Criminal liability can be combined with disciplinary liability in the performance when the employment contract employee commits an act which is unlawful, while a disciplinary offense and a crime, and thus applying both criminal penalty provided by law, as and disciplinary sanction. In these cases no principle in defeat (*non bis in idem*), because it consolidates two types of responsibility of a different nature, which entail different penalties.

Disciplinary liability may be combined with administrative responsibility if the act is unlawful while misconduct and negligence, thereby applying a disciplinary penalty and a sanction.

This principle but excludes the application against the same person, for the same unlawful conduct of two or more sanctions identical in nature: either criminal or civil, administrative or so., since restoring the rule of law violation for each violation requires violated a rule of law applying a single penalty, which depends exclusively on the nature of such legal provision violated.

Therefore, when there is a multiple violation of the rule of law, aimed at legal regulation of different and overlapping occurs two or more of the same kind of legal sanctions that would apply the same person for a single wrongful act, does not violate the principle of applying a single sanction for a single wrongful act.

If a person commits an act that is qualified as a crime, can not be held accountable and administratively for the same offense as an act can not be the same for both offense and offense, the offense is defined as potentially act as a lesser offense than.

In conclusion overlapping criminal liability is excluded administrative responsibility.

This principle is proclaimed in both the civil procedural law and criminal procedural law, the legal texts providing for specific penalties for the same kind of overlapping failure.

The court

One of the main effects of judgments shall cease to be entitled to take legal action in a material way and that preventing a new prosecution for the same offense and against the same person.

Court when the court finds that there is a final and res judicata, it will accept the final solution and will comply with the ban to judge or decide a case is finally resolved. And as it tends to respect this principle, because the final judgments and various sanctions can not be different or the same kind by one or more courts.

We believe that the approach should take into account the rights established in the European Convention on Human Rights as interpreted and applied solutions CEDO Court.[4]

Article 4 of Protocol 7 of the Convention enshrines the "right not to be tried or punished twice", known as traditional "ne bis in idem ", "No one shall be tried or punished by the criminal courts for committing the same State offense for which has already been acquitted or convicted by a final decision under the law and penal procedure of that State. (…)"

In two cases this will expose the principle settled by the European Courts *non bis in idem.*

In the first case, on 11 November 1999, plaintiff was involved in an incident in which, according to the police report called on the spot, broke a neighbor's door, entered his apartment and punched.

Following the police report, Mayor of Gabrovo to the applicant a fine for disturbing the public order of 50 leva (25 euros). The sanctions became final, not being challenged in court.

Subsequently, the prosecutor began criminal and prosecuted for trespassing, battery and other violence. Gabrovo District Court acquitted him for trespassing and battery and other violent convicted to imprisonment for 18 months. The solution was Gabrovo Court upheld on appeal and the appeal by the Supreme Court of Justice of Bulgaria.

The European Court, the plaintiff alleged violations of Articles 6 of the Convention and 4 of Protocol. 7 to the Convention (which guarantees the right not to be tried or convicted twice for the same facts – *ne bis in idem*).

Court in its Judgement delivered on 14 January 2010, found violations of both articles.

Regarding Article 4 of Protocol 7 to the Convention, the Court stated that:

- contravention penalty imposed by the Mayor of Gabrovo applicant can be considered as having a "criminal" in the autonomous meaning of that term which the Convention accords, given that, on the one hand, violated the prohibition imposed by the legal text is addressed to all persons and that, on the other hand, the purpose of punishment is to punish and prevent the future commission of similar acts;

- there is identity of facts between those who rise to the penalty for minor offenses and that those who have caused criminal proceedings against the applicant, regardless of the legal definition of domestic law gives offense, that the two offenses;

- there was a doubling of legal proceedings against the applicant, given that criminal proceedings were preceded by sanctioning its contravention, which became final by neapelare.

In conclusion, the applicant had been "convicted" in the administrative proceedings (contravention) to be treated as a "criminal" autonomous meaning of that term in the Convention. After this "conviction" became final, had been brought against him in another criminal indictment which concerned the same conduct and essentially the same facts. Given that art. 4 of Protocol 7 to the Convention prohibits both the prosecution and conviction of a person for acts which have already led to the imposition of a permanent criminal penalties, the Court found a violation of this article to Bulgaria.

In the second case, the Judgement of 11 December 2008 the Court of Justice (CJCE) ruled in Case C-297/2007 Staatsanwaltschaft Regensburg / Klaus Bourquain, and that the prohibition from being tried twice for the same act also applies to a conviction which could never be enforced directly.

According to the CJCE, "this interpretation seeks to ensure that a person is prosecuted for the same offense in several contracting states resulting from the exercise by it of the right to freedom of movement".

[4] Law no.30/1994 Law on ratification of the Convention on Human Rights and Fundamental Freedoms (signed in Rome on 4 November 1950) and of the Additional Protocols to the Convention, published in the Official Gazette no.135/31.05.1994.

In Case C 297/07, regarding a reference for a preliminary ruling under Article 35 EU Landgericht Regensburg (Germany), by decision of 30 May 2007, the Court received on 21 June 2007, criminal proceedings against Klaus Bourquain.[5]

Reference for a preliminary ruling concerns the interpretation of Article 54 of the Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the Benelux Economic Union, the Federal Republic of Germany and France on the gradual abolition of checks at common borders.[6]

The request was made in criminal proceedings brought in Germany on 11 December 2002 against Mr Bourquain, a German national, in terms of murder, while the criminal proceedings initiated for the same acts by a judicial authority in another Member contractor against the person had already mentioned, on 26 January 1961, by a conviction in absentia.

Legal

First Article of the Protocol integrating the Schengen acquis within the European Union annexed to the Treaty on European Union and the Treaty establishing the European Community by the Treaty of Amsterdam (hereinafter "the Protocol"), 13 Member States of the European Union including Germany and the French Republic, is authorized to establish enhanced cooperation between themselves in areas covered by the scope of the Schengen acquis as defined in the Annex to this Protocol.

Since the Schengen acquis thus defined, in particular, the Agreement between the Governments of the Benelux Economic Union, the Federal Republic of Germany and France on the gradual abolition of checks at their common borders signed at Schengen on 14 June 1985 and the CAAS.

Under Article 2 (1) second paragraph, second sentence of the Protocol, the EU Council adopted on 20 May 1999 Decision 1999/436/EC establishing, in accordance with relevant provisions of the Treaty establishing the European Community Treaty on European Union, the legal basis for each of the provisions or decisions constituting the Schengen acquis. In Article 2 of this decision in conjunction with Annex A thereto, that Articles 34 EU and 31 EU were designated by the Council as the legal basis of Articles 54-58 of the CAAS.

Under Article 54 of the CAAS, which is in Chapter 3, entitled "Implementing *ne bis in idem*", Title III of the Convention, entitled "Police and security"

„A person against whom a final decision was rendered in a trial by a Contracting Party can not be prosecuted by another Contracting Party for the same acts provided that, where a sentence was pronounced, it have been enforced, is being enforced or can no longer be enforced under the laws of the sentencing Contracting Party."

For information concerning the date of entry into force of the Amsterdam Treaty, published in the Official Journal of the European Communities, 1 May 1999 (OJ L 114, p. 56) that the Federal Republic of Germany made a declaration under Article 35 (2) EU accepting jurisdiction to decide the manner prescribed in Article 35 (3) (b) EU.

The facts in criminal proceedings and the question.

On 26 January 1961 at the Bone (Algeria), Mr. Bourquain engaged in the French Foreign Legion, was sentenced to death in absentia by the Permanent Military Tribunal for crimes of Constantine the eastern zone of desertion and intentional homicide.

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[5] By Decision of 11 December 2008 the Court of Justice of the European Communities (CJEC) ruled in the case C-297/2007 Staatsanwaltschaft Regensburg/Klaus Bourquain, and found that the prohibition against being tried twice for the same act also applies in the case of a conviction which could not ever be executed directly.

According to the CJEC, "this interpretation seeks to avoid that a person is prosecuted for the same acts on the territory of several Contracting States after exercising his/her right to move freely."

[6] JO 2000, L 239, p. 19, Ediție specială, 19/vol. 1, p. 183), semnată la Schengen (Luxemburg) la 19 iunie 1990 (denumită „CAAS").

The application of the French Code of Military Justice for the Army, the military court held it proved that, on 4 May 1960, while trying to desert on the Algerian / Tunisian border, Mr. Bourquain shot dead another Legionary all of German nationality, who tried to prevent defection.

Lord Bourquain, refugee German Democratic Republic had not learned of the decision notice given in absentia and given the punishment imposed by the decision considered in adversarial proceedings could not be executed.

Bourquain Lord did not subsequently prosecuted or Algeria, or France. Moreover, in France, all in connection with war crimes in Algeria were given amnesty by the laws mentioned above. In contrast, Germany has opened an investigation against him for the same facts and, in 1962, a warrant was sent to authorities in the former German Democratic Republic, which rejected.

In late 2001, it was discovered that Mr Bourquain lived in the area of Regensburg (Germany). On 11 December 2002, Staatsanwaltschaft Regensburg (Regensburg floor) in terms prosecuted murder, the court, for the same acts under Article 211 of the German Criminal Code.

In these circumstances, by letter dated July 17, 2003, the court of France Ministry of Justice requested information in accordance with Article 57 (1) of the CAAS to determine if the decision of the Permanent Military Tribunal of Constantine the eastern zone, delivered on 26 January 1961 to prevent the commencement of criminal proceedings in Germany for the same offense, given the prohibition of double prosecution, under Article 54 of the CAAS.

Prosecutor's Office Military Tribunal in Paris responded to this request for information, indicating in particular the following:

„Judgement rendered in absentia on 26 January 1961 against [Mr Bourquain] has power *res iudicata*. The decision to sentence to death penalty has become final in 1981. Since the French law, the limitation of the sentence in criminal cases is 20 years, the decision can not be enforced in France."

That court asked the Max Planck Institut für ausländisches und internationales Strafrecht (Max Planck Institute for international criminal law and comparative criminal law) an advisory opinion on the interpretation of Article 54 of the CAAS in the circumstances of the main proceedings. In the opinion of 9 May 2006, the institute concluded that, although enforcement of the conviction in absentia was not possible because of procedural peculiarities of French law, however, in the main, the conditions under Article 54 of CAAS and therefore can not be triggered new criminal proceedings against Mr Bourquain. The same institute, in response to the request for additional comments, and maintained its position in the letter of 14 February 2007.

Landgericht Regensburg, holding that Article 54 of the CAAS could be interpreted as meaning that in order to prevent a new proceedings in a Contracting State, the first conviction in a trial conducted in the territory of another Contracting State shall have been performed at a given moment past, decided to stay proceedings and refer the following question:

„A person against whom a final decision was rendered in a trial by a Contracting Party may be prosecuted by another Contracting Party for the same acts, if the sentence was never applied could not be enforced under the laws State in which he was convicted?"

It should be added that in any case, Article 58 of the CAAS authorizes the Federal Republic of Germany to apply broader national provisions on the principle *ne bis in idem*. Thus, it allows Member States to apply this principle to judicial decisions other than those falling within the scope of Article 54.[7]

Conclusions

Question referred under Article 35 EU - Schengen Agreement - Convention implementing the Schengen Agreement - Interpretation of Article 54 - Principle ne bis in idem – Conviction in absentia - res judicata - non-punishment condition.

[7] Decision of 11 february 2003, Gözütok şi Brügge, C-187/01 şi C-385/01, Rec., p. I-1345, pct. 45.

By this question, the court asks, essentially, whether the principle *ne bis in idem*[8] enshrined in Article 54 of the CAAS is applicable in the case of criminal proceedings in a Contracting State for the facts on which a final decision has already ruled against a defendant in the trial by another Contracting State, even if the sentence was never applied could not be enforced under the laws of the State in which he was convicted.

It should be noted, on the one hand, as the Commission stated in its written observations, that, in principle, a conviction in absentia can be within the scope of Article 54 of the CAAS and can therefore constitute a procedural bar to the commencement of new procedures.

First, the actual wording of Article 54 of the CAAS that judgments in absentia are not excluded from its scope, the precondition for the implementation of this Article 54 is only that there has been a final decision in a trial by a Contracting Party.

Secondly, it should be noted that Article 54 of the CAAS is not subject to harmonization or approximation of criminal laws of the Contracting States in respect of judgments rendered in absentia.[9]

In these circumstances, Article 54 of the CAAS, applied to the case of a decision by default, given in accordance with national legislation of a Contracting State, or to an ordinary decision, necessarily implies the existence of mutual trust with the Contracting States their criminal justice systems and the acceptance by each state of the application of criminal law in force in the other Contracting States, even where their national law enforcement would lead to a different solution (see this Gözütok and Brügge, cited above, paragraph 33).

How many Member States have argued, and the Commission in their written comments, should be checked conviction in absentia by the Permanent Military Tribunal for the eastern zone of Constantine's "final" within the meaning of Article 54 of the CAAS, taking into account the impossibility of enforcement of the penalty determined by the requirement imposed by French law to pursue if he were to reappear in absentia, a new trial, this time in his presence.

It is clear that the Prosecutor of the Military Tribunal in Paris, without making any reference to the fact that crimes were committed by Mr Bourquain amnesty in 1968, notes that the sentence against him became final in 1981, ie before the onset second criminal proceedings in 2002 in Germany.

Should be added that, although Law no. 68 697 French amnesty consequence that its entry into force, Mr Bourquain crimes not subject to any penalty, the effects of that law, as described in particular Articles 9 and 15 of Law no. 66,396, can not be interpreted as meaning that there is an initial decision under Article 54 of the CAAS.

Judgement rendered in the absence of the person concerned must be considered final within the meaning of Article 54 of the CAAS, must determine whether the condition of execution referred to in that Article, namely that the penalty can not be enforced, and where, in any time in the past, even before the amnesty or prescription, the first conviction the penalty imposed could not be directly enforced.

In these circumstances, the answer to the question that the principle *ne bis in idem* enshrined in Article 54 of the CAAS applies to criminal proceedings brought in a Contracting State for the facts on which a final decision has already ruled against a defendant in the trial by another Contracting State, even if the laws State in which he was convicted, the sentence was never applied could not be directly enforced, due to features such as those of the main procedural.

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[8] Decision of 11 february 2003, Gözütok şi Brügge (C-187/01 şi C-385/01, Rec., p. I-1345), Decision of 10 martch 2005, Miraglia (C-469/03, Rec., p. I-2009), Decision of 9 march 2006, van Esbroeck (C-436/04, Rec., I-2333), Decision of 28 september 2006, van Straaten (C-150/05, Rec., p. I-9327), Decision of 28 september 2006, Gasparini (C-467/04, Rec., p. I-9199), Decision of 18 june 2007, Kretzinger (C-288/05, Rep., p. I-6441), and Decision of 18 july 2007, Kraaijenbrink (C-367/05, Rep., p. I-6619).

[9] Decision Gözütok şi Brügge, pct. 32.

Thus, the court said, the principle *ne bis in idem*, enshrined in Article 54 of the Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the Benelux Economic Union, the Federal Republic of Germany and France on the gradual abolition of checks at common borders signed at Schengen (Luxembourg), 19 June 1990, applies to criminal proceedings brought in a Contracting State for the facts on which a final decision has already ruled against a defendant in the trial by another Contracting State, even if the laws of the State was convicted, the sentence was never applied could not be directly enforced, due to procedural features such as those in the main proceedings.

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- By Decision of 11 December 2008 the Court of Justice of the European Communities (CJEC) ruled in the case C-297/2007 Staatsanwaltschaft Regensburg/Klaus Bourquain, and found that the prohibition against being tried twice for the same act also applies in the case of a conviction which could not ever be executed directly.
- According to the CJEC, "this interpretation seeks to avoid that a person is prosecuted for the same acts on the territory of several Contracting States after exercising his/her right to move freely."
- Decision of 11 February 2003, Gözütok and Brugge, C-187/01 and C-385/01, Rec., p. I-1345, paragraph 45.

EXERCISE WITH BAD FAITH OF SUBJECTIVE CIVIL RIGHTS

NICOLAE GRĂDINARU*

Abstract
The abuse of rights is qualified as civil offence and it may not be different from that of aquilian responsibility, the purpose of its sanction is to protect the victim and not to punish the author.
In the Romanian legal doctrine, the abuse of rights was defined as "the exercise of a civil subjective right by breaching the principles of its exercise."
The Constitutional Court held that the person exercising in bad faith and abusively his/her subjective or procedural rights is punishable by appropriate penalties, such as: dismissal of his/her legal action, obligation to bear the costs, application of certain court fines, etc.

***Keywords**: food faith, bad faith, abuse of right, aquilian responsibility, public order, morals.*

Introduction

According to article 57 from the Constitution of Romania, the Romanian citizens, the foreign citizens and the stateless persons shall exercise their constitutional rights and freedoms in good faith, without breaking the others' rights and freedoms.

According to article 17 of the Convention for the Protection of Human Rights and Fundamental Freedoms the abuse of rights is prohibited so that no provision of the Convention shall be construed as authorizing a State, a group or an individual to conduct an activity or to perform an act in order to destroy the rights or freedoms set forth in this Convention, or of a broader limitation of these rights and freedoms than those provided by this Convention.[1]

The restrictions brought to the respective rights and freedoms can only be applied for the purpose for which they were provided.

The Civil Code stipulates in article 14 the good faith so that any natural or legal person must exercise his/her rights and perform his/her civic obligations in good faith, according to the public order and morals.

Good faith is presumed until proven guilty.

Where there is good faith, there cannot be abuse of rights, but in case the right is exercised in bad faith, by its distortion from the economic and social purpose as it is documented, by the violation of another person's rights, he/she can no longer benefit from the protection of law.

Such regulations are also to be found in other special laws such as the stipulations of auricle 136^1 of law no. 31/1990 on companies which contains an express provision in the matter, namely: "The shareholders must exercise their rights in good faith, respecting the rights and the legitimate interests of the company and of the other shareholders."

Abuse of rights in the Civil Code

The French Court of Cassation held that there is an abuse of rights when "the attitude contrary to the general interest of the company, proven by the prohibition to perform an essential operation for it and for the sole purpose of favouring their own interests at the expense of all the other partners' interests."[2]

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[1] The Convention for the Protection of Human Rights and Fundamental Freedoms. Rome 04.11.1950, ratified by Romanian by Law no. 30/1994 published in the Official Gazette no. 135/31.05.1994.

[2] Decision no.158/2009 of Court of Appeal Timişoara, Civil department.

Constitutional Court held that the person exercising in bad faith and abusively his/her subjective or procedural rights is punishable by appropriate penalties, such as: dismissal of his/her legal action, obligation to bear the costs, application of certain court fines, etc. [3]

In the Romanian legal doctrine, the abuse of rights was defined as "the exercise of a subjective civil right with the breach of the principles of its exercise."

The abuse of rights is qualified as civil offence and may not be different from that of aquilian responsibility, the purpose of its sanction is to protect the victim and not to punish the author. [4]

The legal characteristics of the abuse of rights are the following:

- exercising the subjective civil right;
- disregarding the economic and social purpose for which the subjective right is recognized;
- exercising the subjective right in bad faith;
- exercising the subjective right by exceeding its limits.

The abuse of rights can be punished by:

- the rejection of the plaintiff's claim to the court of law when it finds that he/she has abusively exercised a subjective right. Such a regulation is stipulated in article 29, paragraph 5 of Law no. 47/1992: "If the exception is inadmissible, being contrary to the law stipulations, the Court rejects by a reasoned resolution the referral request to the Constitutional Court."[5]

- the removal of the defendant's defence by the Court of law when he/she exercises the respective right abusively;

- when the abuse of law is materialized in an act that causes damages, the Court of law gives rise to the author's liability to the injured person in one of his/her rights by obliging him/her to repair the damage with recovery of damages. Thus, there are the stipulations of article 1353 of the Civil Code which provide that the person who causes a damage through the proper exercise of his/her rights is not obliged to repair it, unless that right is exercised abusively. Therefore, it is established, as general principle, that the person who caused a prejudice to another person by exercising his/her rights is not obliged to repair it unless the rights were exercised abusively. [6]

The Civil Code regulates in article 15 the abuse of rights and stipulates that no right can be exercised in order to harm or to injure another person excessively or unreasonably, contrary to good faith.

The exercise of civil rights with the violation of this "good faith" principle represents *"abuse of rights"* and it is punishable as such.

The holder's civil liability is involved in the case of committing an abuse only if the right is exercised with the intent of causing material or moral damage to another person.

If one cannot remember the author's guilt as the intention to cause damage to another person, the author is responsible in the situation in which the subjective right is exercised excessively and unreasonably, contrary to good faith, and if damage is caused to another person. In the case of the abuse of rights as well, in order to be able to have civil liability, it is necessary to meet the general conditions as in the civil aquilian responsibility, namely: the existence of the illegal act, materialized in exercising abusively the right; the material or moral damage caused by exercising the right, the causal link between the illegal act and the author's damage and guilt.[7]

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[3] Decision no. 161/2002 of the Constitutional Court published in the Official Gazette no. 448/26.06.2002.

[4] Marilena Uliescu. – New Civil code, 3rd edition, revised and added – Bucharest, Universul Juridic, 2011.

[5] Law no. 47/1992 on the organization and functioning of the Constitutional Court, republished in the Official Gazette no. 807/03.12.2010.

[6] Article 1349 of the Civil Code. Aquilian responsibility

Everyone has the duty to respect the rules of conduct which the law or local custom requires and not to bring prejudice through his/her actions or inactions to the legitimate interests of other persons.

The one who, having discernment, violates this duty, is responsible for all the damage caused, being obliged to fully compensate it.

[7] Christina Vlădescu – The abuse of rights in the regulation of the New Civil Code, 2011.www.juridice.ro.

The new Civil Code also speaks about the abuse of rights in the regulation of article 193 paragraph 2 on the effects of the legal personality, so that no ne can plead against a good faith person the quality of law subject of a legal person, if by this one tries to conceal a fraud, an abuse of rights or public order attack.

According to the stipulations of article 630 of the Civil Code, if the owner causes, by exercising his/her right, inconvenience higher than the normal one in the neighbourly relations, the Court may, on grounds of fairness, oblige him/her to pay compensation for the benefit of the injured person, as well as to restore the previous situation when possible.

If the injury caused were minor in relation to the need or usefulness of carrying out the prejudicial activity by the owner, the Court may approve the conduct of that activity. But the injured person will be entitled to compensation.

If the damage is imminent or very likely, the court may approve, by way of presidential ordinance, the necessary measures to prevent the damage.

According to article 2496 of the Civil Code, the right of retention cannot be exercised if the ownership of the property comes from a wrongful or illegal act or if the property is not susceptible of legal prosecution.

The right of retention cannot be invoked by the owner of bad faith except in the cases specifically stipulated by law.

The Civil Code does not establish the way in which the abuse of rights can be sanctioned, the person who is guilty of abuse of rights may be ordered by the Court, on the grounds of the general principles of civil liability, to compensate for the damage as the judge considers it appropriate in the specific circumstances of the case tried.

The Court of law has to establish concretely, according to the particularities of each case, the removal of the effects caused by exercising the abusive right, the compensation for the material or moral damage caused or granting recovery of damages.

The abuse of rights in exercising procedural rights

The exercise in good faith of certain rights is also regulated by the new Code of civil procedure[8] in article 12 which stipulates that the procedural rights must be exercised in good faith, according to the purpose for which they were acknowledged by the law without violating the procedural rights of another party. The party exercising the procedural rights abusively is responsible for the material and moral damage caused. The party may be required, according to the law, to pay a legal fine as well.

The party that does not fulfil his/her procedural rights in good faith is also liable for the material and moral damage caused.

According to article 12 of the new Code of civil procedure, the person who is guilty of abusively exercising a right, shall be required, according to the law, to pay a legal fine.

The Code of procedure in force stipulates in article 723 that the procedural rights must be exercised in good faith and according to the purpose for which they were acknowledged by the law.

The party who uses these rights abusively is liable for the damage caused.

The Code of civil procedure sanctions the exercise of the procedural rights in bad faith, so that the party who uses these rights abusively has the obligation to be liable for the damage caused.

The Code of civil procedure does not show which are the criteria for determining the abuse of rights, the mere rejection of the subpoena form does not mean, eo ipso, that the plaintiff has acted abusively so that he/she may be held liable for invoking certain unjustified claims. As such, it was considered that only the judicial approach, initiated in bad faith or out of a serious error that makes it

[8] New Civil Procedure Code Law no.134/2010 published in the official Gazette no. 485/15.07.2010.

close to fraud, with the intent to cause damage, moral or material, may be considered abuse of rights.[9]

The provisions of article 723 Code of civil procedure do not entitle the Court to invoke *ex oficio* the abuse of procedural law, but rather, according to paragraph (2) thereof, it results that only the adversary, injured by the abuse of procedural rights, may claim the abuse of rights, and not the Court which does not act as the passive subject of this abuse, but as guarantor of obeying the procedural rights.

Due to the fact that the stipulations of paragraph (2) article 723 show which is the penalty for the abuse of rights, namely the obligation to compensate for the "damage caused," the conclusion that can be drawn is that only the adversary, injured by the abuse of the procedural rights, may invoke the abuse of rights, not the Court, which does not act as the passive subject of the abuse or as party in the proceedings, but as guarantor of obeying the procedural rights, as provided by article 129 of the Code of civil procedure.

The only sanction applicable to the abuse of rights is that of the damages offered to the injured party, as provided by the stipulations from paragraph (2) article 723 of the Code of civil procedure. No other legal provision authorizes the rejection of an application solely because during the trial his/her titular has used abusively his/her legal rights, diverting them from their purpose legally acknowledged. In order to sanction such procedural conduct, the judge can use the stipulations from article 108^1 paragraph (1) letter a) or paragraph (2) letter b) Code of Civil Procedure and the legal fine penalty, as well as the stipulations of article155^1 paragraph (1) Code of Civil Procedure stipulating the sanction of proceedings suspension. [10]

According to article 28 paragraph 3 of the Code of Civil Procedure, for the same grounds of recusal a new petition against the same judge cannot be made.

The formulation, again, of the request for recusal takes the form of abuse of procedural law, whose sanction is, in the light of article 723 Code of Civil Procedure not only granting of compensation but also, as a way to compensate in kind, depriving the pleading of the effects sought by the party who did it abusively. However, the inadmissibility of the request for recusal and, therefore, the abuse of rights, is directly found, even by the judge before whom the procedural act was committed, and not by a higher court or by another panel of judges, the purpose of article 28 paragraph (3) Code of Civil Procedure being to prevent delays in resolving cases by making requests for abusive recusal. This goal is achieved only if the inadmissibility of the request for recusal and, implicitly, the abuse of rights, is found directly, by the very judge before whom the procedure act was committed, otherwise the party that wants to block the trial will reach its aim. On the other hand, the provisions of article 30 paragraphs (1) and (2) Code of Civil Procedure consider the hearing of certain requests for recusal admissible in principle, whose trial on the merits involves assessing the merits of the recusal grounds, and article 28 paragraph (3) establishes the inadmissibility of a request for recusal of the same judge for the same reasons. It results that the inadmissibility of a request for recusal is a separate issue which has to be solved by the Court summoned by the request for recusal, under the common law jurisdiction. [11]

Conclusion

The repeated formulation, within the insolvency proceedings, of certain requests for referral to the Constitutional Court and for the suspension of trial, by the debtor and by those creditors who are either shareholders or former directors of the debtor, takes the form of abuse of procedural law, whose sanction is, in the light of article 723 Code of Civil Procedure, in addition to compensation,

[9] Marilena Uliescu. – New Civil Code, 3rd ed. revised and added – Bucharest, Universul Juridic, 2011.
[10] Decision no. 548/2006 of Bucharest Court of Appeal, Fifth Department of Trade.
[11] Completion of 12 December 2006 seventh Department of Trade Bucharest Court of Law.

the depriving of the pleading act of the effects sought by the party who has done them abusively, as a means of redress in kind.

The abuse of rights is found directly, by the very judge before whom the procedure act was committed, and not by a higher court or by the constitutional litigation one. Therefore, the syndic judge, noting that the new request takes the form of abuse of rights, will reject, as inadmissible, the requests for referral to the Constitutional Court and for the suspension of the trial.

The Constitutional Court ruled in several decisions on the abuse of rights, and we mention in this respect, Decision no.161/2002 which states that no Government Ordinance no.5/2001 facilitates the abuse of rights, and the person exercising in bad faith and abusively his/her subjective or procedural rights is punishable by appropriate penalties, such as: dismissal of his/her trial action, obligation to bear the costs, application of court fines and other. [12]

Under article 51 of Law no.47/1992 on the organization and functioning of the Constitutional Court, when it finds that the objection in law of unconstitutionality was unfounded and that it was raised in bad faith to delay the resolution of the trial, the Court may punish the party who invoked the objection in law with a fine of 10,000-100,000 lei.

The Constitutional Court had the possibility to sanction the abuse of rights, thus through Decision no.81/2001 the Court notes that the Constitutional Court Decision no.26 of 23 February 1999, on the plea of unconstitutionality of the provisions from article 239, paragraph 1 of the Criminal Code, is res judicata, the object, the case and the parties being the same both in the previous objection in law and in the objection in law referred to in this decision. Thus, taking into account the provisions of article145 paragraph (2) of the Constitution and those of article 25 paragraph (3) of Law no.47/1992, republished, according to which the final decisions of the Constitutional Court are binding, the party that invoked the objection in law can not reiterate it anymore, whereas the first decision comes into the power of res judicata and, therefore, the exception is inadmissible.

The author of the objection in law knew the content of the Constitutional Court decision, which is published in Romania's Official Gazette, Part I, and, moreover, it is filed at the Court, but in bad faith raised again the same objection in law in order to obtain the case trial suspension. The bad faith of the person who raised the objection in law also results from the random invoking of certain texts of the Constitution and of the Universal Declaration of Human Rights or of the provisions of article 284^{1} of the Criminal Procedure Code, which have no relevance in the case. In this situation, the Court finds that the provisions of article 51 of Law no.47/1992, republished, are incidental pleas in the case, according to which, "When the Constitutional Court finds that the objection of unconstitutionality is unfounded and that it was raised in bad faith to delay the settlement of the case, it may penalize the party who invoked the objection in law with a 10,000 to 100,000 lei fine.[13]

The Constitutional Court has also found that the Court should have rejected itself the writ of summons to the Constitutional Court.

Article 51 of Law no. 47/1992 was repealed by Law no. 232/2004.

To avoid the writ of summons in bad faith to the Constitutional Court which decides on the objections in law raised before the courts or on the commercial arbitration on the unconstitutionality of a law or ordinance or of a provision of a law or of an ordinance in force, which is related to the settlement of the case at any stage of the dispute and whatever its subject, was repealed by Law no. 177/2010, a stipulation which suspended the trial of the dispute until the settlement of the objection of unconstitutionality, thus causing undue prolongation of the trial.

In conclusion, the exercise of a right is considered abusive when the right is used to achieve its purpose, but with the intent to harm another person or contrary to good faith. [14]

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[12] Decision no.161/2002 of the Constitutional Court, published in the Official Gazette no.448/26.06.2002.

[13] Decision no.81/2001 of the Constitutional Court, published in the Official Gazette no.176/2001, CDH 2001, p. 646.

[14] Marilena Uliescu. – New Civil Code, 3rd ed. revised and added – Bucharest, Universul Juridic, 2011.

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- Article 1349 of the Civil Code. Aquilian responsibility
- Everyone has the duty to respect the rules of conduct which the law or local custom requires and not to bring prejudice through his/her actions or inactions to the legitimate interests of other persons.
- The one who, having discernment, violates this duty, is responsible for all the damage caused, being obliged to fully compensate it.
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THE EXECUTION INSTANCE OF THE JUDICIAL JUDGEMENTS SENTENCED IN THE LITIGATIONS OF ADMINISTRATIVE CONTENTIOUS

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Abstract
The instance which solved the fund of the litigation rising from an administrative contract differs depending on the material competence sanctioned by law, in contrast to the subject of the commercial law where the execution instance is the court. In this matter the High Court stated in a decision[1] that in a first case the competence of solving the legal contest against the proper forced execution and of the legal contest that has in view the explanation of the meaning of spreading and applying the enforceable title which does not proceed from a jurisdiction organ is in the authority of the court.
The Law of the Administrative Contentious no 554/2004 defines in Article 2 paragraph 1 letter t) the notion of execution instance, providing that this is the instance which solved the fund of the litigation of administrative contentious, so even in the case of the administrative contracts the execution instance is the one which solved the litigation rising from the contract.
Corroborating this disposal with the ones existing in articles 22 and 25 in the Law, it can be shown that no matter the instance which decision is an enforceable title, the execution of the law will be done by the instance which solved the fund of the litigation regarding the administrative contentious.

Keywords: *The Law of the Administrative Contentious, the instance, the commercial law, the execution instance, administrative contracts.*

Introduction:

The Law of the Administrative Contentious no 554/2004 defines in Article 2 paragraph 1 letter ţ) the notion of *execution instance,* providing that this is the *instance which solved the fund of the litigation of administrative contentious,* so even in the case of the administrative contracts the execution instance is the one which solved the litigation rising from the contract.

Corroborating this disposal with the ones existing in articles 22 and 25 in the Law, it can be shown that no matter the instance which decision is an enforceable title, the execution of the law will be done by the instance which solved the fund of the litigation regarding the administrative contentious.

The instance which solved the fund of the litigation rising from an administrative contract differs depending on the material competence sanctioned by law, in contrast to the subject of the commercial law where the execution instance is the court. In this matter the High Court stated in a decision[2] that in a first case the competence of solving the legal contest against the proper forced execution and of the legal contest that has in view the explanation of the meaning of spreading and

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[1] The Decision no15 from the 5th of February 2007 of the High Court of Cassation and Justice in L. Mera, A. Pena, cited work, pg.119.
[2] The Decision no15 from the 5th of February 2007 of the High Court of Cassation and Justice in L. Mera, A. Pena, cited work, pg.119.

applying the enforceable title which does not proceed from a jurisdiction organ is in the authority of the court.

From the interpretation of article 25 paragraph 1 from Law it results that the execution instance apply the sanctions and gives the compensations only to the demand of the claimant, which means that these cannot be given ex officio.

In this context, provided that the claimant does not demand to the instance the application of the sanctions or of the compensations the coercive force of the state is not set going regarding the defeat of the resistance of the public authority.

Paper content:

In the case of the administrative contracts, the general disposal established in article 25 from the Law no.554/2004 presents interpretations in the sense that the law is applied no matter that the claimant is a legal person of private law or of public law. So, paragraph 4 of article 25, stipulates that the provisions regarding the forced execution are applied "adequately" to the administrative contracts because the classic situation was that of the unilateral administrative acts, in which the defendant is only the public authority.

In the case that the administrative organ resists the execution, the interested part can appeal to the services of a judicial executor who will notify the defendant a court day in which the latter can execute his obligation.

Nevertheless, given the nature of the litigation, which stood at the basis of the forced execution, the judicial executor cannot send but a summons, being only a proper execution. At the most, the judicial executor can inform the criminal pursuit organs for the putting into execution of the offence of abuse confidence sanctioned in the Criminal Code.

Law no.554/2004 stipulates in article 24 paragraph 3 a specific criminal sanction which objective side consists in the non-execution from imputable reasons or the non observance of the ultimate and irrevocable judicial decisions sentenced in the instance of administrative contentious in 30 days from the date of the application of the penalty of the leader of the public authority or, in case, of the obliged person.

The legal action against the decision of the fund instance follows the regime of the community law, in the sense that it is not subjected to the appeal, but only to the recourse, the latter being suspensive of execution. The instance which solved the fund of the litigation regarding an administrative contract does not always coincide with the execution instance, because the decision of the first instance can be attacked by recourse. The decision of the instance which solved the fund also constitutes an enforceable title providing it has not been attacked by recourse or when the recourse has been rejected.

The procedural disposals in community law sanctioned by article 400 and the following from the Code of Civil Procedure become points of law in the subject of the administrative contentious regarding the acts which have in view the execution of the decisions which regard the application and the explanation of the issued enforceable title. The legal contest at execution can be formulated against the enforceable title itself, title which is constituted of a judicial decision. The High Court of Cassation and Justice[3] decided in 2005 that the actions which have as an object the legal contest at execution of the enforceable titles represented by judicial decisions sentenced by instances of administrative contentious are admissible, and the competence belongs to the instance which solved the fund of the litigation of administrative contentious.

In the case of the litigations rising from administrative contracts, the legal contest at execution can be formulated not only by the private law person, but also by the public authority. The disposals

[3] Decision no. 5485/2005 from 16 November 2005 of the High Court of Cassation and Justice, on www.legenet.indaco.ro.

in the community law are applied in this case regarding the suspension of the enforceable title in exchange for a bail. The legal action against the decisions sentenced by the execution instance, the recourse, can be promoted by the both parts of the administrative contract, this not being suspensive of execution.

In the subject of the administrative contracts, regarding the execution of the decisions by which compensations were given for material and moral damages the disposals of the community law, namely of the 5th book in Civil Procedure Code are applicable. In accordance with article 371 "*the obligations which subject consists in the payment of a sum of money, the giving of an asset or of its use, the abolition of a building, plantation or other work or taking another measure acknowledged by law*" can be forcefully executed.

For these categories of decisions the putting into function with an executory formula is necessary in order to become enforceable titles.

As far as the administrative contracts are regarded issued in the basis of OUG 34/2006 regarding the assigning of the contracts of public achievement, of the ones of concession of public works and of the contracts of concession of services[4], article 286 establishes that the person who demands compensations has to prove that the provisions of the urgency ordinance were infringed.

In the case that the person who demands is a natural person or a legal person of private law, the situation does not impose discussions, the public authority having all the execution means given by the community law. But if the legal person of public law is the one who was obliged to pay a sum of money, the situation is different because any expense has to be registered in the budget.

Autonomy and principles of the European law

EU's treaties and regulations created an autonomous legal order that is directly imposed to member states and natural persons or legal entities within the European Union.

Thus, in the court case Costa / Enel, the European Court (former Court of Justice of the European Union-Court) has pronounced upon *the autonomy of the European law (Community law) in relation to the national law* of the member states, stating that the EEC Treaty has set its own legal order, integrated in the legal system of the member states, which is imposed to the national judicial bodies, without the member states' ability to take a subsequently unilateral action against this legal order.

The Case is based on the innovative nature of the European Communities that do not create classical interstate relationships, but a limitation of powers and a transfer of competences to the Community.

In theory it was shown that there is no contradiction in presenting the Community order as being both different from national orders and forming an integral part thereof as well[5].

In this context, it should be noted that the Community provisions' integration in national systems is done automatically, without the interference or intervention of national authorities, however, the national judge applies the European law in its quality as legal autonomous order, and not as a national one.

In its jurisprudence, the Court failed to consider the conditions under which a member state has introduced the treaty in its national law, taking into account that the receiving hadn't had the effect of transforming the treaties and that they must be applied by domestic courts to the extent that they belong to the European law and not the national one[6].

In our opinion, the provisions of art. 4 par. 3 of the Treaty on European Union -Lisbon Treaty (former art. 10 par. 2 T.E.C.), which regulates the principle of loyal cooperation, introduces

[4] Published in the Official Monitor no.148 from 15 May 2006.
[5] See Guy Isaac, Marc Blanquet, Droit general de l'Union Europeene, Publishing House *Sirey 2006, pag. 262.*
[6] Ibidem, pag. 265.

into the member states's duty an obligation "of not doing" in the sense of not taking measures that would jeopardize the application of Community provisions.

The rule instituted by the provisions of art. 267 Treaty on European Union (former art. 234 T.E.C.) establishes the cooperation procedure between national courts and the Court in Luxembourg for a uniform interpretation and in order to ascertain the validity of European rules, making the national judge the judge of the European common law, which is maintained by the Court's interpretation.

The European court case law has established the link between the principle of cooperation and the principle of direct effect of the Community law's dispositions[7].

The direct effect of the European law, as a basic principle, is that the Community provisions - clear, precise and unconditioned (are not subordinated to any further action that contains a discretionary power either of the European institutions or the member states) - may be invoked by individuals, natural persons and legal entities, directly before the national judge, when rights in their favor are created, in the absence or disregarding the contrary national rule and stating that authorities do not have discretionary power regarding the implementation of the European provisions.

The fundamental elements of the principle have been established for the first time in *Van Gend & Loos decision* (covering the direct effect of the treaty's provisions) *where the European Court has pronounced upon the autonomy of the European law against the national law*, and the fact that is biased when generating rights in favor of individuals within their legal jurisprudence, which must be protected by national courts.

We state, same as Pierre Mathijsen[8], that the direct effect of the European law has been recognized since the beginning by almost all national courts, which, by submitting "prejudicial issues" to the European court, agreed that European provisions should apply to their judicial system and confer rights which they must support.

Just by analyzing the criteria that have to be met by a European provision in order for its direct effect to be recognized (clarity, precision and unaffectedness of conditions), we note the following:

a) the *regulation* has a direct effect in accordance with art. 288 par. 2 EU Treaty (former art. 249 par. 2 T.E.C.) which states that "it is binding in its entirety and directly applicable in all member states" and consequently, the direct effect can not be opposed to a legislative provision of a national law which should compromise its essential character *(cause Orsalina Sconisio/ Ministero de l'Agricultura e Foreste)*[9].

In theory, it was shown that the regulation has a completely direct effect - vertical and horizontal, operating in the relationships between states and individuals, as well as in the relationships between individuals[10], claim which seems fair and is supported by the European court case.

b) the *directive* is mandatory for each member state regarding the result that has to be achieved, but gives the authorities in the process of transposition competence relating to form and means.

The directive does not confer in the first phase any rights or obligations for individuals, however, if properly implemented, its effects reach individuals through implementing measures taken by the state.

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[7] Ovidiu Tinca, Jurisprudența Curții de Justiție a Comunităților Europene referitoare la principiul cooperării loiale între statele membre și instituțiile comunitare, *R.R.D.C. no. 3/2007, pag. 51.*

[8] See Pierre Mathijsen, Compendiu de drept european, VII edition, *Publishing house Club Europa 2002, pag. 48.*

[9] Indicated by Ovidiu Tinca in Efectul direct al dreptului comunitar, *Dreptul no. 11/2007 pag. 69.*

[10] See Jean-Caude Gautron, Droit europeene, *Publishing house Dalloz 2006, pag. 181.*

By analyzing the practice of the Court of Justice it ensues the fact that it has a direct effect only on condition that the member state has not adopted measures of transposition within the prescribed period or made an inconsistent transposition, the directive establishing rights that individuals and legal entities may use against the state (*Becker decision C8/81*)[11].

Therefore, the direct vertical effect of the directive can not be resisted unless its provisions are clear, precise and unconditioned against any further action or subject to a certain term.

In the French doctrine[12] it was stated that the lack of enforcement of the directive (not being transposed or its incorrect transposition) is the one that substantiates the power and the national judge's duty to directly apply it, and is a necessary condition added to the unconditional and sufficiently precise character of its terms.

As for us, we agree with this view and add that the two conditions - failure to transpose the directive and its unconditional nature - must be met simultaneously, and where, for lack of transposition or inconsistent transposition, harm has been done to individuals, the European law requires member states to compensate for damages, the national court being competent in deploying the state's willingness to assume responsability.

This will be initiated only if all three conditions are simultaneously met:

a) directive to recognize rights in favor of individuals,

b) the rights' content should be identified by means of the directive's provisions,

c) existence of a causal connection between the breach of the obligation incumbent on the state and the harm suffered by the injured party *(Francavich and Bonifaci decision C/ Italia C6/90 and C9/90)*[13].

In court case *Ratti*[14], the Court reiterated the reasons set out in the *Van Duyn case*, regarding the purpose of adopting directives and the possibility of their direct effect, stating in par. 22 that "a member state that has not adopted the implementing measures required by a directive within the prescribed period can not oppose individuals to the failure of fulfilling its obligations under the directive."

From the above, it results that the theory developed by the Court in case of directives reflects the principle nemo *auditur* propriam *turpitudinem* suam allegans.

In conclusion, it has to be shown as well that, although member states have an estimation margin (discretionary power) when implementing a directive, an individual can, through the national court, determine whether authorities have overstepped the bounds of evaluation.

c) decision under art. 288 Treaty on European Union (former art. 249 par. 4 T.E.C.) is binding in its entirety for its recipients, who may be individuals or member states.

As the Court had pronounced in the *case Franz Grand*[15], decisions addressed to individuals who qualify for the purposes of clarity, precision and unaffectedness by circumstances, have a direct vertical effect.

We conclude by arguing that if a Community disposition has a direct effect, the national judge is obliged to protect the subjective rights created for individuals, letting the national contrary rule utterly unenforceable.

For the purposes of the above, our supreme court has pronounced a decision[16] in which the provisions of Directive no. 2004/38/EC of the Council and European Parliament (on the free movement of EU citizens), came into conflict with the provisions of art. 38 of Law no. 248/2005 which restricted the exercise of this right; on conditions of the directive not being transposed on time,

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[11] Decision from 19.01.1982 in C.J.E.U. Jurisprudence, vol. I, pag. 52.
[12] See Guy Isaac and Marc Blanquet, op.cit., pag. 277.
[13] C.J.E.U. Jurisprudence, vol.II pag. 411.
[14] Quoted by Tudorel Ştefan and Beatrice Andreşan-Grigoriu, op.cit., pag. 219.
[15] Cause 9/70 Franz Grand quoted in op.cit., pag. 214.
[16] I.C.C.J., Decision no. 5982/2007 published in *P.R. no. 1/2008.*

the national court applied the European law, protecting the individuals' rights confered by the Directive.

Besides its direct effect principle, the principle of priority of the European law is also a consequence of the obligation of loyal cooperation between member states.

Affirming the principle of priority was firstly made by the European court during the famous *case Costa / Enel* which resolved the conflict between the Treaty and an Italian law [17].

It was thus stated that the supremacy of the European law is confirmed by the provisions of the art. 288 Treaty on European Union (former art. 249 T.E.C.), according to which regulations are binding and directly applicable in all member states.

Based on these considerations, the Court stated that "the legal system of the Treaty can not be surpassed because of its special and original nature, by national legal rules, whatever their legal force, without being deprived of its character as Community law and without the legal foundation of the Community itself being called into question."

In the court case *Interntionale Handelsgesellschaft*, the Court reiterated arguments because of *Costa / Enel*, stating in paragraph 3 that "the validity of a European measure or its effect on a member state's territory can not be affected by allegations that the measure would be contrary to fundamental rights, such as those formulated by the Constitution of that member state or the principles of national constitutional structure".

From the above, and the doctrine's analysis[18], one can conclude that the principle of Community law has an inclusive effect against national constitutions and consequently any national legislation incompatible with the Community law constitutes a bar, and the national judge is the one that has to apply the Community law's dispositions.

In this respect, in the court case *C-106/77 Simmenthal*[19], seeking a preliminary ruling, former ECJ decided that the national judge should ensure the full effect of the provisions of the European law against any contrary provisions of national law, even later ones, without seeking or expecting its prior removal by legislative means or constitutional court.

In this context, it should be noted that in another case, former ECJ went further, requiring the British judge, for the case where national law forbids them to take interim measures, with the purpose of ensuring the existence of the rights invoked in virtue of the European law, to remove the application of national rules incompatible with the Community law *(C213/89 Factartome LTD/ and others)*[20].

As for us, we reject the priority thesis of the European law against national constitutions, reaching for the limited superiority of the European law, its supra-legislative value, but infra-constitutional in the same time, so that in case of a conflict with the national law, it prevails, but not in case of a normative conflict with the constitution. We argue our position with the approach adopted by the Romanian Constitution as well, which, in art. 11's provisions imposes a priority principle of all international treaties against any national laws, these having therefore a supra-legislative position in the hierarchy of legal norms, but an infra-constitutional one at the same time, meaning that if a treaty contains provisions contrary to the Constitution, it will only be ratified after reviewing the Constitution.[21]

The national judge asked to rule on the compatibility of a national legislation with the European law, can refer to the Court with an "appeal of interpretation" in order to be able to settle this issue of compatibility.

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[17] C.J.E.U. Jurisprudence, vol.I pag. 115-*Decision C6/64.*

[18] See Octavian Manolache, op.cit., pag. 72; Tudorel Ştefan and Beatrice Andreşan-Grigoriu, op.cit., pag. 192; Jean Claude Gautron, op.cit., pag. 185.

[19] C.J.EU. Jurisprudence., vol.I, pag. 115.

[20] Jurisprudence of the C.J.E.U., Vol.II, pag. 403 .

[21] Dan Claudiu Dănişor, Ion Dogaru, Gheorghe Dănişor, Teoria Generală a dreptului, Publishing house *CH Beck 2008, pag. 200-201.*

This action regulated by the provisions of art. 267 Treaty on European Union (former art. 234 T.E.C.) is also a judicial cooperation mechanism which establishes the participation of the Court of Justice to the national courts' regulation, due to the dialogue from judge to judge.

In the occidental doctrine[22] it was considered that the appeal of interpretation regulated by the provisions of art. 267 Treaty on European Union (former art. 234 T.E.C.) has three functions:

a) to ensure the unity of the Community law by avoiding differing interpretations of national jurisdictions;

b) to fill infringement appeals when finding about the state not fulfilling its obligations to which individuals have access, if a conflict between a provision of national law and a Community disposition;

c) to complete the action of cancellation (as to the validity of a secondary legislation act), to which individuals have limited access.

Being in agreement with the doctrinal statements, we can afford to supplement them by saying that the mechanism of prejudicial issues causes the accessibility of the European law to litigants and the national judge who in the future is no longer obliged to notify the Court of Justice of the European Union with an appeal of interpretation.

Regarding the obligation to notify, the Court of Justice in *case C 283/81 SRL Clif and Lanificio di Gavore SpA C / Ministry of Health*, stated that a national judicial body whose decisions are not subject to appeal under the national law is obliged, when before it it is formulated a question about the European law, to notify the Court of Justice unless it finds the question irrelevant or the European disposition was interpreted by the Court or the right way of implementing or the European law is so obvious, that it leaves no room for reasonable doubt.

When reasoning the decision stated above, the theory of "clear act" and "clarified act" from the French law is being applied.

Conclusions:

The law of the local public administration no.215/2001 establishes the obligation of the administrative- territorial units and of the Ministry of Public Finance to assure from the local budgets, respectively the state budget the compensations that Romania must pay for the lost cases at the European Court of Human Rights.

The debts consisting in the compensations owed by the state or by administrative-territorial units cannot be covered but by their money, the material means of any other nature, stock goods, personal properties and estates not being susceptible of forced execution. The problem of forced execution of public authorities presents difficulties concerning the organization of a compulsion system applied by state against the state because the execution organ is in the last instance the state through its representatives.[23]

Not even the public authorities can invoke the lack of funds to justify the non-observance of a judicial decision through which compensations were given in the subject of administrative contracts; such an attitude is not interpreted in the European jurisprudence as an infringement of the property right.

In the view of the European Court of Human Rights[24] the certain, liquid and exigible debts owned by one person are assimilated to the property right being "goods" in a broad way and including not only the personal goods, but also the patrimonial values and debt rights.

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[22] See Jean-Claude Gautron, Droit europeen, *Publishing house Dalloz 2006, op.cit.,pag. 175.*

[23] E.D. Tarangul, *Administrative right course for second year thesis,* Litography „Romanian Book Book Store", pg.393, cf. O.Puie, cited work, pg.84.

[24] Constandache Cause against Romania, Decision on admissibility from 11 June 2002 and Constitutional Court, Decision no.70/2001 and 97/2004.

In terms of assessing the validity of the European law, the notification is required when the judge has a serious doubt on the validity of the European act contested by way of exception.

In our specialist literature it was appreciated that in case of an appeal of interpretation, we have a judge a quo who has to, and if necessary, has the possibility to suspend proceedings and send the competent judge ad quem a controversial legal issue and who the case's settlement depends on.[25]

In this context, it is clear that the European court does not replace national jurisdiction, it gives an abstract decision that affects the attitude of national judges when adjudicating a concrete solution, but does not apply the law in its place.

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[25] Emanuel Corneliu Mogîrzan, Noţiunea de chestiune prejudicială şi cea de acţiune în terminologia dreptului român şi în cea a dreptului Uniunii Europene, *Magazine Dreptul no. 5/2007.*

CONSIDERATIONS REGARDING THE NORMATIVE DIMENSION OF THE JUDICIAL RESPONSIBILITY

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Abstract
The judicial responsibility, understood as an assembly of rules and obligations which are born by committing an illicit fact, can be taken only under the condition of the judicial responsibility. Knowing that the basis of the judicial responsibility is the illicit fact, the irresponsibility cancels the illicit character of the fact. So, the judicial responsibility should be analyzed depending on two criteria: the normative criterion (when the responsibility of some categories of people is established and defined by law) and the bio-psychological criterion (the state of psychic normality which includes the presence of discernment).

Keywords: *the juridical responsibility, the illicit character, the normative criterion, the bio-psychological criterion, rights and obligations.*

Introduction:

The juridical liability represents a premise of the juridical liability, an active way of reporting the individual and the collectivity to a certain cause, it involves taking certain liabilities and risks, sometimes by acting beyond the system of norms, which ensures their rights and obligations.

Thus, while the juridical liability has a normative character and aims at abiding or not abiding by the disposition included in the juridical norm, the juridical responsibility has a value character and aims at reporting the individual at the value contained and expressed by the juridical norm.

Talking about the juridical responsibility, we refer to a personality found under the condition of normality, we are talking about the person who is acting in report with the values expressed by the juridical normative system, meaning that the individual who made himself an own values system may choose the prescription of the juridical norm, by finding it according to his own convictions. The attitude focused in the continual social value, expressed by the juridical norm, is the juridical responsibility itself. The moment when the juridical responsibility was taken is the individual's decision, understood as a final act of the decision.

1. Etymological analysis

The notion of « responsibility » was born by the combination of two Latin words : the noun ***res*** (which may mean : thing, reason, interest, cause, etc.) and the verb ***spondeo*** (which is translated by : to guarantee, to promise). In the ***verbis*** contract from the old Roman law, the term « spondeo » meant a solemn promise of the debtor to perform that obligation assumed by the contract concluded with his creditor. In Gainus' « Institutions », it was provided that in the case of the ***verbis*** obligation, the answer « I promise ! Solemnly ! » (spondeo) was present. In ***Larousse de la Langue Francaise « Lexis »*** (1979, page 1629) it is provided that the term of « responsibility » was introduced much later than the term of « liability » and it means the obligation to fix.

2. The definition of the juridical responsibility

The juridical literature offers a diversity of opinions, under the aspect of defining, starting from the proximal type under which the juridical responsibility ought to fall. Depending on this criterion, we found the following types »

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In some authors' opinion, the juridical responsibility is an ***obligation***, namely:

- the obligation of the subject to fulfill a certain debt that was born by not fulfilling a prior obligation [1];

- the obligation to be subject to a restriction, or to repair a prejudice[2];

- the obligation of the one who did an illegal action to be subject to a juridical sanction[3];

- the obligation to be subject to a restriction because of an illegal behaviour reported by the state[4].

Paper content:

In the works of other authors, the juridical responsibility is understood as a ***juridical relationship of constraint,*** being defined as follows:

- it represents a complex of rights and obligations which form the content of a juridical relationship of constraint, which appears between the state as the only active subject and the author of the illegal action, as a passive subject.[5];

- it is a juridical relationship of constraint having as object the juridical sanction.[6]

- we also find a more extensive point of view, as a necessary step to overpass the limits established by the juridical relationship: it is the institution which includes the assembly of juridical norms that aim at **relationships** which are born in the field of the activity performed by the public authorities under the provisions of the law, against the ones who break or ignore the order, with a view to ensure the observance and promotion of the public order and public wellness.[7].

Happily, there has been formed a group of authors that see the juridical responsibility from the point of view of the three factors highlighted previously : psychological, social and juridical.

Examples:

- it is a form of the social responsibility, which includes the complex of human attitudes reported to the juridical normative system formed in the society in which it lives, with a view to learn, preserve and promote this system and the values it expresses, in order to maintain and promote the juridical order and the public wellness [8];

- it is a concept by which the legislator expresses certain persons' vocation to liability, for some juridical actions and deeds performed personally or through other people or things they manage (valid for the private law, because for the public law the author expresses the definition in a different way: it is the juridical institution by which any legal entity can be declared by the legislator liable for certain juridical actions and deeds which he may perform by issuing, organizing, executing, abiding by the law and making justice personally or through other people or by things managed by him)[9];

- a skill, a real possibility or vocation to work with guilt[10].

We consider that a scientific approach of the juridical responsibility imposes a certain inter-disciplinary analysis and not a static position of equalization with the obligation when being subject

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[1] see Alessandra Levi, Teoria generale del diritto, Cedam, Padova, 1967, p.389.

[2] see Antonie Iorgovan, Administrative Law. Elementary Treaty, Ed. Proarcadia, 1993,p. 175.

[3] see I Oancea, The notion of criminal liability, in the Annals of the University of Bucharest, series Social and Juridical Sciences, no. 6/1959, p. 133.

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[7] see Lidia Barac, A few considerations regarding the definition of juridical liability, Revista Dreptul, no. 4/1994, p. 41.

[8] see Lidia Barac, Juridical responsibility and sanction, Ed. Lumina Lex, Bucureşti, 1997, p. 21.

[9] see Valerică Dabu, Policemen, prosecutors and judges between law and crime, Regia Autonomă, Monitorul Oficial, Bucureşti, 1997, p. 20.

[10] see N. Giurgiu, Responsibility and the Criminal Sanctions, Ed. Neuron, Focşani, 1995, p. 7.

to the juridical sanction. In such vision the relation between the psycho-social and juridical responsibility becomes relevant. We can also get to this conclusion by relating the below thoughts:

1. *The juridical responsibility is a premise of the juridical liability.*

2. *The basis of the juridical liability is the illegal deed.*

3. *The irresponsibility removes the illegal character of the deed.*

So, the irresponsibility removes the juridical liability, logic followed in the juridical practice: the court firstly established if the subject is responsible, when enforcing the law in the resolution of a concrete case, and only after this do they check if this one will be liable for the respective action under the given circumstances. Namely, they refer to the responsibility of the subject. In this context, the juridical responsibility must be seen from two points of view:

a) A ***normative*** dimension, when the law establishes and splits the responsibility in categories of people (for example, the responsibility of the public clerk)

b) A ***bio – psychological*** dimension, as a normal state which includes the presence of the discernment.

The existence of the first dimension may be explained with examples which aim at the juridical responsibility at a constitutional level:[11]:

- in article 21 from the French Constitution, it is provided: „The Prime Minister leads the actions of the Government. He is responsible for the national defense";
- in article 65 of the German Constitution it is shown: „The Federal Chancellor established the main lines of the politics and takes the responsibility for them". Within these limits, each federal minister leads their departments in an independent way and under their own responsibility";
- in article 13 of the Constitution from Denmark it is provided: „The King is not responsible; his person is inviolable and sacred; the ministers are responsible of their behavior in front of the Government, the responsibility is regulated by the law". In the same spirit, article 14 shows that „each minister who countersigned is responsible of this decision";
- in article 22 from the Constitution of Belgium it is shown that „The law determines which are the responsible agents for the violation of the secret of correspondence"

In article 108 from the Romanian Constitution (from 1991) it is provided: „The cases of liability and the punishments given to the members of the Government are regulated by a law regarding the responsibility of ministers" In other laws also the concept of responsibility can be found (examples)

- in the Law of the local public administration (Law no. 69/1991) right in article 1, the responsibility of the organs of the local public administration is regulated;
- in the Law regarding the status of military employees (Law no.80/1995), it is provided – referring to this professional category – „They are responsible of the way in which they fulfill the missions given to them"

The bio – psychological dimension of the juridical responsibility has a position which alternates with the normative dimension: taking as example the public clerk or the military employee, responsible – after the provisions of the law – (the examples can be multiplied), we can retain, subsequent to the legal medical expertise, the irresponsibility of the one who committed an illegal deed (for example, he has a mental condition which cancels his discernment). In this case, the bio – psychological dimension is subsequent to the normative dimension, this being also the order of the research in the juridical practice. The places are switched if, in a primary phase, when the issue of juridical liability is not present. Namely, the public clerk or military employee reached this status and this position because they have proved in time, normally developed personalities, strong bio-psycho-social-cultural structures.

[11] see Les Constitutions de L' Europe des Douze, La documentation francais, Paris, 1992.

Thus, speaking of juridical responsibility, we are talking about a personality found under the condition of normality, which necessarily includes the axiological component: the individual behaves reported to the values expressed by the juridical normative system. If the juridical liability is a normative one, aiming at the compliance or non-compliance of the prescriptions or dispositions of the juridical norms, the juridical responsibility is a value one, namely the individual that created himself an own values system may choose the prescription of the juridical norm because he finds it according to his own ideas. The inner forum is the one dictating such an attitude: the acceptance of the juridical order, seen separately or as a whole, and not a behavior external to his personality. The juridical responsibility represents the attitude focused on the social value contained and expressed by the juridical norm, value assumed and imposed by the individual, with the conviction that he is serving the public and personal wellness.

The normal individual, mentally developed, who acts freely can be legally responsible.

***Note*:** The juridical responsibility is structured in two dimensions, each of them reflecting the fate of the whole, depending on the situation or the context. In the absence of such deal, negative, unreal conclusions may be drawn, some of them even with a comic denouement (we remind the provision of art. 13 from the Danish Constitution: „the King is irresponsible").

3. The basis of the juridical responsibility

The two dimensions on which the juridical responsibility is situated attract, each of them, the identification of its own basis:

- the normative dimension in the virtue of which the juridical responsibility is

provided and regulated by law, leads to an undoubted conclusion: the law is the basis of the juridical responsibility;

- the bio – psychological dimension requires as basis of the juridical responsibility

the normally developed human personality, in its free manifestation. The mental normality must be correlated with freedom, which must be present in three stages: choice, decision (the free will) and action, In each team, the social values expressed by the juridical norm are aimed at, such values becoming criteria of the juridical responsibility[12]. In this way, the juridical responsibility becomes itself a way to appreciate and evaluate the behavior required by the disposition of the juridical norm.

4. The stimulation of the juridical responsibility

The moment when the juridical responsibility starts is the decision of the individual, understood as a final act of the decision. He decides to act – and will act – according to the option chosen, by evaluating that this one is corresponding to the final purpose which must be reached. Such decision must be supported by proper training and education. By training, the informational field may be improved, by education the information may be affectively oriented, turning it into conviction. By training, he is learning the field of obligations and restrictions, by education he is using the freedom to act.

The stimulation of the juridical responsibility can be done by the complementary development of the two forms: training and education. Beyond the theoretical character of the two ways of stimulation, the individual must understand the elements which the society must ensure: a political and juridical democratic regime and necessarily, material and economic conditions mandatory for a decent way of living. In this way, under the conditions of material and social independence, the individual becomes a fertile ground where the training and education can seed the system of attitudes compatible with the values included in the juridical normative system.

[12] see L. Barac, op. cit., p. 29.

Conclusions:

Responsibility – higher form of integration

When the child is born, he has a hereditary potential which must be turned to value, shaped and stimulated by educational processes, socialization and social control. The human individual develops himself as a personality only in society, crossing a lot of social groups as a bearer of statuses and roles. The human is a social-cultural, educational and historical product, who received and assimilated the influences of the environment, historic stage in which he develops and lives.

By education and socialization, the individual assimilates norms and social models of behavior under the influence of certain social factors: family, school, social and cultural institutions, the system of practices from the collective he lives in. By socialization, the child is lead in order to acquire certain habits, knowledge processes, ways to act and behaviors, ideals according to the social environment. The socialization is in a complete inter-dependence with social integration, process by which the individual is assimilated in units and social systems by adapting to the conditions of the social life. In this purpose, the adaptation expresses the agreement between the personal behavior and the models of behavior belonging to a certain social environment. We are talking about a social maladjustment in case of people with mental diseases, criminals, individuals with behavior disorders, the causes being complex : hereditary issues, harmful living environment, frustration or emotional trauma, etc.

Juridical responsibility – condition of the public wellness

The juridical responsibility can be considered as an assumption of desirable values for the responsible individual and not only, desirable for his community. The law itself is a product of the will and expresses the will to live in a juridical community in which the coordinates are good and justice. Such an idea is found in the outstanding definition given to the law by the Romanian legal experts: "***jus est ars bori et acqui***" (the law is the art of good and justice) [13].

From a different perspective, we consider that the finality of the law rule is the finality of the society itself – common wellness: ***Lex est ordinatio ad bonum comune*"**. The common wellness, namely the public wellness cannot have conventional borders, it must be understood in the dialectic national wellness – international wellness. Coming back to the values protected by the juridical norms, these must be accepted as an exemplary collection, situated in an order corresponding to the needs and ideals of some human collectivities *hic et nunc* [14]. What could we understand by public wellness? Firstly, everything that characterizes the good generally, everything claimed by the personality of each of us in order to reach and build a dynamic, prosperous balance, the order which gives us safety and trust and moreover, that „universality of the values of human interest".[15].

By its function of ensuring the preservation and improvement of the system of juridical norms, the juridical responsibility aims at promoting the public wellness.

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THE ROLE OF THE EMPLOYEES' REPRESENTATIVES IN THE LIGHT OF THE NEW ROMANIAN SOCIAL DIALOGUE LAW

IULIA BĂDOI*

Abstract

In the environment of constant social and legislative changes, the field of labor law, as part of the private law domain, is always a subject of debates. The year 2011 is a relevant benchmark for the major modifications brought to the field of labor law in Romania.

The amendments of the labor law significant acts had as role to find efficient means of dialogue between the social partners. The legislative provisions represent only a premise for a successful social dialogue. In fact, the key of communication between the social partners is the negotiation.

The employees' representatives, as social partners, may represent the employees' interests within a unit, in the absence of a union. In the light of the new Social Dialogue Law the employees' representatives may also participate in negotiations even in the presence of a union organization.

There is no doubt that the new Social Dialogue law and Labor Code inserted new concepts meant to facilitate the labor relationships and social dialogue. It's only to be seen in which way these new regulations will affect the labor relationships.

Key Words: *Social Dialogue, social partners, labor conflict, negotiation, employees' representatives*

Introduction

Labor relationships represent a very important part of the private law domain, with significant repercussions over the social and economic life of every state. As a result of constant social evolution and in the context of a global economic crisis with general effects in various aspects of the social life, some legislative changes came as a natural result in Romania.

During the year of 2011, two of the major acts bringing new provisions in the field of labor law were the Labor Code republished and the Social Dialogue Law.

The Labor Code was practically written again, all laws regulating the collective labor relationships were abrogated and replaced by a single law, Law no. 62/2011.

Some of the declared goals of the legislative changes were to render the labor market more flexible and to simplify the contractual procedures.[1]

The Law on Social Dialogue aimed to consolidate the following five acts into one law: Law no. 54/2003 on trade unions, Law no. 356/2001 on employers, Law no. 109/1997 on the organization and functioning of the Economic and Social Council, Law no. 130/1996 regarding collective labor contracts, Law no. 168/1999 regarding the settlement of labor conflicts.[2]

Before the Romanian Labor Code came into force, the institution of „employees' representatives" was regulated only in what concerned the negotiation and closing the collective labor contracts in the hypothesis in which in a certain unit there was no representative union.[3]

Also, we were in the presence of regulations stipulated in several special laws that were making references to the role of the employees' representatives, which will were abrogated.

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[1] Raluca, Dimitriu, "Collective labor conflicts in companies and public institutions: some prospects**",** Transylvanian Review of Administrative Sciences, No. 34 E/2011, pp. 81.

[2] Raluca, Dimitriu, "Collective labor conflicts in companies and public institutions: some prospects**",** Transylvanian Review of Administrative Sciences, No. 34 E/2011, pp. 83.

[3] Ion, Traian, Ştefănescu, "Tratat teoretic şi practic de drept al muncii", Universul Juridic, Bucureşti, 2010, p.125-126.

The social dialogue is the instrument for ensuring the social peace. The social peace is a result of the social dialogue between social partners[4]. Article no. 214 the Romanian Labor Code published in 2003 article 214 [and article no. 211 of the Romanian Labor Code republished in 2011] stated that: "In order to ensure a climate of stability and social peace, the law foreseen consultation and constant dialogue means between the social partners."

The present article has as objective to show the importance of employees' representatives in the light of the new Romanian Social Dialogue Law. In order to be able to speak about the role of this type of social partners or representatives of social partners is essential to analyze some terms such as: labor relationships, social partners, employee, employer, social dialogue, social peace, what happens when we are in the presence of collective labor conflicts and what are the means of settlement.

The Romanian legislation on collective labor conflicts, currently at crossroads, is rather susceptible to discourage the initiation of collective labor conflicts. Such a situation looks alarming since the absence of conflicts does not in fact mean social peace. Irrespective of the law system, social peace is a result of a conscious and voluntary effort, never imposed upon the potential actors.[5]

Definitions and general presentation of the legislative provisions

Defining the elements involved in the labor relationships was always a concern of the Romanian legislator.

The main social partners involved in the labor relationships are the employer and the employee. The new social dialogue law defines the social partners in the article no. 1, letter a) as it follows: "the social partners are the unions and the unions' organizations, the employers and the syndicates and also the representatives of the public administration authorities, which interact in the social dialogue process."[6]

Before being abrogated, the Law no. 168/1999 was using the term "unit" as for indicating a juridical person that uses the work of employees. Art. 6 (2) of the Law regarding the settlement of labor conflicts foreseen that "The labor conflicts between the employers, private individuals and their employees will be settled in accordance with the provisions of this law." The term "unit" was meanwhile abandoned in the juridical literature under the influence of the Labor Code that doesn't use it anymore. [7]

The Labor Code uses a term with a wider understanding, which is "employer"[8], including in this notion the persons that employ paid work. So, in accordance with the legal text of article no. 14 of the Labor Code "the employer is a private individual or a juridical person that can provide employment on the basis of an individual labor contract, in accordance with the legal provisions."

The law no. 62/2011 updated the definition given by the Labor Code: "The employer is a private individual or a juridical person that can provide employment on the basis of an individual labor contract or a working relationship."[9] The new element is the fact that the legal ground for the employment is not only an individual labor contract, but also a working relationship. This provision is wider than the one used by the Labor Code and it comprises in the notion of employee not solely the persons employed on the basis of an individual contract, but also other types of employed persons [such as public servants with special status - like militaries, policemen - that work on the basis of collective labor contracts, in accordance with special laws].

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[4] Raluca, Dimitriu, "Legea privind soluționarea conflictelor de muncă, Comentarii și explicații" –C.H. Beck, Bucharest, 2007, p.14.

[5] Raluca, Dimitriu, "Collective labor conflicts in companies and public institutions: some prospects**",** Transylvanian Review of Administrative Sciences, No. 34 E/2011, pp. 96.

[6] Law no. 62/2011, published in the in Official Journal no. 322/10.05.2011.

[7] Raluca, Dimitriu, "Legea privind soluționarea conflictelor de muncă, Comentarii și explicații", p. 6.

[8] Article no. 14 of the Law no. 53/2003 republished in 2011.

[9] Article no. 1, letter e).

The social dialogue is the willing process of informing, consulting and negotiating between the social partners in order to establish agreements in what concerns problems of commune interest.

The informing consists in the obligation of the employer to transmit data to the union or the employees' representatives with the aim for them to get used to the themes of debates and to permit a proper assessment from their part.

The consultation involves the change of opinions within the process of social dialogue.

The collective negotiation is the negotiation between the employer/syndicate on a hand and union/unions' organizations or employees' representatives on the other hand. The collective negotiation has as goal to regulate the labor or working relationships between the involved parties and also any other agreements for matters of commune interest.[10]

The collective labor contract represents the written convention closed between the employer/syndicate and the employees representatives meant to establish the rights and obligations resulted from the working relationships. By closing collective labor contracts the goal is to promote and to defend the interest of the signing parties, the prevention and limitation of collective labor conflicts, in order to ensure the social peace.[11]

Law no. 168/1999[12] regarding the settlement of labor conflicts divided collective labor conflicts into: (a) conflicts during the pre-contractual stage, bargaining conflicts, solved by conciliation, mediation, arbitrage, strike, called conflicts of interests, and (b) conflicts during the execution of a collective or individual labor contract, solved by the court of law, called conflicts of rights. This is not a recent classification but it has been present in the Romanian law for a long time. The conflicts of rights occurred because a right stipulated in the law or in the collective or individual contract was not complied with, whereas the conflicts of interests occurred in case of disagreement between the parties regarding a claim of the workers not yet stipulated by law, the collective or the individual labor contract. The conflicts of rights were usually solved by the court while the conflicts of interests were solved by specific, extra-jurisdictional methods (conciliation, mediation, arbitrage, strike).

Against this logical approach already in place, which was perceived as fair by the doctrine and by jurisprudence, the new Law on Social Dialogue brings a fundamental change: it removes the difference between conflicts of rights and conflicts of interests (difference which is admitted either expressly in legislation or in the jurisprudence of almost every European law system) replacing it with the classification of the labor conflicts into collective and individual disputes.

Currently, therefore, if the collective contract cannot be concluded because the employer and the employees cannot reach a mutual agreement, a collective conflict can be initiated. However, which may be the nature of a conflict arisen as a result of non-compliance with a collective contract? Such a conflict can no longer have a collective nature (since the collective conflicts are defined exclusively in relation to the moment when the collective contracts are negotiated). It results, somehow surprisingly, that a dispute arisen from non-compliance with a provision in the collective contract can only have an individual nature (irrespective of the number of employees or public servants affected).[13]

Before coming into force of the Social Dialogue Law no. 62/2011 the institution of employees' representatives was regulated by the Labor Code provisions and several special laws. The Social Dialogue Law abrogated most of the important special laws in the field of labor relationships and the new Labor Code also brought novelty elements in the domain, including in what concerns the employees' representatives.

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[10] Article no. 1, letter b) of the Law no. 62/2011.

[11] Article no. 1, letter i) of the Law no. 62/2011.

[12] Abrogated by Law no. 62/2011.

[13] Raluca, Dimitriu, "Collective labor conflicts in companies and public institutions: some prospects**",** Transylvanian Review of Administrative Sciences, No. 34 E/2011, pp. 83.

The law no. 168/1999 related to solving the collective labor conflicts established different attributions for the employees' representatives linked to the interests conflicts, including the right for strike [in case of no representative union].[14]

Although achieving social peace would be ideal, sometimes this doesn't necessarily mean that it's in everybody's best interest. That's why it's important to have instruments of coming to a settlement in case of labor conflicts occur. The Social Dialog Law foresees as means of settlement in case of collective labor conflicts: the conciliation, the mediation and the arbitrage. These means of settlement are instruments only for the parts involved in the conflict.

The conciliation procedure is mandatory. The law contains provisions related to the procedural steps in case of conciliation. If after the debates the parties reach an agreement with reference to the demands, the collective labor conflict ends.

In case the conflict is still not solved, the parties may decide, expressing their free willingness, to initiate the mediation procedure, in accordance with the provisions of the law.

Also, during the conflict the parties may decide, expressing their free willingness, to let an arbitrator to decide upon their demands. The arbitral decisions are mandatory for the parties, update the provisions of the collective labor contracts and are enforceable from the moment they were rendered.

Mandate of the employees' representatives

The regulations concerning the employees' representatives were comprised in Chapter III, articles 224-229 of the Labor Code. The new Labor Code also assigns a special chapter to this institution, Chapter III, articles no. 221-226.

In accordance with the Romanian Labor Code the chosen employees' representatives on the basis of a special mandate can promote and represent the interests of the employees in units with more than 20 employees where none of them is a union member.

Between the employees' representatives and the employees that have chosen them there is a juridical connection that has its legal grounds in a contract of civil mandate.[15]

The employees' representatives are chosen within the employees' general meeting, with the vote of at least half of the total number of employees.

The employees' representatives can not be involved in activities recognized by the law as being an exclusive attribution of the unions.

The employees' representatives can be chosen from within the employees having at least 21 years old and that have been worked in that unit for at least one year without any interruption.

The condition related to the duration of working in a unit is not applicable in what concerns the employees' representatives in the new incorporated units.

The number of employees' representatives is being established together with the employer in accordance with the number of employees.

The duration of the mandate for the employees' representatives can not exceed 2 years.

As it can be easily interpreted from the legal text of the Labor Code, the employees' representatives have to fulfill a series of conditions in order to have this capacity, such as:

- The unit where they perform their activity must have at least 21 employees;
- The employees they represent don't have to be members of a union;
- They have to have a special mandate given by the employees in order to promote and represent their interests;
- They have to be at least 21 years old;
- They must have been worked in that unit for at least 1 year without any interruption.

[14] Ion, Traian, Ştefănescu, op.cit., p.126.
[15] Ion, Traian, Ştefănescu, op.cit., p.127.

In accordance with the Labor Code published in 2003[16], the employees' representatives had the main legal attributions:[17]

- To keep evidence that the employees' rights are being respected, in compliance with the current legislation, the applicable collective labor contract, the individual labor contracts and with the internal regulation;
- To participate in elaborating the internal regulation;
- To promote the employees' interests related to salaries, working conditions, duration of the working time, stability in work and any other professional, economic and social interests linked to the labor relationships;
- To inform the labor inspectorate referring to the non compliance with the legal regulations and with the amendments of the applicable collective labor contract.

The modification of the Labor Code[18] added a new attribution to the employees' representatives[19]:

- To negotiate the collective labor contracts, in accordance with the law.

Before the Labor Code was republished the previous regulation didn't foresee the right of the employees' representatives to negotiate the collective labor contracts, art. 223, letter e) being a new element of the Labor Code.

In the presence of the 2003 Labor Code, in practice we were facing a problem: the representatives chosen in accordance with the Labor Code were they entitled to negotiate and close the collective labor contract and to conduct a strike? Or, by contrary, although in the presence of such representatives (chosen in accordance with the Labor Code), other representatives should be chosen, in accordance with special laws, for closing the collective labor contract or for conducting a strike? And the other way around: the representatives pro causa, meaning chosen for closing the collective labor contract or for conducting a strike [in the absence of a representative union and of other representatives chosen in accordance with the Labor Code's provisions] could they performs also the attribution foreseen by the Labor Code?[20]

In the first case, this problem was solved by the stipulation of article no. 223, letter e) of the new Labor Code.

In the second case, the extension of the attributions of the employees' representatives chosen to negotiate the collective labor contract or for organizing a strike is not possible taking into consideration that the laws in the matter are applicable only in the situation foreseen for their purpose.[21]

The employees' representative attributions, the means of fulfilling their tasks and the duration and limits of their mandate are established by the employees' general meeting, in accordance with the law provisions.

Similar to the regime of the unions' leaders, the employees' representatives are entitled to some facilities and measures of protection.

The time spent by the employees' representatives in order to accomplish their assigned mandate is of 20 hours a month and it's being considered as working time and it's duly paid.

During their mandate the employees' representatives can not be fired for reasons that are not related to the employee, for being professional unfit or for reasons that are linked to the mandate of representing the employees.

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[16] Law no. 53/2003, published in the Official Journal no. 72 on 05.02.2003.

[17] Article no. 226 from Law no. 53/2003 ; the new Labor Code published in the Official Journal no. 345 on 18th of May 2011 – article no. 223.

[18] Law no. 53/2003 republished in May 2011 in the Official Journal no. 345 on 18.05.2011.

[19] Article no. 223, letter e) of the Law no. 53/2003 republished in 2011.

[20] Ion, Traian, Ştefănescu, op.cit., p.126.

[21] Idem.

Definitely, the most important attribution of the employees' representatives is the negotiation of the collective labor contract within a unit.

The initiative concerning the negotiation of the collective labor contract is subject to several steps, as it's being stated in the social dialogue law.[22]

It's important to know that the employer or the syndicate initiates the collective negotiation with at least 45 working days before the expiring of the collective labor contracts.[23] In the case where the employer or the syndicate doesn't initiate the negotiation, this one will start due to the written request of the employees' representative, within 10 days from the request.[24]

The negotiation can not last more than 60 working days, unless we are in presence of an agreement between the social partners. [25]

The law foresees the possibility that through the collective labor contracts to establish to periodically renegotiate any stipulation convened by the parties.[26]

During the first negotiation meeting, the employer settles which public and confidential information can provide to the employees' representatives in accordance with the law (information regarding the updated economical-financial situation and the employment situation). [27]

Also, with the occasion of the first negotiation meeting, the social partners will write a report which will mention the most important information related to the members of the negotiation teams for each side, the maximum period of negotiation, the place and calendar of the meetings. [28]

The negotiations between the employees' representatives and the employer are final when the collective labor contract is being closed and registered at the competent authorities.

Conclusions

Considering the facts presented so far, the aim was to see in which way the legislative changes brought modifications to the attributions of the employees' representatives and in which way these updates improved the labor relationships, but also to compare the previous provisions with the new ones.

There is no doubt that the legislative changes in the field of labor relationship were required in the context of social and economical evolution. Both the Labor Code republished and the Social Dialog Law widened the attributions of the employees' representatives. Taking into consideration that currently it's very difficult to achieve representativeness for unions/unions' organization in order to be able to negotiate the provisions of the collective labor contracts, giving the possibility of negotiation in such case for the employees' representatives even in the presence of a union, can only be a positive change for the employees' interests.

From practical point of view the actual effects are to be noticed in the future and based on these effects a proper assessment of the impact over this area of private law will be made.

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[22] Law no. 62/2011.
[23] Art. 129 paragraph 3 of the Law no. 62/2011.
[24] Idem, paragraph 4.
[25] Idem, paragraph 5.
[26] Idem, paragraph 6.
[27] Art. 130 paragraph 2 and 4 of the Law no. 62/2011.
[28] Idem, paragraph 5.

- Ion, Traian, Ştefănescu, "Tratat teoretic şi practic de drept al muncii", Universul Juridic, Bucureşti, 2010;
- Law no. 53/2003 republished in May 2011 in the Official Journal of Romania no. 345 on 18.05.2011;
- Law no. 62/2011, published in the in Official Journal of Romania no. 322/10.05.2011;
- Law no. 54/2003 on trade unions;
- Law no. 356/2001 on employers;
- Law no. 109/1997 on the organization and functioning of the Economic and Social Council;
- Law no. 130/1996 regarding collective labor contracts;
- Law no. 168/1999 regarding the settlement of labor conflicts.

THE VALIDITY OF CONTRACTS CONCLUDED BY ELECTRONIC MEANS IN ROMANIAN LAW

MIHAELA GIURANIUC (TUDORACHE)*

Abstract
The purpose of this paper is to analyze the legislation, doctrinal opinions and relevant case law regarding the validity of contracts concluded by electronic means (e-contracts) in Romania and to contribute to the current stage of knowledge in this matter.
The objectives pursued by the author are:
- identification of the peculiarities of the transposition of the E-Commerce Directive into Romanian legislation;
- identification of problems that could arise from law's interpretation;
- analyzing the relevant case-law in this matter;
- issuing of the de lege ferenda proposals.
According to Romanian Law, an e-contract has the same effects as a contract concluded by traditional means, if the conditions of validity imposed by law have been observed.
In Romanian legislation, the document in electronic form, to whom was incorporated, attached or logically associated an advanced electronic signature based on a qualified certificate not suspended or not revoked at that time and which was generated with the aid of a secure equipment of electronic signature creation is equated in terms of conditions and effects to a document under private signature.

Keywords: *contracts concluded by electronic means, electronic signature, advanced electronic signature, certification service provider, qualified certificate*

I. Introduction

Enhancing the trust in electronic transactions is a necessary condition for the development of a unique digital market, which would be beneficial for citizens, enterprises and public authorities. In order to make this happen, safe electronic services are necessary, ensuring confidentiality, providing legal certainty and the security of transactions, function beyond border lines and are acknowledged by all the activity sectors, and being at the same time, cheap, easy to use and under the strict control of the parties to the transaction.[1]

In Romania, electronic commerce is gradually occupying an important part in the citizens' lives.

The volume of online payment electronic commerce increased in 2011 by 24% year-on-year, reaching the amount of Euro 158.9 mil., according to the date provided by Romcard and supplied by ePayment[2]. In 2011, the highest transactions were in the field of plane tickets – Euro 9,700, tourism packs – Euro 8,800 and software applications – Euro 6,000. The majority of transactions were performed in Romania – 59.8%, but also in Italy – 14.7%, in Spain – 5.8% or in Great Britain - 5%, according to the above mentioned source.

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[1] COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS, Single Market Act, Twelve levers to boost growth and strengthen confidence "Working together to create new growth"{SEC(2011) 467 final}. Accessed at January 20, 2012 at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0206:FIN:EN:PDF, 13.

[2] Românii aleg tot mai mult să cumpere online: comerţul electronic a crescut cu aproape 25% în 2011, accessed at January 20, 2012 at: http://www.mediafax.ro/economic/romanii-aleg-tot-mai-mult-sa-cumpere-online-comertul-electronic-a-crescut-cu-aproape-25-in-2011-9140677/.

In this economical context, the theme of the paper – validity of the contracts concluded by electronic means - is of a great interest, both from the perspective of scientific research and from a practical perspective, as the electronic commerce have gradually expanded, having today a significant share of total world's trade.

Up today, the theme of the legal recognition of the validity of contracts concluded by electronic means was not treated as an independent subject of research, by Romanian doctrine, being mentioned in the the context of analyse of the form of the electronic contract in general[3] or in the context of the proof of the electronic contract[4].

Also, the theme of the proof of the contracts concluded by electronic means, in case of litigation, is treated by the Romanian doctrine in the context of analysing:

- the legal problems caused by introducing and usage of electronic signature in transactions[5];
- the legal regulation of the electronic signature[6];
- the admisibility of the electronic signature as proof[7];
- electronic signature – as means of the will espression by comerciants, part I[8] and part II[9].

As a method of research, the paper starts from analyzing the legal provisions, relevant case law, and the doctrine in the field, focusing on the legal recognition of the validity of contracts concluded by electronic means and on the proof of the contracts concluded by electronic means, in case of litigation. It highlights the particularities of the transposition of the of EU law into Romanian law and outlines the current status of research in Romania.

Finally, the paper draws specific conclusions meant to complement the existing scientific literature on the subject, and to contribute to the development of the Romanian doctrine in this field.

II. Legal recognition of the validity of contracts concluded by electronic means

The subject matter of contracts in the Romanian law was traditionally regulated by the civil code.

Starting from the 1st of October 2011, Romania has a new Civil Code (NCC) [10] which has replaced the old Civil Code valid since 1864[11], setting up a monist conception for the regulation of all private legal relations in a single code.

Drafted based on the Civil Code model of the Quebec Province, which was adopted in 1991, NCC preserves the *principle of autonomy of the will*, as basis for the contract, traditionally applied in the Romanian private law.

The principle of the autonomy of the will states the full contractual freedom, both in the sense of the substantive freedom and in the sense of a full *freedom of form*.

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[3] Marcel Ionel Bocşa, *Încheierea contractelor de comerț internațional prin mijloace electronice* (Bucureşti: Universul Juridic, 2010), 246.

[4] Alexandru Bleoancă, *Contractul în formă electronică* (Bucureşti: Hamangiu, 2010), 120.

[5] Camelia-Tatiana Ciulei, "Probleme juridice legate de introducerea semnăturii electronice şi folosirea ei în tranzacțiile încheiate pe internet", *Revista de drept comercial* nr. 2 (2009), 88.

[6] Tiberiu Gabriel Savu, „Consacrarea legală a semnăturii electronice", *Revista de drept comercial* nr. 7-8 (2002), 222.

[7] Florea Măgureanu, „Semnătura electronică. Admisibilitatea ei ca mijloc de dovadă", *Revista de drept comercial* nr. 11 (2203), 137.

[8] Ştefan Mihăilă, Marcel Bocşa, „Semnătura electronică – mijloc de exteriorizare a voinței comercianților (I)", *Revista de drept comercial* nr. 6 (2008), 76.

[9] Ştefan Mihăilă, Marcel Bocşa, „Semnătura electronică – mijloc de exteriorizare a voinței comercianților (II)", *Revista de drept comercial* nr. 9 (2008), 33.

[10] M.Of nr. 511 din 24/07/2009, Republicarea 1 în M.Of nr. 505 din 15/07/2011.

[11] M.Of nr. 271 din 04/12/1864, Republicat în Broşura nr. 0 din 26/07/1993.

The freedom of form (principle of *consensualism*) is expressly regulates by NCC in art. 1178 and in art. 1240.

Thus, art. 1178 from the NCC, expressly stipulates that the *contract is validly concluded based on the mere agreement of the parties* unless the law imposes a certain formality for the valid conclusion thereof.

If the parties imposes a certain formality for the valid formation of an contract and that consensual formality was not observed, the contract will be valid.

But, the will of contracting must be externalized in order to produce legal effects. The "will" remained in thought stage could not produce legal effects.

The will of contracting can be expressed verbally or in writing (art. 1240).

The mere agreement of the parties, unaccompanied by any kind of form, is sufficient for the valid formation of the contract.

The will can also be manifested by a behaviour which, according to the law or based on the convention between the parties, on the practices established between them and on the customs, leaves no doubt as to the intention to produce the adequate legal effects.

In the Romanian law, *consensual contracts are the rule*[12].

As we mention, in the case of consensual contracts, the mere agreement between the parties is sufficient so that the parties validly conclude the contract.

However, most of the times, the parties choose to record their agreement in a document ("*instrumentum*"), in order to pre-establish a proof in relation to the contract existence, as well as to the extent of the parties' rights and obligations, in case of conflict.

In Romanian Law, the contract can be proved only through a document (art. 1950 from the NCC).

For certain types of contracts, called "solemn contracts", the law stipulates the necessity *ad valididatem* to conclude the contract in the form of a writing document with handwritten signature or in a writing document with handwritten signature authentified by a public notary.

In theory, the form of a legal act is that condition which consists in the means of externalizing the manifestation of wills, with the intention of creating, modifying or terminating a concrete civil legal relationship. Lato sensu, "the form of the civil legal act" designates three types of requirements concerning the form: (1) the form required for the validity of the legal act itself – ad validitatem; (2) the form required for probating the legal act – ad probationem; (3) the form required for the enforceability of the legal act against third parties[13].

Unlike the old Civil Code, the new Civil Code expressly use the concept of "*contracts concluded by electronic means*", implicitly acknowledging the existence and validity thereof, and making express reference to the special law in relation to the conditions regarding the form thereof. (art. 1245 NCC)

In our opinion, the term "special law" mentioned in art. 1245 from the NCC designates the law applicable to the contract concluded by electronic means, according to its essence and nature, and not the law which regulates the data in electronic form. The special law which regulates the data in electronic form (Law no. 455/2001) expressly re-enforce the principal of consensualism: "No provision of this Law could be interpreted so that the principal of autonomy of the will and the principal of contractual freedom should be limited" (art. 3).

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[12] Constantin Stătescu, Corneliu Bîrsan, *Drept civil. Teoria generală a obligaţiilor* (Bucureşti: ALL, 1997), 25

[13] Gheorghe Beleiu, *Drept civil român. Introducere în drept civil. Subiectele dreptului civil* (Bucureşti: Şansa, 1995), 149.

Therefore, if the contract concluded by electronic means is a sale-purchase contract, then the special law regulating the form of such contract *ad validitatem* is the law applicable to that sale-purchase contract in general.

The validity of the contract concluded by electronic means is expressly mentioned in Romanian law, by art. 7 (1) from Law no. 365/2002 on electronic commerce[14], also:

"*contracts concluded by electronic means produce all the effects that the law recognizes in relation to contracts, when the conditions requested by the law concerning the validity thereof are satisfied"*.

The Law no. 365/2002 on electronic commerce was adopted in the process of transposition of the Directive 2000/31/EC of the European Parliament and Council from the 8th of June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("Directive on electronic commerce")[15] into national law.

The art. 7 (1) from Law no. 365/2002 on electronic commerce consecrates in the national law the *principle of equivalence of the tradition paper-based data with the data in electronic form*, representing a transposition of the provisions of art. 9 from the Directive on Electronic Commerce. Art. 9 from the Directive on Electronic Commerce imposes on the Member States the obligation to watch that their legal system makes possible the conclusion of contracts by electronic means. Member States especially watch that the legal regime applicable for the contractual process does not hamper the use of electronic contracts and does not lead to the lack of legal effect and validity of the contracts because of the conclusion thereof by electronic means. The Directive on Electronic Commerce imposes a negative obligation on Member States, in the sense that the conclusion of a contract by electronic means is not a reason for declaring that a contract does not fulfil the conditions concerning the form.[16]

The principle of the form equivalence is applied to the entire process of concluding a contract, including to the offering, negotiation, and offer acceptance phases.

In the Romanian law, in order for the contracts concluded by electronic means to be valid, the prior agreement of the parties regarding the use of electronic means is not necessary.

In base of art. 7 (1) from Law 365/2002 and art. 1178 NCC, we consider that, in Romanian law, ***a contract concluded by electronic means for which the special law did not impose a special form ad validitatem, is presumed to be valid, independently of the type of electronic signature incorporated, enclosed or attached to it.***

But, the validity of a contract is independent by the proof of the contract. A contract could be validly conclude, but could be impossible to prove it.[17]

As we mention above, in Romanian law, the contract must be proved by documents.

So that, in the cases when a contract is concluded by electronic means, then, in order to prove the contract, all the legal conditions necessary for the data in electronic form to be legally assimilated to the paper document with handwritten signature must be complied with. The same is the case for data in electronic form, other than contracts, and for which the law stipulates *ad validitatem* or *ad probationem* the written form of the manifestation of the will.

[14] M.Of nr. 959 din 29/11/2006, Republicare.

[15] JO L 178/1 din 17.7.2000, 13/vol. 29, page 257.

[16] Apostolos Gkoutzinis, *Internet Banking and the Law in Europe. Regulation, Financial Integration and Electronic Commerce* (Cambridge: University Press, 2006), 186.

[17] Alexandru Bleoancă, op. cit., 121.

III. The proof of the contract concluded by electronic means. Document. Electronic signature.

In the Romanian law, the proof of concluding contracts by electronic means and of the obligations resulting from such contracts is subject to the dispositions of the common law in terms of proof and to the dispositions from Law no. 455/2001 on the electronic signature[18] (art. 7 paragraph 3 from Law no. 365/2002).

Until the 1st of October 2011, in Romania, the matter of probation in the civil law relations was regulated by art. from 1169 to art. 1206 from the Civil Code and by art. from 167 to art. 241 from the Code of Civil Procedure[19].

NCC entered into force on the 1st of October 2011 and it no longer contains a special chapter about probation.

A special chapter dedicated to probation can be found in the new Code of Civil Procedure, which will become effective on the 15th of July 2012[20] (NCCPr.).

Thus, in art. 259 from the NCCPr, *the document* is defined as any writing or other registration which includes data about a legal act or fact, irrespective of the material support thereof or the means of preservation and storage thereof.

Moreover, the NCCPr make a distinction between the paper document, the computing support data and the data in electronic form.

While the computing support data is accepted as proof in the same conditions as the paper document, if it complies with the conditions stipulated by the law, *the data in electronic form* are subject to the dispositions of the special law.

The special law in the matter of data in electronic form is the Law no. 455/2001 on the electronic signature, which implemented in the internal law the Directive 1999/93/EC of the European Parliament and Council from the 13th of December 1999 on a Community framework for electronic signatures [21] (Directive on electronic signatures).

The term "data in electronic form" is defined by Law no. 455/2001 on the electronic signature as a collection of data in electronic form among which there are logical and functional relations and which render letters, digits or any other characters with legible significance, destined to be read using software or a similar procedure.

Consequently, a data in electronic form can be the following: an e-mail, the terms and conditions posted on a website and any other document drafted in electronic form, if they can be read using computer software or a similar procedure.

At the transposition of the Directive on the electronic signature into the Romanian law, the Romanian legislator change the name of the article "Legal effects of electronic signature" with the "Legal effects of the data in electronic form".

The Law no. 455/2001 on the electronic signature expressly lists the conditions that a data in electronic form must be fulfil in order to be legally assimilated to a written paper with handwritten signature.

The data in electronic form to which an *extended electronic signature,* based on a *qualified certificate,* not cancelled or not revoked on the respective moment and created by a *secure signature-creation-device* was incorporated, enclosed or logically associated, will be assimilated in terms of its

[18] M.Of nr. 429 din 31/07/2001.
[19] Broşura no. 0 from 26/07/1993.
[20] M.Of nr. 485 din 15/07/2010.
[21] JO L 13, 19.01.2000, 12.

conditions and effects, to the *written paper with handwritten signature (art. 5 from the Law no. 455/2001)*. This provision establishes the principle of the equivalence of the electronic signature with the handwritten signature, in the conditions in which the electronic signature is *extended, based on a qualified certificate,* not cancelled or not revoked on the respective moment and created by a secure signature-creation-device. This concept corresponds to the terms "qualified electronic signature" from the Directive on electronic signatures.

In art. 262 paragraph (2) from the NCPrC, it is mentioned that an electronic signature is not valid unless it is reproduced in the conditions stipulated by the law. But, the Law no. 455/2001 regulate the force of evidence of an electronic signature and not the validity.

In our opinion, this wording contradicts art. 5 paragraph 2 from the Directive on electronic signatures, according to which an electronic signature will not lack legal effectiveness and will not be rejected as evidence in justice for the mere reasons that:

- *It is presented in electronic format* or
- It is not based on a qualified certificate or
- It is not based on a qualified certificate issued by a certified provided or certification services or
- It is not created by a secure signature-creation-device.

De lege ferenda, we consider that the text of art. 262 paragraph 2 from NCPrC should be replaced with the following: "The force of evidence of an electronic signature is regulated by the special law on electronic signatures".

This modification appears necessarily in the context of the recent jurisprudence, when by Decission no. 1077/2007, the Bucharest Court of Law – 6th Commercial Section ascertained that the e-mail correspondence which was intended to be used in order to establish the recognition of a debt rising from a consensual contract cannot be taken into account as evidence, in relation to the dispositions from art. 5 and subseq. from Law no. 455/2001 on the electronic signature, because the submitted e-mail did not have any extended electronic signature included, enclosed or associated to it[22].

In our opinion, the Decision issued by the Bucharest Court of Law overruled the dispositions of art. 5 paragraph 2 from the Directive on electronic signatures and *rejected* as evidence a data electronic form on the grounds that the document was in electronic form and did not have enclosed any extended electronic signature based on a qualified certificate, created by a secure signature-creation-device. Taking into account that the respective data in electronic form was not intended to be used for proving the existence of a contract or of an act in relation to which the law stipulated ad *validitatem* the written form, instead was intended to be used for proving the recognition of a debt (proof that could be made with witnesses, interrogatory, presumptions), the correct solution would have been the appraisal of the proof as admissible and the qualification thereof as a "commencement of a proof in writing".

In doctrine[23], it was asserted that the data in electronic form to which an electronic signature was associated, which is not an extended electronic signature or which is not based on a qualified certificate or which is not created using a secured signature generation mechanism, can be assimilated in terms of its effects and conditions, to the commencement of a proof in writing and it can be supplemented by other means of probation in order to make the proof of the respective legal relationship.

The commencement of a proof in writing is regulated by art. 304 from the NCPrCP in the section called "Proof by witnesses", being defined as any writing, even *unsigned* and undated, which

[22] Tribunalul Bucureşti, Dosar 43787/3/2006, accessed at January 20, 2012 at: http://www.euroavocatura.ro/jurisprudenta/1252/Corespondenta_prin_email__Semnatura_electronica__Creanta_nelichida.

[23] Florea Măgureanu, op.cit, 141.

comes from a person against which the respective writing is enforceable or from the one whose successor in title is such person, if the writing makes the claimed fact credible. The commencement of a proof in writing can make the proof between the parties only if it is supplemented by other means of probation, including by the proof by witnesses or by presumptions.

Given the dispositions of art. 5 paragraph 2 from the Directive on electronic signatures, according to which a signature cannot be refused as evidence on the grounds that it is an electronic one, we also consider that a data in electronic form which does not fulfil the legal conditions in order to have the force of evidence of a *written paper with handwritten signature* will have the legal value of the commencement of a proof in writing, with the mention that this qualification is valid only in the cases when the respective data in electronic form is not used in order to make the proof of a contract. The assimilation of such "incomplete" data in electronic form with the commencement of a proof in writing is correct even if one cannot certainly establish that the data in electronic form comes from the party against which it is enforceable, because the commencement of a proof in writing is not a stand-alone proof. The same is in the case of the traditional commencement of the proof in writing, when additional pieces of evidence are necessary in order to establish whether the handwritten mentions belong to the person against whom they are enforceable.

The data in electronic form, to which an electronic signature was logically incorporated, enclosed or attached, *recognized* by the person against whom it is enforceable, has the same effect as the *authentic act* between the ones subscribing to it and those who represent their rights (Art. 6 from Law no. 455/2001). That is, if the a data in electronic form is recognized by the party against whom it is enforceable, it will have the legal value of an authentic document even if it is not accompanied by an electronic signature in extended form, even if it is not based on a qualified certificate and/or even if it is not created by a secure signature-creation-device. In our opinion, this category also includes contracts concluded by electronic means on whose grounds the parties started executing their mutual obligations. Thus, if the parties established by e-mail the contents of an advertising service supply contract, the e-mail has a simple electronic signature and the Performer fulfilled its obligations as agreed by e-mail, and the Beneficiary made the payment of the price, even partially, we consider that the respective contract was duly concluded, even if the two parties did not sign their own e-mail correspondence with extended signatures based on qualified certificates.

In the cases when, according to the law, *the written form* is requested as a probationary condition or as a condition of validity of a legal act, a data in electronic form fulfils this requirement if an extended signature based on a qualified certificate and created by a secure signature-creation-device was logically incorporated, enclosed or attached to it (art. 7 from the Law no. 455/2001). There is no need for the certificate to be unsuspended or non-revoked at such time as was expressly lists on the conditions necessary to assimilate a data in electronic form with a *written paper with handwritten signature* detailed at art. 5 from the Law no. 455/2001. In our opinion this difference is an error in the legislative procedure, because there is no reason to regulated differently those types of electronic signature. *De lege ferenda*, at art. 7 from the Law no. 455/2001 should be added that the qualified certificate on which is based the extended signature must be "unsuspended and non-revoked" when the written form is requested as a probationary condition or as a condition of validity of a legal act, also.

In a relatively recent case, by Decision no. 358/2009, the Court of Appeal from Suceava appraised that the resignation delivered to the employer by e-mail does not fulfil the conditions of a written notification required ad validitatem by art. 79 paragraph 1 from the Labour Code, because the

e-mail lacked an extended signature based on a qualified certificate and created by a secure signature-creation-device, logically incorporated, enclosed or attached to it.[24]

In our opinion, a written document with handwritten signature can be amended by a data in electronic form if the latter has a qualified electronic signature logically incorporated, enclosed or attached to it.

We could resume, that the Romanian law knows three types of electronic signatures which, in relation to the dispositions of art. 5 paragraph 2 from the Directive on electronic signature, should be accepted as a means of probation, the court of law being empowered to assess their force of evidence, on a case to case basis:

1. "Simple" Electronic signature

According to the Law, the *electronic signature* represents data in electronic form, enclosed or logically associated with other data in electronic form and which serves as an identification method.

The scope of this definition also covers the writing of one's name in an e-mail correspondence, the scan of the holograph signature, the signatory's biometric data.

The problem with these techniques is posed by their intrinsic low level of security: given the fact that a biometric or scanned signature is always the same and is not univocally connected to the signed message, anyone (the recipient itself) can gain possession of the data, can record it in their own personal computer and can take the place, without authorization, of the real owner, in order to send messages[25].

Thus, a "simple" electronic signature certifies only the sender's consent regarding the contents of the data in electronic form, without being able to exactly establish whether or not the contents was changed. Also, the reproduction of such signature can be performed by anybody.

The legal definition does not stipulate that the electronic signature must come only from a natural person, which means that a legal entity can also be the holder of an electronic signature.

The definition provided by the Romanian law is similar to the one provided by the Directive 1999/93/EC of the European Parliament and Council from the 13th of December 1999 on a Community framework for electronic signatures (Directive on electronic signatures).

2. Extended electronic signature

The extended electronic signature represents that electronic signature which cumulatively fulfils the following conditions:

a) is uniquely related to the signatory;

b) provides the identification of the signatory;

c) is created by means under the sole control of the signatory;

d) is related to the data in electronic form, to which it makes reference, so that any ulterior modification thereof is identifiable.

As can be seen from the above definition, the extended electronic signature is the correspondent of the advanced electronic signature, regulated by the Directive on electronic signatures and provided certainty both in relation to the identification of the signatory and to the data integrity.

The scope of the extended electronic signature also includes the digital signature.

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[24] Curtea de Apel Suceava, Decizia nr. 358/2009, accessed at January 20, 2012 at: http://www.legi-internet.ro/jurisprudenta-it-romania/decizii-it/semnatura-electronica/semnatura-electronica-validitatea-unui-inscris-in-forma-electronica-martie-2009-curtea-de-apel-suceava.html.

[25] Ştefan Mihăilă, Marcel Bocşa, "Reguli uniforme privind cometul electronic (III)", *Revista de drept comercial* nr. 2 (2010), 31.

3. The extended electronic signature *based on a qualified certificate and created* by a *secure signature-creation-device. (qualified electronic signature)*

The qualified certificate represents a certificate that includes the following issues:

a) the indication of the fact that the certificate was issued as a qualified certificate;

b) the identification data of the certification service provider, and its citizenship, for natural persons, respectively its nationality, for legal entities;

c) the name of the signatory or his/her pseudonym, identified as such, and other attributes specific to the signatory, function of the purpose for which the qualified certificate is issued;

d) the signatory's personal identification code;

e) the signature verification data, which corresponds to the signature creation data, under the sole control of the signatory;

f) the indication of the beginning and end of the validity period of the qualified certificate;

g) the identification code of the qualified certificate;

h) the extended electronic signature of the certification service provider issuing the qualified certificate;

i) if applicable, the limits for the use of the qualified certificate or the value limits of the operations for which it can be used;

j) any other information established by the regulatory and supervising authority specialized in this field.

and which is issued by a certification service provider which fulfils the following conditions:

a) has the financial means and material, technical and human resources adequate for guaranteeing the security, reliability and continuity of the provided certification services;

b) ensures the fast and safe operation of the information recording stipulated in art. 17, especially the fast and safe operation of a service for suspending and revoking the qualified certificates;

c) ensures the possibility of accurately determining the date and time of the issuance, suspending or revocation of a qualified certificate;

d) checks, by adequate means, compliant with the legal dispositions, the identity and, if the case may be, the specific attributes of the person to whom it issues the qualified certificate;

e) uses staff which holds specialized knowledge, experience and skills, necessary for the supply of the respective services and, especially, which has management skills, specialized knowledge in the field of electronic signature technology and sufficient practical experience in relation to the corresponding security procedures; moreover, it should apply the adequate administrative and management procedures in line with the acknowledged standards;

f) uses products associated to the electronic signature, with a high degree of reliability, protected against modifications and which ensure the technical and cryptographic security of the activities involving the electronic signature certification;

g) adopts measures against the falsification of certificates and guarantee confidentiality during the process of generating the data for signature creation, in the case when certification service providers generate such data;

h) preserves all the information concerning a qualified certificate for minimum 10 years since the expiry date of the certificate, especially in order to be able to make the proof of the certification in case of litigation;

i) does not store, reproduce or reveal to third parties the signature creation data, except for the case when the signatory asks for that;

j) uses reliable systems for storing the qualified certificates, so that: only the authorized persons are allowed to insert and change the information found in such certificates; the accuracy of

the information is open for verification; the certificates can be analyzed by third parties only if the holder thereof agrees with that; any technical modification, which might endanger such security conditions, is identifiable by the authorized persons;

k) any other conditions established by the regulatory and supervising authority specialized in this field.

The party invoking before the court an extended electronic signature must prove that it fulfils the defining conditions of the extended electronic signature.

The extended electronic signature, based on a qualified certificate issued by an *accredited* certification service provider is presumed to fulfil the defining conditions stipulated for the extended electronic signature.

The party invoking a qualified certificate before the court must prove that the certification service provider which issued the respective certificate fulfils the legal conditions stipulated for the certification service provider in order to issue qualified certificates.

The *accredited* certification service provider is presumed to fulfil the legal conditions stipulated in relation to the certification service provider in order to issue qualified certificates.

The accreditation of certification service providers in Romania is a voluntary procedure and is made by the Ministry of Communications and Information Society, according to the Minister Order no. 473 from the 9th of June 2009 on the procedure for granting, suspending and withdrawing the decision concerning the accreditation of certification service providers[26].

For the time being, in Romania there are 3 accredited certification service providers[27]:

- TRANS SPED SRL;
- DIGISIGN S.A;
- CERTSIGN S.R.L.

The secure signature-creation-device is that device used for the creation of an electronic signature, which cumulatively fulfils the following conditions:

a) the signature creation data, used for generating the signature, appears only once and is confidential;

b) the signature creation data, used for the signature generation, cannot be inferred;

c) the signature is protected against falsification by the technical means available at the time of its generation;

d) the signature creation data is effectively protected by the signatory against the use thereof by unauthorized persons;

e) it does not change the electronic data, which must be signed, and it does not prevent it from being submitted to the signatory prior to the completion of the signing process.

The party invoking before the court a secure signature-creation-mechanism must prove that it fulfils the above conditions.

The secure signature-creation-device, homologated based on this law, is presumed to fulfil the above conditions.

The homologation of the secure signature-creation-device in Romania is performed by the homologation agents, public or private law legal entities, agreed by the Ministry of Communications and Information Society.

[26] M.Of. nr. 411 din 16/06/2009.

[27] Ministerul Comunicaţiilor şi Societăţii Informaţionale, accessed at January 31, 2012 at: http://www.mcsi.ro/Minister/Domenii-de-activitate-ale-MCSI/Tehnologia-Informatiei/Servicii-electronice/Semnatura-electronica/Registrul-furnizorilo-de-servicii-de-certificare-P.

In conclusion, a qualified electronic signature generated by an accredited certification service provider and created with a homologated secure signature-creation-device fulfils the highest safety standards, being presumed to be valid.

An qualified electronic signature generated by an accredited certification service provider and created with a homologated secure signature-creation-device is not equivalent under any circumstance with a valid signature, but is **relatively presumed as being valid**. For example, in the case of digital signatures, there is the possibility to use the "private key" without the right to, either by the certification service provider, or by a person which gains possession thereof, without authorization.[28]

If one of the parties fails to recognize the data in electronic form or the electronic signature, the court will always order that the verification is made through a specialized technical expertise.

For this purpose, the expert or the specialist has the duty to ask for qualified certificates, as well as any other necessary documents, according to the law, for the identification of the author of the writ, of the signatory or of the certificate holder.

The electronic signature is a means of signing a data in electronic form and it may not be invoked as the proof of signing of a document in physical form. The document in physical form must bear a handwritten signature. For this purpose, recently, the courts of law which were faced with requests for ascertaining the absolute nullity of the minutes for acknowledging the offence of driving on public roads without a vignette, delivered in physical form and not bearing a handwritten signature, rejected the defence of the acknowledging agent, who stated that the minutes were signed with an electronic signature and cancelled the respective minutes for lacking a signature, motivating that an electronic signature can only accompany a data in electronic form, not a document in physical form[29].

In practice, several methods for signing data in electronic form have been developed, which vary from very simple methods (e.g. the inserting of the scanned image of a hand signature in a text processing document), to very advanced methods (e.g. using cryptography).

The electronic signatures based on the "encrypting of a public key" are called digital signatures and are considered as crucial for certain applications, such as official communications with public institutions. A digital signature can be beneficial because it ensures a single identified person and it makes the connection between the signature and the writ. It guarantees both the signatory's identity and the contents of the signed document.

Among the private persons, the electronic commerce has developed without the use of an qualified electronic signature, because the costs for such signature would exceed the benefits brought by such transactions, the majority of which are of low value.

This is why the regulation of the electronic signature has not been developed, and the private persons continue to use the "click and accept" means of purchasing.[30]

Obviously, the contracts concluded by electronic means, which in majority are sale-purchase contracts, are valid in the Romanian law, because they are consensual contracts. The absence of a

[28] Tiberiu Gabriel Savu, op.cit., 227.

[29] Judecătorii anulează amenzile pentru că procesele-verbale au semnătura electronică a CNADNR şi nu semnătură olografă, accessed at January 22, 2012 at: http://www.avocatnet.ro/content/forum%7CdisplayTopicPage/topicID_264018/Judec%C4%83torii-anuleaz%C4%83-amenzile-pentru-c%C4%83-procesele-verbale-au-semn%C4%83tura-electronic%C4%83-a-CNADNR-%C5%9Fi-nu-semn%C4%83tur%C4%83-olograf%C4%83.html.

[30] Study on the Economic Impact of Electronic Commerce Directive, accessed at January 12, 2012 at: http://ec.europa.eu/internal_market/e-commerce/docs/study/ecd/%20final%20report_appendix%20c.pdf.

qualified electronic signature attached to such contracts does not attract their nullity, but the impossibility to prove them, in case of litigation.

In Romania, the prove of contracts concluded by electronic means must be done in accordance with the provisions of NCC (which state that a contract can be proved only through a document), the provision of NCPrCiv (which recognised the data in electronic form as a document) and the provisions of the Law no. 455/2001 on the electronic signature (which establish the force of evidence for data in electronic form).

The providers of certification services must comply with the legislation regarding the protection of data and the right to privacy.

However, in order to enjoy a universal acceptance of their probationary value, electronic signatures must be fit for use as evidence before the court of law in all countries.

The international recognition of the probationary value of the electronic signature may face difficulties in international transactions, because the accreditation of the certification service provider is not regulated by a worldwide norm establishing international standards applicable at universal level. The certification service providers who perform certification services for the public must observe the national norms on professional liability.

For the development of the electronic commerce at international level, international agreements should be concluded, guaranteeing the worldwide interoperability by the mutual recognition of the certification services.

IV. Conclusions

We have analyzed the legal provisions, relevant case law, and the doctrine existing in Romania in the field of contract law, in general, and in the field of electronic contracts in particular, focusing on the legal recognition of the validity of contracts concluded by electronic means and on the proof of this type of e contracts in case of litigation.

The results of this research adds to the actual state of of the art in the contract law, by providing a first coherent and critical interpretation of the national laws and jurisprudence regarding the validity and proof of a contract concluded by electronic means.

In Romania law, a contract concluded by electronic means for which the special law did not impose a special form *ad validitatem*, is presumed to be valid and produce all the effects that the law acknowledges in relation to that contract, independently of the type of electronic signature incorporated, enclosed or attached to it.

In the cases when, according to the law, *the written form* is requested as a probationary condition or as a condition of validity, contracts concluded by electronic means fulfil this requirement if an extended signature based on a qualified certificate and created by a secure signature-creation-device was logically incorporated, enclosed or attached to it.

Only a qualified electronic signature generated by an accredited certification service provider and created with a homologated secure signature-creation-device is presumed to be valid. For the rest, the party that prevails itself of an qualified electronic signature must prove all its definitory legal conditions.

In our research we formulate some opinions that could help the practitioners in law at the interpretation of the unclear disposition of law, as:

- the term “special law” mentioned in art. 1245 from the NCC designates the law applicable to the contract concluded by electronic means, according to its essence and nature, and not the law which regulates the data in electronic form;

- the wording of art. 262 paragraph (2) from the NCPrC, that stipulates that "an electronic signature is not valid unless it is reproduced in the conditions stipulated by the law" contradicts art. 5 paragraph 2 from the Directive on electronic signatures;
- contracts concluded by electronic means to which an simple electronic signature was logically incorporated, enclosed or attached, but on whose grounds the parties started executing their mutual obligations, are the subject of Art 6 from Law no. 455/2001 which stipulates that "data in electronic form, to which an electronic signature was logically incorporated, enclosed or attached *recognized* by the person against whom it is enforceable, has the same effect as the *authentic act* between the ones subscribing to it";
- a written document with handwritten signature can be amended by a data in electronic form if the latter has a qualified electronic signature logically incorporated, enclosed or attached to it.

Also, we formulate some proposals de *lege ferenda* in order to remove the errors appeared in the legislative procedures, as:

- Art. 7 from the Law no. 455/2001 should be complemented with the provision that the qualified certificate on which the extended signature is based must be "unsuspended and non-revoked" when the written form is requested as a probationary condition or as a condition of validity of a legal act;
- the text of art. 262 paragraph 2 from NCPrC which contradicts art. 5 paragraph 2 from the Directive on electronic signature must be harmonised by replacing it with the following: "The force of evidence of an electronic signature is regulated by the special law on electronic signatures".

As a theme of further research, the author intends to complement the analysis of the validity of the contract concluded by electronic means by concentration on the international recognition of the probationary value of the electronic signature both between the Member States and between a Member State and a third country.

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ASPECTS OF CIVIL LIABILITY, AS A FORM OF SOCIAL LIABILTY, IN THE CONTEXT OF ECO-ECONOMY

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ABSTRACT
This study aims to treat certain aspects of civil liability, as a form of legal liability and social responsability in the context of today's economy. In the current global context, for the economy and thus society can survive one must take into account compliance with environmental sustainability. Implications of this line of development on the civil liability will be analyzed in this study.

Keywords: *civil liability, social responsibility, eco-economy, environmental liability*

Introduction

The present paper addresses a topic of utmost importance to the legal environment, respectively an institution which constitutes the very foundation of civil law, namely civil liability.

This paper proposes as main objectives the presentation of civil liability institution as a form of legal liability, considering first the general framework of its social liability in terms of joint relationship between law and society.

We are trying this way to bring a touch of novelty and originality in addressing this issue, on the one hand by presenting the novelty brought by the new Civil Code in this field and on the other hand by a multidisciplinary treatment of the analyzed subject.

In this sense, we are trying to present a definition of the notion of social liability, through the analysis of the relationship between law and society, presenting several definitions and views promoted by a number of prominent people from various fields, including lawyers, historians philosophers etc.

Another novelty and originality issue is presented by capturing the institution of legal liability in the context of eco-economy, considering the need to draw attention to the role of this institution, particularly important in finding solutions to provide an adequate protection and direction of citizens and environment in the scenery of the economic and environmental crisis that presents at the beginning of this millennium.

However, appealing to logic and comparative methods, we analyze this institution in the context of the new regulations of the Civil Code, considering discussing at certain points the choices of the legislature of 2011, such as, for example, on the subjective concept of civil liability. We consider very important, though, that the new regulation allowed the legal possibility of civil liability in situation where fault is less important, the most important matter being prejudice repair.

Liability issues have known an oversized attention from doctrine and judicial practice since the time of Roman law, and its legal nature was considered in turn to be that of punishment and compensation for damage, whether the doctrine and law stopped at the subjective concept, promoted with high intensity for a long time, whether it was proposed its objectification, whether it meant accepting a mixed concept, considering that the principle of the liability is based on the author's fault, but yet situations may have existed, which would have required the intervention of liability without requiring proof of fault of the author.

We also analyze the suggestions of certain national doctrine voices, which consider that, in the current era, objectification of the principle of civil liability is necessary, presenting also arguments for and against these proposals.

Such objectification proposal of the civil liability, had, as a premise, the adoption of the precautionary principle by the common civil law, taken from environmental specific civil liability.

One of the innovations that this chapter is capturing is an attempt to combine specific elements of this liability with elements of common law civil liability, by trying to propose a new vision of civil liability in general, vision whose consequences upon the basic elements of civil liability are analyzed herein.

1. General considerations on legal liability – form of social liability in the current eco-economic context

Motto: "*For the first time, a civilization is consuming from the natural capital instead of living out of the interest that capital provides."*

"Transforming our environmentally destructive economy into one that can sustain progress depends on a Copernican shift in our economic mindset, a recognition that the economy is part of the earth's ecosystem and can sustain progress only if it is restructured so that it is compatible with it. The preeminent challenge for our generation is to design an eco-economy, one that respects the principles of ecology. A redesigned economy can be integrated into the ecosystem in a way that will stabilize the relationship between the two, enabling economic progress to continue.

Lester Brown

Social liability appears as a special relation created between society and individual, in which human conduct should be allowed to take the form of rights and freedoms recognized by society, established by the provisions, principles or values of that society, and whose failure to comply would lead to a form of social sanction, whether we speak of moral, economic, political or legal liability.

Human society, to be able to survive and evolve at the same time, imposed a specific individual human conduct, limited by rules of coexistence of plural nature, from moral and customary rules to legal rules which govern every sector of public and private life, their breach attracting a reaction of rejection, of condemnation of the human subject, compelling it to obey social norms, presenting various tools used to compel the subject, the most important being the preventive tools, but also the disciplinary ones.

Individual behavior is subject to assessment and feedback from institutionalized society, with the help of social norms, required to shape decisions and behavior of the individual, aiming them in the direction of the dominant social order. Social liability involves social sanctioning of the attitude of the individual which is inconsistent with the established social norms.[1]

"Ubi societas ibi ius", thus when we discuss society, we also imply law, as two realities that cannot survive one without the other.

The relationship between law and society, although necessary through the nature of the implied reality, is presented in a very interesting manner by Petre Andrei as: "the ideas of just, unjust, need of legal norm were born with the birth of society, that is why legal values are social values, whose role is to regulate the function of social reality."

Liability, as a branch of social liability, aims the negative consequences which an individual would bear if its conduct is contrary to legal norms, created by civil society, consequences which would manifest through the creation of new judicial reports, shortly of new obligations.

[1] E. Lupan, M. Şt. Minea, A. Marga, *„Dreptul mediului. Partea specială."* Edit. Lumina Lex, Bucharest, 1997, p. 367.

Ecological, economic and legal. Three areas that cannot live without each other, in the present millennium, where an amazing evolution of science and technology is present, an intense exploitation of the natural – renewable and non – resources in order to support a global economy strengthened to provide for the ever growing human population.

Along all these, humankind, master without limits of the surrounding nature, due to ever exploitation environmental intense degradation, finds itself in the position to impose legal limits in order to restore the ecologic and economic environment.

Thus occurs the civil liability, which is destined to prevent destruction of the planet by the individual, in the chaos created by the struggle for survival.

Ecologic challenges of the new millennium, particularly in terms of operating principles of the economic system, outline the efforts size this new path requires.

The first significance results from the ecologic and environmental characteristics of the latest decades. These represent the period in which factual elements may be listed, such as illnesses caused by pollution, floods and landslides, lower production of fish, desertification, reduced soil fertility, species extinction and many others that were amplified. On the other hand, profit and welfare arguments, strongly supported the development of economic activities which contributed significantly to the manifestation of the effects listed above. Threshold of the millennium is where "gaps seeds" sprout and the man is forced to reassess their place in the biosphere, to formulate a perspective on the functioning of ecological systems that created them, being faced with millennial action of population growth limit, as a result of depletion of the resources that support it.[2]

The notion of liability has had a large number of definitions over time in specialty doctrine, one of the definitions we support being as follows: "Legal liability is the related rights and obligations complex, which – by law – is born as a result of committing an illegal act, and which constitute the framework of society imposed coercion, with the purpose of insuring the stability of social reports and mentoring members of society to respect the rule of law"[3].

Liability had a double role, in terms of eco-economic analysis: on the one hand, the role of protecting the environment from destructive human actions, especially against the pollution, perhaps the greatest enemy of the environment and human, and, on the other hand, to protect man against environmental changes and environmental products through its creations and interventions, we refer in particular to liability for damage that occurs in genetically modified organisms produced.

Thus, the use of genetically modified micro-organisms requires those who are concerned to assess health and environmental risks of their activity, even if they are not known.

Liability has several forms depending on the branch of law that interferes: civil legal liability, criminal legal liability, legal liability administrative law, financial law legal liability, etc.

In the case of responsibility for the protection of ecosystems is distinguished civil liability, criminal liability and liability offenses.

Social responsibility, first, and juridical liability, secondly, must be considered in the context of contemporary society, in the development course of global economy, which generated a high consumption of renewable and non-renewable resources and created serious ecological imbalances, which, irreparably, affect the environment.

The problem of the environment, affected in a more rapid rhythm and increasingly in danger of complete destruction, is now examined by all political and legal mechanisms in the world in the attempt to find solutions for overcoming the eco-economic crisis in which humanity is the present moment.

In this regard, a general objective of the Sustainable Development Strategy for an enlarged European Union is "continuous improvement of quality of life for present and future generations

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[2] F. Bran, I. Ioan, *Eco-economia ecosistemelor si biodiversitatea*, Editura ASE, Bucharest, 2004, p. 5-7.

[3] M. N. Costin, *O încercare de definire a noţiunii răspunderii juridice*, in Revista Română de Drept nr. 5/1970, p. 83.

through the creation of sustainable communities able to manage and use resources efficiently and to the potential environmental and social innovation of the economy to ensure prosperity, environmental protection and social cohesion ".[4]

So the concerns of modern economists who have to face human drama confronted with the alarming decline of many species of plants and animals, massive cutting of forests, the increase of world population and the decrease of food supply and other problems of similar nature, are turning to "the increase of the human welfare through sustainable economic development, given the global and regional environmental effects of large transfers of energy and raw materials, which take place in human development and maintenance for life. "[5]

2. Discussions about some aspects of civil liability as a juridical liability form

Civil liability is a fundamental institution of civil law, and one of the basic forms of legal liability, which has aroused the interest of theorists and practitioners worldwide.

The foundation of the liability institution is, above all, the need to constrain the person who causes prejudice to another, to repair that prejudice. It is the principle formulated by the European Group on Tort Law in European Tort Law Principles of Contents: "A person to whom damage to another is legally attributed is liable to compensate that damage".

One well-known voice of the French doctrine, following the specific case jurisprudence noted that "specific to civil liability is restoration of the prejudiced equilibrium as much as possible, and restoring the injured party at the state previous to the prejudice suffered, at the expense of the wrong-doer".

The above cited author, notes that the current practice has the tendency to give priority to the notion that states that the role of civil liability is to repair the damage and restore the previous situation, if possible, and not that of punishing the author of that injury, the punitive function is thus left in charge of other types of liability, such as criminal, administrative etc[6].

Yet not all acts of deeds that create an injury to someone other than the author entail civil liability.

As noted by French doctrinaires[7], the object of civil liability is the prejudice repair, who's author will be considered responsible from legal point of view and proof of the existence of a prejudice is not enough to have a right to repair, but there must exist a characterization of the "deed generating retribution" to be able to give birth to a repair obligation, repair which will cover only the damage that can be legally estimated as products of the illicit deed.

Civil liability has been given several definitions by specialty literature, the common feature being the existence of an obligational report on which grounds a person is indebted to repair damage caused to another by its deed or, in cases provided by law, by the act of another.[8]

As a legal institution, civil liability is comprised of all legal norms regulating the obligation of any person to repair a prejudice caused to another by its non-contractual or contractual deed, for which is required by law to respond[9].

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[4] *http://circa.europa.eu/irc/opoce/fact_sheets/info/data/policies/environment/article_7294_ro.htm.*

[5] D. Chiriac, C. Humă, A. Mihăilescu, *Dimensiunea ecologică a consumului de bunuri şi servicii*, edition coordonated by M. Stanciu, Expert, Bucharest, 2008, p. 17.

[6] Ph. Malaurie*, Liberte et responsabilite* , Defrenois, Paris, 2004, p. 351.

[7] Ph. Malaurie, L. Aynes, Ph. Stoffel-Munck, *Les obligations*, ed. 5, Defrenois, Paris, 2011, p. 9.

[8] To see I.M. Anghel, Fr. Deak, M.F. Popa, *Răspunderea civilă*, Ed. Ştiinţifică, Bucharest, 1970, p. 9-11; M. Eliescu, *Răspunderea civilă delictuală*, Ed. Academiei, Bucharest, 1972, p. 5-8; I. Albu, V. Ursa, *Răspunderea civilă pentru daunele morale*, Ed. Dacia, Cluj-Napoca, 1979, p. 23-24; L. Pop, *Drept civil. Teoria generală a obligaţiilor. Tratat*, Ed. Fundaţiei „Chemarea", Iaşi, 1996, p. 158; P. Drăghici, *Faptul juridic ilicit cauzator de prejudicii*, Ed. Universitaria, Craiova, 1999, p. 41.

[9] To see: I. Albu, V. Ursa, *op. cit*., p.24.

Legislative base of these rules is the Civil Code entered into force on 1 October 2011 and other special laws.

2.1. **The conception of the New Civil Code editors on liability structure: duality or unity?**

The necessity to adapt the liability to the transformation of social relations even if it is recognized although, at times, by the legislator in 2011, is without major changes in regulatory and foundation of this institution.

The new regulation preserves the unique, but not unitary nature of civil liability, with its two forms, tort and contractual liability, expressly establishing general rules for each one.

As it was only natural, the new lawful starts treating the institution in question, from the obligation to repair the damage caused to individuals through an illicit deeds, joint obligation of both forms of accountability, responsibility being ultimately just a mechanism to repair damage.

The institution of civil liability is regulated by the provisions of the Civil Code, more precisely the Book V, Title II, Chapter IV.

Regarding the possibility of cumulating the two forms of civil liability, art. 1349-1350 stipulates that one cannot choose between contract and tort liability, according to the provisions most favorable if the law does not so provide.

The new Civil Code provisions do not contain a legal definition of civil liability, so it was left to the doctrine this entire responsibility for such an approach.

Civil liability, in a simple definition, it contains a person's obligation to repair the damage unjustly suffered by another person, through the injury of its rights and interests.

Both types of liability have, as a starting point, the breach of an obligation.

Tort refers to the duty of everyone to fully repair all the damages caused to another person through the breach of the obligation to respect the rules of conduct which the law or local custom requires and shall not affect rights or legitimate interests of others-art. 1349 alin1-2 of the New Civil Code.

The contractual liability includes the duty of every person party to a contract to repair damage caused through default of another party that has contracted art. 1350-2, paragraph 1 of the New Civil Code.

There are still differences between the two forms of liability, but the new Civil Code, as the old code, adopted a theory of joint civil liability.

In its conception there is only one liability, seen as a legal institution, but with two regimes. The two regimes play a complementary role. The legal regime of tort liability is considered as the common law and the legal status of contractual liability has derogatory nature.

The purpose and key elements are common to the two responsibilities: injury, wrongful act, causal link between the wrongful act, damage and negligence. Fault is not essentially different, it always derives from a breach of existing obligations.

2.2. **The critique of the vision of the New Civil Code regarding the concept of subjective liability**

As noted in the international doctrine[10], accidents at work, traffic accidents, nuclear accidents and then the whole series of sources of danger created by technical progress led to a more pronounced process of socializing responsibility in all its components and a decline of individual responsibility.

[10] G. Viney, *La declin de la responsabilite individuelle*, Ed. Librairie Generale de Droit et de Jurisprudence, Paris, 1965.

It is noted however that the vision of the legislation in 2011 remains dependent on subjective liability based on fault, focusing on punitive function of civil liability and not on the reparative function, which would give preference to the repair of the damage suffered by the victim and not to the punishment of the author.

The importance of this difference between the two angles of view is that subjective civil liability in certain legal relations does not meet the requirements of reparation, either because of the difficulty in the author's fault probation, either because the author is obliged to respond even in the absence of the concept of guilt, on the principle of security, risk, family solidarity, etc.

This orientation of liability in 2011 was criticized in Romanian doctrine and for good reason.

It was said that what once was able to sustain that "to talk about liability without fault, of fault without an illicit deed was like talking about a man without a head, a car with no engine, a syllogism without premises"[11] today may not be available. Fault, the traditional basis of liability may not give a reasonable answer for more and more damages that cannot be attributed to individual behavior.[12]

Such evolution of liability has made some voices assert that nowadays "there is a crisis of tort liability, a reconstruction of it."[13]

Civil liability is therefore into a permanent change, adaptation, especially in a constantly spreading. It's like a spider webs and invades all areas of law "and becomes a right which tends to absorb all others, goods, people and even contracts."[14]

Therefore, it would be required a new approach to civil liability, one of its objectification, since the foundation of liability in negligence is not a solution to meet its application to situations that require the most diverse damages even if the fault cannot be established.

2.3 A new vision of civil liability in the current eco-economic context. The precautionary principle

2.3.1 General considerations

Motto: *"L'homo sapiens, who for more than five millennia of building a civilization with its values and shortcomings, but which respected itself, transformed in the last two centuries into homo economicus and, with the passing from the industrial age to the technological era, it seems to become, at a frightening speed, "catastrophicus homo".*

Constantin Teleagă

Part of the national doctrine, in recent years, taking into account the eco-economic context in which we live, characterized by economic and environmental crisis faced by humanity, respectively depletion of natural resources, the alarming rate of pollution of the environment and other factors of the same nature, has developed a new legal concept, which seems at first sight, and abstract concept, purely theoretical, namely the precautionary principle.

Gradually, this concept, which until twenty years ago was almost unknown, begins a transformation into a legal factual reality, due to the idea that, as said[15], no one can predict the future, and the new risks arising from unrestrained development of science and technology require the need

[11] P. Esmein, *Le fondement de la responsabilite contractuelle*, in Revue trimestrielle de droit civil, 1933, p. 627.

[12] S. Neculaescu, *Răspunderea civilă delictuală în Noul Cod civil-Privire critică*- in Dreptul, nr. 4/2010, p. 46.

[13] S. Carnal, *La construction de la responsabilite civile*, Presses Universitaires de France, Paris, 2001.

[14] Ph. Malaurie, L. Aynes, Ph. Stoffel-Munck, *op. cit*., p. 11.

[15] C. Teleagă , *Principiul precauţiei si viitorul răspunderii civile,* in Revista Română de Dreptul Mediului, nr.1(3)/2004, p. 29.

for a "a remedy of law to punish those who do not adopt an appropriate behavior to this new existential situation"[16].

Although this concept first appeared in the science of environmental law, perhaps the first area facing risk and prejudice caused to humankind environment and health , most times without a possibility to establish a fault of the polluting agent, it has spread rapidly in other areas of legal and social fields.

The precautionary principle has emerged and developed due to the attempts of the doctrine to find a viable solution in a context that nor moral liability, or classic civil liability, would have the necessary power to protect the two elements at stake: the planet and the humankind.

A new type of ethical responsibility is necessary because the rationality of science, which occurs abruptly in biological life, not only may reverse the order of nature but also the human destiny[17].

Analysis of eco-economic causes of the crisis we face today, revealed that for a long time, the industrial society of the XIX century, which believed that technical progress is humankind's bright future, considered that nature was an inexhaustible reservoir of resources and a waste bin for the waste left behind by the exploitation of these resources, in the service of man and progress[18].

Analyzing the eco-economic road followed by mankind in a historical context, as well noted by a Romanian author[19]: "the twentieth century continued this tradition to which were added, through military equipment, means of destruction previously unimaginable, which has the particularity to "pollute" the litter box inherited from uncontrolled industrialization processes. The object of the quantitative growth had to reach a critical mass and humankind conscience to realize its own capacity for self-destruction, for something to start to change. But change is slow and problematic. Nature responds slowly to aggression and technological society is unable to measure time with the same standards with which Prometheus unleashed to conquer the universe, losing on his way, if not on the Milky Way, to which it aspires, the sense of measure"[20].

"Man has gained much ground on human natural temporality and human temporality tends to defeat the natural one definitively."[21]

As stated above, the principle in question has arisen in environmental law with the other two principles: the polluter pays principle and the principle of prevention.

The relationship between environmental law and civil law is one of direct connection and interdependency, environmental law has always resorted to the principles and elements of classic civil liability and civil law has the tendency to borrow elements that appear in the environmental law such as, for example, the precautionary principle, which we believe will be adopted by civil law in a matter of years.

What civil liability, specific to reports that have as a constitutive element the environment, took from civil law is the classical schematic of civil liability recorded in the principle "the polluter pays": the author of the illicit deed which acts negligently or with intent, produces a prejudice, and so, between the deed of the author and the prejudice there is a causality report, and thus the author is bound to repair it.

The principle of prevention, which we mentioned earlier, foresees the obligation to intervene before the damage would occur, but the matter is about a prejudice that is certain and a causal relationship between the action to be prevented or the unaccepted omission and prejudice.

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[16] D. Mazeaud: *„Responsabilité civile et précaution*" in Responsabilité Civile et Assurances Nr. 6 bis/2001. p. 72.

[17] H. Jonas*, Le principe de responsabilité* , Paris, Cerf, 1990, p.174.

[18] N. de Sadeleer*: „Les principes du pollueur – payeur, de prévention et de précaution"*, Bruxelles, Bruylant/AUF, 1999, p. 37.

[19] C. Teleagă, *op. cit*., p. 30.

[20] C. Teleaga, *op.cit*.,p 30.

[21] J.P. Delage, *„Une histoire de l'écologie"*, Paris, La Decouverte, 1991, p. 250.

The principle subject to discussion[22], the precautionary principle, implies that there is a prejudice, which was not yet produced, and the eventuality of the prejudice is not proven without a doubt and, as stated, the risk is uncertain, its realizations is possible at most, plausible, thus it would be a preventive action, anticipated in the context of uncertainty regarding risk, difficult to define, but which is applicable in the positive law.

The precautionary principle was born due to shortcomings of legal instruments in classic civil law where "damage is uncertain, but a risk impact would also have such consequences that repair, meaning a return to the previous situation, is excluded, and its dimensions are unpredictable and incalculable."[23]

But, as said by supporters that want to take over the principle of common law liability, the law is about to be changed through an evolutionary process that will mean the adoption of this principle. "The evolution that marks the transition from a legalistic model of justice, formal and logical, to a teleological justice whose ambition would be to find appropriate solutions to the objective choice…"is in progress.

2.3.2 The precautionary principle and the civil liability

Envisaging anticipatory preventive action in response to uncertainty, the precautionary principle represents an important milestone in risk reduction. The question is no longer merely how to prevent assessable risks, but rather how to anticipate risks pervaded by uncertainty. By leaving behind the realm of 'sound science', precaution necessarily gives rise to conflict.[24]

The precautionary principle was born in international environmental law, is a forward-looking concept: it is used to determine what can be allowed to happen in the future. There, instead of using a behavior marked by prudence as the standard evaluation of past actions of an individual to judge the legality of its actions? In civil law, the answer is "yes." Apply the precautionary principle in civil law abolishes the foreseeability test and transforms liability based on fault in strict liability.[25]

With the emergence of this principle, there are theorists who have tried a combination of classical notions of civil liability with the notions expressed by this principle, but not the current form of proposals emerged, lacking the force of arguments that would give the concrete of a possible legal regulations.

However the idea of civil liability which must be reconsidered for the purposes of admission and application of the precautionary principle is one innovative and prospective.

At first glance, there is an incompatibility between civil liability as is currently regulated and the precautionary principle.

It is easy to see from where comes this apparent incompatibility, if we analyze the elements of liability and the foundation of this institution and what suggests the precautionary principle.

Thus, civil liability is to repair the damage already produced, and the precautionary principle aims to protect the community and the environment of major risks, but uncertain.

There are authors who consider that In this latter case it is not about the repair of the damage but the repair of a risk, therefore if creating a risk means a material repairable injury, we can talk about civil liability.[26]

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[22] C. Teleagă, *op.cit*., p. 30-31.

[23] *Ibidem*, p. 30.

[24] N. de Sadeleer: *"The Precautionary Principle in EC Health and Environmental Law"* in European Law Journal Volume 12, Issue 2, pages 139–172, 2006.

[25] Bruce Pardy, *Applying the Precautionary Principle to Private Persons: Should it Affect Civil and Criminal Liability,* Les cahiers de droit, nr. 1, vol. 43, 2002, p. 63.

[26] Geneviève Pignarre: *„La responsabilité, débat autour d'une polysémie"* in RCAss nr. 6 bis/2001, p. 15.

Insights in the current liability is difficult to accept the idea that civil liability has as object a risk, as long as the damage has not occurred, because this institution, now, does not punishes the author unless we can speak of a certain damage to be repaired.

As said, now is often necessary to prevent, neutralize, eliminate questionable but possible dangers, taking action even under uncertainty, and this urgently. Because damage uncertain, but possible, have very specific size and because, at least in principle, they are not repairable.

We agree basically with the proposal of the author, that in such a conception, tort liability, has the right to leave the rigid land of classic law to explore the virgin territory of the uncertainty and to play an active role in today's globalized society.

Precautionary principle should allow tort liability facing orientation that goes beyond the horizon of the foreseeable future, precisely because it threatens us with force increasing unpredictability. In this view elements of liability would largely change largely.

The precautionary principle, applied retrospectively, is inconsistent with the rules of tort liability as they presently exist. It is not compatible with the elements of negligence or nuisance because all of these causes of action now require fault in the form of foreseeability. Whether the precautionary principle should be applied to tort actions for environmental harm depends upon whether those fault requirements are appropriate. Strict liability is more consistent with the dominant purpose of tort actions derived from actions on the case: to compensate. Tort liability is not primarily intended to punish defendants, but to compensate victims harmed by the actions of others. To require fault on the part of defendants before liability will be imposed frustrates that purpose, and confuses the mandate with that of criminal law. The key determinant of liability should be causation, not fault. Thus, it is consistent with the purposes of tort law to apply the precautionary principle to the actions of alleged tortfeasors[27].

Proposing a new orientation to civil liability, or due to striking a news and they announced radical changes, even the formation of a new kind of liability should consider changes that would require the adoption of this principle on the concepts and elements which is based on classical civil liability: negligence, injury, causal link.

2.3.3. Fault in the new vision of civil liability under the precautionary principle

As we already know, guilt is a constitutive condition of common law liability, namely the subjective responsibility.

In civil law, concept of fault is used in place of the notion of guilt, without making any difference between them and includes several levels: the fraud or intent, negligence and imprudence. Unlike civil law, criminal law uses the notion of guilt, not guilt as synonymous, but as a form of it with intent.

Fault has been defined in legal literature as abnormal behavior, unexpected in conflict with the rules that define the normal conduct a balance of social harm[28].

Therefore it was said that "lack of caution is responsible for liability for negligence. We find that as the scale and scope of risk lies in many sectors of social life, guilt must be revised because it becomes urgent to find a responsible"[29].

Fault in the precautionary principle would correspond to an insufficient diligent, thorough examination of all aspects of neglect due diligence to their depletion. Raising the bar, imposing a duty to anticipate risk, diligence carried to its ultimate consequences, the principle redefines the scope of fault. It promotes an ethic of prudence in which each of us is asked to reconsider its

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[27] B. Pardy, *op.cit*., p. 70.

[28] A. Bénabent: *„Droit civil. Les Obligations“,* Paris, Montchrestien, 1997, p. 323.

[29] C. Thieberge – *„Libres propos sur l'évolution du droit de la responsabilité - vers un élargissement de la fonction de la responsabilité civile“*, in Revue Trimestrielle de Droit Civil (RTDC) nr. 3 sept. 1999, p. 572.

approach to the unpredictable, which gives rise to a new conception of fault. Therefore, caution and diligence obligation would form a new structure of fault. Guilty in this case as one that in a situation of uncertainty or doubt don't adopt an attitude of caution. The duty of care would require more professional attention, especially in health and ecology and would require the detection of what may constitute a potential danger, systematic monitoring, evaluation, production expertise of all the processes that generate risk.[30]

2.3.4. The injury, causal link and the precautionary principle

In the current design of tort are to be repaired only the certain damages which occurred or will definitely occur, and does not fall under tort liability the future , possibly, hypothetical damages.

But the precautionary principle suggests the adoption of measures which take into account the uncertain damage, irreversible, which, as I said, are currently incompatible with the principles of common law liability.

Difficulties exist in the causal link because, as it was mentioned, precautionary prejudice is conditioned by multiple causality whose identification is not easy.Therefore it was concluded that the expected liability of the precautionary principle is without prejudice and without liability victims, based on non-repairable damage anticipation of change. It is designed to provide liability risks and thus avoid the major damage.[31]

Draft of this type of liability is yet to be outlined. Even if we don't reject from the beginning the idea of innovation and healthy foundations in what regards the sustainability of the precautionary principle, there still are steps to be taken to implement such a vision of civil liability. Even then, such liability would only add elements to the classic civil liability, without removing the whole basis of liability as it appears.

Conclusions

This paper has addressed an issue that has presented a great interest to lawyers, theorists and practitioners, since the formation of law; due to its importance, being called a "keystone" of the entire legal system, respectively the institution of civil liability.

The institution mentioned above was presented in the wider context of judicial liability, as a form of social liability, having thus tried to offer an appropriate definition to each of the liability notions.

Social and responsibility, and thus liability, the most important form of social responsibility, were analyzed yet in the eco-economic context in which we find ourselves at the beginning of the millennium. It was necessary to adopt a such initiative as long as the economic crisis and especially ecologic crisis is more acutely felt, and, as it is well known, the legal element – and we particularly mean civil liability – is an instrument to find solutions for this kind of issue.

We also analyzed the perspective of the legislature of 2011 on the foundation of subjective liability, choosing to devote, as a rule, the liability based on fault, but not exclude the possibility of intervention of an objective liability in situations established by law.

Adopting the concept of subjective liability has been criticized by specialized literature, considering that in the new millennium the point of view regarding the institution of liability should be abandoned. So we should abandon the idea that is more important to punish the author then to repair the prejudice. If so far the sanction was a main objective, from now on the social and eco-economic realities impose a an approach towards prevention and, if prejudice has already been caused, we should first attempt to repair and only then we might direct towards punishing the author.

[30] C. Teleagă, *op.cit*., p. 45.
[31] C.Teleaga,*op.cit.*, p. 45.

We should thus allow criminal and administrative liability to sanction the author of an environmental prejudice and allow civil liability to become mainly a protective legal environment and only secondly a mean of sanctioning the illicit deed.

We believe that the trend of civil liability is to objectify, yet without completely removing the notion of fault, which still finds applicability. The point of view upon civil liability must be changed, and an objective liability must be adopted at the point where it intervenes, without trying to appeal, with no real proof, to assumptions.

We tried thus, to capture the inter-connection and inter-condition relationship between ordinary civil liability and environment specific civil liability, analyzing the points where they interfere by borrowing different elements.

Such "loan" is the takeover by the special civil liability, from the classic civil liability of the classical scheme which involves: wrongful act, injury, causal link and in some cases fault.

This scheme finds perfect application of the "polluter pays" principle, which maintains the concept of guilt taken from common civil law.

But, a basic principle entered the specific law environment, the precautionary principle, which proposes a slightly different objective liability, the novelty being a liability for a prejudice which has not yet occurred, but whose possibility of occurrence present minimal data.

We conclude that, although the proposed draft for the adoption of the precautionary principle in joint liability would be a step forward in the evolution of this institution, which probably will be done over the years, currently doctrinal proposals have failed to create a strong existential framework of an objective liability which would sanction individual behavior in a precautionary manner before the injury would occur, or even before the prejudice would become cert.

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THE TIMESHARE INDUSTRY AT ITS FINEST

ELENA-RALUCA DINU*

Abstract
The coagulation process of timeshare systems, the drafting action of its main peculiarities and the stake of its implementation have ushered the proclivity of U.S.A and of the E.U member states to legally set the aboriginal bricks of the juridical tower overseeing the ownership right in its new gala dress, which was the timeshare cloak that unfurled upon the naked shoulders of the resort service industry. The U.S.A precipitated in establishing the controlling channels of such a large scale operation by making the timeshare ownership concept a part of the South Carolina legislative compound, but nevertheless the E.U did not cave under the grueling weight of the good's market new product figure, adopting instead the Timeshare Directive aimed to protect the consumer's best interests. This paper suggests a bird's eye view over the requirements induced through the 94/47/EC Directive and then later through the new and improved 2008/122/EC Directive (with the Romanian transposition of the two normative acts' provisions) for an individual to become the beneficiary of their protection. The study will be completed with a series of data concerning the economical impact of timeshare development, which will credit the fast-forward actions of the above mentioned continents that proved themselves visionaries in the long run.

Keywords: *timeshare network, temporary usage right, article 2 of the Timeshare Directive, O.G 14/2011, economical input of the timeshare industry in the larger picture of the trade market*

Introduction

Many of the economical agents that offered timeshare goods to the consumers have previously sold only the appearance of property, creating an illusionary image in the minds of purchasers, which in the final picture frame couldn't pinpoint the exact right gained in exchange of the price they paid the other contractual party. Thus, an avalanche of pleads from the citizens of member states were sent to the mail box of all the European organisms, but especially to the European Parliament, the main complaints emerging from them all being the aggressive sales techniques and the contractual elements that imply making use of the international private law prerogatives that create difficulties in the flow of the timeshare sales contract[1]. Having in mind that in the majority of the member states this sort of contracts was poorly schematized[2], the European Community decided to weave a harmonized minimal provision basket that referred to the obligation set in the name of the economical agents to inform the consumers upon the constituent aspects of the contract, the methods through which these data should come into their acknowledgement and also upon the manners of annulment and denouncement of the juridical act that bounds the two parties.

At the origins of the Timeshare Directive sat an European Parliament decision from October 13th 1988 that rang the bell on the aspect that consumers were the victims of delinquent manifests on behalf of the sellers in this type of contracts. Further down the lane, the same institution with the back-up of the European Council strived to adopt the 94/47/EC Directive and did so on the 26th of October 1994. In accordance with the arguments that stood as corner stones for its adoption, the directive was necessary to come into being in order to obtain an uniform legal by-standing for the

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[1] Decision of the Federal Court of Germany from the 19 th of March 1997 explained in Revue critique de droit internationnal privé, 87 no. 4/1998, page 610 with notes by professor Paul Lagarde in pages ranging from 619 to 631.

[2] Only four states had norms to provide for timeshare contracts before the 94/47/CE Directive was adopted: Portugal, France, Greece and Great Britain.

timeshare sales contracts and to withstand the unfair trade practices on one hand and to protect the acquirer's right that rise from signing this sort of convention, on the other.

Although the working staff of the two European organisms has neglected mentioning the juridical nature of the rights that are gained by the consumer, they did not oversee the probability for the parties to become confused on this respect, thus they made the specification that even if the timeshare contract bears resemblances to the rent contract, the two shouldn't be seen as species of the same kind of convention. Therefore, this paper considers that a glance at the material and personal domains of application of the two directives comes in the aid of the large consumer population that may not be in tune with the requirements needed to be checked in the grid for them to benefit from the communitary protection offered by the Timeshare Directive and the 2008/122/EC Directive.

Content

Article 2 first paragraph of the 94/47/EC Directive states that this act applies to all the contracts regarding the direct or indirect securing manners of a periodical usage right of one or more locative spaces. It further establishes that the contract or group of contracts must be signed for a time span of at least three years and must refer to the transfer or promise of transfer of an ownership right or any another right (usus, fructus) over the above mentioned object for a minimum of a week in a determined or determinable interval each year in exchange for a global price. This definition is sufficiently vast to include all the juridical embodiments of how the usage right may be loomed, as well as all the real-world manifestation that came into being before the directive was adopted. The ante-adoption literature[3] underlined and amended the fact that the initial proposal of the European Commission made talk about the economical agent in the terms of "seller" and only about the potential transfer of an ownership right, hypothesis that is fairly unacceptable in accordance with the multitude of systems in the form of which timeshare may be found in pure state: obligational type, real, associated and trust based. The criticism has been partially taken into consideration, the final definition keeping an open field for all the possibilities.

The Timeshare Directive mentions that the usage right is bound to be obtained directly or indirectly, but doesn't go an extra mile to explain and exemplify the situations in which the right is extracted otherwise than by expressing the consent to become party in a timeshare contract, but the doctrine came in hand when it suggested that an indirect obtaining manner covers, in fact, the hypothesis arose in some Germanic law systems in which the transfer of the usage right operates solely after the concrete take in possession of the contractual object. Article 2 regards the directive as applying to immovable objects, meaning a building as a whole or part of it to which the usage right is exerted, therefore the material domain that constrains the timeshare contracts is the spaces with a living destination attached to them. By interpreting these guidelines we must conclude that the Timeshare Directive excludes de plano the protection of purchasers of boats, trailers, goods with an industrial or commercial destination, of terrains which hold no constructions upon them, even if they would be destined to act as camping grounds, thus we must observe that the living destination can be fulfilled only by a building and not by a surface of land on which nomadic population dwells. An author[4] makes a supplementary underlining in the sense that the 94/47/EC Directive is to be applied not only to leisure time destination locative spaces, but also to housing apartments if the buyer exerts each year for an exact period of time any professional actives in the region in which the object of the timeshare contract is situated.

The third and fourth paragraph of article 2 discuss about the seller and depict him as any individual or juridical personal that in its activity domain creates, transfers or is obliged to transfer

[3] M. Martinek, Teizeiteigentum an Imobilien in der Europäischen Union- Kritik des Timesharing-Richtlinienvorschlags der Europäischen Kommision in ZeuP 1994, pages 470 to 492.

[4] Maria Constança Dias Urbano de Sousa, Das Timesharing an Ferienimmobilien in der EU, Nomos Verlag, Baden-Baden, 1998, pages 22 to 23.

the usage right upon the object of the timeshare contract, meanwhile the purchaser may become anyone who is the recipient of that right or in favor of whom such a right has been born. The proposal[5] of the Economical and Social Committee for associations or enterprises that do not comply to the activity domain to stand as parties in this type of contract has been rejected by the communitary legislation. Moreover, the directive does not expand its protection to purchasers that don't intend to retain the object for their own needs, but had the explicit motivation of selling the good in order to become beneficiaries of a profit. Similar to the 87/102/EC Directive regarding consumer's credit, the Timeshare Directive makes use of the seller notion in a functional way, not by a strict reference to the qualification that the party embodies, that's the reason why an owner that decides at one moment to share the usage right of his vacation house with a number of other people will not be sheltered by this normative act. This exclusion of private persons from the sphere of protection of the directive has been frantically criticized[6]. As for the purchaser concept, the aspect that raised eyebrows was if the protection applies on an abstract level or it must subdue to a concrete situation, respective if a person that works in the timeshare industry signs such a contract for his own use will be not be neglected by the directive. The answer to this dilemma was offered by interpreting the provisions of another directive that is 85/577/EC regarding the protection of consumers in contracts that are negotiated outside the realm of commercial destined spaces[7]. The European Court of Justice decided in the respect of following the spirit of this act that the protection is unbias and must, therefore, be applied to all the individuals that sign a contract that is covered by the umbrella of the directive, regardless of their occupation[8].

The 282/2004 Law for the transposition of the Timeshare Directive is a faithful copy of it, the Romanian legislator not bothering making any additional specifications, rendering the material and personal domains of application such as the directive established them in the second article. Although article 3 letters a and b of the law is not very easy to understand because of the multiple juxtapositions and intricate phrases, it's clear that the text isn't meant to limit the domain of protection to the contracts regarding vacation housing, but it stretches to accommodate other buildings or part of them with a living destination as far they are the object of a contract that unfurls for at least three years, which constitutes a periodical right of usage for an unspecified time span, but no less than a week each year in exchange for a global price paid upfront. Because the law doesn't distinguish, the less experimented would consider that the special provisions of the directive apply without distinction also to rent contracts, supposition that must be from the start put aside as unlikely. The 114/1996 Law provides solely for the juridical relationships born between a landlord and a tenant in virtue of satisfying the permanent necessities of residence for a person or a family, the other rented goods complying to the common legal bindings, so vacation housing, defined as temporary dwellings, will not fall under the concept of locative space in the sense of this law, which means a continues living situation from the part of the consumer. Because the 16th article of the 282/2004 Law doesn't pull away from recognizing that it transposes word for word the Timeshare Directive, in order to determine the material domain of application we must glance at point 6 of the exposition of reasons for the adoption of the directive that states the contractual transactions take place on the hotel and residence market. Adding all the information, considering the preponderant commercial juridical nature of the contracts and also the motivation of protecting the consumers, we can conclude that the law's norms are exclusive for commercial contracts who's object are hotel type buildings, the French literature naming them contracts de location saisonniers[9]. The use of the seller notion is plausible for

[5] Published in JOCE no. C 108 from the 19th of Aprilie 1993, page 3.

[6] M. Martinek in Das Recht der Europäischen Union-Kommentar, by E. Grabitz and M. Hilf, no. 106.

[7] C. Toader, Considerații asupa ordonanței privind contractele încheiate în afara spațiilor comerciale in RDC nr. 12/1999.

[8] CJEC decision from the 14th of March 1991, C-361/89, di Pinto.

[9] J. Huet, Traité de droit civil. Les prinncipaux contrats spéciaux, LGDJ, Paris, 2001, page 689.

criticism since the part who transfers an usage right shouldn't be qualified as such, but nevertheless the term is sustained by the fact that the location contract is also known as the sale of usage, the fact that the contracts are broadly commercial and by the fact that the obligation of the economical agent may consist of transferring a real right. One more argument in favor of the commercial nature of the timeshare contracts resides in the necessity for the purchaser to sign juridical acts in his professional activity domain.

The new Directive 2008/122/EC for the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange was passed by the European Parliament in Strasbourg on the 22nd of October 2008. There was an overwhelming majority in favor of the Directive with 674 votes for it, 11 against and 10 abstentions. The new Directive has received widespread support from industry bodies, consumer representatives and government agencies. It gave consumers better protection and confidence when investing in timeshare, other long-term holiday products and related services. The Directive is dated 14/01/2009, came into effect on 23/02/2009 and established that it must be transposed into national laws by Member States by 23/02/2011. The new Directive clarifies, improves on, extends and harmonizes the protection given to consumers buying timeshare throughout the EU. The new Directive extends the scope of timeshare to include canal boats, caravans, cruise ships, etc. excluded by definition in the old Directive. In the spirit of the directive, the timeshare contracts mustn't be interpreted as having objects that include multiple unit reservations unless they imply rights and obligations that exceed the ones that arise from the separate reservations. On the same basis, the long term holiday product contracts shouldn't be set on the platform with regular fidelity programs that confer the purchaser clearances for future holiday plans in a chain of hotels. As far as all the other specifications I made when analyzing the Timeshare Directive and the 282/2004 Law of transposition, they translate to the 2008/122/EC Directive and its Romanian transposition law (O.G. 14/2011) that is in fact an approximate copy of the directive.

Timeshare is a relatively complex and high-value product when compared to a traditional package holiday. As consumers want to buy a holiday experience, and not a complicated product, the marketing challenge for the timeshare industry is to persuade consumers to take the time to understand timeshare and the high-quality holiday experience that it offers. For the developer, this challenge is compounded by the volume of sales needed at each development: every apartment needs to be sold roughly fifty times – once for every week that it can be used. Here are some economic information that paints a picture of the timeshare market.

General characteristics of the timeshare industry in Europe

- In 2007 1.5 million European households owned timeshare.
- The UK and Ireland form the largest market having 589,653 timeshare owners, followed by Germany and Italy.
- Most resorts are concentrated in Spain, with 26.3% of the total, 14.94% in Italy and 11.05% in the UK & Ireland
- There were a total of 1,312 resorts in Europe.
- The total number of units in European resorts is 73,540, resulting in 67,590 million bed nights.
- Average occupancy levels across completed European resorts was 71.7%.

Economic impacts of the timeshare industry in Europe

- € 3.2 billion of expenditure was generated by the European timeshare industry in 2007.
- European timeshare owners spent € 1.6 billion during their timeshare vacation, plus
- € 957 million on timeshare purchases and € 618 million on timeshare maintenance fees.

• The top spending market is the UK generating almost € 1.4 billion (about half the total expenditure) in timeshare.

• The average expenditure in 2007 per trip (or vacation) was € 1,588 per family, which was mainly spent on restaurants, car rental, parking and petrol, groceries, accommodation and gifts, souvenirs and clothes.

• In terms of employment, a total of 69,836 jobs are directly sustained by the timeshare industry.

• The overall employment costs for the timeshare developers sector across all resorts is € 1.28 billion (€ 1.06 billion if considering only resorts on the twelve European countries of this study).

European Timeshare Owners

• 86.6% of the owners reported that they were satisfied with their timeshare holiday and, 55.6% of them stated that they were very satisfied.

• 73% of the owners felt that their timeshare accommodation was better than other self-catering holidays they had taken, whilst 50.9% of all owners stated that their timeshare was much better than other self catering holidays.

• 32.2% of European timeshare owners own timeshare in their own country of residence, whilst two thirds of owners own timeshare abroad.

• Quality of accommodation, exchange opportunities and the credibility of the company are the three most important attributes and features in the owner's purchase decision.

• The average age of timeshare owners in Europe is 55 years.

• The average level of pre-tax household income of the European timeshare owners is € 60,475.

European Timeshare Developers

• 60% of developers described their resorts as 'built and marketing'.

• 21% of developers described their resorts as 'built and sold out', and a further 19% as 'under construction and marketing'.

• The average number of completed resort projects between 2002 and 2007 is 4.1 projects per developer.

• Almost half of the timeshare developers plan to sell out the completed resorts by 2015.

• 84% of timeshare developers do not have plans to build more units or new resorts.

• In 2007 in-house/hotel marketing programs accounted for 32% of developers' marketing expenditure, while direct marketing represented 23%.

• 98.3% of all developers state that their organization handles both the sales and marketing process of their timeshare development.

Conclusions

During 2011 the travel industry as whole saw a dramatic increase as families began feeling more comfortable spending their money on leisure activities. Over the past few years many people have felt the pinch of the downturn in the economy and therefore decided to skip their vacation timeshare plans or travel somewhere closer to home, families began traveling with more frequency across the country. Business travel has also seen a dramatic increase in frequency as companies began augmenting revenue from consumer spending and feel more comfortable sending their employees around the country to conduct business. Secondly, the increased travel demand led to a rise in timeshare rentals. Timeshare owners who tried to rent their timeshare found their units drawing more interest than over the past few years. Due to the expanding demand for rental units owners also realized they were able to increase their asking price, before many owners were trying to simply cover their maintenance fees when renting, there may be a little room for profit in the year

that have past. Finally the timeshare resales remained in the same position they have been for the last couple of years. While travelers were willing to travel more often they didn't feel comfortable enough to commit to purchasing a timeshare and they rather rented a timeshare to make sure the economy continues to stabilize during the next few years. While owners found timeshare rentals increasing in both frequency and price timeshare, resales did not follow the same trend these years, however resales should be set to take a boost during the following years if the economy continues to grow and people continue to gain a sense of security and confidence in it.

They have always been seen as innovators within the industry but now Worldwide Timeshare Hypermarket have embraced the world of the new digital media with their own Facebook pages, Twitter account and even a Youtube channel. These have been set up so that Worldwide Timeshare Hypermarket will be able to reach out to both its existing customers and to give them coverage to reach a whole new range of people who may not have access to their normal means of advertising. These should not simply be viewed, however, as additional advertising streams. Paramount importance to Worldwide Timeshare Hypermarket is the role that these media avenues can play in expanding their program of educating the public to the benefits of timeshare ownership.

The educational process took a major step forward in July 2009 with the airing on satellite television's Travel Channel and Travel Deals Direct of a 30 minute program all about the ownership system which can now be viewed on their Youtube channel in bite size pieces. Phil Watson, Managing Director of Worldwide Timeshare Hypermarket was quoted as saying "we have made major steps towards educating the public about timeshare and what it has to offer. We are very excited, therefore, with the way we can expand that education program to an ever wider audience."

A large part of the success of the program has been down to Harry Taylor, Chief Executive Officer of the Timeshare Association (Timeshare Owners and Committees) TATOC who features heavily in the television program and explains all there is to know about timeshare, exchanges, management fees and re-sales. Harry Taylor has affirmed: "Worldwide Timeshare Hypermarket have been long term industry leaders and are taking timeshare and timeshare resale's to a new level and new audiences and I am sure that these initiatives will be very successful and prove to be popular with existing and prospective timeshare owners".

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THE CONSIGNMENT CONTRACT FROM THE PERSPECTIVES OF THE OLD AND NEW LEGISLATION

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Abstract
A form of intermediation contracts based on the mandate without representation is also the consignment agreement, a variety of the contract of commission. The consignment contract is lawfully established by Law No. 178/1934 for the regulation of the consignment contract. The New Civil Code, under Article 2054, limits to providing that this agreement is a variety of the contract of commission having as object the sale of some immovable goods which the consignor entrusted to the consignee for this purpose.
The consignment agreement may be defined as the consent, by which a party, called consignor, entrusts the other party, called consignee, certain goods in view of being sold in its own name, but on behalf of the consignor, at a price established by the parties, in exchange for a payment. The consignee is bound to deliver the obtained price or, as the case may be, return the unsold good. The purpose of the paper is to underline the changes in legislation subsequently to the New Civil Code and to compare both perspectives.

Keywords: *mandate without representation, contract of commission, consignor, consignee, movable goods*

§I. INTRODUCTION, NOTION AND LEGAL FEATURES OF THE CONSIGNMENT CONTRACT

1) Notion of consignment contract

The consignment contract is a special form of intermediation contract without representation, along the contract of commission, shipment contract etc. The consignment contract is a variety of the contract of commission, in the sense that it is an intermediation contract, arising from a power of attorney granted by the principal, and as regards the actual means in which the representative acts the consignment contract is characterized by imperfect or indirect representation[1].

As a variety of the contract of commission, the consignment contract[2] distinguishes itself by a particular object, consisting of concluding with third parties particular legal documents. As per Article 2054(2) of the New Civil Code, the consignment contract is governed by the rules of the New Civil Code, expressly provides regulations for this type of contract, by means of the special law, as well as by the provisions regarding the contract of commission and contract of mandate, to the extent in which the latter forms of contract are compatible.

A definition of the consignment contract is given by the provisions in the new civil provision, under Article 2054(1) of the New Civil Code. According to these provisions, the consignment contract is a variety of the contract of commission having as object the sale of movable goods which the consignee entrusted to the consignor for this purpose.

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[1] See, further on the legal regime of the consignment contract, St. D. Cărpenaru, *Tratat de drept comercial român*, 2nd Edition, revised and supplemented, Universul Juridic Printing, Bucharest, 2011, p. 584-591; F.A. Moțiu, *Contractele comerciale de intermediere fără reprezentare*, Lumina Lex Printing, Bucharest, 2005, p. 139-170; F.A. Moțiu, *Contractele speciale – în Noul Cod civil –*,Wolters Kluwer Romania Printing, Bucharest, 2010, p. 258-263.

[2] See L. Papp, *Contractul de depozit şi consignaţie*, Cartea Românească Printing, Ploieşti, 1934.

Before the New Civil Code entered into force, the consignment contract was regulated by the provisions of Law No. 178/1934 on the regulation of the consignment contract[3].

The legal mechanism of the consignment contract presupposes a power of attorney being granted and this instrument underlies the consignee acting as intermediary in view of selling movable goods to third parties belonging to the consignor and given in consignment, in its own name, however on behalf of the consignor. The sale of movable goods is made in exchange for a price previously established by the consignor, and the effect of having executed the consignment contract consists either in the obligation to send the consignor the amounts of money received for the sold goods or, in case the goods were not sold to third parties, in the obligation to return the goods to their rightful owner.

In conclusion, the consignment contract is the legal document by means of which one party, called consignor, entrusts the other party, called consignee, certain goods, in view of being sold to third parties, in its own name, but on behalf of the consignor, at a previously established price, and the consignee is bound to deliver the obtained amounts or to return the unsold good to the consignor.

2) Legal features of the consignment contract

The consignment contract displays a series of legal features, which establish the main features of this separate legal institution, as follows:

a) The consignment contract is a consensual contract

The consignment contract is a consensual contract[4], arising from the parties simply giving their consent (Article 1174(2) of the New Civil Code). This manifestation of will which was thus articulated should not take a particular form provided by the law.

As regards the form of the consignment contract, the New Civil Code stipulates under Article 2055, that the consignment contract should be concluded in written form, which is necessary only for making proof of the contract, unless otherwise provided by the law. In this sense, Article 2 of Law No. 178/1934 also stipulates that, this contract, and also any other convention regarding the amendment, change or termination of the consignment contract, may be proven only by a written proof.

In other words, the written form of the consignment contract is requested *ad probationem*[5], and not *ad validitatem*, and the contract's validly arises from the parties freely expressing their will.

In conclusion, as a consequence to the consensual nature of the consignment contract, it should be mentioned that the goods being entrusted by the consignor to the consignee, in view of being sold, is not a condition for the valid rise of the contract[6], and it is an effect of the contract being executed. In this sense, the issue of delivering the movable goods to be sold and, correlatively, the consignee receiving them, shall be examined in the matter of the effects of the consignment contract, as reciprocal obligations of the parties.

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[3] Law No. 178/1934 on the regulation of the consignment contract was published in the Official Gazette No. 173 of 30 July 1934.

[4] F.A. Moțiu, *Contracte speciale,* p. 259.

[5] St. D. Cărpenaru, *op.cit*., p. 585.

[6] With respect to the opinion according to which the consignment contract has an *in rem* character, since it involves the handing over of some goods in the care of the consignee, see R. Petrescu, *Teoria generală a obligațiilor comerciale*, Romfel Printing, Bucharest, 1994, p. 191.

b) In principle, the consignment contract is an onerous contract

The consignment contract is onerous in nature[7], each contractual party wishes to obtain a patrimonial advantage following the execution of this legal instrument[8]. Thus, on the one hand, the consignor wishes to sell its movable goods, and on the other hand, the consignee wishes to obtain the proper remuneration in exchange for the service it rendered.

According to the provisions of the New Civil Code, under Article 2058(1) thesis I of the New Civil Code, stipulates that the onerous nature of the consignment contract is presumed, and, only if the parties expressly provide, it could also be a gratuitous contract.

As regards the gratuitous or onerous nature of the consignment contract, one should also take into consideration the provisions of Article 12 of Law No. 178/1934, according to which the rightful remuneration of the consignee is established by the parties under the contract, or by calculating the difference between the price obtained in exchange for the sold movable goods belonging to the consignor and the inferior sell price agreed by the parties, or established by a court of law. This provision also entitles to draw the conclusion that the consignment contract is onerous in nature.

c) The consignment contract is a bilateral contract (synalagmatic)

The consignment contract is bilateral[9] (synalagmatic) in nature, because it gives rise to reciprocal rights and obligations in the care of both parties.

Thus, as regards the consignment contract, it is of the kind as to give rise to reciprocal and interdependent rights and obligations in the care of both parties, as follows: the consignor is bound to hand over to the consignee the movable goods to be sold, and also to ensure that the consignee is paid for the rendered service, consisting both in the amounts agreed in the contract, and also the additional expenses which the consignee incurred for fulfilling its duties. In exchange, the consignee is bound to receive, preserve and insure the movable goods handed over in view of being sold, and also to fulfil the entrusted tasks and to account for the proper manner for fulfilment. It follows that, the consignor and the consignee, as a result of the rights and obligations in their care under the consignment contract, display, in the legal relations between them, a double quality, as lenders and debtors.

d) The consignment contract is an *intuitu personae* contract

As a variety of the contract of commission, which is nothing else but a contract of mandate without representation executed between professionals, the consignment contract takes over the *intuitu personae* nature of the contract of commission.

The consignment contract is concluded in consideration of the personal qualities of each contractual party, thus justifying the *intuitu personae*[10] nature thereof. The obligations undertaken by the consignor, as well as those undertaken by the consignee, are a direct consequence of the other party assuming the obligations and especially the reciprocal trust which they have in their capacities and for the execution with good-faith of the other party.

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[7] F.A. Moțiu, *Contracte speciale,* p. 259.

[8] With respect to the classification of legal documents in onerous legal documents and in gratuitous legal documents, see Gh. Beleiu, *Drept civil român. Introducere în dreptul civil. Subiectele dreptului civil*, 11th Edition, revised and supplemented by M. Nicolae and P. Truşcă, Universul Juridic Printing, Bucharest, 2007, p. 132-133.

[9] F.A. Moțiu, *Contractele speciale,* p. 259.

[10] F.A. Moțiu, *Contractele comerciale de intermediere,* p. 148.

Therefore, the *intuitu personae* nature of the consignment contract is based on the fact that the consignor puts its trust in the consignee's abilities and professional experience, which was entrusted with selling certain movable goods belonging to the consignor, while the consignee undertakes to fulfill the obligations under the contract, in consideration of the remuneration to which its rendered service entitled.

Under Article 2063 of the New Civil Code, the consignment contract terminates, *inter alios*, by the death, dissolution, bankruptcy, incapacitation or deregistration of the consignor or consignee. These special causes for terminating the consignment contract justify the *intuitu personae* nature of the contract, which causes the contract to terminate in case there appears a cause leading to the impossibility to carry on with the execution of the contract by the same parties and in the same original capacities.

e) The consignment contract is a nontranslative property contract

Following the execution of the consignment contract, the consignor is bound to hand over to the consignee the movable goods to be sold thereby, and also the correlative obligation of the consignee to execute the given tasks. As an effect of the movable goods being entrusted to the consignee, the ownership right over such goods is not transferred to the consignee, and it shall continue to remain in the consignor's patrimony.

Thus, the consignment contract is not a translative property contract; the consignee strictly acts as temporary holder of the consignor's goods, during the time elapsed between their being handed over and the actual sale to third parties. Consequently, as we will hereinafter show, the consignor may exert at any time its right of control over the goods in question, also being able to request their return, by rescinding the executed contract. In this sense, as per Article 2057(2) of the New Civil Code, the consignor disposes of the goods entrusted to the consignee, throughout the entire duration of the contract. It may, at any time, repossess them, even if the contract was executed for a limited duration.

§II. CONDITIONS FOR VALIDITY

1) Form of the consignment contract

As previously mentioned, the consignment contract is consensual in nature. Therefore, for it to be validly executed it is not necessary to observe any conditions of form, the simple manifestation of the parties' will leads to the valid rise of the contract.

Thus, the consignment contract may be in writing, either by drawing up a signed document not notarized or writ in authentic form, or verbally. As a variety of the contract of commission, the provisions of Article 2044 of the New Civil Code may be applied by analogy to the consignment contract, as follows: the contract of commission is executed in written form, authenticated or signed but not notarized, and, unless the law provides otherwise, the written form is only necessary for making proof of the contract. In other words, further to this provision, it may be concluded that the validity of the contract does not depend on the written or verbal form of the consignment contract, but its proof exclusively depends on executing the contract in written form.

As per Article 2055 of the New Civil Code, the consignment contract is executed in writing, and this is only necessary to prove that the contract was duly executed, unless otherwise provided by the law. In this sense, the New Civil Code is in line with the old regulation regarding the consignment contract, according to which, as per Article 2 of Law No. 178/1934, the consignment

contract, as well as any juridical legal for its amendment, change or termination, may only be proven by written evidence.

2) Proof of the consignment contract

Bearing in mind that the execution of the consignment contract may be both in written and oral form, as previously mentioned, under Article 2055 of the New Civil Code, similar to Article 2 of Law No. 178/1934, according to which the execution of the consignment contract in written form only serves as a means of making proof of the legal relation thus born, it may be said that the written form of the consignment contract is required *ad probationem*, and not *ad validitatem*.

However, the proof of the consignment contract may only be made by a written document, ascertaining the will of the parties and the main rights and obligations falling in their care. Thus, the document created as proof serves to identify the object of the executed consignment contract, consisting in the sale of movable goods belonging to the consignor, in its own name by the consignee, but on behalf of the consignor, issuer of the power of attorney, in exchange for a proper remuneration, and also helps to identify the means and limitations within which the consignee may act in relation to third parties.

Proving the consignment contract, on the one hand, envisages the consignor actually granting a power of attorney, whereby it lists the actual conditions which the sale-purchase contracts for the entrusted goods should observe; for instance, such conditions may refer to the markets on which the goods will be sold, the lowest price applicable to the sale etc. In addition, the power of attorney containing the consignor's will is also a means in which third parties may check the tasks entrusted to the consignee, and also the limits within which it may act on behalf of the consignor. This purpose which the instrument which contains the consignor's will serves exists only if it is assumed that the third parties are informed about the consignee's capacity as intermediary.

On the other hand, proving the consignment contract envisages the consignee accepting the tasks given by the consignor. By executing the contract, the consignee undertakes to take over the movable goods belonging to the consignor and to sell them in its own name to third parties, however, with the consequence of the effects of the concluded sale-purchase legal documents occurring in the consignor's patrimony, which shall receive all the amounts received for the respective goods. The proof of the consignee's acceptance is made either by the probative instrument which the parties concluded, or by the deeds for the execution of the contract, unquestionably evincing its will in the sense of performing the given tasks.

Lastly, the proof of the consignment contract may also envisage the amount of the remuneration to which the consignee is entitled for the services it rendered to the consignor, consisting either in the amount provided as such in the contract, or in the difference between the price actually obtained for the sold movable goods and the lowest price imposed by the consignor, bearing in mind the onerous nature of the contract, under which the consignor has the obligation to pay its proxy for its rendered service, as such amount shall be established by a court of law on a case to case basis, arises.

Proving the consignment contract directly influences the occurrence of the effects arising from the sale-purchase contracts concluded by the consignee in the consignor's interest. Thus, not proving the contract shall cause the sale of the movable goods not to lead to the rise in the consignor's patrimony of the right over the amounts obtained in this way, as accompanied by the consignee's obligation to forward these amounts to the grantor of the power of attorney. As regards the fact that the sale purchase contracts are concluded in its own name by the consignee, not making

proof of the contract will cause the consignee to be the creditor of the amounts representing the price of the sold goods, and the consignor to be a third party in these legal documents.

3) Substantive conditions of the consignment contract

a) Parties' capacities

A condition for the valid execution of the consignment contract is the parties meeting the requirements regarding the parties' capacity to execute the contract. Both the consignor and the consignee need to meet the requirements regarding the capacity to acquire rights and to validly assume the obligations arising from the consignment contract.

Firstly, as regards the consignor, it should have the capacity to itself conclude the legal documents for whose conclusion it grants a power of attorney to the consignee. Bearing in mind that the sale-purchase contract with respect to the movable goods belonging to the consignor are concluded and produce legal effects on its behalf, in the absence of a power of attorney granted under the contract, it should be able to conclude such documents on its own[11].

Secondly, as regards the consignee, it should have full capacity, since it concludes sale-purchase contracts with third parties in its own name (*proprio nomine*), in the relationships with third parties appearing as the true party of the respective legal relation. Usually, the consignee acts as a professional[12], a natural or legal person, concluding such type of professional operations or having the operations which are object of the consignment contract included in the company's business object[13].

The conditions regarding the parties' capacities are mandatory for the valid existence of the consignment contract, all the more since the incapacity of a party is provided as a cause of termination for the contract. And the *intuitu personae* nature of the consignment contract, loss of capacity of one of the parties may lead to the contract being terminated.

Given that the loss of the capacity necessary for the valid existence of the contract leads to its termination, all the more the failure to meet the conditions for capacity when the contract is executed does not allow its valid rise.

b) Consent

The consent which the consignment contract presupposes in order for it to validly rise implies both the manifestation of the consignor's will, and also the consignee's will.

On the one hand, the valid execution of the consignment contract presupposes the consignor expressing its will, which shall grant a power of attorney under which it transfers to the consignee the task of selling certain movable goods, in its own name, however on behalf of the consignor which is owner. Thus, the consignor's consent is expressed by the power of attorney which is being granted to the consignee.

As regards the consignor's consent being expressed by granting a power of attorney, it was admitted that the manifestation of will should be express. In this sense, for the valid execution of the contract, the power of attorney should exist and be proven in view of accurately establishing the

[11] St. D. Cărpenaru, *op.cit*., p. 585; F.A. Moțiu, *Contractele comerciale de intermediere,* p. 148.
[12] F.A. Moțiu, *Contractele comerciale de intermediere,* p. 149.
[13] Mona-Lisa Belu-Magdo, *Contracte comerciale*, Tribuna Economică Publishing, Bucharest, 1996, p. 139.

obligations which the consignee undertakes under the contract, and also the limits of the powers granted thereto. Moreover, the power of attorney granted by the consignor should be expressly granted, should be in such a form as to allow to prove the unquestionable manifestation of the consignor's will with respect to the consignee's possibility of acting in its own name in the relations with third parties, however on behalf of the grantor of the power of attorney.

In conclusion, as regards the consignor, its manifestation of will by empowering the consignee for handling specific professional businesses, in its own name, however on behalf of the principal, should be express. This results in the *per a contrario* interpretation of Article 2012(1) of the New Civil Code, according to which, unless the context requests otherwise, the proxy represents the principal when concluding the documents for which it was empowered. Therefore, basically, the mandate implies power of representation, and assuming there are doubts as regards the power of representation conferred to the representative, the granted power of attorney shall imply representation.

On the other hand, as regards the consent expressed by the consignee when the consignment contract is executed, it was ascertained that its manifestation of will may also be tacit. In other words, the execution of the contract may be express or tacit[14], in the latter case the contract arises from the consignee performing the tasks received from the consignor.

c) Object and scope of the consignment contract

With respect to the object of the consignment contract, the New Civil Code stipulates under Article 2054(1) the following: "the consignment contract (…) has as object the sale of movable goods which the consignor entrusted the consignee for this purpose."

Thus, the consignee negotiates and concludes with third parties sale-purchase contracts having as object the goods belonging to the consignor, in view of being sold in its own name and on behalf of the grantor of the power of attorney. Legal documents object of the contract of commission are included in the businesses carried out by the consignor, entrusting the consignee with fulfilling certain professional operations.

As regards the object of the sale-purchase contracts which the consignee undertakes to conclude, the new civil regulation takes over of the old regulation which was concerned with the consignment, found under Article 1(1) of Law No. 178/1934, according to which the object of the sale-purchase contracts which the consignee shall conclude is "the movable goods or objects". Thus, the goods which the consignee is entrusted to sell on behalf of the consignor are movable goods[15].

The consignor's correlative obligation under the contract has as object the consignee being paid remuneration appropriate for its services rendered on behalf of the consignor, as shown below.

The consignment contract produces effects within the limit of the powers granted to the proxy. Thus, the scope of the contract results, and consequently, produces effects, depending on the operations which the consignor provided in the granted power of attorney, whereby it established the limits within which the consignee is entitled to act. As a result of accurately establishing the consignee's rights and obligations, the consignor shall be bound within the limit of the conferred

[14] Bucharest Tribunal, commercial section, decision No. 225/1996, in D. Lupaşcu, *Culegere de practică judiciară a Tribunalului Bucureşti 1990-1998*, All Beck Publishing, Bucharest, 1999, p. 191-193.

[15] F.A. Moțiu, *Contractele comerciale de intermediere,* p. 151.

powers, while the legal documents concluded beyond the limits of these powers shall remain with no effects in relation with it.

In conclusion, the limits of the freedom to act are expressly provided under the granted power of attorney. In this sense, according to the provisions of the New Civil Code, under Article 2017(1) and (2), regulating the contract of mandate, however which are applied by analogy in the matter of consignment, it is stipulated in the sense that the proxy (consignee) does not exceed the limits established by mandate. Nevertheless, it may divert itself from the received instructions, if it is impossible for it to previously inform the principal (consignor) and it may be presumed that it would have consented to the diversion if it had known the surrounding circumstances.

§III. EFFECTS OF THE CONSIGNMENT CONTRACT

Bearing in mind the main features of the consignment contract, it produces specific legal effects, which differentiate it and confer it a special construction in the broad category of contracts of intermediation.

Firstly, the consignment contract produces legal effects in relation to the contracting parties, the consignor and the consignee. These effects are direct consequences of the legal relations born between the parties, and consisting in rights and obligations falling in the care of the parties. Secondly, the consignment contract produces legal effects representing the consequence of performing the contractual obligations. Thus, the consignee concludes sale-purchase legal documents, in its own name however on behalf of the consignor. Establishing a contract with third parties is also of the kind as to produce effects both in the relations between the consignee and third parties, and in the relations between the consignor and third parties.

1) Effects of the consignment contract in the relations between the consignee and the consignor

A) Consignor's obligations

a) Obligation to entrust the consignee the movable goods to be sold

Based under the power of attorney granted by the consignor, which underlies the contract that was executed by the parties, the consignor undertakes to entrust to the consignee the movable goods that shall represent the object of the sale-purchase contract to be concluded with third parties. In order for the proxy to be able to fulfil the undertaken contractual obligations, it should receive the goods that shall be sold by it.

As per Article 2057(1) of the New Civil Code, the consignor will entrust the goods to the consignee in order to perform the contract (...). The new regulation in the matter of the consignment contract is a continuation of the logical-juridical reasoning which Article 1(1) of Law No. 178/1934 implies; the article in question indicates that the object of the obligation to hand over in the care of the consignor is the movable merchandise or goods[16].

We should mention an extremely important aspect regarding the title with which the movable goods belonging to the consignor are delivered to the consignee. The goods are made available to the latter however at no time is the ownership title transferred thereto. The regulation of the New Civil

[16] As regards the means of performing the obligation to hand over the goods, Law No. 178/1934 stipulates under Article 1(2), in the sense that the goods entrusted to the consignee shall be handed over thereto, all at once or gradually, by successive notes or invoices, issued in relation to the contract.

Code indicates the fact that the ownership title over the goods object of the consignment contract, remains in the consignor's patrimony, further to it fulfilling its obligation to entrust the goods to the consignee. Thus, according to the provisions of Article 2057(2) thesis I of the New Civil Code, the consignor disposes of the goods entrusted to the consignee, throughout the entire duration of the contract.

As a consequence of the fact that subsequently to the consignee being entrusted with the movable goods, the consignor remains the owner thereof until the transfer of property to third parties occurs, and the consignor shall enjoy all the rights over the goods which were thus entrusted, including the right to dispose of them at any time, unless otherwise provided in the contract[17].

The consignor's ownership right over the movable goods is expressed by its possibility to manifest its autonomy of will, by indicating the criteria or even the person to whom the ownership over the goods will be transferred, by a request of returning the goods from the consignee's care or even by personally and actually picking the goods up. The New Civil Code provides, by Article 2057(2) thesis II, the consignor's possibility of repossessing the entrusted goods at any time, even if the contract was executed for a limited duration.

The difference as compared to the regulation of Law No. 178/1934, which the New Civil Code makes as regards the consignor's right to request the repossession of the goods from the consignee's care, consists in that, although the old regulation did not require sending a prior notice and in relation to picking up the goods, the New Civil Code conditions the repossession of the goods by giving a prior notice allowing the consignee to hand them over (Article 2057(3) of the New Civil Code).

Assuming that the consignee refuses to hand over the goods, they may be repossessed by a presidential ordinance, as per the provisions of Article 581 of the Civil Procedure Code, stipulating that, in expedite events, the court of law may order temporary measures for keeping hold of a right which would have caused damages by delay, in order to prevent an imminent loss and which could not be remedied, and also to remove any impediments which could occur on the occasion of an execution[18].

Thus, by means of the presidential ordinance, the consignor may exercise its right to pick up the goods from the consignee's care which is not the owner, to the extent in which it stands against the goods being taken over by the consignor. Moreover, the presidential ordinance may be granted also in view of the consignor picking up the goods at any moment, even in case the contract stipulates a clause regarding the obligation to give a prior notice.

The right of the consignor-owner to dispose of its goods subsequent to them being delivered to the consignee in view of performing the contract is also materialized in its recognized possibility to inspect and check the standing of the goods, at any moment, throughout the entire duration of the contract (Article 2057(1) thesis II).

[17] These conclusions are a natural consequence of keeping the ownership right over the goods in the consignor's patrimony, as Article 3(3) of Law No. 178/1934 also mentions.

[18] As per the old regulation, Article 4(3) of Law No. 178/1934 stipulates that the presidential ordinance may be given even without summoning the parties, to the extent in which the consignment contract is executed by a signed in the form of a signed document not notarized.

The consignor-owner is also acknowledged the right to unilaterally change the terms for the sale of the goods entrusted to the consignee, unless otherwise provided under the contract (provisions of Article 2056(2) of the New Civil Code). The consignee will be bound by this change, as of the moment when it is informed in this respect.

An additional consequence of the fact that the ownership over the goods is not transferred to the consignee following the goods being handed over is also the event in which, as per Article 2057(4) thesis I of the New Civil Code, in case consignor is declared bankrupt, the goods are included in its statement of assets. Therefore, since the handing over of goods does not turn the consignee in their owner, but it shall simply become their temporary holder, the solution according to which the consignor being declared bankrupt causes the goods to be included in the statement of assets of all the goods belonging thereto is justified, in other words, both the goods it actually owns but also the goods in the consignee's possession, under the consignment contract. The latter goods may be used just as well to cover the consignor-owner's debts, or may be divided following the closing of the bankruptcy procedure, to the extent in which the value of the consignor's goods exceeds the value of the debts.

Consequently, the consignee being declared bankrupt does not trigger the inclusion of the goods received in consignment in its statement of assets, and they shall be excluded from the consignee's statement of assets and shall be immediately repossessed by the consignor (Article 2057(4) thesis II of the New Civil Code).

b) The obligation to pay the consignee the rightful remuneration

The new civil regulation establishes the onerous nature of the consignment contract, based on a presumption set by the Article 2058 of the New Civil Code, according to which the consignment contract is presumed to be onerous.

The quantification of the amount which the consignor is bound to pay is made either by a contractual clause, or based on objective conditions under which the contract is performed, as shown hereinafter. In this sense, according to Article 2058 of the New Civil Code, the remuneration to which the consignee is entrusted is established by other or, in lack thereof, as the difference between the sale prices established by the consignor and the actual sale price. If the sale was made at the current price, the court of law shall establish the remuneration.

Firstly, the parties are free to establish the consignee's remuneration by a contractual clause referring to this aspect.

Secondly, to the extent in which the parties made no mention in the contract with respect to the retribution or benefit given to the consignee, it would only be entitled to the overcharges it shall obtain from the sale. In other words, the consignee may claim, as remuneration, the difference between the prices actually collected under the sale-purchase contracts that it concluded with third parties having as object the consignor's movable goods, and the sale prices provided by the consignment contract or the consignor's notes, invoices, or instructions[19]. Thus, if either by contract or based on the instructions given by the consignor certain minimum prices are established for the sale of the goods, any higher value obtained from third parties following the consignee's endeavors or qualities, could be in its benefit, as remuneration.

[19] In this sense the provisions of Article 12(1) of Law No. 178/1934 were regulated.

Thirdly, to the extent in which the remuneration to which the consignee is entitled under the consignment contract, is determined neither by contract nor by the consignor's notes, invoices or instructions, and the sale of the goods to third parties is made by the consignee at the current price, the consignee may address a court of law to establish its retribution. In view of establishing the accurate amount thereof, the court of law shall take into consideration the difficulty of the sale, the diligences the consignee makes for performing the contract and the remunerations practiced on the relevant market for similar operations (Article 2058(2) of the New Civil Code). This regulation takes over the old one, similarly stipulating under Article 12(2) of Law No. 178/1934.

In conclusion, the onerous nature of the consignment contract presupposes the consignee's right to receive a payment for its rendered service, either at the value established by the parties' consent, or at the value established by the court of law.

Bearing in mind the paragraphs above, it follows that the appropriate retribution to which the consignee is entitled is established in lump amounts, by a fixed amount, or in percentages, by reference to the price obtained for the sold goods[20].

c) Obligation to repay the consignee the expenses incurred by it on the occasion of performing the tasks

In this sense, as per Article 2059 of the New Civil Code, the consignor is bound to cover the consignee's expenses incurred for preserving and selling the goods, unless otherwise provided by the contract. Therefore, the obligation to repay the expenses made by the consignee on the occasion of the received tasks also includes the amounts made by it for the preservation and sale of the goods received in consignment, for concluding contracts with third parties, and also for protecting it against any loss incurred while performing the consignment contract. Such hypotheses, in which performing the contractual obligations causes losses to the consignee, the losses shall be covered by the grantor of the power of attorney.

Moreover, the consignee's right of being indemnified does not survive in case the consignor repossesses the goods or orders them to be removed from the consignee's possession, and also in case the consignment contract may not be performed, without any fault of the consignee. Thus, the latter is entitled to have its expenses made for performing the contract covered (Article 2059(2) of the New Civil Code). To the extent in which the consignor is bound to repossess the goods in the care of the consignee and it fails to fulfil this task, the consignor in default is held liable to pay the maintenance and storage expenses. Failure to fulfil its obligations triggers the consignor's liability for any loss suffered by the consignee on the occasion of preserving and storing the goods.

In case the contract is terminated by the consignee's renunciation, if, given the circumstances, the consignor may not promptly repossess the goods in question, the consignee shall remain liable for its obligations to keep, insure and maintain the goods until the consignor repossesses them. The consignor is bound to carry out any diligence necessary for repossessing the goods promptly after the contract is terminated, subject to the sanction of covering the costs for preservation, storage and maintenance (Article 2059(4) of the New Civil Code).

B) Consignee's obligations

a) Obligation to receive, keep and insure the goods entrusted for being sold

Based on the consignment contract, the consignor issues a power of attorney whereby it empowers the consignee to conclude with third parties sale-purchase legal documents for certain

[20] St. D. Cărpenaru, *op. cit.*, p. 586; F.A. Moțiu, *Contractele speciale,* p. 260.

goods belonging to the consignor, in its own name and on behalf of the consignor. In order to fulfil the granted tasks, the consignee should be entrusted with the goods in question, with respect to which it should fulfil certain obligations to receive, preserve and insure, throughout the entire duration in which the goods are in the consignee's possession.

This obligation to receive and preserve the goods which shall be the object of future sale-purchase contracts, is an obligation that is reciprocal and correlative to that in the consignor's care consisting of having to entrust the consignee with the goods in question.

The obligation to receive the goods object of the consignment contract, presupposes their being received by the consignee, however not limited thereto. The obligation to take over the consignor's goods is a complex obligation, which also implies the preservation of goods[21] and allowing them to be at the free disposal of the consignor-owner throughout the entire duration. Taking into consideration that the delivery of goods by the proxy does not also cause the transfer of the ownership right in the consignee's patrimony, it follows that the property, and implicitly the prerogative of disposal, remain in the consignor's benefit, which, at any moment, may amend the granted power of attorney or may give additional instructions as regards the conditions for selling its goods.

In addition, the consignor may also exercise the rights over the goods in question also by its acknowledged possibility to inspect, control and request their being repossessed at any time. Such hypotheses, in which the consignor wishes to repossess the goods, as per Article 2057(3) of the New Civil Code, the consignor is bound to send a prior notice to the consignee, with the purpose of granting him a term within which it may prepare the goods to be handed over.

Regarding the means of exercising the obligation of preserving the goods received under the consignment contract, the New Civil Code stipulates under Article 2060(1) that the consignee shall receive and shall keep the goods as an owner and shall give them to the buyer or, as the case may be, the consignor, in the standing in which it received them for being sold. In other words, on the one hand, the conclusion of sale-purchase contracts with third parties with respect to the goods entrusted in consignment, should bear in mind the standing in which the goods were received from the consignor. On the other hand, to the extent in which the goods are not sold to third parties, and returned to the consignor, they should even more be sent back in the same standing in which they were handed over, and the consignee is bound to preserve and insure them.

As regards the obligation to receive and preserve the goods in consignment, all costs for their preservation and sale of the goods entrusted in consignment, are in the consignor's care, unless otherwise provided by a contractual clause, as per Article 2059(1) of the New Civil Code.

In view of verifying the means in which the consignee fulfils the obligations assumed under the consignment contract, the consignor is acknowledged the right to control and verify, at any moment, the merchandise entrusted to the consignee, and also to proceed to an inventory thereof (Article 2057(1) of the New Civil Code). In order for it to exercise this right, the old law acknowledged the consignee's right to obtain, at any moment, upon request, the presidential ordinance (Article 8 of Law No. 178/1934).

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[21] Supreme Court of Justice, commercial section, decision No. 572/2000, in Pandectele române No. 4/2001, p. 52; Bucharest Court of Appeal, commercial section, decision No. 466/1999, in Bucharest Court of Appeal. Culegere de practică judiciară în materie comercială, 2007, volume I, Wolters Kluwer Printing, 2008, p. 88.

Another aspect which the obligation to receive established in the care of the consignee presupposes, consists in the fact that it is bound to insure the goods given in consignment. Thus, as per Article 2060 of the New Civil Code, the consignee shall insure the goods at the value established by the contractual parties of the consignment contract or, in lack thereof, at the goods' price estimate on the day when the goods are received in consignment. The consignee is bound to regularly pay these insurance premiums.

Accordingly, the purpose which this provision wishes to attain is that of procuring that all the risks to which the goods are exposed to during the period in which they are in the consignee's care, be covered by the concluded insurance, starting with when the goods are sent by the consignor.

As regards the consignee's obligation to insure the goods, correlatively to this obligation, in its care there also exists the duty to regularly pay the insurance premiums related to the insurance contract which was concluded. As long as the goods are in the consignee's care, it is also bound to insure them, so its obligation to also make the payment arising from the insurance contract is legitimate. Any insurance concluded by the consignee, with respect to the goods entrusted in consignment, are deemed as fully concluded in favour of the consignor, provided that it notifies the insurer with respect to the consignment contract, prior to paying any damage. Consequently, in order for the consignor to benefit from the insurance, the consignor is bound to inform the insurer that the goods are in the consignee's care based on a consignment contract, at any moment, until damages in case of occurrence of the ensured risk are paid.

The New Civil Code, by Article 2060(2) thesis II, provides that the consignee's liability is engaged towards the consignor for the deterioration or disappearance of the goods due to force majeure events or an action of a third party, if they were not insured upon their receipt in consignment or the insurance expired and was not renewed or the insurance company was not approved by the consignor.

To the extent in which the consignee fails to fulfil its obligation of insuring the goods object of the consignment contract, the consignor may insure the goods at the consignee's expense, in order to cover the risk of disappearance or deterioration of the goods. Such insurance is rightfully concluded in the consignor's benefit, provided that it notifies the consignment contract to the insurer prior to it paying the damages (Article 2060(3) and (4) of the New Civil Code).

As regards the consignee's obligation to receive, keep and insure the goods entrusted for being sold, it should also be mentioned, that, regarding the fact that the ownership over the goods in question is not transferred in the consignor's patrimony, in case (…) the consignee is declared bankrupt, the goods are excluded from its statement of assets and shall be repossessed promptly by the consignor (Article 2057(4) thesis II of the New Civil Code).

b) Obligation to perform the tasks given by the consignor

Under the consignment contract, the consignee undertakes the obligation to conclude with third parties sale-purchase contracts with respect to certain movable goods belonging to the consignor. Based on the power of attorney granted by the consignor, the consignee concluded legal documents with third parties, in its own name and on behalf of the grantor of the power of attorney, in other words, in this way it performs its contractual obligations.

The sale-purchase contracts are concluded under the terms and conditions indicated by the consignor, which had an interest in perfecting such operations. The consignee may sell or alienate the goods entrusted in consignment, only in the conditions provided by contract. In other words, the

consignee is bound by the consignor's instructions given under the power of attorney, and may act, in line with its capacity as intermediary without representation, only within the limits provided by the beneficiary of the business. The consignee undertakes under the consignment contract, the obligation to sell the consignor's goods, however the actual means of fulfilling its duties, meaning complying with the terms and conditions for concluding the sale-purchase contracts with third parties, the persons towards which the goods are alienated, the sale prices and the means of collecting money etc. are those imposed by the consignor.

Based on the consignor's right, as actual beneficiary of the contracts concluded by the consignee with third parties, of imposing the limits and conditions under which the proxy may act, the consignor may unilaterally change, at any time throughout the duration of the contract, the terms of the sale, unless otherwise provided by the contract. The consignor may, therefore, amend the provisions included in the power of attorney granted to the consignee, in the sense of amending any element relating to the object of the consignment contract.

Such amendments are mandatory for the consignee, since these amendments are communicated in writing. As regards the consignee's obligation to act in its client benefit, any instruction coming from the client is imperative for the intermediary, which by performing the consignment contract serves the consignor's interests. The mentioned rule was also taken over by the new civil regulation under Article 2056(2) which stipulates that subsequently to when the power of attorney is granted, the consignor may unilaterally change the established sale price, and the consignee shall be bound by this amendment since being communicated in relation thereto in writing.

In conclusion, performing the contract is the consignee's main obligation and it is bound to comply with the instructions given by the grantor of the power of attorney, the owner of the sold goods. Nevertheless, in the absence of certain express provisions referring to the terms of sale for the entrusted goods, and in the absence of written instructions coming from the consignor, the consignee may not sell the goods entrusted in consignment , unless for cash and at the market's current prices.

This rule is also taken over by the new civil regulation, which stipulates, under Article 2056(1), that the price at which the good shall be sold is the one established by the contractual parties to the consignment contract, or, in lack thereof, is the current price of the merchandise on the relevant market, at the moment when the sale is made.

In addition, it is also provided that, unless otherwise stipulated or unless the consignor instructs otherwise, the sale shall be made only by way of cash payments, by transfer or crossed cheque and only at the merchandise's current prices, as per paragraph (1) of the same article (Article 2056(3) of the New Civil Code).

Consequently, based on an express provision included in the contract, the consignee may be authorized to sell the goods on credit, also mentioning the terms of such sale. In such situation, since the sale-purchase contracts concluded with third parties are concluded on behalf of the consignor, in view of being profitable for it, the receivable for the price owed for the goods sold on credit belongs to the consignor[22]. Thus, the consignee may validly take any action on the receivable towards debtors and third parties, may receive the payment, may follow the receivable and may take any insurance measures.

[22] St. D. Cărpenaru, *op.cit*., p. 588.

Nevertheless, in case the consignee is granted the right to sell the goods on credit, unless the parties agree otherwise, it may grant the third party buyer a term within which it may pay the price of, which shall not be longer than 90 days and exclusively based on a bill of exchange or promissory note (New Civil Code, Article 2061(1)).

If the goods were sold on credit, unless otherwise provided, the consignee is jointly liable towards the consignor, for the payment on term of the price for the goods sold in this method (Article 2061(2) of the New Civil Code).

As regards the acknowledgement of the possibility of making a sale to third parties on credit, it was established that the consignor has the right to forbid the consignee to make a sale on credit to certain companies or particular persons, even if by contract the consignee was empowered to make sales on credit, with or without restrictions (Article 15 of Law No. 178/1934). This interdiction is mandatory for the consignee since being informed in writing in relation thereto.

c) Obligation to be accountable to the consignor for fulfilling the granted power of attorney

Under the consignment contract, the consignee is bound to comply with the instructions given by the consignor in view of concluding sale-purchase contracts with third parties, with respect to the consignor's goods. As an effect of assuming towards the consignor the mentioned obligations, in the consignee's care the obligation to be accountable in front of the grantor of the power of attorney for how it fulfilled the entrusted tasks shall also arise.

The obligation to be accountable has not been taken over by the new civil regulation however with respect to the consignee's capacity as intermediary without representation acting on behalf of the consignor we believe it is necessary to maintain such obligation in the consignee's care. This examination is made by reference to the old provisions of Law No. 178/1934.

The obligation of accountability is a complex obligation, which, on the one hand, gives rise to duties in the consignee's care, and on the other hand, to correlative rights in the consignor's benefit.

Thus, as regards the first aspect which the obligation of accountability presupposes, namely, that of the consignee being bound to regularly inform the consignor on the manner in which the power of attorney is fulfilled, it should be mentioned that in its capacity of intermediary without representation, the consignee shall inform the consignor on any action taken in relation to its goods, received in consignment, which could mean an act in the sense of performing the contract, and just as well a ground for causing incapacity or hindering the contract being performed.

As per Article 18(1) and (2) of Law No. 178/1934, the consignee is bound to inform the consignor, at the terms stipulated in the contract, on all the sales it made that had as object the goods which were entrusted in consignment by the consignor. The notice sent to the consignor shall have to precisely indicate the goods sold in exchange for cash and the goods sold on credit, indicating, in the case of the latter goods, the name and full address of each debtor, the owed amount based on the sale-purchase contracts, the granted payment term, and also the received bills of exchange or guarantees. In case the contract contains no such provision relating to the consignee being bound to inform, at the latest, at the end of each week the consignee is bound to inform the consignor on any operations relating to the week in question.

As regards the consignee's obligation to be accountable to the consignor for the manner in which it fulfilled the received tasks, an additional aspect which this duty presupposes consists in the

fact that, as per Article 17(1)-(3) of Law No. 178/1934, the consignee is bound to account for all the operations relating to the goods entrusted to him in consignment, so that their control and verification may be easily made.

In this sense, by its clauses the consignment contract may stipulate that the consignee is bound to keep one or more special registries in which it shall record the operations relating to the goods entrusted in consignment. In case the contract provides that the consignee should keep special registries, it shall be bound to present these registries, upon the consignor's first request. In order to proceed to the examination and verification of the special consignment registries, the consignor is entitled to obtain a presidential ordinance, as per Article 4 of this Law.

2) Consignee's right of lien

As previously mentioned, the consignment contract is an onerous contract, which gives rise in the care of the consignor to the obligation to remunerate the consignee for the rendered service. A right of receivable over the amounts to which it is entitled for the rendered service in the consignor's interest is acknowledged in favour of the consignee.

The consignment contract is a variety of the contract of commission, meaning that certain provisions setting out the legal regime of the contract of commission are applicable to it, to the extent in which they are compatible. Thus, as regards the contract of commission, the old regulation acknowledged for the consignee, by analogically applying the provisions relating to the contract of mandate with representation, a special privilege[23], with the purpose of covering all amounts which are owed to it based on or as a result of performing the contract of commission[24], the consignment contract contains different provisions. In the case of the contract of commission, the special privilege established in favor of the consignee envisages covering, on the one hand, the commission owed to it for the rendered service in the principal's interest, and on the other hand, any other expenses for fulfilling the power of attorney, or the losses incurred while performing the contract. The special privilege of the commission agent is exerted over all of the principal's goods, object of the contract of commission and which are in the commission agent's care or disposal.

The issue of the consignee's special privilege over the consignor's goods is taken over in the new civil regulation which stipulates under Article 2062, that, unless otherwise provided, the consignee has no right of lien over the goods received in consignment and the amounts to which the consignor is entitled, for its receivables in it. Unlike the provisions of Law No. 178/1934, the New Civil Code acknowledges the consignee's possibility to exert a right of lien over the consignor's goods, to the extent in which the parties agree by a contractual clause in this respect.

Even if assuming that the right of lien was exercised, the consignee's obligations regarding the maintenance of goods still remain valid, however the storage costs fall on the consignor, if the exercise of the right of lien proves substantiated.

Absence of the consignee's right of lien over the consignor's goods, as regulated by the New Civil Code, falls in line with the provisions of Law No. 178/1934. Hence, unlike the regulation included in the contract of commission and although the consignment contract is a variety of the contract of commission, as far as the consignment contract is concerned, according to Article 20 of

[23] F.A. Moțiu, *Contractele comerciale de intermediere,* p. 93-97.

[24] With respect to the commission agent's right of lien over the principal's goods, see Ioana-Nelly Militaru, *Privilegiul dreptului de retenție al comisionarului*, in Revista de drept comercial No. 1/2008, p. 65 et seq.

Law No. 178/1934, the consignee may not exercise towards the consignor any right of lien, and neither on the goods entrusted to it in consignment, nor on the amounts or the amounts obtained from selling these goods. In other words, certain receivables belonging to the consignee against the consignor as a result of performing the contract do not entitle the consignee to exert a right of lien over its movable goods or over the amounts collected from third parties after sale-purchase contracts were concluded.

This special regulation does not display a logical justification, of the kind to explain the difference in the legal regimes between the contract of mandate and the contract of commission, on the one hand, and the consignment contract, on the other.

3) Effects of performing the consignment contract

a) Relations between the consignee and third parties

As shown above under the consignment contract the consignor shall grant a power of attorney, whereby it shall empower the consignee to conclude sale-purchase contracts for certain movable goods belonging to the consignor with third parties, in the consignee's own name, however on behalf of the grantor of the power of attorney.

Hence, performing the consignment contract, under the terms established by the parties, leads to direct legal relations between the consignee and third parties, in the virtue of which it shall transfer the ownership right over the goods in question to third parties, acting in its own name, as if it were the real owner of the goods. Therefore, the effect of performing the consignment contract consists in creating direct legal relations between the consignee, as seller, and third parties, as buyers. These relations are governed by rules applicable in the matter of sale-purchase contracts.

Bearing in mind that the sale of the goods is made by the consignee in its own name, this makes the third party buyers have the benefit of a direct action against the consignee, whereby its liability towards third parties for failure to fulfil any obligation undertaken under the concluded sale-purchase contract is triggered.

In addition, the consignee may take action against third parties, resorting to any action which the seller has, as per the law, for performing the sale-purchase contract and for the price being paid.

b) Relations between the consignor and third parties

Based on the consignment contract, the consignor acts as beneficiary of the operations of intermediation without representation which the consignee exercises, being the actual owner of the affairs concluded by its proxy. Hence, the sale-purchase contracts for the goods belonging to the consignor and entrusted in consignment, although are concluded in the consignee's own name, they are in the consignor's benefit. On the one hand, the latter is the actual owner of the sold goods, and, on the other hand, the creditor of the amounts representing the value of the goods.

In other words, although between the consignee acting as seller in its own name, and third party buyers, direct legal relations are created which are particular to sale-purchase contracts, nevertheless, the consignee is not the actual owner of the goods thus alienated. Accordingly, bearing in mind that these contracts are concluded based on a power of attorney granted by the consignor and on its behalf[25], the right over the price obtained by the consignee in exchange for the sold movable goods belongs to the consignor.

[25] Supreme Court of Justice, commercial section, decision No. 4311/2002, loc. cit., p. 115.

Moreover, the transfer of the real rights over the sold movable goods and the risks relating to the goods operates directly between the consignor and third parties[26]. The direct transfer of the ownership from the consignor's patrimony to that of third parties' is the logical consequence of the fact that the ownership over the goods entrusted in consignment does not consecutively pass through the consignee's patrimony. The latter is being handed over the goods as simple temporary holder in charge of certain obligations however the ownership and disposal right still remain in the patrimony of the consignor, until being sold to the third parties[27].

Hence, as regards the effects of performing the consignment contract, no direct legal relation is established between the consignor and third party buyers.

Nevertheless, bearing in mind the consignee's simple capacity of intermediary, even though it would have undertaken certain obligations in its relation with third parties by the concluded sale-purchase contracts, for instance, guaranteeing hidden vices of the goods, such obligations in question fall in the duty of the consignor[28].

In case the goods given in consignment are sold on credit, the receivable for the owed price belongs to the consignor[29], as actual owner of the affair.

As per Article 2061(2) of the New Civil Code, unless the consignment contract provides otherwise, the consignee is jointly liable together with the buyer towards the consignor for the payment of the price in exchange for the merchandise sold on credit.

Towards debtors and third parties, the consignee may validly take any action over the respective receivable and, especially, shall be able to receive the payment, and follow the payment being collected and may take any insurance measures[30]. This conclusion is justified by the fact that, at least apparently, the consignee acts as seller-owner of the goods, thus being acknowledged any actions for satisfying its receivable and the proper performance of the third parties' obligations.

4) Consequences of non-observance of obligations

Under the consignment contract, both the consignor and the consignee, undertake a number of mutual obligations, which are the body of the contract, as previously examined. Failure to observe any such obligations, from the part of any party, triggers the liability of the party in default. As per

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[26] In this sence, see, Brasov County Tribunal, civil decision No. 1214/1975, in Revista română de drept No. 4/1976, p. 52.

[27] F.A. Moțiu, *Contractele speciale,* p. 263.

[28] In this sense, please see, Cristina Popa Nistorescu, *Contractul de consignație,* in Revista de drept comercial No. 11/2009, p. 115.

[29] R.I. Motica, L. Bercea, *Drept comercial român şi drept bancar*, volume I, Lumina Lex Printing, Bucharest, 2001, p. 364.

[30] In this sense the old regulation applicable to the consignment contract made stipulations under Article 13(2) of Law No. 178/1934. Nevertheless, upon the consignor's first request, the consignee is bound to notify the debtor the source and the nature of the receivable. In other words, the consignee is bound to exceed its capacity of a simple intermediary, to the extent requested by the consignor. As of the moment the consignee delivers the notification, it will no longer be able to take any valid action with respect to the receivable in question, the rights hereinafter exclusively belonging to the consignor (Article 13(3) of Law No. 178/1934). Prior to the notification or in case the consignee refuses to send the notification, the consignor may seize at any moment the amounts owed in the debtors' hands, without any bail (Article 13(4) of Law No. 178/1934).

the legal provisions in the matter of the consignment contract, such liability may be, as the case may be, civil or criminal.

a) Civil liability

As per the legal provisions relating to the consignment contract which were previously examined, signing the contract presupposes the rise of legal relations between the consignor and consignee, based on which the parties acquire rights and assume reciprocal obligations, appropriate to the quality in which they act under the contract.

The consignment contract is a variety of the contract of commission, hence, as regards the rights and obligations between the consignor and consignee, by analogy, the rules in the matter of the contract of commission shall apply; according to these rules between the principal and consignee there are the same rights and obligations as between the principal and proxy. Accordingly, the relations between the parties to the consignment contract are similar to those specific for the contract of mandate.

Thus, any party's failure to observe the contractual obligations, triggers the contractual liability of the party in default, under the legal terms provided for the contract of mandate[31].

b) Criminal liability

The provisions regarding the criminal liability under the consignment contract found in Law No. 178/1934, which was abrogated since the New Civil Code entered into force, were not taken over by the latter.

§IV. TERMINATION OF THE CONSIGNMENT CONTRACT

1) Cases of termination of the consignment contract

A) General causes for terminating the consignment contract

Termination of the consignment contract may be due to any of the general causes for extinguishing the contractual obligations. Hence, the consignment contract terminates, by the consignee fulfilling the tasks given by the consignor, by the lapse of the term for which the contract was concluded and within which the consignee was bound to fulfil the undertaken tasks, by meeting the resolutive condition affecting the contract, or by fortuitous incapacity of fulfilment, for instance, due to the loss of the movable goods entrusted to the consignee in view of being sold and being object of the contract etc.

B) Main causes for terminating the consignment contract

As regards the main cases for terminating the consignment contract, as per Article 2063 of the New Civil Code, it may be terminated by the consignor rescinding the contract, the consignee renouncing to it, for any of the causes indicated under the contract, and also in case of death, dissolution, bankruptcy, incapacitation or de-registration of the consignor or consignee.

a) Rescindment of the power of attorney granted by the consignor

The consignment contract terminates as a result of the power of attorney granted by the consignor being rescinded. Taking into consideration that the consignor grants the power of attorney, in view of the consignee concluding sale-purchase contracts with respect to the consignor's movable goods given in consignment, it follows that the main interest in entering into contracts with third parties belongs to the grantor of the power of attorney. Thus, although the sale is concluded in its

[31] St. D. Cărpenaru, *op.cit*., p. 590.

own name by the consignee, the patrimonial advantages it presupposes are reflected on the consignor, as true owner of the affair.

Consequently, if the consignor's interest in selling its goods via an intermediary disappears, the consignor is acknowledged the right to revoke the granted power of attorney, which fact leads to the termination of the contract. The consignment contract may not continue if the party interested in performing it or not revokes the right to produce effects in its patrimony by contracting, on its behalf with third parties. This solution is rightful even more since the effects of the contracts with third parties, consisting in the transfer the ownership right over the sold movable goods, consist in transferring the ownership right over the sold movable goods, directly affecting the consignor.

As regards the termination of the contract after the consignor rescinds it, along the arguments relating to the appropriateness of the contract, the right to revoke the power of attorney is also justified by the *intuitu personae* nature of the legal document. The consignment contract is especially executed based on the consignor's trust in the consignee's experience and professional conduct. Assuming that throughout the contract, this trust is lost,[32], to maintain the contract is no longer justified[33].

The consignment contract, as shown above, displays an onerous nature. This feature may also give rise to the consignee's right to claim damages for the losses suffered as a result of the unexpected or abusive rescindment. The action for damages is the sole right acknowledged to the consignee in case an unexpected or abusive rescindment, the repossession action is not permitted.

The provisions of the New Civil Code expressly establish, as previously mentioned, that the consignor revoking the power of attorney leads to the termination of the contract (Article 2063 of the New Civil Code). A similar conclusion may also be derived from Article 2057(2) thesis II, according to which the consignor may repossess the movable goods entrusted in consignment, at any time, even if the contract was executed for a limited duration.

b) The consignee renouncing the contract

The consignment contract terminates as a result of the consignee renouncing the contract. Equally to the possibility acknowledged to the consignor to revoke the granted power of attorney, the consignee's right to renounce to perform the contract is likewise admitted; this fact leads to the impossibility of continuing with the contract under the terms in which it was initially concluded and consequently, to its termination. The consignee may renounce to the granted power of attorney at any time, subject to the consignor being notified, in order to avoid causing it any losses.

This cause for terminating the consignment contract is expressly regulated by Article 2063 of the New Civil Code, and is motivated by the *intuitu personae* nature of the contract, which in the absence of the consent from one of the contractual parties to terminate or continue with the contract shall cause the contract to terminate. The consequence of terminating the contract following the consignee's renunciation is that the consignor is bound to promptly repossess the goods entrusted in consignment.

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[32] For additional explanations, see Claudia Roşu, *Contractele de mandat şi efectele lor,* p. 103.

[33] In this sense, as per Article 3(2) of Law No. 178/1934, the consignment contract, and more specifically the power of attorney underlying the consignee's possibility to act on behalf of the consignor may be revoked by the consignor at any time after granting it, even if the contract was concluded for a limited period, unless otherwise provided. Thus, irrespective whether the execution of the contract was agreed for a limited or unlimited period, the possibility to revoke the power of attorney is free, may occur at any time, being motivated by the very fact that the execution of the contract directly depends on the consignor's interests, which should come first.

As per Article 2059 of the New Civil Code, if, given the circumstances, the consignor may not promptly repossesses the goods, in case the contract terminates by renunciation from the consignee, it shall remain bound by its obligations to keep, insure and maintain the goods until the consignor is able to repossesses them. Thus, as long as the goods are in the consignee's care, the latter is bound to preserve, insure and maintain them, if for objective reasons the consignor may not repossess the goods.

Nevertheless, the consignor is bound to take any necessary diligence to repossess the goods promptly after the contract is terminated, subject to covering the costs for preservation, storage and maintenance.

c) Death, dissolution, bankruptcy, incapacitation or de-registration of the consignor or consignee

Death, dissolution or de-registration of the consignor or consignee cause the termination of the contract, based on its *intuitu personae* nature. The consignment contract is executed in consideration of the consignee's experience and capacity to serve the consignor's interests by concluding with third parties sale-purchase contracts regarding its goods, and also in consideration of the consignor's possibilities to satisfy its obligations for paying the remuneration undertaken by contract. In case the other party dies or disappears, the premises which were taken into consideration when the contract was executed disappear.

The consignee is entitled to be remunerated for its rendered services until the consignor's death, pro rata with what has been owed to it for fully performing the granted power of attorney. This rule is also applicable as regards partial remuneration in case of the consignor's death, which shall be made by its inheritors.

The consignment contract terminates also as a result of bankruptcy or adjudication of incapacity applied to any party[34]. The motive is that the contractual parties should be legally competent – the consignor should be itself able to conclude the sale-purchase contracts for which it grants a power of attorney to the consignee, while the consignee should be fully legally competent, since, in performing the contract, it concludes legal documents in its own name. Loss of this competence causes inability to maintain the contract.

2) Effects of terminating the consignment contract

Termination of the consignment contract results in the parties' obligations being extinguished. On the one hand, the undertaken obligations consisting in concluding with third parties sale-purchase contracts with respect to the consignor's goods should no longer be performed. In addition, the consignee, after the contract is terminated, should return the consignor the movable goods entrusted in consignment, or should hand over the amounts received in exchange for the sold goods. Further, the consignee should account to the consignor for the manner in which it chose to fulfil the given tasks.

[34] Based on the old regulation, as per Article 21 of Law No. 178/1934, in case the consignee is bankrupt, the consignor may reclaim the entrusted goods or their price. Since the movable goods entrusted in consignment do not successively pass in the consignee's patrimony, the goods in question or price obtained by being sold to third parties, are not included in the consignee's statement of assets.

On the other hand, the consignor is bound to take the necessary measures to recover the unsold goods from the care of the consignee, also taking along the amounts or values obtained by it in exchange for the sold goods. The consignee is bound to pay the consignee the remuneration appropriate for the part of the contract which was performed until it was terminated, and also to indemnify it for all the expenses or losses suffered as result of the undertaken tasks.

As per Article 2057(4) thesis I of the New Civil Code, in case the termination of the consignment contract occurs as a result of the consignor being declared bankrupt, the goods entrusted to the consignee in consignment are included in the consignor's statement of assets. In other words, these goods should be returned and may be followed by the consignor's creditors. This provision is a consequence of the fact that the goods entrusted in consignment are not successively passed in the consignee's patrimony, since they are handed over to it as simple temporary holder, while the ownership continues to remain in the consignor's patrimony.

Assuming otherwise, that the termination of the contract occurs as a result of the consignee being declared bankrupt, the goods entrusted in consignment are excluded from the statement of assets and shall be promptly repossessed by the consignor. Accordingly, the consignee's creditor shall not be able to follow these goods for satisfying their receivables, and the goods should be returned to the consignor. The explanation resides in the fact that the property over the goods remains in the consignor's patrimony, and the consignee is a simple temporary holder until they are sold to third parties or being returned in the care of their actual owner.

In the same sense, Law No. 178/1934 also stipulates under Article 21, as follows: in case the consignee is bankrupt, the consignor may reclaim the goods entrusted in consignment or their price which was not paid by money, or otherwise.

CONCLUSIONS

The consignment contract is therefore a species of mandate without representation which has as representative the contract of commission. Therefore the contract of consignment derives from the contract of commission.

But the consignment contract is a special contract, used mainly by entrepreneurs, found on a very large scale in both internal and external commercial relationships. Thru it a faster unloading of goods is possible, mainly because the consignees have their own network used to unload and deliver the goods on the market. also, this type of contract favors cost reductions of the consignee prices regarding the launch, advertising, direct sale of a large quantity of goods, making them more accessible to the consumer. Therefore many producers of goods sell by means of a consignee, usually a specialized company already known on the determined market territory.

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NOVATION, WAY OF MODIFYING THE LIABILITIES – THEORETICAL AND PRACTICAL ASPECTS

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Abstract
Although largely treated by the scholars in their writings, the novation is not a common practice in the Romanian juridical area. As a definition, the novation represents that juridical mechanism through which the parties of an agreement decide to replace a pre-existent valid liability with a new liability, by observing certain conditions.
The purpose of this paper is, mainly, to highlight the amendments brought by the New Civil Code and to explain their impact on the operation under discussion.

Keywords: *New Civil Code, novation, modify, liability, parties, agreement.*

Introduction

Defined as the convention based on which the parties extinguish an old liability and replace it with a new liability[1], the novation presumes the existence of a causality relationship between the two successive liabilities, thus: the extinguishing of the old liability depends on the generation of the new liability and, also, the generation of the new liability depends on the extinguishing of the old liability.

Regulated by the Civil Code from 1864, in Chapter VIII treating on the extinguishing of liabilities (more specifically, in articles 1128 to 1137), the novation is currently regulated in Title VI – *Conveyance and transformation of liabilities* from the Civil Code in force starting with the 1st of October 2011, respectively in articles 1609 to 1614. In our opinion, based on the current regulation regarding novation, the previous interpretations belonging to certain doctrinaires were discarded, which, taking into account the old regulation and the fact that through this operation the old liability is extinguished, considered and analyzed it as being a true juridical means of extinguishing a compulsory relationship[2].

Like many other Romanian law operations, novation, too, originates in the Roman law. The latter saw a great importance in the period when the assignment of claims, just like any other means of assignment of liabilities, was not allowed in Rome; thus, the novation appeared as a means of conveying a liability, allowing the interchange or indirect replacement of the creditor or of the debtor by another person[3]. In the Roman law, novation was defined by Ulpian as being "*a transfer of duty from a previous liability to a new liability (prioris debiti in aliam liabilityem transfusion atque translatio)*", and further on, novation occurred through the change of duty between the same parties, thus replacing an older liability with a new one[4].

Although long exploited in the specialized doctrine, the proposed theme remains, however, a subject open to interpretations and debates, with the necessity of making new determinations in order

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[1] See: L. Pop, *Contributions to the study of civil liabilities*, "Universul Juridic" Publishing House, Bucharest, 2010; Ion Turcu, *New Civil Code as republished, Book 5. On liabilities, art. 1164-1649*, "CH Beck" Publishing House, Bucharest, 2011; C. Stătescu, C. Bîrsan, *Civil law. General theory of liabilities,* 8th Edition, "ALL Beck" Publishing House.

[2] L. Pop, *Contributions to the study of civil liabilities*, "Universul Juridic" Publishing House, Bucharest, 2010, page 250; M. Duță, *Dictionary of Private Law. 2nd Edition*. "Mondan" Publishing House, 2002.

[3] L. Pop, *Contributions to the study of civil liabilities*, "Universul Juridic" Publishing House, Bucharest, 2010, page 251.

[4] L. Pop, *Contributions to the study of civil liabilities*, "Universul Juridic" Publishing House, Bucharest, 2010, page 251.

to emphasize the changes brought to the matter under discussion through the legislative changes recently occurred in our country. Moreover, we consider that the proposed theme is of current interest, also due to the fact that in a market economy undergoing continuous changes, the liabilities gained, in time, a special significance due to their decisive role in the destiny of any participant to a juridical relationship.

In conclusion, the main purpose for drafting this paper consists in making a complex analysis of the novation operation, first of all from the perspective of the Civil Code provisions, recently adopted in our country.

Notion. Types of novation. In the course of time, the operation being the subject of the present study has been assigned several definitions, but we will only focus on the one according to which novation is the convention through which the parties to a compulsory juridical relationship extinguish an existing liability, and replace it with a new liability[5]. As we will see hereinafter, this definition assigned to novation is of special importance for establishing and analyzing the effects of novation.

According to the above mentioned definition, this operation is characterized by the fact that the compulsory juridical relationship turns into a new compulsory juridical relationship, the extinguishing of the old liability being only a side effect of this operation[6].

The specialized doctrine of our country classifies novation into two categories: objective novation and subjective novation[7]. Thus, *novation is objective* when it occurs between the initial debtor and creditor, but the scope or the cause of the juridical relationship is changed. *Novation is subjective* when the creditor or the debtor under the juridical relationship is replaced with another person. We will deal with the two types of novation in more detail on the course of this paper, as we progress in the analysis of novation as an operation.

Conditions for novation. We must state from the beginning that because the novation is an agreement, it presumes the fulfilment of all the validity conditions concerning agreements, as stipulated by the applicable law. Moreover, according to the specialized doctrine and to case law,[8] novation also presumes the fulfilment of the following conditions[9]:

1. *the existence of a valid pre-existing liability which will be extinguished by novation* – a few mentions should be made in relation to this pre-existing liability.

Thus, novation will not produce effects if the old liability is absolutely null and void. If the old liability is relatively null and void, the realization of novation may mean the confirmation of the liability, which becomes valid, and, consequently, it will turn into a new liability. Of course, for this effect to take place, the novation must be agreed with by the person entitled to invoke the relative null and void character of the liability.

However, in spite all that, in case the person which could ask for the cancellation of the old liability is incapable of doing that or its consent was vitiated at the time of consenting on the novation, it can be subject to cancellation for inability or vice of consent. The same thing happens in

[5]C. Stătescu, C. Bîrsan, *Civil law. General theory of liabilities,* 8th Edition, "ALL Beck" Publishing House, page 385.

[6]Ion Turcu, *New Civil Code as republished, Book 5. On liabilities, art. 1164-1649*, "CH Beck" Publishing House, Bucharest, 2011, page 686.

[7]C. Stătescu, C. Bîrsan, *Civil law. General theory of liabilities,* 8th Edition, "ALL Beck" Publishing House, page, L. Pop, *Contributions to the study of civil liabilities*, "Universul Juridic" Publishing House, Bucharest, 2010, page 251.

[8]Civil Judgment no. 204 from the 5th of March 2009, Court of Appeal of Timişoara, Civil Section.

[9]For further details, see C. Stătescu, C. Bîrsan, *Civil law. General theory of liabilities,* 8th Edition, "ALL Beck" Publishing House, page 386 and subseq.

case the person who was not aware of the fact that the old liability was subject to cancellation, although such person was fully capable of that.

It was still the doctrine the one which stated the fact that novation cannot be completed when the old liability consists in delivering a determined individual good which accidentally dissipated prior to the completion of novation, but not due to the debtor's fault, because the old liability was extinguished by law[10].

It was unanimously apprehended that the liability subject to a condition can be replaced, through novation, with a pure and simple condition (and the other way round). However, things are different in relation to the possibility of novating a liability subject to a condition into a new liability subject to the same condition. Thus, according to some authors, if the old liability was affected by a condition, the same will be the case of the new liability, too, unless otherwise agreed by the parties[11]. On the other hand, it was claimed that the liability subject to a condition cannot be novated into a new liability subject to the same condition, being assessed that the adding or elimination of a condition which affects the juridical relationship represents the modification of the same liability[12].

Finally, an imperfect civil liability can turn, through novation, into a civil liability as such.

2. *the generation of a new valid liability* – as we have mentioned before, the fulfilment of novation is conditioned by the generation of a new liability, which is the reason for the extinguishing of the old liability.

If the new liability is not valid, being null and void, the novation will not produce effects, and the old liabilities will continue to exist. In case the new liability is subject to cancellation, meaning it is relatively null and void, it will consolidate retroactively after the expiry of the term for the prescription of the action for cancelling. Thus, if the new liability is absolutely null and void or cancelled, the old liability will become effective again, on a retroactive basis.

3. *the new liability must contain a new element (aliquid novi) in relation to the old liability which is extinguished* – novation cannot exist without this new element which, as shown before, may consist in the change of parties, of the scope or of the cause for the juridical relationship.

We have shown before[13] that this element of novelty can also consist of the transformation of a conditioned liability into a pure and simple liability or of the transformation of a pure and simple liability into a conditioned liability.

As we have mentioned in the first part of our work, based on an analysis of art. 1609 from the Civil Code, one can infer that novation can be of two types, i.e. novation when one of the subjects to the juridical relationship (creditor or debtor) is changed with another person and novation when another element under the compulsory juridical relationship between the same parties, is changed.

Further on, we will make a brief analysis of the two types of novation:

a) *Novation when the debtor or the creditor changes* – either party to the juridical relationship can be changed through the novation contract.

Novation when the *debtor* is changed is expressly stipulated in paragraph (2) of art. 1609 from the Civil Code, according to which novation occurs when a new debtor replaces the initial debtor, which is discharged by the creditor, thus the initial liability being extinguished. Art. 1609

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[10]L. Pop, *Contributions to the study of civil liabilities*, "Universul Juridic" Publishing House, Bucharest, 2010, page 254.

[11]C. Stătescu, C. Bîrsan, *Civil law. General theory of liabilities,* 8th Edition, "ALL Beck" Publishing House, page 386.

[12]L. Pop, *Contributions to the study of civil liabilities*, "Universul Juridic" Publishing House, Bucharest, 2010, page 254.

[13]C. Stătescu, C. Bîrsan, *Civil law. General theory of liabilities,* 8th Edition, "ALL Beck" Publishing House, page 387, L. Pop, *Contributions to the study of civil liabilities*, "Universul Juridic" Publishing House, Bucharest, 2010, page 258.

paragraph (2), final thesis also states the fact that in this case, novation can operate without the initial consent.

According to the specialized studies from our country, novation with the change of the debtor presumes a certain and unequivocal manifestation from the creditor, in the sense of discharging the original debtor. Thus, the case law in our country, as well as the French case law decided that there is no case for novation when[14]: the creditor accepted a second debtor, without expressing its intention of discharging the first debtor; the creditor accepted a partial payment from a third party; a third party undertakes in relation to the creditor to pay the debtor's debt; the debtor empowers a third party to pay its debt to the creditor, originating from a compulsory relationship; the creditor accepted, upon the debtor's request, to invoice a third party for the payment of the services supplied by the debtor; the lessor agrees to assign the rental contract, without discharging the assigning lessee or accepts a long term payment of the rent by another person different from the titular of the rental contract.

From the point of view of the means of defence in the case of novation with the change of the debtor, the Civil Code establishes in art. 1612 that the new debtor may not oppose to the creditor the means of defence that it had against the initial debtor, or the ones that the latter had against the creditor, except for the case when, in the latter situation, the debtor can invoke absolute nullity of the act which generated the initial liability.

Novation with the change of the *creditor* is expressly stipulated in paragraph (3) of art. 1609 from the Civil Code, according to which novation occurs when, as an effect of a new contract, another creditor substitutes the initial one, in relation to which the debtor is discharged, thus the old liability being extinguished. In other words, the initial creditor discharges its debtor in exchange for a new liability which it undertakes in front of a new creditor[15].

The specialized doctrine correctly apprehended that the novation with the change of the creditor lost part of its usefulness once with the occurrence of the assignment of claims, the two operations being distinct[16]. Thus, if in the case of the assignment of claims, the initial liability remains the same, only the creditor being changed, in the case of novation, however, the initial liability extinguishes and transforms into a new liability. The assignment of claims is expressly stipulated in the Civil Code, in articles 1566 to 1592.

b) *Novation with the change of a structural element of the compulsory relationship, achieved by the same subjects* – it was claimed that the *change of the object* of the compulsory juridical relationship is when, for example, the parties agree that instead of an owed amount of money, another performance is executed.

On the other hand, *changing the cause* may occur when the buyer of a good (acting as debtor of the good's price) agrees with the seller on the generation of a new liability, while preserving the price under the title of a loan[17].

Some authors also remind of the *novation with the change of the liabilities' means*, accepting, however, that this concept of means in the field of novation is ambiguous and quite difficult to circumscribe[18].

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[14]L. Pop, *Contributions to the study of civil liabilities*, "Universul Juridic" Publishing House, Bucharest, 2010, page 261 and Ion Turcu, *New Civil Code as republished, Book 5. On liabilities, art. 1164-1649*, "CH Beck" Publishing House, Bucharest, page 687.

[15]L. Pop, *Contributions to the study of civil liabilities*, "Universul Juridic" Publishing House, Bucharest, 2010, page 259.

[16]See: Ion Turcu, *New Civil Code as republished, Book 5. On liabilities, art. 1164-1649*, "CH Beck" Publishing House, Bucharest, page 686; C. Stătescu, C. Bîrsan, *Civil law. General theory of liabilities,* 8th Edition, "ALL Beck" Publishing House, page 386.

[17]C. Stătescu, C. Bîrsan, *Civil law. General theory of liabilities,* 8th Edition, "ALL Beck" Publishing House, page 385.

[18]See L. Pop, *Contributions to the study of civil liabilities*, "Universul Juridic" Publishing House, Bucharest, 2010, page 265.

One must apprehend, however, that the modification of the execution term of a liability does not represent a novation, the old liability not being extinguished, and the new liability not being generated at the same time.

4. *The parties' intention to novate (animus novandi)* – more specifically, the parties' intention to transform the old liability into a new one.

This last requirement is expressly stipulated in art. 1610 from the Civil Code. According to which novation is not presumed, and the novation intention should be certain. The absence of this mutual intention of the parties, to perform the novation, makes the novation inexistent.

Effects of novation. Based on the definition of novation, itself, it can be inferred that this operation produces a double effect, namely the extinguishing of an old liability and the generation of a new liability. Thus, a new juridical relationship occurs between the parties, always of a contractual nature, being the result of the parties' will to perform the novation[19].

According to the correct apprehensions of the specialized doctrine, between the two effects of novation there is "an indissoluble connection, in the sense that the generation of the new liability has as cause the extinguishing of the old liability and the other way round; the old liability extinguishes only if the new liability is generated and, correlatively, the generation of the new liability is subordinated to the extinction of the old liability"[20].

Once the old liability is extinguished, all the actions, the accessory clauses, the exceptions and guarantees which accompanied it.

a) *The situation of the novated claim guarantees* – according to art. 1611 from the Civil Code, the mortgages which guarantee the initial claim will not accompany the new claim, unless expressly stipulated. Thus, the initial claim mortgages are not taken over by the new liability, but, to the extent the preservation thereof is desired, this must be expressly stipulated in the deed of novation.

If the novation involves the change of the debtor, the guarantees can no longer be preserved, but the new debtor can offer its goods as guarantee. In this sense, paragraph (2) of the same art. 1611 stipulates that in the case of novation with the change of the debtor, the mortgages related to the initial claim do not subsist in relation to the initial debtor's goods without the latter's consent and they do are not correlated with the new debtor's goods without the agreement thereof. Thus, if the new debtor does not possess goods which may be offered as a guarantee, the old debtor may continue to preserve the initially established guarantees, in order to be used by the creditor[21].

If the novation operates between the creditor and one of the joint debtors, the mortgages connected to the old claim may only be transferred onto the co-debtor's goods, which takes over the obligation concerning the new debt [art. 1611 paragraph (3)].

b) *the effects of novation on the joint debtors and guarantors* – expressly regulated by art. 1613 from the Civil Code, this effect of novation consists in the fact that the novation operating between the creditor and one of the joint debtors discharges the other co-debtors in relation to the creditor. The novation which operates in connection with the main debtor discharges the guarantors. In spite all that, the exception is represented by the case when the creditor asked for the co-debtors' agreement or, depending on the case, the guarantors' agreement, in order for the latter to be bound by the new liability; the initial claim subsists in the situation in which the debtors or the guarantors fail to express their agreement [art. 1613 paragraph (2) from the Civil Code].

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[19]C. Stătescu, C. Bîrsan, *Civil law. General theory of liabilities,* 8th Edition, "ALL Beck" Publishing House, page 387.

[20]L. Pop, *Contributions to the study of civil liabilities*, "Universul Juridic" Publishing House, Bucharest, 2010, page 266.

[21]Ion Turcu, *New Civil Code as republished, Book 5. On liabilities, art. 1164-1649*, "CH Beck" Publishing House, Bucharest, page 689.

c) *the effects of novation on the joint creditors* – the novation approved by a joint creditor is not enforceable against the other creditors except in relation to the part of the claim undertaken by the respective creditor (art. 1614 from the Civil Code).

Conclusions. Although, nowadays, this operation (i.e. the novation) is not frequently used in the legal practice area, it still represents a subject of interest for the legal scholars. Thus, it is our view that new interpretations and opinions will be formulated in the future with respect to this subject, mainly due to the new provisions of the Civil code.

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THE PRINCIPLE OF UNJUST ENRICHMENT FROM THE EUROPEAN CODES TO THE EUROPEAN CIVIL CODE

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Abstract
Despite a very long history and the unanimous recognition of solid moral grounds, the principle of unjust enrichment found its place in the legal systems only very late and its acceptance occurred after many hesitations and imposed many conditions for its application.
This paper takes a comparative view at the way the principle of restitution (according to which the unjustified enrichment is not allowed) is reflected in three leading continental European legal systems (French, German and Swiss) and the possible role this principle will play in a future European Civil Code.

Keywords - *restitution, codification, Europe, unjustified enrichment, principles.*

Introduction

Lawmakers have always avoided the legislative sanction of principles that are too general as they did not wish to undermine the legal system by introducing principles whose general applicability would have called into question many of the special legal institutions. It is however undeniable that, although it was not taken up as a principal tenet of law, unjust enrichment represented a "formative force behind a variety of rules and institutions of positive law"[1].

Originating in the Roman Law, the moral principle of restitution is currently recognised under all modern legal systems represented in Europe. Nevertheless, its recognition by the jurisdictions of the Old Continent is inconsistent. Even though differently reflected in various legal systems of European states, the principle of restitution could, and in our opinion should, be regarded as one of the fundamental pillars of the European Civil Code, if such a code is ever to be enacted. It is therefore of great interest to look at the main current European codifications in order to identify the elements which need to be harmonised.

By having a have a closer look at some of the civil law (Romano-Germanic) jurisdictions (focusing on the French, German and Swiss Codes) we aim at indentifying the elements related to the principle of not allowing unjustified enrichment which might potentially find their place in a future common European codification.

1. General comments regarding Romano-Germanic Legal System

The jurisdictions in the Romano-Germanic system were the first to adopt the principle of unjust enrichment through legal actions. But even in this system there were two quite different approaches of the issue which in turn generated radically different consequences.

In the Romano-Germanic system there were two fundamental codifications that underlay all subsequent civil codifications: the French Civil Code and the German Civil Code. The Swiss Code of

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[1] Zimmermann, Reinhard, *The Law of Obligations: Roman Foundations of the Civilian Tradition*. 1990.

Obligations is also worth mentioning because it influenced the codifications of some of the states of Latin America in the first half of the past century and its translation was adopted in Turkey in 1926.

2. The French Model

The first major codification was made during Napoleon's time, in France - the Napoleonic Civil Code of 1804. It is one of the great achievements and prides of its creator and namesake who used to say that his victories might be forgotten, but his code will last throughout history. And he was most definitely right. The Napoleonic Civil Code was a model to follow for countries from all corners of the world (such as Romania, which in 1864 adopted a Civil Code strongly inspired from the French one). When Spain adopted, in 1889, a Civil Code of French inspiration, it brought the spirit of the Napoleonic Code to its colonies, and many South American states followed suite.

The Napoleonic Civil Code contains no explicit reference to unjust enrichment per se, but many of its specific institutions are evidently based on this principle. The lack of a clear legislative sanction thereof is attributed to a great extent to the code's authors being influenced by the writings of famous legal scholars, such as R.J. Pothier (1699-1772) and J. Domat (1625-1696) which did not uphold unjust enrichment as a source of obligations, but did however expressly regulate *negotiorum gestor* and undue payment under the name of quasi-contracts. These two latter institutions, together with other important institutions of the French law[2], can be considered special applications of the general principle. Pothier and Domat, together with other jurists, considered that "the principle is too vague to be proposed as legal rule and that, like an underground river, it feeds precise rules, which prove its existence, but it never surfaces"[3].

Nonetheless, the need for a general sanction of the principle, so as to avoid unjust situations, was increasingly felt. The merit for creating the modern theory of unjust enrichment in the French legal system is attributed entirely to doctrine and jurisprudence.

At first, the courts or law had constantly rejected the principle of unjust enrichment in cases that were not perfectly regulated by the existent legal rules. It was deemed that its general applicability could have unfortunate consequences on other law institutions, preventing their application, and that the system of legal rules as a whole could be blown away like a house of cards by the equity current being manifested. Practically, it was said then that the two fundamental principles, *neminem laedere* (which underlies tort) and *suum cuique tribuere* (which refers to the non admittance of unjust enrichment), could replace all civil law rules, and that was unacceptable.

At the end of the 19th century, a strong doctrinal movement militated in France for the recognition of unjust enrichment as a source of civil obligations. The prestigious French jurists, Aubry and Rau, authors of the classical patrimony theory, developed a theory of unjust enrichment within their very theory on patrimony. They considered that one of the rights of a patrimony owner is the right to claim, by means of a personal action, which we can classify as *de in rem verso* action, the restitution of the patrimonial objects and assets. They also asserted that *actio de in rem verso* should be taken as a sanction of the equity rule according to which no one can enrich themselves at the expense of another in all cases where a person's patrimony is unjustly enriched at the expense of

[2] For example accession, restitution in case of incapacity. The Napoleonic Civil Code contains many similar special applications of unjust enrichment. Aubry, Charles, and Rau, Charles. *Cours de Droit Civil Français*, 246. Quatrieme Edition, T. VI.

[3] Ripert, Georges, *La regle morale dans les obligations civiles*, 246. Quatrieme Edition: 1949.

another person's patrimony, unless the latter does benefit by obtaining what is due to him, through any action arising from contract, quasi contract, tort or quasi tort"[4].

Nonetheless, the jurisprudence hesitated to adopt this solution. In 1892, in a famous case (known as the "Boudier affair" or the "fertilizers affair"), the Court of Cassation in Paris decided to allow an action grounded on unjust enrichment. It "opened the flood gates wide"[5], taking it as far as to support that the exercise of such action "deriving from the equity principle, which prohibits enrichment at the expense of another, is not subject to any condition if not stipulated by any text of law,"[21] .

It is unanimously accepted that the judgement given in this case represented an acknowledgement of unjust enrichment as source of civil obligations; however, the general nature of this formula, which was so wide that it could have destroyed the entire legal order[6], was bound to be amended. Therefore, in a judgement on 12 May 1914, the Court of Cassation in Paris found, in another case, that *actio de in rem verso* cannot be allowed unless certain conditions are met, and listed therein the conditions enunciated by Aubry and Rau.

The judgements that followed adopted these conditions, and unjust enrichment and *actio de in rem verso* were taken on by most jurisdictions of French inspiration.

Last, but not least, it should be mentioned that in many jurisdictions that can be considered of French inspiration, where the Civil Codes were amended or even where new codes have been adopted, the institution of unjust enrichment is expressly regulated (for example, article 2298 of the Civil Code of the State of Louisiana, articles 1493 to 1496 of the Civil Code of Quebec, article 212 of the Dutch Civil Code as well as the regulation in the newly enacted Civil Code of our own country, Romania), in some cases the new texts departing from the conditions established by the French law. As a matter of fact, even a draft of the Romanian Civil Code, drawn up during the Communist period, was supposed to include five articles regarding unjust enrichment and undue payment, the latter, we believe, being rightfully considered a particular situation of the former.

At the end of this historical overview of the sanction, in the modern law, of unjust enrichment as source of obligations, we can conclude that, notwithstanding the immense merit of having acknowledged this legal institution, French law is also responsible for preventing many of its useful applications by formulating certain conditions, not so much restrictive, as discouragingly abstract and insufficiently defined, such as the "absence of cause".

3. The German Model

The second extremely important codification in Europe is the German Civil Code (B.G.B.)[7]. After long hesitations of the German jurists and having generated famous controversies, it became effective, almost 100 years after the adoption of the Napoleonic Code.

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[4] Aubry, Charles, and Rau, Charles. *Cours de Droit Civil Français*, op. cit, 246. Quatrieme Edition, T. VI.

[5] Carbonnier, Jean, *Droit Civil, 4, Les Obligations*, n° 312.

[6] Stark, Boris, Roland, Henri, and Boyer, Laurent. *Droit Civil, Les obligations, 2. Contrat,* 767. Sixieme edition.

[7] Bürgerliches Gesetzbuch, German Civil Code of 1896, effective as of 1900, is chronologically the second most important codification in Europe, after the Napoleonic Civil Code of 1804, and, is similarly an inspiration model for many modern civil codes.

After the fall of Napoleon, Germany continued to be politically influenced by France. Baden Baden kept the Napoleonic Code and continued to apply it, while other states rejected it and returned to Ius Commune. However, all German states increasingly raised the issue of codification, wishing to achieve a simplification and rationalization of the law. The position of a well-known jurist, Friedrich Karl von Savigny, played an important role in postponing the codification at the time. He was the founder of the so-called *Moderne Rechtsschule* which drawn up the "New Pandectae", in which an overwhelming importance was given to terms and definitions.

The adoption of the Code was strongly supported by Ihering, and due to his efforts, in 1896 the B.G.B. was adopted and became effective as of January 1st, 1900.

It has been said that the German Civil Code is more academic and more technical and its rules are more precise than those of the Napoleonic Code[8]. Unfortunately, as we shall see, when it comes to the issue of unjust enrichment the German jurists did not live up to the expectations and the current regulation is not the best there is.

Significantly influenced by the conclusions of the Modern Law School of Savigny and based on Pandectae, B.G.B. has a structure completely different from that of the Napoleonic Code and consists of five books:

1. General Principles (one of the novelties as compared to the Napoleonic Code, comprising the common rules of the private law system, as a whole);
2. Obligations (it comprises the main product of the Roman law and *Ius Commune.* It should be mentioned that in the German system, as opposed to the French one, the construct of obligation is more important than that of property, since after the industrial revolution, it was deemed that not property is essential, but obligation);
3. Property (note the existence of the principle of abstraction, which allows for the existence of two contracts in the field of transmission of property: one of "obligation" and one of "transfer" ("disposition");
4. Family; and
5. Inheritance.

The differences between the two most important European codifications did not refer only to their structure, but also to the institutions they regulated. Unlike the Napoleonic Code, the German Civil Code not only acknowledges unjust enrichment, but in addition to applications thereof in numerous subject matters[9], it includes ten articles (from 812 to 822) dedicated expressly to this institution grouped in a subchapter entitled "Unjust Enrichment" (*Ungerechtfertigte Bereicherung*)[10].

The German Civil Code is often presented as a codification characterized by precision, consistency and clarity, thus showing consistency with the Roman law, but in the regulation of unjust enrichment, the long praised code lacks precisely in precision and clarity. The shortcoming seems to be attributed to the fact that the regulation contains a general action, followed by several lists of situations, to which no clear correlations are made. This reflects a compromise between Savigny's

[8] Tetley, William, *Mixed jurisdictions: common law vs civil law (codified and uncodified).*

[9] For example: article 324 provides for the application of the unjust enrichment rules, when a contract is terminated due to circumstances for which the party is not responsible; article 682 when the parties do not have business management capacity; article 684 when management is contrary to the interests/will of the managed party; articles 987, 988 and 993 where it is raised the issue of restitution of an asset by its holder.

[10] V.BGB, Title 24, Section 7, *Obligations Book*, articles 812 to 822.

ideas, supporting the introduction of a general action based on unjust enrichment and the other authors of the code, who preferred the traditional approach, based on *condictiones*.

However, it remains unquestionable the application of unjust enrichment where, due to the principle of abstraction, a transfer made on the basis of a valid "transfer contract" could give rise to restitution if the "obligation contract" ceases to be valid, thus the "transfer contract" losing its cause. Some of the other situations where actions based on unjust enrichment apply were mentioned when we talked of *condictiones.*

Last, but not least, we should be mentioned that, used to the technical nature and clearly defined concepts of the German law, German courts were quite reluctant to an extensive application of unjust enrichment when faced with general terms such as "enrichment at the expense of another" or "unjust". As a result, unaccustomed to such extremely wide constructs, German courts also limited the application of the principle.

4. Swiss Code of Obligations

Without going into details, it should be nonetheless mentioned that the Swiss Code of Obligations of 1912 includes a chapter (entitled "Obligations Deriving from Unjust Enrichment") dedicated entirely to the institution that makes the object to our analysis. The seven articles regulating the field refer to:

- General Conditions (article 62, which in the first paragraph asserts the principle, demanding restitution when a person has been unjustly enriched at the expense of another and in the second paragraph lists several particular cases of restitution, derived from Roman law, namely: when something was obtained (1) for no valid reason; (2) for a reason that was not achieved; or (3) for a reason that subsequently ceased to exist);
- Undue payment (article 63 defines in the first paragraph the conditions when the general rule applies in case of undue payment and sets out the condition that the *solvens* provide proof of error; the second paragraph sanctions the inapplicability of the general rule of restitution in case of natural obligations);
- Scope of the restitution obligation (article 64 stipulates what in German law is known as "objection to the loss of enrichment" – that is, the defendant's possibility to obtain a rejection of the claim made against him, if he proves that he is no longer "enriched" at the time of the claim – and also specifying the exceptions from this situation, cases when the defendant is bound to the restitution, even if he is no longer "enriched": (1) if he alienated in bad faith the benefit received; (2) if he should have known, at the time of the alienation, that he might be bound to return them);
- Rights in respect to expenditure (article 65 establishes the condition of restitution of the expenses made by the defendant who is obliged to return the benefit, as it follows: in the first paragraph, it stipulates that the defendant is entitled to reimbursement of the expenses necessary or useful, although where unjust enrichment was received in bad faith, the useful expenditure must be reimbursed only within the limits of the added value existing at the time of the restitution; the second paragraph makes reference to compensation for other expenditures, to which the defendant is not entitled, but where no such compensation is offered to him, he may, before returning the property, remove anything he added to it, provided this is possible without damaging it);
- Statutes of limitation (article 67 the first paragraph contains the rule: the statutes of limitation and the date on which it begins to elapse is the time when the injured party learned of his right to restitution, without, however, exceeding ten years after the date when such right arose; the second paragraph stipulates an exception, which allows the "impoverished" party to refuse to satisfy

the claim, even if his own claim for restitution exceeds the statutes of limitation, when the enrichment consists of a debt.

Without risking any final conclusion as regards the regulation of the unjust enrichment in the Swiss law, we notice that this regulation can be considered a solution of compromise between the German system, where unjust enrichment is extensively regulated, and the French system, where such regulations is completely absent.

5. Towards an European Codification

In today's Europe tendencies of legislative harmonization manifest in all aspects of the law, including those traditionally considered "strictly national", such as civil law. It has been quite a few years already since, despite a great number of opponents, there were serious debates about the drafting of a European Civil Code. Once the idea was launched, many realized that this is an immense challenge and the European jurists are facing probably the most important and delicate task requiring an in-depth comparative analysis, which meant going back to the principles. After launching the call for initiating this step, many commissions have been established and many reputable jurists become involved in this mission, starting, arbitrarily or not, from the Obligations Law, an area that saw another group of states try to come up with a common codification, almost a century ago.[11].

Moreover, as Professor Christian von Bar, coordinator of the Osnabrük group, who, at the request of the European Parliament, made a study of the private law systems in the European Union, in view of creating a European Civil Code, said, it is undisputable that there is a "need for a common legal code, valid all over Europe, particularly a code governing the distribution of wealth, now that the Common Market has a common currency". In this context, the moral principle of rejecting unjust enrichment, acknowledged by all legal systems, but applied so differently, even by great law systems, proves to be again at the centre of attention, more than a century after it was acknowledged as a source of obligations in the continental European law.

Conclusions

Traditionally considered an institution of "civilian" tradition, the principle of unjust enrichment has lately been quoted[12] as one of the "civilian" principles adopted by the common law, and it lies at the basis of the theory of restitution. Not long ago, the common law system did not allow actions that included general claims of restitution based on unjustified enrichment, but once the forms of action were abolished, the substantive principle of unjustified enrichment acquired an extremely important role, being considered a fundament of all actions leading to restitution, not only of those originated from quasi-contract.

The equitable principle of non-admittance of unjust enrichment is currently applied in most national law systems of the five continents. In Europe and the Americas, both the "civil law jurisdictions" and the mixed ones (such as Scotland, Louisiana, Quebec) are based on this principle, and lately even the "common law" jurisdictions afford a wide acknowledgment of the unjust enrichment, due to a wider acceptance of the theory of restitution in those countries.

[11] We refer here to the French and Italian Project of Code of Obligations, v. Steurmann, *Contribution a l'etude du Projet Franco-Italiende Code des Obligations et a son introduction en Roumanie*. 1933.

[12] Tetley, William, op. cit.

In the civil law system, unjust enrichment appears to be expressly regulated as source of obligations in some countries (such as Armenia, Bulgaria, Switzerland, Philippines, Germany, Greece, Italy, Louisiana, Mexico, Mongolia, Quebec, Peru, Portugal, and Tunisia and more recently our own country, Romania) or, without being sanctioned in special texts of law, it was synthesized and developed by the doctrine and jurisprudence (such as, for example in France, Spain, Romania, Argentine), and the principle of unjust enrichment underlies many of the fundamental institutions of the system.

The importance of this principle is confirmed also by the structure proposed for the European Obligations Law, which is deemed to be formed of three main braches: Contract Law, Tort Law and Restitution Law, the latter being based on the principle of non-admittance of unjust enrichment.

In this day and age, when globalization has become an almost obsessive subject, lawmakers have an understandable tendency to return to principles, particularly to moral principles based on which to develop a global and coherent if not uniform legal system. Moral principles, as undisputable source of judicial institutions, are increasingly rediscovered and carefully considered by jurists of all legal systems. The obvious purpose is to find common ground for the law institutions functioning in various regions of the globe, and this is why the generous principle of unjustified enrichment should continue to be the object of many research studies, being one of those principles with universal vocation.

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CONSIDERATIONS ON THE RELATIONSHIP BETWEEN PRODUCER AND CONSUMER ON FOOD MARKET

MĂDĂLINA DINU*

Abstract
Perhaps one of the largest legislative climbing in recent years is shaped by the instruments that Romanian legislator puts at hand in order to protect its consumers from potential abuses of the producer. The importance of rules of such liability producer is justified primarily by the fact that a modern democratic society, consumer protection has become an essential part of the whole system of social protection. Moreover, the consumer's right to health and safety of its community is a constitutional principle, a consumer is considered by the Community forums as a new form of citizenship.

Keywords: *producer, consumer, food market, provider, protection*

Introduction

The desiderate that the offer issued by the producer and accepted by the consumer to be as agreed between the parties, remained often an illusion, so that, through domestic and international legal instruments are provided, on the one hand, guarantees that for lack of sufficient consumer products conform it to have a partial or complete repair of the damage suffered by negligence product producer or service to access it, on the other hand, if there legislative means that protect consumers, the producer will have more care on the quality of marketed products.

In this paper I intend to analyze the legal framework through which is the incidence of domestic producer responsibility for food quality, beginning with the analysis of concept as producer, consumer and relationship between them. It is important to understand that acceptance of Romanian legislator gave such notions, as the only way we will be able to evaluate the actions of state, theoretical and practical solutions proposed for removal from the market of individual consumers posing, users and public. Producer responsibility for the quality of food placed in the center of the idea of security products in the circulation and thorough study of the mechanisms involved in binding its producer and similar persons.

Content

Concept of producer

The current sense, the producer shall mean that person by his work, creating goods, scientific or artistic value[1]. Based on the producer type near term and reaching specific difference, we might say, the producer of food, means a person who by his labor to produce food themselves or others.

However, the term ”producer” has a rather broad sense, going into this class operators in a broad sense, however, and persons holding capacity of the seller or dealer, trader manufacturers were considered producing a finished product or component of a product, the raw material manufacturing, who apply their name, mark or other distinctive sign on products, who reconditions the product, trader or distributor, by his conduct change product features, representative of a registered trader who

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[1] dexonline.ro.

not established in Romania or in his absence, the importer of the product trader who import products in order subsequently to an operation selling, renting, leasing or any other form of distribution, the distributor of the imported product, if not importer knows, even if the manufacturer is listed, the product distributor if the importer can not be identified, unless you notify the person aggrieved within 30 days to request the identity of the importer[2].

In a synthetic definition, we can say that producer is the manufacturer of a finished product, the producer of any raw material or a component manufacturer, and any person who, by putting his name, trade mark or other distinctive product presents as its producer. But, in a careful analysis of the provision of Article 3 of Law across 240/2004, noted thatsecurity must be extended to all those involved in production and distribution ofproduct on the market, taking into account in determining liability both work real producer, and that of the apparently.

In this context, and considering the meaning given by law the concept of producer, we can easily imagine situations where the producer, as defined by law can not be identified, in which inherent next question is: who will be responsible for any effects harmful product put on the market? Liability is the responsibility of each provider who fails to notify within a reasonable time damaged consumer identification producer or the person who supplied the product. In other words, we can say that operates a transfer of responsibility from the producer to the supplier, each supplier of the product that created the harm, being treated as a producer, consumer harmed if he did not communicate in a reasonable time, data identifying the manufacturer or the person who supplied the product; same is true in the event that we are dealing with an imported product that affect food safety, if the product does not indicate the importer provided, even if said producer name.

This interpretation of legal provisions resulting from the linking of art. 2 of Law 240/2004 with those of Article 2 of Law nr.321 of 15.10.2009 which is the law in matters of food marketing and supplier defined as "*person or entity authorized to engage in production, processing or food distribution to marketing. "* In other words, in the Law nr.321 notion is analyzed by the manufacturer, but only that the provider that involves the producer, can speak about identity in defining the two concepts. We disagree with this view, saying that the distinction between the concept of manufacturer and supplier that is the proximate genus which is the producer the specific difference that is given to the concept of provider, as any producer and supplier can be but not every vendor can be a producer. Specific activity is the manufacture of the product manufacturer while its distribution is characteristic for the work done by the supplier. Certainly the two activities, production, distribution that can be found in the remit of the same person, but in the meantime can target different people, the producer being the person in charge ofall aspects of production until such time that reach the final product, while the supplier is one who takes food marketing activity respect the finished product. However, the two activities, namely manufacturing and product distribution must be made in a professional, profit-making activities, which is why the marketing of product is essential for the approach of a potential liability.

Concept of consumer

The consumer is central pawn production activities, distribution and consumption. Economic activity is based around the consumer, which is the ultimate recipient of all spheres of production.

In other words, is what determines consumer market competition between various producers, whereas, in relation to personal needs and the knowledge about the products on the market, the consumer is opting for a product against another, he enjoying the certain rights to all the high principles of the Consumer Code (Chapter III), namely:

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[2] Alice Mariana Apetrei, *Notiunea de consumator in Regulamentul (CE) nr.583/2008 al Parlamentului European si al Consiliului din 17 iunie 2008 privind legea aplicabilă obligatiilor contractuale (Roma I) si, respectiv, in legea română (Codul Consumului –Legea nr.296/2004)*, Dreptul nr.1/2011, p.158.

a)the right to be protected against the risk of purchasing a product or a service are likely to prejudice the life, health or safety or affect their rights and legitimate interests;
b) the right to be informed fully, fairly and accurately on the essential characteristics of products and services so that they adopt decision on them to meet their needs better and to be educated as consumers;

b)the right of access to markets that provide a wide range of quality products and services;

c)the right to be compensated for damage caused by poor quality of products and services, using for this purpose means provided by law;

d) right to organize associations for consumer protection in order to protect their interests;
e) the right to refuse signing contracts containing unfair terms in accordance with the law;
f) the right to not be prevented by an operator to obtain a benefit provided by applicable law;

The definitions in the literature, the consumer shall mean, on one hand "the person who consumes goods from production[3]", on the other hand, "the person who buys for his own goods offered by manufacturers in the free market, competitive[4]" .

Based on the two meanings of the notion of consumption, it outlines two theories that essential element consumer, objective theory, that the subjective theory.

The objective theory, the notion of consumers include all natural or legal persons, entered in this field "producers, manufacturers, traders, the traders generally purchasing goods for their activity, buyers of products for their particular use, simple passer-by who have a relationship with the product, but have suffered damage as a result of its defective character.[5] " Therefore, according to this view, all persons are protected against manufacturer launches market risk products for consumers use. I appreciate that this view requires some qualification, meaning that not all people are consumers but those who had a connection with the product improperly, directly or indirectly. As such, the mere passing of speaking this theory becomes the consumer andtherefore enjoy the protection of law only insofar as the risks and consequences ofproduct produced directly or indirectly have effects on him. Thus, we can not includein the consumer category passers person who does not even aware of that producton the market.

Subjective notion of consumer theory associated with the processes of acquisition, possession or use of goods or services for private purposes. In other words, as stressed by the French specialist legal literature, consumers are "people that purchase or use goods or services for something unprofessional, or for their personal use[6]".

Therefore, unlike the objective theory that identifies the consumer with any person, subjective theory establishes two rules for determining the consumer of other people: on the one hand, the person to acquire, possess or use a good or service, on the other hand, acquisition, possession or use of goods or services to be performed privately. Subjective theory and joined the Romanian legislature intended to define when the consumer as "any natural or legal person who

[3] Vasile Breban, *Dictionar general al limbii române*, Bucuresti, Ed. Enciclopedică, 1992, p.208, in Benonica Vasilescu, *Politica de protectie a consumatorilor – componentă a politicii de protectie socială*, Buletin de informare legislativă, nr.4/2008, p.16.

[4] Le Petit Larousse Illustre, Paris, Larousse, 1995, p.262.

[5] Benonica Vasilescu, *Politica de protectie a consumatorilor – componentă a politicii de protectie socială*, Buletin de informare legislativă, nr.4/2008, p.16.

[6] Jean Calais-Auloy, "*Droit de la consommation*", 3-e edition, Paris, Dalloz, 1992, p.3.

buys, acquires, uses, and consume food outside professional activity[7]" or "individual or group of individuals acting purposes outside his trade, industrial production[8], craft or profession ".

Therefore, according to the subjective theory to acquire the consumer and thus qualify for protection in this matter, a person must meet two conditions:

1. to be an individual person, legal person can not be a consumer. As such, in relation to the subjective theory embraced by the Romanian legislation in the field, in the notion of the consumer are included only individuals or groups of individuals who sign a contract outside of their professional activity. In that the groups of people who appreciate that the text is in association aims to protect consumers associations and not any associations. As such, consumers only have the status of associations to defend and protect consumer interests.

2. individuals to purchase, acquire, use or consume products or services outside their area of professional activity. Therefore have the status of consumers are protected from individuals who buy, acquire, use the products for consumption. In other words, if people buy some goods for personal consumption but not for resale, for example, they will not be qualified as consumers will not enjoy protection in this regard. Moreover, the hypothesis stated above can attract even their liability if they distribute such products on the market which caused further adverse consequences for human health.

We believe that the reason why the legislature included in the consumer sphere only people who purchase goods for consumption is that if products are purchased by individuals in their professional activity, they have enough knowledge to properly assess purchased the product complies with current laws.

The activity of legal persons, whatever form of organization(companies, autonomous, nongovernmental organizations, public institutions) is oriented towards profit orprovision of other essential services of public administration, issues that lead to exclusion them from the notion of consumer.

I appreciate this provision objectionable and discriminatory normative grounds that can easily imagine situations in which legal entity in its outside professional activity may have a consumer. In this context the natural question arises about the reason that the legislature did not intend to include in the scope of consumer and legal person. In other words, by excluding individuals notions of consumer legal sense, means that, in those situations in which legal entity acquiring property outside his business, itenjoys no protection?

I think the answer can only be negative, meaning the legislature to protect the individual normative provisions establishing a number of its rights and obligations of the manufacturer, as appropriate seller, by special law in order to give greater liability of persons guilty of making efficiency market rigors of legal non-conforming products.

In this context, given that the legal consumer can not appreciate that, for situations in which it is involved in legal relations with the producers, the latter will be liable for defects of things sold under the Civil Code, specifically the provisions governing the contract of sale.

Although both in law and in the international concept of "consumer" is considered only natural, reading the provisions of Law 321/2009, note that the concept of consumer isdefined as "any person or entity that buys, acquires, uses and consume food outsideprofessional activity ". As such, consumers in food can be both natural and legal person, provided they acquire, use and consume those products outside the scope of professional activity.

While recognizing that the consumer means a natural person who uses the particular purpose and unprofessional, products and services offered on the market formanufacturers,

[7] art.2 alin.2 pct.5 din Legea nr.321 din 15 octombrie 2009.

[8] the professional activities of the Romanian legislator understood trade, industrial production, craft or profession, through this list legislature intended to limit the scope of commercial activities, in addition to those listed can be included in any other activities related to the performance of.

retailers and service providers, the natural question arises whetherthe consumer is not the same person with the buyer ? We appreciate that despite legislation in the content which the two notions are confused, we can not sign identity between the two, whereas the term includes the consumer, a buyer may be situations in which a consumer acquires an asset in other ways than buying it. Consumptiongood can result not only from a contractual relationship, but also a legal relationshipon which the owner has not expressed willingness.

Conclusions

Attempt to regulate internal concepts of producer, consumer, food by reference to international law But I think that the current Romanian legal system is not yet adapted to the needs of society, is, not infrequently contradictory (and I mean to provide the sense notion of consumer) and often incomplete.

Confusion and contradictions that arise in regulating various acts of the same concepts (for example, in Act 240/2004 consumer can only be natural for the body of law 321/2009 to meet the legal person as a consumer).

I think that these inaccuracies are from correlated transposition of Directives into national law instead of making extensive doctrinal discussions on the subject.

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THE NATIONAL AUTHORITY FOR ANIMAL HEALTH AND FOOD SAFETY, THE MAIN BODY INVOLVED IN FOOD SAFETY IN ROMANIA*

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Abstract
This paper is intended to present the role, functions and responsibilities of the National Authority for Animal Health and Food Safety as the main body involved in food safety in Romania. It will be also exposed the Regulation 178/2002 of the European Parliament and the Council, the general food "law" in Europe, and Law 150/2004, which transposed into Romanian legislation Regulation 178/2002.

Keywords: *Food safety, main body involved in food safety, general food law, regulation 178/2002, law 150/2004*

I. Introduction

The National Authority for Animal Health and Food Safety is the main body involved in food safety in Romania.

After Romania's EU integration, Romanian authorities wanted to align the legislation regarding food safety to the European standards. Therefore, the European legislation has been transposed into national law.

For food safety for consumers, the European Union has developed a series of standards regarding food, animal safety and health and plant health. These standards are applied both for food produced within the EU and for imported food. The present study analyzes the role, functions and responsibilities of National Authority for Animal Health and Food Safety as the main body involved in food safety in Romania.

The study also presents the general law on food safety at European level, but also at Romanian level. We will try to shortly present the main principles regarding food safety in Europe and in Romania.

Work content

II. The National Authority for Animal Health and Food Safety, Role, Functions, Responsibilities

II.1. Role of the Authority

In order to apply the European policies regarding food safety, the National Authority for Animal Health and Food Safety was founded in Romania, as being the main body responsible for applying the European rules.

According to Law 150/2004 regarding food safety and feed safety[1], the "National Authority for Animal Health and Food Safety, … is the authority in charge of regulations in the field of food safety and animal health which coordinates all activities in this field, from the production of the

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1 Published in Official Gazette of Romania no. 462/24.05.2004/29.11.2006 and republished in the Official Gazette of Romania no. 959/29.11.2006.

primary materials to the end consumer. The Authority represents the link to the European Authority for Food Safety and runs on structural, functional and decisional autonomy[2].

The National Authority for Animal Health and Food Safety (hereafter referred to as Authority) was founded by Government Ordinance 42/2004[3] through the reorganization of the Romanian Agency for Food Safety and of the National Agency for Animal Health from within the Ministry of Agriculture, Forestry, Water Resources and Sustainable Development"

The organization and the activity of the Authority were regulated by Government Decision 130/2006[4], which was abolished through the enactment of the Government Decision 1415/2009[5].

Therefore, at present, the organization and the activity of the Authority are regulated by Government Decision 1415/2009.

II.2. Functions

According to the above-mentioned normative act, the Authority has following functions[6]: regulatory function, controlling function, strategic function, administrative function and representative function.

The regulatory function assures the accomplishment of the juridical framework and the elaboration of the specific regulations from within the field of animal health and the field of food safety, according to the adopted strategy and in compliance with the national and the European law.

The controlling function is carried out by ensuring of supervision and control of the implementation of and conformation to the regulations in its field of activity.

The strategy in its field of activity, the evaluation, the analysis, the management and the risk communication in its field of activity, as well as national and European research projects regarding its field of activity are elaborated through the strategic function, in accordance with the government policy and the international trends.

The fourth function accomplished by the Authority refers to the administration of the subordinated structures, which assures the coordination and the management of the services for which the state, within the field of animal health and food safety, is responsible.

The last function assigned to the Authority is a representative one, which, in its field of activity, assures the representation on behalf of the state or the Romanian Government in- and outside the country.

II.3. Responsibilities

According to article 3 paragraph (1) lit. B, Law 150/2004, republished, the Authority has following responsibilities in the field of food safety:

1. elaborates and implements the strategy and the legislation regarding food safety;

2. elaborates regulations for food safety, approved by ordinance of the president of the Authority, and, as the case may be, together with the competent authorities, approved by common ordinances;

3. promotes and coordinates the elaboration of unitary methodologies for risk assessment within the field of food safety;

4. carries out the risk assessment and lays out the measures that have to be enforced in case a major problem occurs which may harm the health of the people;

5. coordinates the elaboration of the codes of practice and other such activities;

2 Art. 2 from Law 150/2004, republished.

3 Published in Official Gazette of Romania no. 94/31.01.2004..

4 Published in Official Gazette of Romania no. 90/31.01.2006.

5 Published in Official Gazette of Romania no. 834/03.12.2009.

6 According to art. 2 from the Gover Decision 1415/2009, modified and ammended.

6. coordinates methodologically the supervision and the control regarding food safety, from the production of the primary material to the end consumer;

7. ensures the coordination of the elaboration and implementation of the government policies regarding food safety and animal health;

8.coordinates the identification of the specialists in order for them to take part in activities for the Codex Alimentarius, as well as in activities of national and international bodies and organizations in the specific field of activity;

9. coordinates the identification of the specialists in order for them to take part in activities of national and international bodies and organizations in the field of standardization, food safety and quality;

10. coordinates the control activity in the field of food safety and quality, after the scheme used in the European Union;

11.coordinates methodologically the controlling, testing and examination of food, from the production of the primary material to the end consumer;

12. creates and uses own data bases, collecting, classifying, correlating, permanently updating, archiving and disseminating the information regarding monitoring of records, approvals and authorizations related to food safety awarded by public authorities that have responsibilities in this field, monitoring the results of the supervision and control activities regarding food safety, as well as of the juridical framework in the field, the statistic data and the data regarding the research and development process;

13. coordinates education and training of staff involved in food safety;

14. gives scientific advice and technical assistance in the specific area of activity;

15. is the national contact point and coordinator of the national Rapid Alert System for Food and Feed – SRAAF;

16. organizes a permanent contact point based on tel verde, an emergency number from where any natural or legal person may obtain objective information and where these persons may present objections regarding food safety;

17. provides supervision and control regarding the compliance with the general conditions from the alimentary field through the implementation of specific measures which should lead to reducing the incidence and the elimination of transmittable diseases, from animals to humans;

18. supervises and monitors economic operators working in the food industry, in terms of food safety;

19. participates together with other competent institutions in the standardization, grading and classification process of food products;

20. represents the contact point and keeps permanently in touch with the national and international authorities in charge of food safety;

21. develops and promotes laws in the field of animal health and food safety and takes part in promoting the regulations regarding quality of food;

22. develops together with other competent institutions national food safety programs;

23. promotes and coordinates the education and training of staff involved in food safety by conducting postgraduate courses in its field of activity at universities that are accredited by the Ministry of Education, Research and Innovation for this purpose, based on a protocol or partnership agreement concluded with higher education establishments that are accredited in the field of food safety;

24. develops and approves agreements, partnerships, protocols and intergovernmental agreements with similar central authorities from other countries regarding the cooperation in the field of food safety, in compliance with the European and national law;

25. organizes, coordinates, manages and controls the activity of intra-Community trade, import, export, transit and border inspection in the field of food safety;

26. develops rules of organization and operation and appoints the duties and responsibilities of the subordinated units in the field of food safety;

27. participates in the development of national and international strategies to combat terrorism and bioterrorism;

28. cooperates and is responsible along with the central government authorities for the organization and implementation of the necessary measures for food safety;

29. develops and updates contingency plans for food safety;

30. notifies the international organizations WHO, EFSA, DG SANCO, FAO that are responsible for food safety;

31. cooperates on international level with all organizations involved in food safety and in other related areas to keep Romania within the European and international circuit of specific policies;

32.checks the territorial and national application of the food safety regulations;

33.provides official control of operators which are producing, processing, transporting and distributing food;

34. organizes specific audit activities in order to carry out and implement the provisions of the European regulations;

35. coordinates the elaboration of the Integrated National Control Plan for Romania - PNUCI and of the Annual Report on PNUCI;

36. performs any other duties regarding food safety and regulations on food and on biotechnology set by national and European legislation.

III. The General Food Law

Given that food safety has become a major topic in the last decade, the capability of producing safe food requires a multidisciplinary approach, involving key areas which include also legal matters. In order to ensure food safety, all stages of the food chain, as a continuous process, are taken into account, starting from and including primary production and ending with selling or distribution of food directly to consumers, because each element might potentially have an impact on food safety itself.

The EU-Law on food is based on the principle that food operators bear the responsibility for all stages of production, processing and distribution from within the framework of activities controlled by them. They have also the obligation to ensure that the food products meet the requirements of the food safety legislation.

III.1. Regulation (EC) no. 178/2002 of the European Parliament and of the Council

At European level, the general legal framework is represented by the Regulation (EC) no. 178/2002[7] of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, modified as follows: Regulation (EC) no. 1642/2003 of the European Parliament and of the Council of 22 July 2003[8], Regulation (EC) no. 575/2006 of the European Commission of 07 April 2006[9], Regulation (EC) no. 202/2008 of the European Commission of 4 March 2008[10].

The above-mentioned regulation lays down the general principles governing food and feed in general and food and feed safety in particular, at Community and national level[11], and the general objectives, risk assessment, the precautionary principle and the protection of the consumers' interests

[7] Published in the Official Journal of the European Union L 31/1, 01.02.2002.
[8] Published in the Official Journal of the European Union L 245/29.09.2003.
[9] Published in the Official Journal of the European Union L 100/08.04.2006.
[10] Published in the Official Journal of the European Union L 60/05.03.2008.
[11] The general principles of the food legislation are regulated in Section I, articles 5-8 .

respectively. Regulation 178/2002, as subsequently amended, establishes procedures for problems that have direct or indirect impact on food and feed safety.

The regulation also establishes definitions, principles and obligations covering all stages of the food chain. As to the general obligations regarding food trade, food and feed imported into the Community for placing on the market, as well as food and feed exported from the Community for placing on the market of a third country are subject to regulations.

As for food and feed imported into the Community for placing on the Community market, these must meet the relevant requirements of food law or the conditions recognized by the Community to be at least equivalent thereto or, where there is a specific agreement between the Community and the exporting country, the requirements contained therein.

Food and feed exported or re-exported from the Community for placing on the market of a third country shall comply with the relevant requirements of food law, unless otherwise requested by the authorities of the importing country or established by the laws, regulations, standards, codes of practice and other legal and administrative procedures as may be in force in the importing country

The regulation also stipulates that in other circumstances, except in the case where foods are injurious to health or feeds are unsafe, food and feed can only be exported or re-exported if the competent authorities of the country of destination have expressly agreed, after having been fully informed of the reasons for which and the circumstances in which the food or feed concerned could not be placed on the market in the Community.

Where the provisions of a bilateral agreement concluded between the Community or one of its Member States and a third country are applicable, food and feed exported from the Community or that Member State to that third country shall comply with the said provisions.

III.2. Law 150/2004

Regulation 178/2002 was transposed in Romania by Law no. 150/2004 on food and feed safety[12], with later amendments and addenda.

According to the above-mentioned Law[13], certain requirements must be met for achieving food security: food should not be marketed unless it is safe, food is considered unsafe if it is harmful to health or unfit for human consumption. In determining whether any food is unsafe, regard shall be had to the normal conditions of use of the food by the consumer and at each stage of production, processing and distribution, and to the information provided to the consumer, including information on the label, or other information generally available to the consumer concerning the avoidance of specific adverse health effects from a particular food or category of foods.

In determining whether any food is injurious to health, regard shall be had to the probable immediate and/or short-term and/or long-term effects of that food on the health of a person consuming it, but also on subsequent generations, to the probable cumulative toxic effects and to the particular health sensitivities of a specific category of consumers, if that kind of food is intended for that category of consumers. In determining whether any food is unfit for human consumption, regard shall be had to whether the food is unacceptable for human consumption according to its intended use, for reasons of contamination, whether by extraneous matter or otherwise, or through putrefaction, deterioration or decay.

Where a food which is unsafe is part of a batch, lot or consignment of food of the same class or description, it shall be presumed that all the food in that batch, lot or consignment is also unsafe, unless following a detailed assessment there is no evidence that the rest of the batch, lot or consignment is unsafe. The conformity of a food with specific provisions applicable to food safety are considered not to represent a risk related to the aspects to which that law refers to.

[12] Republished in Official Gazette of Romania no. 959/29.11.2006.
[13] Art. 15 from Law 150/2004 regarding food and feed safety.

The conformity of a food with specific provisions applicable to that food shall not bar the competent authorities in the field of food safety from taking appropriate measures to impose restrictions on it being placed on the market or to require its withdrawal from the market where there are reasons to suspect that, despite such conformity, the food is unsafe.

As we can see, the law 150/2004 tries to transpose the Regulation 178/2002. It is very important that Romanian authorities hardly try to apply European legislation into national legislation. Of course, we need time and resources to reach the European level in food safety, but Romania started in a good way.

Conclusions

By this article, we have tried to present the role, the functions and main responsibilities of the National Authority for Animal Health and Food Safety as the main body involved in food safety in Romania. We have also presented the general food law for Europe and for Romania.

Of course, this is only a small part of the aspects regarding food safety, but we will try to present other major problems as contaminants in food, the legislation on official control, the legislation regarding pesticides in food, legislation regarding radioactive contamination etc.

References

- Regulation (EC) no. 178/2002
- Regulation (EC) no. 1642/2003 of the European Parliament and of the Council of 22 July 2003
- Regulation (EC) no. 575/2006 of the European Commission of 07 April 2006
- Regulation (EC) no. 202/2008 of the European Commission of 4 March 2008
- Law 150/2004
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BANK GUARANTEES

VASILE NEMEŞ*

Abstract

The present study propose the analyse of the irrevocable commitment of a bank entity towards a determined person, through which guarantees a certain legal conduct of its client, and, in case of breach, assumes the payment obligation of a determined amount of money.

This kind of legal technique it is called bank guarantee and in the usual business language it is called "Letter of Bank Guarantee".

The determined reason to choose this scientific initiative it is the frequency of this kind of financial - banking commitments with various practical issues which are occurred by the use of those.

From the legal point of view, the bank guarantees are not under an own legal regulation and are based on the common law, used in the guarantees domain.

Through the new aspects of the actual Civil Code it are the legal regulation of the letter of bank guarantee and of the comfort letter, which shall constitute the main regulation in the negotiation and conclusion of a letter of bank guarantee or a bank comfort letter.

For the legal reports with foreign elements, the parties can also use the Uniform Rules regarding the Guarantees at Request (URGR) Publish no.758/2010.

Keywords: *guarantee, letter of guarantee, comfort letter, obligation, issuant, beneficiary, debtor.*

1. Introductory notions

By adopting the new civil code, several institutions of private law have been redefined and others were first introduced in the Romanian legal regulation. They also include the institution of guarantees.

The participants in relationships involving obligations specific to guarantees may be the natural persons and legal entities and, according to this criterion, the guarantees may be real, when these relate to movable or immovable property and personal guarantees, when the guarantor is liable with all the present and future assets to guarantee his obligations.

2. The concept of bank guarantee

In the practice of commercial activities are more frequent the situations where the obligations undertaken by different subjects of legal relationships are guaranteed by the banking entities or by non-banking financial institutions[1].

The bank guarantees are preferred to other categories of guarantees due to the financial credibility enjoyed by the banking companies in the relevant market, as well as due to easiness to capitalize them.

It is necessary to note that not all the guarantees in which is involved a banking entity fall into the category of the bank guarantees.

In the carried on crediting activity, a banking company is required to comply with the financial prudence regulations which, among others, imply the procurement of some guarantees from the debtors credited by it. According to quality of the debtors and the purpose of the credit, the banking entities request the establishment of some real or personal guarantees. It is understood that, in case of failure to reimburse the granted credit, the lending bank will pursue either the assets

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[1] The non-banking financial institutions are regulated by the Law no. 93/2009 regarding the non-banking financial institutions, published in the Official Gazette no. 259 of April 21, 2009.

assigned to guarantee, or the persons who have undertaken the obligation to make the payment instead of the debtor, if he fails to fulfill it. Not such relationships involving obligations form the content of the bank obligations. In order to be in the presence of a bank guarantee is required the bank to take the legal position of debtor of the payment obligation. It is noted that, in case of the lending operations for which the debtor brings real or personal guarantees, the bank has the status of creditor of the guarantees, meaning that it is the beneficiary of the guarantee, a quality that allows it to pursue them in order to satisfy its debts to the guaranteed debtor. Or, the bank guarantees are those where the bank has the capacity of debtor, meaning that it undertakes the obligation to pay a sum of money or to indemnify if the debtor guaranteed by it does not fulfil or fulfil improperly the guaranteed obligations.

Therefore, in the crediting relationships, the bank has the capacity of creditor of the real or personal guarantee set up in its favour and, as concerns the bank guarantees, the issuing bank has the capacity of debtor of the guarantee. It means that, if the customer guaranteed by it will not fulfil the obligation to reimburse the credit, the lending bank will satisfy its debt by pursuing the assets assigned to guarantee or the persons who have undertaken to make the payment instead of the debtor. The guarantees accompanying the credit have nothing particularly compared to the civil legal guarantees, meaning that they may be real or personal, that is the debtor may set up an immovable or movable property or he may guarantee with his entire patrimony. The only difference is that the beneficiary of the guarantees of the credit is the lending bank entity.

On the other hand, the bank guarantees are different from the ordinary guarantees in that they are intended only to pay a sum of money or to give some compensation. Unlike the guarantees of common law that may have as object both movable and immovable property, as well as the personal guarantees, the bank guarantees are set up exclusively on some amounts. In other words, the bank issuing the guarantee is committed to its beneficiary, not with an immovable property or determined movable property, but with its entire patrimony. This is because, according to the financial-bank prudence rules, the acquisition and the ownership of movable and immovable property, it has a legal system very different from the other legal entities and natural persons.

3. Concept and regulation

As shown above, the new Civil Code has defined the field of guarantees and, as a novelty, introduced the so-called category of *autonomous guarantees*. Under the heading *autonomous guarantees*, the Civil Code regulates the letter of guarantee in article 2321 and the letter of comfort within the content of article 2322.

We notice, therefore, that the legislator does not use the term of bank guarantee, but, in practice, both the letter of guarantee and the letter of comfort are issued by a banking entity. Hence the usual expression *letter of guarantee*. Certainly, as the two categories of guarantees are regulated, they may be used and issued by any participant in the legal relationships, but, as we mentioned, they are especially used by the issuers of the banking companies. Hence the consequence according to which, if they are issued by other entities, they shall have the character of ordinary guarantees and only if they are undertaken by a banking entity or non-banking financial institution, they will acquire the legal status of bank guarantees.

4. Letter of bank guarantee

According to the provisions of article 2321 of Civil Code, the letter of guarantee is the irrevocable and unconditional commitment by which a person, called issuer, undertakes, at the request of a person called authorizing officer, in consideration of a preexisting report involving obligations, but independently, to pay a sum of money to a third party called beneficiary, under the terms of the undertaken commitment.

The definition given by the legislator shows the main characters of the letter of bank guarantee.

Thus, although the legislator uses the notion of *guarantee*, actually, this is an authentic contract between the issuer and the beneficiary of the guarantee. It follows that this category of obligations has as source the parties' agreement and, at least in principle, it cannot be set up by a judicial process or by any legal norm.

Then, the letter of guarantee has an irrevocable character, resembling with the irrevocable documentary letter of credit[2]. The irrevocable character of the letter of bank guarantee consists in the fact that, once undertaken the payment committed, it cannot be unilaterally revoked, denounced or modified by the issuing bank.

The commitment made by the issuing bank is also unconditional, meaning that the bank will pay, without being able to invoke the exceptions resulting from the relationships involving obligations which are guaranteed by it. Hence the autonomous character of the letter of guarantee materialized by the payment of money, independently of the pre-existing legal relationships guaranteed by it.

The letter of bank guarantee has a trilateral character, expressed by the fact that in the conduct of the relationships of guarantee participate at least three entities: the issuing bank, the authorizing officer and the beneficiary.

This type of guarantee requires a relationship involving obligations, pre-existing and independently of it. In other words, as a technique of drawing up and issuing the guarantee, the bank will undertake the irrevocable payment commitment only after the obligations intended to be guaranteed have been executed.

The letter of guarantee aims to pay a sum of money, which means that will not be brought as a guarantee any movable or immovable property. Since is not specified a property or a category of assets as a guarantee, it means that the issuing bank exhibits its entire patrimony on the occasion of issuing the letter of guarantee, meaning that its status is very similar to the personal guarantor' status from the relationships involving obligations specific to the common law.

5. The participants in the legal relationships specific to the letter of guarantee

As shown in the definition given by article 1321 of Civil Code, in the conduct of the relationships of a letter of guarantee take part the issuer, the authorizing officer and the beneficiary.

Under the silence of law, in capacity of issuer may be any natural person or legal entity and the undertaken commitment will have the legal nature of the letter of bank guarantee only in case it was undertaken by a banking entity or non-banking financial institution.

The issuing bank has the capacity of debtor of the guarantee, meaning that if its customer, that is the authorizing officer guaranteed by it does not fulfil his obligations or fulfill them improperly, the issuing bank will pay a sum of money to the third-party beneficiary.

The authorizing officer of the bank is a customer who, in the preexisting relationships involving obligations, acts as a debtor, meaning that he has to execute certain actions, to perform works, to provide services or to deliver certain goods to the beneficiary, pursuant to some arrangements made with him. Thus, the letter of guarantee requires the existence of at least two conventions. The first consists of the agreement between the authorizing officer and the beneficiary to deliver certain assets, to perform works or to provide services and the second is the convention that materializes the proper letter of guarantee by which the issuing bank undertakes to pay a sum of money to the beneficiary.

The position of the participants in the relationships specific to the letter of guarantee is different. In the convention generating the preexistent relationship involving obligations, the parties

[2] The main regulation of the documentary letter of credit is the Publication no. 600 regarding the uniform rules and the practice on the letters of credit of the Chamber of International Commerce - Paris (UCP - 600); for further details concerning the documentary letters of credits, see V. Nemes, Banking Law. Academic course, "Juridic Universul" Publishing, Bucharest 2011, page 184 et seq.

are the authorizing officer and the beneficiary and their capacity varies according to the nature of the convention. This may be a sale-purchase contract by which the authorizing officer, in capacity of seller, undertakes to deliver certain goods to the beneficiary, in capacity of buyer, or may be an agreement, an enterprise contract by which the authorizing officer, in capacity of entrepreneur, undertakes to perform a work for the beneficiary.

The mechanism of the bank guarantee arises from the protection ensured by the beneficiary. Keeping on the above examples, the beneficiary, in capacity of buyer or, where appropriate, consignee of the works, requires the authorizing officer, namely the seller, respectively the entrepreneur, to bring as a guarantee the obligation of a bank to compensate him by paying a sum of money, if the authorizing officer, in capacity of seller or, where appropriate, entrepreneur, will not fulfill his obligations or will fulfill them improperly. Definitely, he will not deliver the goods at the deadline agreed in the contract, he will not deliver the goods as determined by the parties, he will not complete the works within the agreed period etc.

From the technique of regulation and operation of the letter of guarantee is understood that the parties of a bank guarantee are the issuing bank and the beneficiary of the guarantee. This is because the issuing bank undertakes to make the payment to the beneficiary. We notice, therefore, that the authorizing officer is not a party of the letter of guarantee, as the issuing bank is not a party of the contract which generated the preexisting relationship involving obligations.

Definitely, under the principle of relativity of legal documents, the letter of guarantee will cause legal effects between the issuing bank and the beneficiary, the authorizing officer being a third party of it and the contract which generated the preexisting relationship involving obligations will cause legal effects exclusively between the authorizing officer and the beneficiary and the third party of the contract being, this time, the issuing bank.

6. The purpose of the bank guarantees

As we mentioned above, according to the provisions of article 2321 of Civil Code, the letter of guarantee is the commitment by which the issuer undertakes, at the request of the authorizing officer, to pay a sum of money to the beneficiary for the event that the authorizing officer will not fulfill his obligations arising from the preexisting legal relationships or will fulfill them improperly.

As we can see in the content of article 1321 of Civil Code, the obligation of the issuing bank consists of the payment of an amount. Therefore, the purpose of the letter of bank guarantee will consist of sums of money, excepting other movable or immovable property.

Definitely, the purpose of the letter of bank guarantee is the irrevocable and unconditional obligation of the issuing bank to pay a sum of money to the third party, called the beneficiary, in the event that the authorizing officer fails to perform his obligations or perform them improperly.

7. The effects of the letter of bank guarantee

As the relationships specific to the letter of bank guarantee have a trilateral character, meaning that in such relationships participate the issuer, the authorizing officer and the beneficiary, we will consider the effects generated by it, distinctly, between the issuer and the authorizing officer, the effects between the issuer and the beneficiary, as well as the legal effects between the authorizing officer and the beneficiary.

7.1. The effects of the bank guarantee between the issuer and the authorizing officer

As shown by the norm, the article 1321 of Civil Code, the letter of guarantee is issued upon the request of the authorizing officer. Usually, the authorizing officer is a customer of the issuing bank, who needs its commitment towards the beneficiary.

We mentioned that the authorizing officer is not a party in the letter of guarantee; under the principle of relativity of legal documents, the authorizing officer is a third party. This feature is materialized by the fact that is generated the relationship involving obligations of the bank guarantee

and it will be carried out exclusively between the issuing bank and the beneficiary of the guarantee. The issuing bank undertakes the payment commitment, based on the legal relationships with the authorizing officer. Please note that the bank warrants the obligation of the authorizing officer towards the beneficiary of the preexisting relationships involving obligations and, in order to undertake the commitment, the authorizing officer, in his turn, must provide the guarantees required by the bank. Once the bank compensates the beneficiary, it will return against the authorizing officer in order to recover the amounts paid pursuant to the letter of bank guarantee.

According to the financial-bank prudence rules, the issuing bank may require guarantees to the authorizing officer, such as: mortgages on movable goods or mortgages on real estates, pledge on accounts or certain personal guarantees in order to protect its right to recover the amounts paid to the beneficiary. The right of the bank to recover the amounts paid as a guarantee is stipulated in the article 1321, paragraph 4, of Civil Code which states that: *"The issuer who made the payment has the right of recourse against the authorizing officer of the letter of guarantee"*.

Since the right of recourse is provided by law, the issuing bank will recover the amounts paid as a guarantee, even if this issue is not expressly stipulated in the contract.

7.2. The legal effects between the issuer and the beneficiary

Whereas the parties of the letter of bank guarantee are the issuing bank and the beneficiary, it causes legal effects between the two parties. Definitely, if the authorizing officer does not fulfill his obligations of the preexisting legal relationships (he does not deliver the goods, does not perform the works, does not provide services etc.) or fulfill them improperly, the beneficiary will activate the letter of guarantee and, pursuant to the undertaken obligation, the bank which makes the guarantee will pay the amount stipulated in the contract.

The letter of guarantee may be executed at the first and simple request of the beneficiary, meaning unconditionally, or it may be subject to the occurrence of certain circumstances that might cause the non-fulfillment or improper fulfillment of the guaranteed obligations.

Article 2321, paragraph 2, of Civil Code provides that the undertaken commitment is executed at the first and simple request of the beneficiary, if not otherwise provided in the letter of guarantee. It follows that the method to activate the letter of guarantee depends on the parties' agreement and, definitely, it may be submitted in two forms: one form is that the amount will be paid at the first and simple request of the beneficiary and the second, where the letter of guarantee is conditional, the sums of money will be paid only after the beneficiary will demonstrate the conditions which generated the non-fulfilment of the obligations by the debtor.

For example, in the letter of guarantee may be stipulated that the payment of the amounts will be made only if the authorizing officer did not fulfil his obligation due to the fact that he became insolvent or he started the insolvency proceeding. The differences between the letter of guarantee at the first and simple request (unconditional) and the conditional letter of guarantee are substantial and consist in the manner and terms of payment of the amounts by the bank which makes the guarantee.

If the guarantee is at the first and simple request, is sufficient the beneficiary to prove that the authorizing officer did not fulfil his obligations of the pre-existing legal relationship or fulfilled them improperly and, therefore, the bank which makes the guarantee will be required to pay the amount indicated in the letter of guarantee. On the other hand, if the bank guarantee is conditional, for example by the debtor's insolvency or other circumstances, the beneficiary may not claim the payment from the issuing bank before proving the conditions for the non-fulfilment of the obligations by the authorizing officer. In this example, the beneficiary of the letter of guarantee must prove to the bank which makes the guarantee that the authorizing officer did not fulfil his obligations due to the insolvency proceeding. Therefore, in the relationships involving obligations, from the beneficiary's view, the greatest protection is offered by the letter of bank guarantee executed at the first and simple request.

We mentioned in the above lines that the relationships specific to the bank guarantees are independent of the pre-existing relationships involving obligations guaranteed by them. The autonomous character of the two categories of relationships involving obligations is expressly provided by the article 1321, paragraph 3, of Civil Code.

In this respect, the said legal text provides that the issuer cannot oppose to the beneficiary the exceptions based on the relationship involving obligations existing before the commitment undertaken by the letter of guarantee and he shall not be held to pay in case of abuse or obvious fraud.

The beneficiary of the bank guarantee may assign the right to request the payment within the letter of guarantee if its text expressly provided it; therefore, the letter of bank guarantee is transferable but only if the parties have conferred such character.

In terms of the period in which the letter of guarantee covers the payment of the amounts for the obligations undertaken in the preexisting legal relationships, the Civil Code allows the parties to agree in such matter. Specifically, we have in view the provisions of the article 2321, paragraph 7, of Civil Code, providing that, if not otherwise stipulated in the letter of guarantee, it shall take effect from the issuing date and the validity shall cease by law at the specified deadline, independently of the delivery of the original letter of guarantee. In practice, the validity period of the letter of guarantee exceeds the execution time of the obligations undertaken in the preexisting legal relationships. This is because, even if the letter of bank guarantee is autonomous, independent and unconditional, it cannot be activated before the expiration of the execution period of the obligations undertaken in the preexisting, main legal relationships guaranteed by it. In other words, the beneficiary cannot capitalize the bank guarantee before the maturity of the main obligations, meaning before the term for the delivery of the goods, providing services, execution of works etc. A contrary attitude of the beneficiary would lead to the refusal of the request regarding the payment as prematurely submitted.

It should be noted that is important the non-fulfillment of the obligations of the guaranteed preexisting legal relationships or improper performance by the authorizing officer to take place and to be observed within the validity period of the letter of bank guarantee because, by hypothesis, if the guaranteed events occur after the expiry of the letter of guarantee, undoubtedly the bank which makes the guarantee is exempted from liability. In the practice of the guaranteed legal relationships often happens the parties extend the terms for the execution of the obligations by omitting, many times, to also extend the validity of the letter of bank guarantee. In such cases where the maturity of the obligations is extended and falls outside the validity period of the letter of guarantee, the bank which makes the guarantee cannot be required to pay pursuant to the letter of guarantee.

Therefore, in order the bank guarantee may be capitalized, it is important that the non-fulfillment of the guaranteed obligations or improper fulfillment take place during the validity of the letter of bank guarantee and the capitalization of rights will be done thereafter, amicably or by judicial process.

7.3. The legal effects between the authorizing officer and the beneficiary

The authorizing officer, not being a party in the letter of bank guarantee, causes legal effects between the issuing bank and the beneficiary of the guarantee. Do not forget that the letter of bank guarantee comes into being at the request of the beneficiary. The request is submitted to the authorizing officer and he, finally, requires the bank to issue a letter of guarantee. Therefore, although the letter of bank guarantee causes legal effects directly between the issuing bank and the beneficiary, the guarantee is not generated at the direct request submitted to the beneficiary by the bank, but upon the request submitted to the authorizing officer.

Due to the independent and autonomous character of the letter of guarantee, the authorizing officer will not be responsible for the non-fulfillment of the payment obligation undertaken by the bank which makes the guarantee. This is because, as we mentioned above, according to the

applicable legal norms, the payment of the amount is the responsibility of the bank which makes the guarantee. For this reason, if the bank which makes the guarantee refuses to pay, the beneficiary cannot claim damages from the authorizing officer, but only for the capitalization of his rights pursuant to the letter of guarantee, by judicial process.

8. Letter of comfort

8.1. Concept and regulation

The regulation of the letter of comfort is foreseen in the provisions of the article 2322 of Civil Code. According to the said text, the letter of comfort is the irrevocable and autonomous commitment by which the issuer undertakes an obligation to do or not do, in order to support another person, called debtor, for the execution of its obligations towards a creditor.

Even here the law does not condition the capacity of the issuer, meaning that the letter of comfort may be undertaken by any natural person or legal entity. It will be deemed a bank letter of comfort if the payment commitment is undertaken by a banking entity or non-banking financial institution. In the regulation of Civil Code are also foreseen the main characters of the letter of comfort. Therefore, as the letter of guarantee, the letter of comfort generates an obligation to guarantee the execution of certain services by the debtor for his creditor.

The letter of comfort is also submitted as an authentic contract between the issuer and the creditor of the main obligations, who will receive the legal status of beneficiary of the letter. The commitment undertaken by the letter of comfort has an irrevocable character, expressed on the fact that, as in case of the letter of guarantee, the issuer cannot unilaterally cancel, withdraw or modify the payment obligation.

The purpose of the letter of comfort consists in the obligation of the issuer to do or not do, in order to support another person. Thus, unlike the letter of guarantee whose purpose consists in the payment of an amount, the letter of comfort has as subject the obligation to do or not do. This is clearly shown in the definition of the letter of comfort contained in the article 2322, paragraph 1, of Civil Code, according to which the letter of comfort is an irrevocable and autonomous commitment where the issuer undertakes an obligation to do or not do, in order to support another person, called debtor.

The payment of an amount is the secondary purpose of the letter of comfort and an accessory, meaning that it is conditioned by the non-fulfillment of the obligation to do or not do, undertaken by the issuer of the letter of comfort. This feature arises from the content of the article 2322, paragraph 2, of Civil Code, according to which the issuer of the letter of comfort may be required only to pay damages to the creditor.

The letter of comfort has a trilateral character, the participants in the legal relationships specific thereof are: the issuer, the debtor and the creditor of the guarantee obligation.

The letter of guarantee is independent and autonomous of the main obligations guaranteed by it. This feature is foreseen in the content of the article 2322, paragraph 1, of Civil Code prohibiting the creditor to assert any defense or exception arising from the relationship involving obligations guaranteed by the letter of comfort.

8.2. The legal effects of the letter of comfort

As the letter of guarantee, the letter of comfort causes three categories of legal effects, namely: legal effects between the issuer and the debtor, legal effects between the issuer and the creditor or the beneficiary of the letter and legal effects between the debtor and the creditor.

As concerns the legal effects specific to the relationships between the debtor and the issuer of the letter, it should be noted that the letter of comfort is issued at the request of the debtor, submitted to the issuer. As in case of the letter of guarantee, the issuing of the letter of comfort is based on the creditor's initiative, but he does not apply for it directly to the issuing bank, but to his debtor and, finally, the debtor applies to the issuer in order to make a guarantee for him.

If the debtor fails to fulfill his guaranteed obligations or fulfill them improperly, the issuer is liable for damages to the creditor. After he compensates the creditor, the issuer of the letter of comfort shall recourse against the debtor in order to recover the paid amounts. The issuer's right of recourse is foreseen in the article 2322, paragraph 3, of Civil Code providing that the issuer of the letter of comfort, who is required to compensate the creditor, has the right of recourse against the debtor.

As the issuer of the letter of guarantee, the issuer of the letter of comfort may condition the issuing thereof by certain real or personal guarantees from the debtor who asked him to make a guarantee, on his behalf, towards the creditor. It is understood that, if the debtor does not make the payment, the issuer of the letter of comfort may capitalize his right of recourse by pursuing the movable or immovable assets or the persons who have guaranteed the debtor's obligation.

As concerns the legal relationships between the issuer of the letter and the creditor, they are governed by the principle of independence and autonomy of the undertaken guarantee obligation.

The article 2322, paragraph 2, of Civil Code provides that, if the debtor fails to fulfill his obligation, the issuer of the letter of comfort may be required only to pay damages to the creditor and only if the latter proves that the issuer of the letter of comfort did not fulfill his obligation undertaken by the letter of comfort. The payment of damages may be performed amicably and, in case of refusal from the issuer of the letter of comfort, by judicial process.

However, it should be noted that, according to the article 2322, paragraph 1, final thesis of Civil Code, the issuer may not oppose the creditor any defense or exception arising from the relationship involving obligations between the creditor and the debtor. This is the consequence of the independent and autonomous character of the guarantee obligation undertaken by the letter of comfort towards the obligations arising from the main legal relationships guaranteed by it.

Finally, the legal effects between the debtor and the creditor are those arising from the main relationship involving obligations, in relation to which the letter of comfort was issued. Indirectly, the letter of comfort takes effect also regarding the legal relationships between the creditor and the debtor by the fact that, as stated in the foregoing, according to the legal norms, the issuer of the letter may be required to pay damages only if the creditor proves that he did not properly fulfil his obligations.

Conclusions

As it relates from the present study, the New Civil Code has the merit of institutionalising the rules that are the embedment necessary for the making and use of the bank guaranties, which are so used in the commercial activity nowadays.

The Civil Code legislates only the general principals regarding bank guaranties wich means that the parties to the obligation must see to the details and must adapt these guaranties in accordance to their personal interests.

None the less, apart from the dispositions of the Civil Code regarding the guaranties, the rules regarding the financial prudence towards the credit institutions and nonbanking financial institutions exposure must be kept in sight.

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CORPORATE SOCIAL RESPONSIBILITY: OPTIONAL OR REGULATORY

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Abstract
Given the collateral activity developed and the economic background of the present author I took the approach of a topic that includes aspects from both fields, namely "Corporate Social responsibility- optional or regulatory".
Through the paper I will try to summarize the pros and cons of regulation, mandatory of corporate social responsibility and to review, present the ways in which countries with advanced economies in European Union and the EU itself have addressed this issue.

Keywords: *corporate, social, responsability, optional, regulation, economies*

Introduction

The interest in the social responsibility of businesses, mainly known as "corporate social responsibility" (CSR), is not of recent date, the issue of a „moral" responsibility of companies which should contribute to the welfare of the community that provides for their existence and profit has been raised ever since the end of the XIXth century.

Currently, the debate has switched from a moral-type approach towards a utilitarian approach, business social responsibility being rather perceived from the perspective of costs and benefits involved.

The basic idea CSR relies on is that profits, people and the environment can be harmonized in a strategic corporate approach, so that the company can become economically viable, socially responsible and careful towards ecological aspects.

Corporate responsibility is seen as a complementary and effective agreement between business and the society where it operates, an agreement which highlights the mutual dependence between companies and community.

So that the company's actions and society's evolution can lead to success, they should be conducted in an atmosphere of *mutual trust and predictability* so as to enable both the achievement of business success and fulfillment of obligations to shareholders, as well as social welfare and environment protection.

Trust between the actors involved relies on past experience of cooperation relations and on community's cultural level.

As countries of the world and international institutions have acknowledged that adoption of corporate social responsibility principles serves the objectives of long-term development, the need for international standards has come up to define the meaning of a "desirable corporate behavior".

The main debate in this area refers to two distinct concepts:

❖ CSR seen as a **moral obligation or duty** towards a wider or narrower range of groups of interest

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❖ and CSR as an **initiative voluntarily assumed by companies**, in order to meet social and economic objectives.

To solve the dilemma: **volunteering of regulation**, the European Commission, established at the management level of the European Union, has assumed a role of arbitrator in promoting CSR, mediating **adoption of certain regulations and encouraging voluntary approaches**.

By its strong social policy and by its objectives proposed in the Lisbon Strategy, the European Union insisted in particular on the **development of the CSR concept** and on its practical implementation.

Thus, in the European Union, the European Forum on corporate social responsibility issues defines **CSR** as "**a concept whereby companies voluntarily integrate social and ecological aspects in their business operations and in their interactions with stakeholders**".

At the same time, the European Commission has based its strategy to promote CSR on a few principles having regard to:

1- Recognition of the voluntary nature of CSR;
2- The need to render credibility and transparency of CSR specific activities;
3- Focus on community actions which truly bring added value;
4- Balanced approach to CSR, from the economic, social, environmental perspectives, including its correlation with the interests of consumers;
5- Granting increased importance to the specific demands of SMEs;
6- Support and compliance with existing international agreements and instruments (Labour Standards, etc)

In addition, the European Commission has focused its strategy on the following domains:

1- A better knowledge of the positive impact of CSR on enterprises and society in Europe, mainly in developing countries;
2- Increase of expertise and good practice exchange between companies in terms of CSR;
3- Promoting the development of CSR management abilities;
4- Stimulation of the SR attitude within SMEs;
5- The integration of CSR with other communitarian policies, such as meeting social standards (SA 8000) and environmental standards (ISO 140010), so that the fundamental rights be unalterably respected.

CSR awareness, evoked in the European Council in Lisbon in March 2000, resulted in the introduction of the "Best Practice" concept in areas such as:

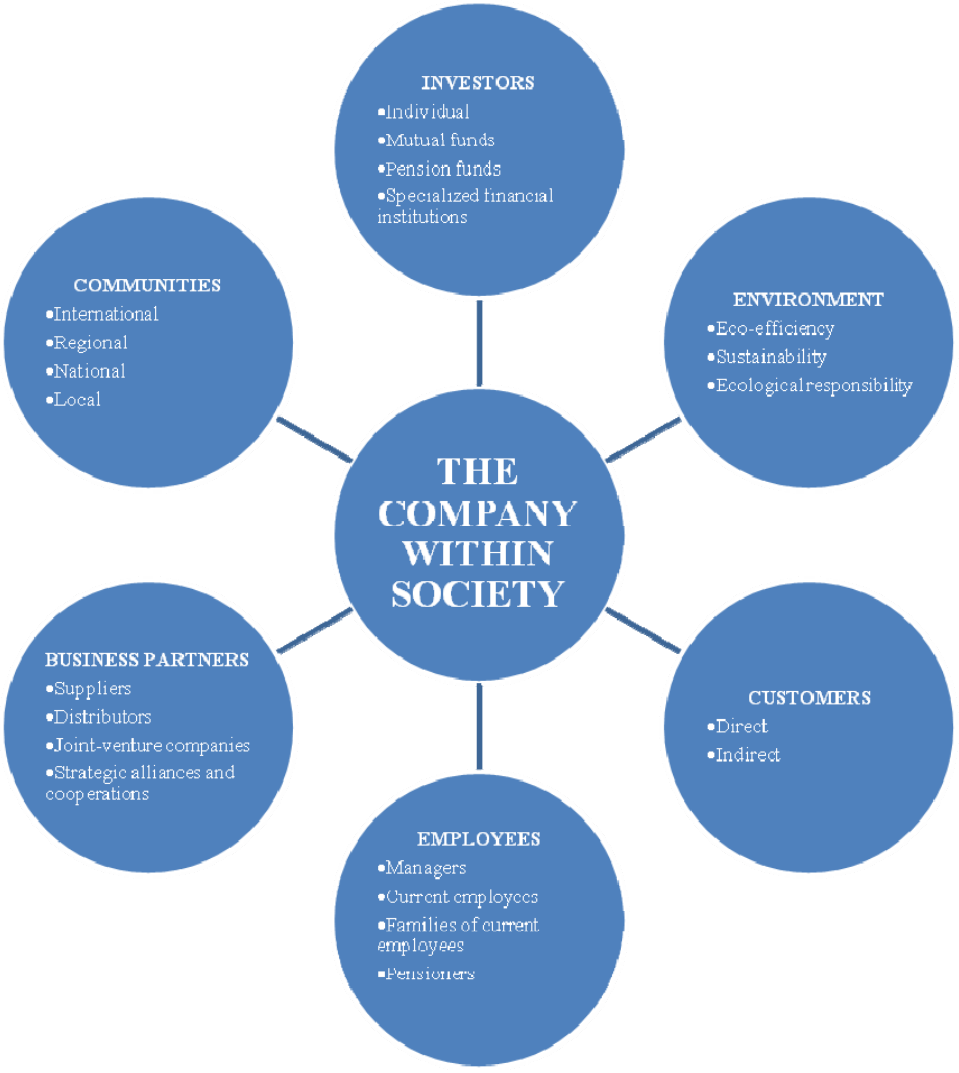
- Lifelong learning;
- Work organization;
- Equality of chances
- Social inclusion;
- Sustained development.

Starting from the premise of raising awareness on every aspect specified in the definition, the center of gravity becomes, thus, the **enterprise and the company (from SME to corporations), their responsibility in social and environmental areas**.

In the Green Paper, the European Commission **defines the CSR concept as being voluntary decision of enterprises -companies to contribute to the improvement of society and a cleaner environment**. The same document specifies that "for an enterprise to be socially responsible, it must meet legal requirements, comply and invest in human capital, environment and relations with the parties involved."

All these definitions show that, in the modern society, the company must be responsible not only to shareholders (owners), but also to all groups which are influenced or influence, directly or indirectly, company's activity: the shareholders/owners, customers, employees, suppliers, distributors, business partners, creditors, competitors, governmental and non-governmental organizations, local communities, public opinion, groups of interests, the media, etc. considering that the primary duty is to provide quality goods and services at fair prices, which would contribute to the welfare and development of society as a whole (see *Fig. 1. The six key responsibilities of CSR*). Socially responsible companies consider the profit to be a reward for the work performed for the benefit of the community.

Fig. 1. The six key responsibilities of CSR



Source: Palazzi, M. Starcher, G., *Corporate Social Responsibility and Business Success,* The European Baha'i Business Forum, Paris, France, 1997, revised 2006, p. 9, http://www.ebbf.org/fileadmin/pdfs/publications/responsibility - success.pdf

Thus, one can appreciate the social responsibility of the company as "the obligation freely assumed by a firm, beyond its legal obligations or those imposed by economic constraints, to pursue long-term objectives which are for the benefit of society."[1]

In order to avoid some misunderstandings, one should differentiate the ***social involvement of companies***, through philanthropy, donations or sponsorships from ***corporate social responsibility***.

What are the differences between the ways of action mentioned above?

- ***Philanthropic activities*** are organized for charitable, humanitarian causes.
- The ***donation*** is a quite widespread method, by which a company provides financial support to an organization or to actions of the community it is part of.
- ***Sponsorship*** is another method, perhaps even most frequently used, to financially support an organization or an event which brings promotion, and it is deducted from the corporate tax to a maximum of 0.3% of turnover, but no more than 20% of the due corporate tax.

Corporate social responsibility, though it may also include the methods above, **represents more than those**, being in fact ***a strategy***, specially developed for this purpose,**through which firms can interact with the community where they operate**- in narrower or wider sense -.The CSR strategy, which also creates benefits for the company, may include expertise and various other types of services offered to beneficiaries in potential partnerships. The *spirit of mutual aid* which underlies philanthropic actions is *replaced with a relationship of reciprocity*.

Usually, it is accepted that corporate social responsibility activities and projects be allotted 0.8% - 1% of companies' operational profit.

This concept and managerial attitude proved to be the most effective, not only as it ensures *company's economic success*, but also because it allows obtaining a *competitive advantage* due to gaining confidence of the people from inside and outside (customers and suppliers) and acquiring – as a consequence – a good reputation (goodwill).

Communication between employer and employees, between developer and community is necessary for all the projects, initiatives and actions related to social responsibility. There are various possibilities for the transmission of messages related to corporate social responsibility: product labels, packaging, media relations, publications, events organized for this purpose (conferences, contests, promotional events), reports, posters, brochures, fliers, websites, advertisements, informational packets or verbal messages.

The methods used for information dissemination depend on the selected target group: customers, employees, local community, press.

Thus, the community will have confidence that the company protects the environment and acts responsibly on social level and employees will be proud to work in a company concerned with their issues and which appreciates their work and contribution.

There are however situations where certain managers consider the corporate social responsibility as a marketing tool which can bring profit, this approach having generated controversies on the ethical character of some projects and actions carried out under the auspices of this concept. Especially if those companies sometimes cause certain damages to the community where they run business. (for example, the Rosia Montana project in Romania)

One of the major dilemmas concerns the ethics of those companies which cause damages to the community or environment where they operate and, at the same time, they carry out or participate

[1]S. P. Robbins, M. Coulter, *Management*, Prentice – Hall International Inc., New JeRSCy, USA, 1996, p. 148.

in social responsibility projects. The question is whether these companies are entitled to a positive image and the other benefits pertaining to the corporate social responsibility.

Due to non-compliance with the basic principles of corporate social responsibility, some countries face situations which can lead to a *crisis of the corporate system*, by loss of confidence of business partners, Governments and citizens in the successful models of the previous years.

In order to prevent conflict situations with serious social and economic consequences, a series of actions are considered on three intervention levels:

1.stimulation of corporate responsibility by voluntary adopting of the necessary changes,

2.corporate supervision through a system of regulations, control and penalties,

3.sanctioning of the culpable enterprises.

Pros and cons of social responsibility of enterprises

Starting from the various approaches and visions on CSR, the specialized literature devotes an ample presentation of its pros and cons.

Bowie andDuska, in*Business Ethics*[2], carried out a synthesis of the most frequent arguments invoked **for and against a maximalist approach to CSR**.

Pros for the maximalist approach of corporate social responsibilities:

a. **the call to citizenship**: businesses, as institutional members of the society, are citizens, and citizens have civic responsibilities and duties;

b. **obligation to gratitude**: corporations capitalize on the society, so they have some obligations of gratitude towards the society which allows them to exist and operate; businesses should behave in accordance with the wish of the general public;

c. **responsibility of social power**: corporate social responsibility derives from company's social power; the significant financial resources of corporations should be used wisely and largely to solve urgent social problems**.** Therefore, businesses must use their power for good purposes, socially and environmentally.

Cons for the maximalist approach of corporate social responsibilities:

a. Obligations of corporations to do well cannot be extended indefinitely, companies' increased duties to help in solving certain social problems could lead to the impossibility of obtaining profits by companies or their refusal to contribute to solving those social problems.

b. There is no authority to define criteria for moral assessment (social needs and hierarchy of their priorities) when the enterprises fulfill their maximal social responsibility.Company managers, accustomed to management decisions - based on economic and financial criteria, will find themselves in the position to make ethical decisions - based on moral considerations. Thus, businesses will influence social priorities, which must remain at the discretion of the Government and elected representatives.

c. Shareholders will be deprived of a part of the profits, which will be allocated by managers as they wish. This contradicts the hypothetical social contract concluded between managers - as agents of the owners - and shareholders.

d. The increased social responsibility of a company mistakes its social obligations for discretionary actions, freely undertaken by the company. Businesses do not have the moral responsibility to do well. The relationship between ethics and business must be realistic: after all, the

[2] N.E.Bowie, R.F. Duska, *Business Ethics*, 2 ed., Prentice-Hall International, New JeRSCy, USA, 1990, p. 42.

ultimate goal of business is to make profit, even if this requires meeting additional moral and social obligations.

Gheorghe Ionescu[3], in his book *Culture of business: American model*, considers the pros and cons of the extended corporate social responsibility depend on the analysis perspective, i.e. whether it is considered to be an economic system responsible only to shareholder/owner, or if it is viewed as an economic-social system responsible to a multitude of different groups of interests.

Current realities show that, **beyond the balance between the pros and cons** of social responsibilities (table 1), **companies have developed a specific social behavior, which exceeds the concept of financial profit's strict maximization**. The main purposes of the company's involvement in social activities can be grouped as follows:

- economic reasons: ensuring profits (and protection of shareholders' interests) on long term; avoidance of additional future costs (imposed by Government policy, environmental degradation, etc.);
- extra-economic reasons: improvement of public image, social pressure, etc.

Table 1. Pros and cons of corporate social responsibility

PROs	CONs
• **The pressure of public opinion;** • **Ensuring long term profits;** • **Observing moral obligations;** • **Improvement of the public image;** • **Improvement of the environment;** • **Avoidance of certain Government regulations;** • **Commitment to social responsibilities according to their power in society;** • **Promoting long-term interests of shareholders;** • **Availability of resources to support the charitable actions;** • **Reason: superiority of prophylaxis over treatment;**	• Infringement of market regulations; • Setting of firm's purpose through extra-economic actions; • High costs; • Growth above the limits of power in society (by involvement in extraeconomic areas); • The lack of specialists in social issues; • The difficulty of the track (for accounting purposes) the use of resources; • Nonexistence of a wide social support (pros/cons).

Sursa: Robbins, Stephen P., Coulter M., *Management*, Prentice Hall, International, Inc., 1996

Partisans of **anti - CSR** see the company as a purely economic system, profitable by its very nature and responsible only to shareholders.The arguments brought in favor of this vision may include:

➢ The system of the competitive market works effectively, real, only when the organization focuses on economic performance and capitalizes shareholder's interest. This model provides the best possible use of the resources of the society.

[3] Gh. Gh. Ionescu,*Culture of business: American model,*Economic Publishing House, Bucharest, 1997, p. 177-178.

- As economic institutions, organizations will specialize in what they do best, i.e. the efficient production of goods and services. The profit represents a reward for its effective, real, social performance.
- Businesses must not necessarily pursue social goals. This function is left to other institutions of society.
- Any unselfish attempt of corporate social responsibility is basically a part of shareholders' resources, which will no longer be, legitimately, distributed as profits.
- Businesses have a great economic power. Social responsibility of large corporations will have excessive influence of inappropriate, highly exaggerated, on many other activities. Pluralism is cherished and avoidance of concentration of power is intended.
- The company that will emphasize social responsibility will have a competitive disadvantage as compared with those which do not assume such a responsibility or practice it less.

Partisans of corporate social responsibilities consider the company as an economic-social system responsible to a multitude of various groups of interests and they justify their favorable attitude using, among others, the following points of view:

- There are no situations of pure competition and the competitive environment does not automatically guarantee the optimum allocation of resources. The market economy does not guarantee the efficiency and equity activities undertaken by operators.
- Businesses are not only profitable economic instruments, but business activities also have significant social impacts. Profit is not the only indicator of social performance.
- Usually, managers are not trained to deal with social responsibility in their decisions, although the social impact of their decisions is unavoidable. Many corporations have enormous resources and, as such, many of these should be channeled towards activities related to social welfare.
- Social responsibility does not necessarily determine opposition or damage to the interests of shareholders. In long-term operation, consideration of social responsibilities will emphasize of shareholders' interests.
- A better society offers better chance for better future conditions. Investments to improve the social structure predict a favourable business environment, which also has a positive impact on all community members.
- Business organizations that assume a more responsible position discourage certain groups of interests – such as trade unions and Government – and helps large companies to avoid Government regulations and restrictions, thereby avoiding distortions of competition and the free enterprise system. In a broad sense, the business organization has a particular interest in its engaging in social responsibility events.

The presented reasons show that the pro-CSR attitude envisions issues in a broader context or for longer periods of time, while anti-CSR attitude is much more interested in immediate profitability.Over the last two decades, in the developed society, increasingly more corporations have become interested in social responsibility issues, as the arguments in favor of this approach have become more numerous.

The Expression of Social Responsibility in other countries of the European Union

As for the development of CSR on the European continent, one must highlight European Union's contribution to the conceptual development and practical implementation of corporate social responsibility.

In Europe, the interaction between companies and society is strongly marked by the economic, political and cultural diversity on the entire continent. The development of social responsibility of the enterprise in Europe has been determined both by the proactive strategies adopted by leading companies and by the European institutions and national Governments, as well as external pressures from other groups of stakeholders, including civil society or investors, in general.

The idea that **companies should contribute to the general welfare of societybeyond the limits imposed by legal obligations enjoys a long tradition in Europe**, especially in the Anglo-Saxon area.

In Western Europe, following a pioneering endeavor in the Bismarck period in the second half of the XXth century, a social protection system has been developed, as part of the social contract between State and citizens, giving consistency to the notion of "citizenship", so that, for the reduction of social polarization and the development of middle classes,the countries of Western Europe have assumed the role of guarantor of welfare, by the technical role in the organization and supervision of social security systems -mandatory public insurances against major risks in life - and by the role of provider of allowances within the family and demographic policy.

The public mandatory social insurance systems, regardless they are based on social contributions or differentiated income taxes, represent mandatory saving from gross wages, deriving from labor.Whether they are paid by employee or employer, these revenues belong to employees, as labor price, the State only having technical role in administration of pension systems, health insurance, labor accidents or unemployment insurance systems. In addition, in order to avoid social exclusion, according to the principle that "it is easier to prevent than treat", through the budgets of local authorities, local communities, the States have organized and guaranteed a final barrier - network against poverty by the social assistance system, consisting of the compensations and/or occasional social services, strictly customized and limited. The entire social protection system — regardless we refer to social security through insurance or family support policies and social assistance - is based on intragenerational and intergenerational solidarity between rich and poor regions, between rich and poor people, between sexes and between any majority and any minority.

On equal terms,we must all be equal before the law. But only on equal terms. Otherwise, the law can become an abuse of the strong against the weak. Otherwise, even laws may generate crisis. Increasingly more frequent, legality does not necessarily mean legitimacy.

In the recent decades, economic factors and the socio-political situations in many countries in Western Europe have led to a partial redefinition of boundaries in the public sector and private sector, as well as their roles in society. In this context, increasing attention is paid to **voluntary actions** undertaken by companies as part of their corporate social responsibility strategies, in order to manage the economic, social and environmental effects of their activities and to contribute to society's development, in general.

Considering that Europe is a relatively rich continent and a stable region of the world, benefiting from a well developed social and economic structure, the **current problems and challenges associated with CSR in Europe differ significantly from those in less developed regions of the world.**

Thus, **many of the social and environmental corporate responsibilities, which might fall under companies' voluntary involvement in other parts of the world, are strictly legally regulated and defined in Europe**. However, the increasing interest towards business opportunities

associated with innovative approaches in terms of CSR and stakeholders' growing expectations about corporate responsibility and implementation of responsible business practices at intra-and extra-continental level will consolidate the CSR agenda.

Furthermore, given the recent financial and economic crisis, the level of public trust in business environment has decreased significantly in many European countries. In this context, the lending crisis and the recession that followed have emphasized companies' need to contribute to rebuilding civil society's confidence in the business environment and shaping a more responsible and sustainable economy, both in Europe and globally.[4]

In 2007, the European Commission, through the High Level Group of National Representatives on Corporate Social Responsibility issues, has developed a summary of the corporate social responsibility policies in the 27 EU Member States.[5]

This collection illustrates both similarities and differences between national CSR policies.

Although they differ from one country to another, the objectives of these policies are often similar and cover aspects such as:

- encouraging dialogue with all types of stakeholders and public-private partnerships;
- strengthening the transparency and CSR practices and instruments;
- raising public awareness, increase of knowledge, dissemination and copying of excellence models in the field;
- ensuring a more solid and consistent connection between the objectives of sustainable development and public policies.

Thus, for a better presentation of the information in the 27 Member States, the data collected have been structured on three main categories:

I. policies that promote the progress registered in CSR,
II. policies aimed at ensuring transparency of CSR practices and tools
III. and initiatives in other public policies which have a positive impact on CSR.

The conceptual framework of the CSR analysis at European level is as follows:

1. Promotion of CSR:

- Raising public awareness,
- Research,
- Public-private partnerships,
- Business incentives (for example, corporate awards and recognitions)
- Management tools.

2. Providing transparency in CSR practices:

- Principles and codes of conduct,
- The general framework of social reporting,
- Management systems and labels of social/ecological recognition,
- Socially responsible investments,
- Advertising,
- Others.

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[4] CSR Europe, *A Guide to CSR în Europe: Country Insights by CSR Europe's National Partner Organisations*, Brussels, Belgium, October 2009, p. 2-3.

[5] European Commision, General Directorate for Employment, Social Affairs and Equal Opportunities, High Level Group of National Representatives on Corporate Social Responsibility (CSR HLG), *Corporate Social Responsibility – National Public Policies in the European Union*, Brussels, Belgium, 2007, p. 1-95 pe
http://ec.europa.eu/employment_social/soc-dial/csr/csr_compendium_csr_en.pdf.

3. Development of public policies to support CSR:

- Sustainable development strategy,
- Social policies,
- Environment policies,
- Public procurement,
- Trade and export policies (for example, promoting the OECD guidelines),
- Others (development policies or fiscal policies).[6]

At the level of each country, only policies and initiatives directly linked to the social responsibility of the enterprise were reviewed, without being addressed other national policies.

All these show that the nature and characteristics of the corporate social responsibility vary between different Member States and from one cultural context to another: in some countries, CSR is integrated in national policies (such as; Bulgaria, Cyprus, Denmark, Finland, France, Germany, Portugal, Sweden, etc) which leaves little space to companies for voluntary corporate social involvement, while others have rather developed initiatives to raise public awareness and the socially responsible practices are left to the discretion of companies (Estonia, Greece, Ireland, United Kingdom, Netherlands, Slovenia, etc.) starting from the premise that the role of Government and of public authorities is to support opportunities for companies' involvement and not to set up formal structures and strict rules to guide the corporate involvement.

In order to achieve a minimum impediment in all countries, the European Union has developed a number of principles aimed at internal and external relations of enterprises with the community. Internal relations with companies aim:

- to minimize the impact of their activities on the environment and natural resources,
- to ensure a better quality of life for employees at their job and otherwise,
- to ensure a safe and healthy working environment,
- to address responsibly reorganizations in case of crisis, taking into account the interests of all parties involved.

In their external relations with all the interested parts, companies are responsible for:

- respect for human rights stipulated in the *Universal Declaration of Human Rights*,
- support for development of the communities they activate in,
- support for the development of local economic systems by concluding partnerships with local distributors,
- protection and encouraging global environmental protection.

EU recommends adoption of those principles in business strategies of enterprises and reporting on their implementation.

CSR is complementary to specific approaches to ensure increased social and environmental performances and it should not be considered as a legal substitute or a task of companies with public responsibilities, which mainly continue to be under the influence of Governments.

At European Union level, special attention is paid to social responsibility of small and medium-sized enterprises (SMEs), not only to that of large companies, the special term which denotes their social responsibility being: *responsible entrepreneurship*.Even though a special term is

[6] European Commission (2007), *Corporate Social Responsibility – National Public Policies în the European Union*, p. 3.

used, its content overlaps CSR's definition. A different term is used as CSR is a complex notion, mainly developed for large companies.[7]The interest for SMEs is owed to the fact that they represent, at European Union level, the predominant form of business organization, both in number and as contribution to the GNP, as well as in the job offer.[8]In addition, the rate of their occurrence and extinction is very high, their activity being run on markets dominated by large/very large multinational companies and financial and banking policies, which are not always favorable.As a result, the economic success of SMEs is difficult, being possible by a specific mixture of factors, which can turn them into competitive advantage. Under these circumstances, the European Commission got involved, particularly in the last decade, in identifying new methods for SME's to be successful, one of its policy's priorities being stimulation of social responsibility, regarded as potential source of competitive advantage.

The European states, aware of the benefits of CSR, have adopted various regulations in the area.Thus, France requires companies listed at the stock exchange to prepare annual reports dedicated to CSR and all countries have ministries in charge with various aspects of social responsibility.

Thus, in France, at least two ministries have direct responsibilities in the field of CSR: the Ministry of Solidarity and Social Cohesion, as well as the Ministry of Ecology, Sustainable Development, Transports and Housing.[9]

In the United Kingdom, at least three departments (which include several fields run by State Ministers, Secretaries of State or State Undersecretaries) are responsible for areas directly related to business, environment and innovation: the Department for Business, Innovation and Skills, the Department for Environment, Food and Rural Affairs, the Department for Communities and Local Government -community cohesion.[10]

In Belgium, several ministries are directly responsible for CSR related areas, their new names being, Federal Public Service for Employment, Labour and Social Dialogue, the Federal Public Service Economy, SMEs, Middle Classes and Energy, the Federal Public Service for Programming covering the following areas:Social integration and Social Economy and Poverty reduction, Sustainable development, Science policy and, finally, Protection of consumers.[11]

Concerns with CSR are noticed in every policies and strategies of ministries in the EU countries, not only in those with direct social interface. Monitoring of reports is probative from this point of view.

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[7] European Commission, Directorate-General for Enterprise, *Responsible Entrepreneurship. A Collection of Good Practice Cases among Small and Medium-sized Enterprises across Europe*, Luxembourg: Office for Official Publications of the European Communities, 2003.

[8]European Commission , *http://ec.europa.eu/enterprise/csr/index_en.htm*, accessed in July2006.

[9]Ministère des Solidarités et de la Cohésion sociale Ministère de l'Ecologie, du Développement durable, des Transports et du Logement.

[10]Department for Business, Innovation and Skills -Minister of State for Business and Enterprise, Department for Environment, Food and Rural Affairs - Parliamentary Under-Secretary of State for Natural Environment and Fisheries, Department for Communities and Local Government- community cohesion.

[11]Service public fédéral Emploi, Travail et Concertation sociale. Service public fédéral Économie, PME, Classes moyennes et Énergie, Services publics de programmation Intégration sociale, Lutte contre la Pauvreté et Économie sociale, Développement durable, politique scientifique, Protection des consommateurs.

European Union's Directorate-General for Employment, Social Affairs and Equal Opportunities makes annual monitoring of national public policy for Corporate Social Responsibility in the European Union.[12]

Though new in Romania, corporate social responsibility has become an increasingly present concept in the Romanian business community.

Corporate social responsibility was first known due to multinational companies, which are, as yet, the main promoters of corporate initiatives in our country (Coca-Cola, Lafarge, Holcim, Carpatcement, Zentiva, Orange, Vodafone, etc.). As nearly any major concept subject to an accelerated assimilation need in Romania, CSR was initially more like a fashion, rather than the result of full awareness on the needs of all categories of stakeholders.

Originally, the national companies have turned to socially responsible practices in their attempt to meet business standards consolidated at European and international levels. As the Romanian market is becoming increasingly competitive, national companies started to see the potential of a social and economic approach in their brand development, as a prerequisite for he long and medium term commercial success. Thus, corporate social responsibility started being present in the business strategies of companies of all sizes.

A study prepared by European Union's Directorate-General for Employment, Social Affairs and Equal Opportunities in 2007 underlines the weak points of the Romanian social responsibility programs and the low level of public awareness.

The number of complex CSR programs has only increased in the past three years in Romania and few companies are involved in major social responsibility projects.

There are no policies to support CSR activities at Government level and, only in 2008, under the authority of the Ministry of Labour, a Department for Corporate Social Responsibility (DRSC) has been established - the department dealing with the identification and formulation of public policies in CSR, in collaboration with the ministries and specialized bodies of the central and local public administration authorities, employers' organizations, non-governmental organizations and trade unions representative at the national level.

The objectives of the Department are:

- promotion of business practices which help to the success and profitability of companies as well as meeting the objectives concerning sustainable development;
- raising awareness on the social responsibility concept, initiation of an open, constructive dialogue with all interested parties;
- formulation of performance standards in areas such as safety, health and equality of chances.

Development and implementation of public policies in the field of CSR is a challenge that requires learning and innovation, and the public authorities that plan to approach CSR need to expand this capacity. MMFES' commitment to integrate CSR in developing public policies is vital for improvement of decision-making processes on all levels in order to increase competitiveness in a sustainable manner.

[12]Commission Européenne, *Responsabilité sociale des entreprises Politiques publiques nationales dans l'Union européenne,* Direction générale de l'emploi, des affaires sociales et de l'égalité des chances Unité D.2, 2007.

The number of complex CSR programs has only increased in the past three years in Romania and few companies are involved in major social responsibility projects. There are no policies to support CSR activities at Government level.

Conclusions

Even though Corporate Social Responsibility, as it is formally known, is a relatively recent phenomena, company owners and managers have become involved with activities, that can be related to CSR, almost ever since the Industrial Revolution.

But, until 1990, CSR was generally restricted to corporate philanthropy.

From the beginning of the 1990s, extended CSR concepts and practices have become de focus point. What triggered this radical change?

In 2007, Scherer and Palazzo claimed that, in a globalised world, there is a need to change to a new extended political concept concerning CSR.

In fact, globalization also implies a weakening of the national power, the political authorities being able to regulate the businesses that want to extend their operations to a global level. Thus, companies have become key elements on the economical and political scene.

For example, present times companies are considered to be socially responsible, including for their providers chains (for example: Nike).

This is why companies that are in control have the moral obligation to use their power in a responsible manner and to influence the weaker parties in adopting new activities codes, to a certain standard.

Today, the state's authority can be taken over by international organizations, like the IMF, and also by multinational corporations.

On the one side, globalization puts companies in the position that the state was formally in and it obliges them to own up to a responsible corporate conduct. On the other side, a social corporate behavior is necessary for corporations to be able to control the way society reacts to them.

Looking at the situation from this perspective, the importance of having international (European) organizations that can regulate boundaries, rules and standards, for each member state – the minimal amount in order for states to be able to take on and implement for the companies that activate on their territory – becomes very clear.

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CONSIDERATIONS ON EXCESSIVE LIBERALITIES REDUCTION*

ILIOARA GENOIU**

Abstract
Reduction of excessive liberalities represents one of the sanctions typical to succession field, which operates, on demand, as a result of forced heirship being transgressed.
The present work is aimed to analyze all the issues regarding this sanction, under all the aspects which the latter involves, in the light of the current Civil Code[1]. Thus, there will be analyzed elements such as: the way reduction operates, persons who can demand it, ways of performing reduction, statute of limitations term, order in which reduction is performed, legal effects and reduction of some special liberalities.
The present work will also provide a comparative analysis of reduction, by pointing out the novelty elements brought in the field under discussion by the current Civil Code, in comparison with the 1864 Civil Code. In general, when it comes to forced heirship, the current Civil Code consecrates several novelty elements, reconfiguring the matter in question. These modern elements also concern the excessive liberalities reduction issue. Consequently, one of the objectives of the current work is to point out such novelties and to assess their modern character.

Keywords*: forced heirship, disposable portion, donations, legacies, imputing liberalities.*

1. Introduction

Law No. 287/2009 reconfigures the field of succession in general, by preserving from the former regulations only those provisions having a justness and actuality which were never doubted throughout time.

The present work is aimed to analyze the issues regarding excessive liberalities. The New Civil Code regulates this sanction typical to testamentary field in Book IV "On inheritance and liberalities", Title III "Liberalities", Chapter IV "Forced heirship, disposable portion and reduction of excessive liberalities", Sanction 2 "Reduction of excessive liberalities", articles 1091-1098. In relation to them, the new Civil Code regulates the following aspects: the way reduction operates, persons who can demand it, ways of performing reduction, statute of limitations term, order in which reduction is performed, legal effects and reduction of some special liberalities.

In this context, our aim is to analyze such aspects in a comparative manner, so as to point out the elements which the new Civil Code preserved from the former civil regulations (the 1864 Civil Code), but also the novelty elements which the same Civil Code consecrated. We will also assess the justness and appropriateness of the novelty elements consecrated by Law No. 287/2009.

Under the circumstances in which, after the new Civil Code entered into force, on October 1st 2011, it has been published only a specialized work relating to successions[2], we consider that our scientific initiative is both actual and useful. We also want to popularize this way the novelties consecrated by law No. 287/2009 in the field of excessive liberalities reduction, so as to contribute, hopefully, to the good enforcement of the justice act. Moreover, we consider that the results of our

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[1] Law No. 287/2009 on the Civil Code was republished in Romania's Official Gazette, Part I, No. 505 from July 15th 2011.

[2] The work in question was written by professor Dumitru C. Florescu and is called *Dreptul succesoral,* (Bucharest: Universul Juridic Publ. House, 2011).

current analysis can be of interest for notaries public, judges, attorneys, Law students and any other law subject interested in the field of succession.

2. Content

2.1. Short considerations on excessive liberalities

The performance of liberalities with the observance of forced heirship represents one of the limits of the right to make provisions. According to article 1086 of the new Civil Code, "Forced heirship constitutes that part of the inheritance estate to which forced heirs[3] are entitled, according to law, even against the deceased's will, expressed by means of liberalities and disinheritances". Consequently, forced heirship operates only in the case in which the deceased has forced heirs.

Thus, the limits of forced heirship concern, naturally, not only the liberalities ordered by the deceased, but also the disinheritance testamentary clause. Even if a deceased disinherited his forced heirs in his last will act, such heirs will obtain the forced estate, according to law.

If the deceased has only non-forced heirs, he may exert his right to decide on his assets irrespective of any other limitation.

According to provisions of article 1089 of the new Civil Code, the disposable portion represents "…that part of the inheritance estate which is not reserved according to law and which can be freely disposed of by a testator, including by using liberalities".

It thus emerges that, if a deceased has on the one hand forced heirs, while on the other hand he performed liberalities (legacies or donations), his estate shall be divided in two parts: the legal heirhsip, to which forced heirs are entitled, even against the deceased's will, and the disposable portion, which can be disposed of by the deceased out of his own will, without any legal restriction.

Nonetheless, it the liberalities disposed of by the deceased affect forced heirship, such liberalities shall be subject to reduction, being considered excessive.

2.2. Definition of excessive liberalities reduction

Excessive liberalities reduction constitutes the sanction which deprives of efficacy those liberalities made by a deceased, which affect forced heirship[4]. The essence of excessive liberalities reduction concept emerges from the provisions of article 1092 of the new Civil Code, according to which "After an inheritance is opened, the liberalities which transgress forced heirship are subject to reduction, on demand".

Thus, the reduction of excessive liberalities triggers only the latter's inefficacy, and not also their nullity. Consequently, the reduction of excessive liberalities must not be confounded with nullity, although both of them have the legal nature of a civil sanction. Nullity is the sanction which intervenes as a result of a donation contract or a will being concluded by ignoring the essential validity conditions, provided for by law, while reduction concerns a donation contract or a legacy, validly constituted, but which affect a legal limit, namely forced heirship. While nullity intervenes for causes which are anterior or concomitant with the conclusion of a civil legal act, the reduction intervenes for causes which are ulterior to the conclusion of a civil legal act, in a valid way.

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[3] According to provisions of article 1087 of the new Civil Code, forced heirs are the surviving spouse, the deceased's privileged descendants and ascendants.

[4] The excessive liberalities reduction is defined in the same terms also by: Francisc Deak, *Tratat de drept succesoral,* II edition, updated and completed (Bucharest: Universul Juridic Publ. House, 2002), 340; Stanciu Cărpenaru, „Dreptul de moştenire" in *Drept civil. Contracte speciale. Dreptul de autor. Dreptul de moştenire,* Francisc Deak and Stanciu Cărpenaru (Bucharest: Bucharest University, 1983), 477; Ioan Adam and Adrian Rusu, *Drept civil. Succesiuni*, (Bucharest: All Beck Publ. House, 2003), 346; Dan Chirică, *Drept civil. Succesiuni,* (Bucharest: Lumina Lex Publ. House, 1996), 186, a.s.o.

Are subject to reduction not only the donations made by a deceased during his life, but also legacies [5], irrespective of the fact that they are universal, by universal title or by particular title.

In all cases (regarding donations or legacies), the reduction issue is raised only after the inheritance opening, article 1092 of the new Civil Code clearly stating it. At the same time, the reduction issue is raised irrespective of the fact that the beneficiary of the excessive liberality is a third party or heir – forced heir or non-forced heir.

2.3. Person who can invoke excessive liberalities reduction

According to article 1093 of the new Civil Code, "Reduction of excessive liberalities can be demanded only by forced heirs, by their successors and by the unsecured creditors of forced heirs". It thus emerges that the reduction of excessive liberalities can be invoked only by the following persons[6]:

- forced heirs, who are effectively entitled to inheritance (those who accepted inheritance);

If there are more forced heirs, they can collectively demand the reduction of excessive liberalities. Still, the way of exerting the right on demanding reduction, which can be individual or collective, must not be mistaken with the character of such a right, which is always individual. As a result of the individual character of the right to reduction, if one of the forced heirs waives the use of such a right, the result is that liberalities are reduced only if forced heirship is replenished by the other forced heirs.

- if a forced heir dies, after the opening of the inheritance in relation to which had such a quality, but before exerting his right on demanding reduction, his right is passed on to his own heirs;

If a forced heir has only one heir, the latter has the choice to exert or waive the right on reduction. If he has more heirs, in order to avoid any difficulty, is preferable for heirs to have a unitary option for the right to reduction, namely either to waive or to exert it. Difficulties emerge only when the heirs of the forced heir do not state the same option regarding their inherited right, so that some of them want to use such a right, while others waive it. Nonetheless, in all cases, since the right to reduction has an individual character, the fact that some of the forced heir's successors waive such a right does not affect the right of the others to exert it[7].

- unsecured creditors of forced heirs.

According to the provisions of article 848 of the 1864 Civil Code, it was possible to demand the reduction of excessive liberalities, apart from forced heirs and their successors, also by those "presenting their rights". Consequently, according to the former Civil Code, the sanction under scrutiny could be invoked by the universal successors or successors by universal title of the forced heir, but also the creditors of the forced heir, as persons "presenting the rights" of that forced heir. Thus, the notion "persons presenting the rights of a forced heir" designated the so-called "having cause" persons. The successors by particular title of the forced heir (such as the buyer or the donor of

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[5] Article 848 of the 1864 Civil Code contained an inadvertence, since it only referred to liberalities among alive persons, under the circumstances in which, from other provisions of the same normative act (such as articles 850, 852 and 853) resulted without any doubt that reduction also concerned legacies. Yet, specialized literature unanimously considered that reduction generally regards liberalities, namely donations and legacies. For that matter, see: Dan Chirică, *quoted works,* 187; Francisc Deak, *quoted works.,* 341, Alexandru Bacaci and Gheorghe Comăniță, *Drept civil. Succesiunile,* (Bucharest: C.H. Beck Publ. House, 2006), 163, footnote 4. Article 1092 of the new Civil Code refers to liberalities, thus to both donations and legacies. It can be thus seen that, by taking into account the criticism within legal doctrine, the new Civil Code removes any doubt regarding liberalities subject to reduction.

[6] The list of persons who can invoke reduction has a limitative character, so that other persons than those nominated by the lawmaker at article 1093 of the new Civil Code cannot exert such a right. As a result of such reasoning, it was criticized the solution admitting the request of privileged collaterals for the reduction of excessive liberalities. See P. Savu and others, „Notes on the civil decision No. 3743/1957 of the Regional Court of Craiova", in *„Legalitatea populară" Magazine* (2/1958): 110.

[7] Francisc Deak, *quoted works,* 341.

an individual good established from the inheritance), by not being "having cause" persons, could not exert the right to reduction.

Still, it can be noticed that the new Civil Code, in the limitative list contained by its article 1093, refers only to unsecured creditors of forced heirs, and not also to the whole category of "having cause" persons. As a consequence, by *lege lata*, the universal or by universal title successors of the forced heir cannot demand the reduction of excessive liberalities, to such a right being entitled only the unsecured creditors of the forced heir.

Given that the right to reduction concerns precisely donations and legacies, donors and legatees themselves cannot demand the reduction of liberalities from which they benefited. If there are more persons on behalf of whom a donation was performed, they can demand only the observance of the legal order regarding the reduction of excessive liberalities[8].

It can be thus seen that Law No. 287/2009 innovates in terms of those persons who can demand the reduction of excessive liberalities, by acknowledging this right only to forced heirs, their successors and unsecured creditors.

2.4. The order in which excessive liberalities are reduced

It is necessary to know the order in which the reduction of excessive liberalities operates, only if the deceased carried out more liberalities. The new Civil Code, at article 1096, establishes the rules regarding the order in which liberalities are subject to reduction. Thus:

a) *Legacies are reduced before donations* [article 1096 paragraph (1) of the new Civil Code].

The institution, by the lawmaker, of such a rule with an imperative character, which cannot be changed by the deceased's will, is based on two ways of reasoning:

- legacies have effects from the moment an inheritance is opened, unlike donations, which have effect from the moment they are performed. Thus, in time, donations precede legacies, so that is assumed that donations, at least in part, are done from the disposable portion and that is natural for reduction to concern primarily the last liberalities ordered by a person.
- if donations were to be reduced with priority, in competition with legacies, the principle on the irrevocability of donations would be affected;
- by reversing the order imposed by the lawmaker, it would also be affected the principle *prior tempore potior iure.*

b) *Legacies are reduced all at the same time and in a proportional manner*, except for the case when a testator ordered for some legacies to have priority, case in which the other legacies shall be reduced first [article 1096 paragraph (2) of the new Civil Code].

Therefore, as a rule, legacies are reduced all at the same time and in a proportional manner, irrespective of being universal, by universal or particular title and being included in the same or in different wills. Still, by exception, a testator may dispose for some legacies to have priority, case in which the other legacies will be first of all reduced.

The institution, by lawmaker, of such a rule having an imperative character, which can be changed by the deceased's will, is based on the reasoning that all legacies produce effects starting with the same date (the testator's death).

c) *Donations are successively reduced, in the opposed order of their date, starting with the most recent* [article 1096 paragraph (3) of the new Civil Code].

As a result of this rule, if the last donation is not enough for completing the quota of the entire forced heirship, it shall be moved on to the reduction of the following donation.

The reasons which determined the institution of such an imperative rule are determined, just as in the case of the one mentioned above, by the preoccupation of not affecting the principle on the irrevocability of donations, but also to the principle *prior tempore potior iure.* Also in this case, there are presumed to have affected forced heirship the donations more recently performed.

[8] Ibidem, 343.

Being related to public order, the rule according to which donations are subject to reduction in a reversed chronological order cannot be modified by donor's will, irrespective of the latter being expressed by means of *inter vivos* or *mortis causa* liberalities[9]. Still, by exception, the donor has the acknowledged right to establish the order in which concomitant donations (having the same date) are reduced. If the donor expresses no will for that matter, concomitant donations shall be subject to reduction, just like legacies, all at the same time and proportionally with their value. Thus, according to the provisions of article 1096 paragraph (4) of the new Civil Code, "Concomitant donations are reduced all at the same tine and in a proportional manner, except for the case when the donor ordered for certain donations to have preference, case in which the other donations shall be first of all reduced".

If the beneficiary of the donation which should have been reduced is insolvent, it shall be moved on to the reduction of the former donation [article 1096 paragraph (5) of the new Civil Code]. Consequently, if the beneficiary of the donation alienated the donated asset and has no other assets which could be pursued, the former donation is reduced[10].

It can be thus identified another novelty element brought in the field subject to analysis by Law No. 287/2009. Under the incidence of the former Civil Code, which contained no provision for that matter, such a solution was being proposed by most of specialized literature[11].

As it could have been seen, the moment when a donation is carried out is very important. This aspect does not raise difficulties in the case of actual donations (performed by authentic act). In the case of other donations (non authentic donations, such as indirect donations, simulated donations or even handed in gifts), the reduction shall take into account the moment when such donations received a certain date, according to article 1182 of the 1864 Civil Code[12].

Specialized literature[13] has also raised the issue regarding the reduction of indirect liberalities[14], the latter representing the duties relating to direct liberalities. Indirect liberalities are subject to reduction only if they meet two conditions:

- the duty is provided for in favor of a third party and not of donor's, therefore constituting a stipulation for another person;
- the donor's intention was to gratify.

In the light of the principle *accesorium sequitur principale,* the reduction of a direct liberality shall also trigger the reduction of indirect liberality. Since indirect liberalities have the same date as direct liberalities, which they entail, their reduction shall be performed simultaneously and proportional with their value.

As to us, we consider that such an opinion can be upheld also at present.

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[9] Specialized literature acknowledges that a donor can stipulate for the donation made in favor of his spouse, who is revocable anyway, to be subject to reduction before other donations subsequently disposed. See: Matei B. Cantacuzino, *Elementele dreptului civil,* (Bucharest: All Educational Publ. House, 1998), 312; Francisc Deak, *quoted works,* 345, footnote 1.

[10] National Union of Notaries Public, *Codul civil al României. Îndrumar notarial,* volume I, (Bucharest: Monitorul Oficial Publ. House, 2011), 412.

[11] For that matter, see: Constantin Hamangiu and others *Tratat de drept civil român,* (Bucharest: 1929), 679; Mihail Eliescu, *Moştenirea şi devoluţiunea ei în dreptul Republicii Socialiste România,* (Bucharest: Academiei Publ. House, 1966), 370; Dan Chirică, *quoted works,* 193; Alexandru Bacaci and Gheorghe Comăniţă, *quoted works,* 166. Specialized literature has also stated another opinion, much more equitable, which nonetheless did not benefit from the same support as the first one. According to it, the consequences of the insolvency of a person receiving a donation subject to reduction should have been borne not only by the former person receiving the donation, also by forced heirs. Such fact could have become possible by excluding the donation in question from the estate subject to calculation. For that matter, see: Matei B. Cantacuzino, *quoted works,* 313; Francisc Deak, *quoted works,* 345, footnote 2.

[12] Its correspondent in the new Civil Procedure Code is article 272.

[13] This issue, not at all deprived of theoretical and practical use, was for the first time brought in attention by Fr. Deak, *quoted works,* p. 346-7.

[14] Indirect liberalities are called II degree liberalities.

2.5. Procedural ways to exert the right to reduction

According to provisions of article 1092 of the New Civil Code, reduction does not operate by right, ex officio, but it must be demanded[15]. Reduction can be carried out both by agreement and by judicial ways.

A) *Reduction by good agreement*

Between forced heirs, on the other hand, and the legatees on favor of whom the deceased left certain provisions, can take place an agreement regarding excessive liberalities which overcame the limits of the disposable quota. By being a genuine contract, the convention of the parties on reduction can be revoked only unilaterally, but it can be annulled or declared null for not observing the essential validity conditions.

The ways of performing reduction by good agreement (extra-judicial), regulated by the provisions of Law No. 36/1995 are the following:

a) reduction of liberalities until the limits established by law are reached, by a notary public, on the basis of the agreement between the person interested in it [article 82 paragraph (3)];

b) division of assets by good agreement [article 81 paragraph (3)].

B) *Judicial reduction*

In the absence of the agreement expressed by the interested persons, the reduction of excessive liberalities can be invoked in front of the court, by exception or by an action method, as the case may be [article 1094 paragraph (2) of the new Civil Code]. The method to be followed differs, just as the assets which constituted the object of the liberality in question are in the possession of the person of the person receiving that liberality or of forced heirs.

a) The hypothesis frequently encountered in practice is characterized by the fact that the assets constituting the object of a liberality are founded at the person receiving that liberality (usually, the donee and only exceptionally the legatee). In this case, forced heirs are entitled to take the legal action for reduction, which has a personal and patrimonial character. Since such an action is not a real one, the forced heir cannot pursue the goods which constituted the object of the excessive liberality while they are possessed by third parties which obtained them[16].

From the personal and patrimonial character of the legal action for reduction, the following consequences result:

- the quality of plaintiff can be assigned only to the heir whose forced estate was affected by the excessive liberality;
- the legal action for reduction can be promoted only between the limits of the forced heirship to which the plaintiff is entitled;
- the beneficiary of the legal action for reduction admission can be only the plaintiff.

According to provisions of article 1094 paragraph (3) of the new Civil Code, "If there are more forced heirs, reduction operates only between the limits of the forced quota to which is entitled the person who demanded reduction". It thus emerges that the legal action for reduction is divisible.

We mention that the former Civil Code contained no provision for that matter, so that judicial practice was the one to adopt such a solution[17]. Under these circumstances, we consider praiseworthy

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[15] Supreme Court, civil sentence, decision no. 1253/1989, in *„Dreptul" Magazine* (4/1990): 71.

[16] Supreme court, Civil section, Decision No. 33/1967, in *„Culegere de decizii pe anul 1967"*, 129; Supreme court, Civil section, Decision No. 2019/1967, in *„Revista română de drept" Magazine* (5/1968): 161.

[17] Supreme court, Civil section, Decision No. 780/1973, in *„Culegere de decizii pe anul 1973",* 202; Supreme court, Civil section, Decision No. 743/1985, in *„Culegere de decizii pe anul 1985",* 93-6. In the light of the 1864 Civil Code, jurisprudence admitted nonetheless that the reduction demand made by one of forced heirs was to be befitted from also by the other heirs from the same category, only if, by having this quality, the demand in question was being promoted within the partition action and only if the other forced heirs were within the term of statute of limitations, which they themselves could promote. See for that matter: Supreme Court, civil section, decision no. 1119/1977, in *„Culegere de decizii pe anul 1977",* 92-5.

the fact the new Civil Code takes over the former orientation of jurisprudence, providing a legal character to it.

- the legal action for reduction, by being subject to the statute of limitations, must be taken within the statute of limitations term, which is of 3 years. According to provisions of article 1095 of the new Civil Code, the term mentioned above starts to elapse, as a rule, from the moment succession is opened or, as the case may be, from the date when forced heirs lost the possession of the assets constituting the object of liberalities. In exceptional cases, such as those in which a forced heir does not know, out of reasons of which he is not guilty, about the existence of some excessive liberalities, the statute of limitations term starts to operate from the moment the forced heir learns about the existence of the liberalities in question and their excessive character.

We mention that the 1864 Civil Code made no reference to the issue presented above. Consequently, jurisprudence was the one to adopt a certain orientation. As a result of the latter, the legal action for reduction had to be taken within the general statute of limitations term, of 3 years, which started to elapse from the moment inheritance was opened[18]. In case a forced heir did not know about the existence of some excessive liberalities, for reasons of which he was not guilty, the statute of limitations term started to operate from the moment the forced heir became aware of the excessive liberalities or should have learnt about their existence[19].

It can be therefore noticed that new Civil Code provides a legal character to most of the jurisprudential orientation regarding legal action for reduction. Yet, some different elements can be identified. Thus, according to the new Civil Code, the 3 year term starts to operate, as a rule, not only from the moment an inheritance is opened, but also, according to the case, from the moment forced heirs lost possession of the assets constituting the object of liberalities. Then, in the exceptional case in which a forced heir does not know about the existence of some excessive liberalities, the term starts to elapse, according to the new Civil Code, only from the moment the forced heir learns about the liberalities in question and about their excessive character.

b) If forced heirs are in the possession of assets which constituted the object of excessive liberalities (a fact which can be encountered in case of legacies), the beneficiaries of excessive liberalities can demand for such assets to be handed in, by resorting to legal action (for getting back legacy, heredity petition, a.s.o.). In his defense, the forced heir can invoke reduction[20] in front of the plaintiff or can resort to a counterclaim action for that matter[21].

We mention that the reduction exception does not benefit from statute of limitations [article 1095 paragraph (3) of the new Civil Code]. Before the new Civil Code entered into force, legal doctrine and jurisprudence also adopted the same solution regarding the fact that the reduction exception could not benefit from statute of limitations. According to them, a forced heir found in such sitation could not be subject to statute of limitations, by considering that he had exercised in fact all his prerogatives deriving from his quality, so that he could not be accused of negligence[22].

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[18] See Supreme Court, civil section, decision no. 1457/1973, in *„Revista română de drept"* (7/1974): 59-60.

[19] See, for example: Supreme Court, civil college, decision No. 33/1967, în *„Culegere de decizii pe anul 1967",* 129; Supreme Court, civil section, decision No. 1884/1974, in *„Repertoriu II 1969-1975",* 206; Supreme Court, civil section, decision No. 1665/1976, in *„Repertoriu III 1975-1980"*, 134 a.s.o.

[20] See: Mihail Eliescu, *quoted works,* 371; Stanciu Cărpenaru, *quoted works,* 478; Eugeniu Safta-Romano, *Dreptul de moştenire,* (Iaşi: Grafix Publ. House, 1995), 336; Dumitru Macovei, *Drept civil. Succesiuni*, (Iaşi: „Chemarea" Publ. House, 1993), 126; L. Stănciulescu, *Drept civil. Contracte şi succesiuni*, 4th edition revised and completed, (Bucharest: Hamangiu, Publ. House, 2008), 408.

[21] See: Dan Chirica, *quoted works*, 191; Alexandru Balaci and George Comanita, *quoted works*, 168.

[22] See: Francisc Deak, *quoted works,* 349; Dan Chirică, *quoted works,* 191; Stanciu Cărpenaru, *quoted works,* 478; Dumitru Macovei, *quoted works,* 126; Alexandru Bacaci and Gheorghe Comăniţă, *quoted works,* 168; Ioan Adam and Adrian Rusu, *quoted works,* 352, a.s.o. The same provisions were also enforced by judicial practice. See, for example, the Supreme Court, civil section, decision No. 700/1972, în *„Repertoriu II 1969-1975",* 206-7.

2.6. Effects of excessive liberalities reduction

According to provisions of article 1097 paragraph (1) of the new Civil Code, "The effect of reduction is the inefficacy of legacies or, as the case may be, the annulment of donations, in order to replenish forced heirship".

Thus, the effects of reduction are accomplished in a different manner, depending whether liberalities regard legacies or donations.

A) Reduction of legacies triggers their inefficacity, either partially or totally, jus as forced heirship can be replenished or not only with a part from their value. In such case, the replenishment of forced heirship shall be done in kind, a fact which is possible as a result of the assets which constituted the object of excessive legacies existing in the testamentary estate.

B) Reduction of donations triggers their annulment, either partially or totally, jus as forced heirship can be replenished or not only with a part from their value

Due to the abolishment of a donation as an effect of reduction, the forced heir becomes owner of the asset which allowed the replenishment of his forced heriship and, in such quality, he can demand the restitution of that asset, in principle in kind [article 1097 paragraph (2) of the new Civil Code][23]. Consequently, a testator cannot dispose of forced heirship to be insured by means of an equivalent.

The exceptions which characterize the rule presented above are provided for in a clear, limitative manner by article 1097 paragraphs (3) – (5) of the new Civil Code. Thus, the replenishment of forced heirship is carried out by equivalent in the following cases[24]:

a) before the opening of the inheritance, the donee alienated the asset, or instituted real rights upon it, or the asset disappeared due to a cause of which the donee is not guilty [paragraph (3)];

In such case, forced heirs are entitled only to the counter equivalent in money. This solution is just, since reduction has effects only from the moment inheritance is opened, while alienations and responsibilities emerging from duties created by the donor before that moment remain valid. The solution mentioned above is completely applicable, in case a donee has the quality of third party before inheritance or non-forced heir.

It must also be mentioned that the duty to pay the counter equivalent in money does not also belong to the donee, who cannot be accused of the disappearance of the asset. In this case, the asset will no be included in the testamentary estate, being presumed to have disappeared also from donee's possession.

In all the cases regarding restitution by equivalent, operates the rule instituted by article 1091 paragraph (2) of the new Civil Code, according to which it will be taken into account the state of the assets at the moment they were donated and their value at the moment inheritance is opened.

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[23] See also Supreme Court, civil section, decision No. 1314/1994, in *Revista „Dreptul",* (7/1995), 87.

[24] According to the 1864 Civil Code, the replenishment of forced heirship could be performed by equivalent, in clear and limitative cases provided for by law:

a) the excessive donation was ordered in favor of a descendant or the surviving spouse, with the exemption to be reported;

In this case, the donee had the right, according to the provisions of the 1864 Civil Code, to perform reduction, by taking less from the forced heirship, if hereditary assets were of the same nature with the assets received by donation.

b) excessive donation, having as object a building, was ordered in favor of a potential heir, without the exemption to be reported, and the part necessary for the replenishment of forced heirship was smaller than half the value of the asset;

On the basis of article 770 paragraph (2) of the 1864 Civil Code, the donee had in this case the choice between:

- keeping the asset and compensating the other forced heirs, by taking less from other hereditary assets;
- paying the financial equivalent of the surplus;

c) the donee alienated the object of donation or instituted duties upon it, before inheritance was opened;

d) the donated asset perished out of donee's guilt.

Beneficiaries must obtain full ownership of forced heirship, without the latter being subject to other duties or supplied by granting a usufruct right[25].

Therefore, it can be noticed that the new Civil Code reunites two exceptional situations regulated by the 1864 Civil Code (the donee alienated the object of donation or instituted other duties upon it, before inheritance was opened, and the donated good perished out of donee's guilt), in only one. Otherwise, the new Civil Code would not have brought any other innovative element until this point of our analysis.

b) the donation which is subject to reduction was done on behalf of a forced heir, who is not bound to report that donation [paragraph (4)];

In this situation, the donee – forced heir, who is not bound to report the donation – will be allowed to keep that part which overcomes the disposable portion, inside his estate.

The equivalent of the situation motioned above in the 1864 Civil Code regards the hypothesis in which an excessive donation was left on behalf of a descendant or surviving spouse, with the exemption to be reported.

It can be thus noticed that the new Civil Code expands the group of persons which can use such an exception, from descendants and surviving spouse, to forced heirs category. But besides the surviving spouse and descendants, the quality of forced heir is also held by the deceased's privileged ascendants. Still, the duty to report donations belongs only to the surviving spouse and the deceased's descendants, who come effectively and together to the legal inheritance [article 1146 paragraph (1) of the new Civil Code].

c) If a donee is prospectively bound to report and the part subject to reduction represents less than half from the value of the donated asset, then the forced donee can keep the asset, whereas the reduction which is necessary for replenish the estate of the other forced heirs shall be performed by taking less or by a financial equivalent.

Therefore, the case mentioned above regards only the surviving spouse and descendants, when coming effectively and together to the legal inheritance, since they are prospectively bound to report. It is necessary for them not be exempted from the obligation to report donations out of testator's will. We also mention that this option is acknowledged by law, in relation to prospective heirs who are bound to report, only with the view to replenish the estate of the other forced heirs, namely of privileged ascendants.

The correspondent of this exceptional case in the former Civil Code regards the situation in which an excessive donation, having as object an immovable asset, is ordered in favor of a prospective heir, without exemption from report, whereas the part necessary for replenishing forced heirship is less than half the value of the asset.

It can be therefore noticed another different element between the former and current regulations in the field of reduction. Unlike the 1864 Civil Code, the new Civil Code does not restrict the field of the hypothesis described above only to immovable goods.

On the basis of provisions of article 1097 paragraph (5) of the new Civil Code, the donee has in this case the possibility to chose between:

- keeping the asset and offering compensations to the other forced heirs, by taking less from the other inheritance assets;
- paying the financial equivalent of the surplus.

It has been pointed out that the reduction of donations triggers their retroactive abolishment. The moment until which abolishment remains retroactive is, in this case, represented by the date when inheritance is opened. Thus, it is being consecrated an exception from the common law rule, according to which the abolishment of a civil act goes back in time, up to the date that act was concluded. The preservation of this exception is upheld with text arguments. Thus:

[25] See also Supreme Court, civil section, decision No. 760/1969, in *„Repertoriu II 1969-1975",* 206.

a) according to the provisions of article 1097 paragraph (3) of the new Civil Code, the documents by means of which the assets donated to third parties are alienated, before the opening of inheritance, remain valid;

b) on the basis of article 1097 paragraph (6) of the new Civil Code, in case forced heirship is replenished in kind, the person who received the donation keeps the fruits from that part of the asset which overcomes the available portion, obtained by the date the persons entitled demanded reduction.

2.7. Reduction of some special liberalities

Liberalities in usufruct, use, habitation, annuity or life maintenance, which are hard to evaluate, as they depend on a casual element, namely the length of beneficiary's life, are subject to a special legal regime, consecrated by the provisions of article 1098 of the new Civil Code[26]. Thus: "If the object of a donation or legacy is an usufruct, use, habitation, annuity or life maintenance, forced heirs have the possibility either to exert that liberality as it was stipulated or to abandon the possession of the disposable portion on favour of the beneficiary of that liberality or to demand reduction according to common law".

Therefore, from the legal provisions mentioned above, it results that forced heirs, whose forced estate is affected by a liberality consisting in usufruct, use, habitation, annuity or life maintenance, have the following possibilities:

a) to comply with liberalities as they were instituted by the deceased;

b) to give up to the disposable portion, so that the beneficiary of usufruct, use, habitation, annuity or life maintenance becomes, under these limits, owner;

c) to demand reduction according to common law;

The new Civil Code also provides that, if forced heirs do not reach an agreement regarding their options, the reduction shall be performed according to common law.

In comparison with the correspondent provisions of the 1864 Civil Code (article 844), article 1098 of the new Civil Code brings two novelty elements:

- expands the area of special liberalities subject to reduction, from usufruct and life annuity, to liberalities consisting in usufruct, use, habitation, annuity and life maintenance;

- offers three possibilities to forced heirs whose forced estate is affected by a liberality consisting in usufruct, use, habitation, annuity or life maintenance. The 1864 Civil Code offered instead to forced heirs only the possibility to comply with liberalities as they were ordered by the deceased and the possibility to give up to the disposable portion. In addition, the new Civil Code offers also a third possibility, that of demanding reduction according to common law.

Consequently, the new Civil Code offers to forced heir the possibility to choose between there forms of action. An apparent advantageous situation seems to be created for the forced heir. In reality, the solution provided by the legal provisions under discussion has a reasonable character for both parties involved. On the one hand, forced heir is advantaged as a result of the fact that he has the possibility to adopt a course of action out of three, according to his personal interests, while on the other hand the beneficiaries of usufruct, use, habitation, annuity or life maintenance cannot make any reproach to lawmaker, given that their interests are guaranteed, irrespective of the solution adopted by the forced heir. If the forced heir decides to comply with the liberality in question, as it was ordered by the deceased, the beneficiaries of that liberality cannot express discontent, since they received precisely the rights conferred by that liberality. At the same time, the beneficiaries of the liberality have no reasons to declare themselves under-privileged not even in the case in which the

[26] Its correspondent in the former Civil Code was represented by article 844. According to the latter: "If the disposition relating to alive persons, left by documents or by will, constitutes an usufruct or life annuity having a value which overcomes the disposable portion, then forced heirship have the capacity to comply with such dispositions or to abandon the possession of the disposable portion".

forced heir decides to give up, on their favour, to the property of the disposable portion. On the contrary, in such an eventuality, for beneficiaries is created a favourable and profitable situation, superior to deceased's real intention, since they obtain more than the testator intended them to. Moreover, beneficiaries' interests are completely protected also if the forced heir decides to demand reduction according to the conditions of common law.

Exerting the right regarding the reduction of excessive liberalities in usufruct, use, habitation, annuity or life maintenance can be done either in a friendly manner, according with the non-litigation procedure, or in a judicial manner, with the correct application of the rules analyzed.

The provisions with a derogatory character of article 1098 of the new Civil code become applicable only in those situations which meet the following conditions:

a) the object of excessive liberality is usufruct, use, habitation, annuity or life maintenance;

The legal text mentioned above is not applicable to the excessive liberalities having as object simple property or the property bearing life annuity in favour of the forced heir[27]. Moreover, the legal provisions already mentioned make no direct reference to the hypothesis in which the beneficiary of the liberality in usufruct, use, habitation, annuity or life maintenance is the forced heir, hypothesis which would regard co-heirs[28].

b) the deceased instituted only one liberality;

Only in the case in which the deceased made only one excessive liberality in usufruct, use, habitation, annuity or life maintenance, become applicable the provisions of article 1098 of the new Civil Code, valuation not being necessary[29]. On the contrary, valuation is necessary in case the deceased made several liberalities, among which one in usufruct, use, habitation, annuity or life maintenance.

c) each forced heir, in case there are more forced heirs, has the possibility to choose, in an individual way, one of the legal solutions applicable to excessive liberalities consisting in usufruct, use, habitation, annuity or life maintenance, given that the legal action for reduction has a divisible character. The consensus of forced heirs is necessary, only if the object of liberality involved is an indivisible good. In the absence of this consensus, there will become applicable the provisions of article 1098 paragraph (2) of the new Civil Code, according to which reduction shall be done according to common law.

d) if a forced heir gives up to the possession the disposable portion, in favour of a donee or legatee, the latter remain donee and, respectively, legatee by particular title, not having the duty to take upon themselves the debts relating to inheritance[30].

The option right consecrated by the provisions of article 1098 of the new Civil Code has a personal character, so that it cannot be transmitted by inheritance[31]. Consequently, this right can only be exerted by the forced heir, whereas no successor or creditor of a forced heir can use the option conferred by the exceptional legal provisions, already mentioned.

The provisions of article 1098 of the new Civil Code have no imperative character[32], so that, one the one hand, parties can decide upon another way of reducing excessive liberalities consisting in usufruct, use, habitation, annuity or life maintenance, while on the other hand the deceased can decide for the derogatory system in question not to be applied. By forbidding the transformation of

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[27] For the solution which must be adopted in this hypothesis, see: Constantin Hamangiu and others, *quoted works,* 1012; Mihail Eliescu, *quoted works,* 381; Francisc Deak, *quoted works,* 353; Dan Chirică, *quoted works,* 198-9.

[28] See Francisc Deak, *quoted works,* 354.

[29] See Matei B. Cantacuzino, *quoted works,* 315.

[30] See Francisc Deak, *quoted works,* 355.

[31] See Dimitrie Alexandresco, *Explicaţiunea teoretică şi practică a dreptului civil român,* volume IV, part II, (Bucharest: Socec & Co Publ. House, 1912), 624.

[32] See: Constantin Hamangiu and others, *quoted works,* 686; Francisc Deak, *quoted works,* 355; Dan Chirică, *quoted works,* 197.

the right on usufruct, use, habitation, annuity or life maintenance in full ownership, the person ordering that makes possible the come back to common law, in the field of excessive liberalities reduction.

3. Conclusions

At the end of our analysis, we are listing the novelty elements consecrated by Law No. 287/2009 in regard to reduction of excessive liberalities. Thus:

- Law No. 287/2009 innovates in relation to persons who can demand the reduction of excessive liberalities, by acknowledging this right only to forced heirs, to their successors and unsecured creditors of forced heirs. According to the former civil regulation, the whole category of „having-cause" persons could use this right.

- According to the new Civil Code, if the beneficiary of the donation which must be reduced is insolvent, then it shall be moved on to the reduction of the former donation. Under the incidence of the former Civil Code, this solution was being proposed by most of specialized literature.

- According to the new regulation in the civil field, the legal action for reduction has a divisible character. Such character was being imposed to legal action for reduction also by the regulations which preceded the entry in force of the new Civil Code, under the circumstances in which the 1864 Civil Code contained no provisions for that matter.

- The new Civil Code regulates in great part the former orientation of jurisprudence when it comes to the statute of limitations applying to legal action for reduction. Thus, the maximum period of time within which the legal action must be filed is of 3 years and starts to elapse, as a rule, from the moment inheritance is opened or, as the case may be, from the moment forced heirs lost the possession of the goods constituting the object of liberality but also, as an exception, from the moment forced heirs became aware of the existing liberalities and their excessive character. According to the new Civil Code, the exception from reduction cannot be subject to statute of limitations.

- In what concerns the exceptional cases, in which reductions is performed by equivalent, the new Civil Code reunites two exceptional circumstances, regulated by the 1864 Civil Code (the donee alienated the object of donation or instituted duties upon it, before inheritance was opened, and the asset in question perished out of donee's guilt) in only one. Moreover, the new Civil Code expands the group of persons who can keep inside forced heirship that part of donation subject to reduction, which overcomes the disposable portion, from descendants and surviving spouse to the category of forced heirs.

- In what concerns the reduction of some special liberalities, in comparison with the 1864 Civil Code, the new Civil Code brings the following novelty elements: expands the area of special liberalities subject to reduction, from those consisting in usufruct and life annuity, to liberalities consisting in usufruct, use, habitation, annuity and life maintenance; offers three possibilities to forced heirs, whose reserve is affected by a liberality consisting in usufruct, use, habitation, annuity or life maintenance. The 1864 Civil Code offered instead to forced heirs only the possibility to comply with liberalities as they were ordered by the deceased or to give up to the disposable portion. Moreover, the new Civil Code brings a third possibility, namely that of demanding reduction according to common law.

Finally, we consider that, by bringing together the proposals made by legal doctrine and jurisprudential orientation, which were shaped by the former Civil Code, but also by using an updated language, the new Civil Code provides the reduction of excessive liberalities with a modern, just and flexible regulation.

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BANK CONTRACTS IN THE NEW ROMANIAN CIVIL CODE

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Abstract
The adoption of the new Civil Code and its entry into force on October 1st 2011 has involved an extensive reform of the private law. The new Code, as its authors notice, has aimed primarily to achieve a unification of the private law, the largest part of the land commerce regulations from the commerce code adopted in 1887 being absorbed into the new text and, secondly, to harmonize the basic institutions of the private law with the European regulations and directives.
Beyond these two major objectives, the new Civil Code comprises regulations with innovative character compared to the Romanian law, such as bank contracts.
This study is preliminary and aims to highlight the inspiring models of the new Civil Code and to analyse the functionality of the newly used concepts.

Keywords: *new Civil Code, bank contracts, bank current account, bank deposit, rental of value boxes*

1. Preliminary considerations.

The new Romanian Civil Code, which entered into force on October 1st 2011, has contributed, besides from the modernization of some institutions of civil and commercial law and the harmonization of various legal mechanisms with the norms of European Union law, to the innovative regulation of some types of contracts.

The typology of banking contracts seems to be this respect one of the aspects with obviously innovative character.

The old Commercial Code, although mentioning banking contracts between operations considered acts of trade (art.3), did not offer any definition about them and did not regulate them separately. In the predominant conception of the legal literature of the XIXth century, the banking contracts are nothing but mere applications of civil contracts like the civil deposit or loan. They acquire a commercial character when they are used exclusively and permanently by the commercial banks to increase their profit.

It was only in the XXth century, by the contribution of important theorists such as Joseph Hamel, Joaquin Garrigues or Giaccomo Molle, that the banking contracts acquired an autonomous profile. The Italian Civil Code from 1942 has established this recognition, the regulation being included in Chapter XVII – Contratti bancari.

2. Current account in the new Civil Code.

With the new reform, the regulation of the current account contract was transferred from the Commercial Code (art.370-373) – partly repealed at this moment – to the content of the new Civil Code. The previous provisions had into consideration only the effects produced by the closure of a current account contract and the way in which it could be dissolved. There were no legal rules defining the concept itself or its scope of applicability[1].

The current provisions of NCC resolve such a situation. Thus, art.2171 NCC retains the current account contract as that contract by which the parties, referred to as account holders, are

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[1] See Decision of *Curtea de Casație*, 7 ianuarie 1901, quoted in Dumitrescu, *op. cit*., II, 207.

committed to register in an account the receivables arising from mutual remittance, considering them non-eligible and unavailable until the closure of the account.

On the other hand, it is stated that the credit balance of the account upon its closure represents an eligible receivable. If its payment is not required, the balance represents the first remittance from a new account and the contract is considered renewed indefinitely.

Although the current bank account contract is individualised, having an entire section of the Civil Code dedicated to it, it is not very clear if in the vision of its authors the current bank account is a legal independent institution or just a version of the current account (on one hand, as shown above, the relevant provisions (art.2184-art.2190 NCC) are found in another section and, on the other hand, this section does not comprise any definition of the concept.

The provisions which, as a matter of fact, are numerous seem rather applications of the current account. For instance, according to art. 2184, if the bank deposit, credit or any other banking operation is done though the current account, the account holder may, at any time, dispose of the credit balance of the account, in compliance with the notice, if the latter has been agreed by the parties.

According to art.2188 NCC, if the current bank account is concluded for an indefinite period of time, wither party may terminate the current account contract, observing a 15-day notice, unless the contract or practices mention another term, under the damages sanction.

The reference period of 15 days is unnecessary, considering that art.2183 paragraph 2 NCC referring to the current account, as generic figure, mentioned that in the case of the contract concluded for an indefinite period of time, each party may declare its termination upon the closure of the account, informing the other party 15 days in advance.

Another norm, art.2187NCC provides that if the account owner dies, before reaching partition, the heirs are considered co-owners of the account, account and the consent of all co-owners is necessary for performing the operations in the account.

Thus, the personal creditor of one of the joint-heirs cannot seize legally the credit balance of the joint account. He can only ask for partition. The joint-heirs are kept divisible by the credit institution for the balance due of the account, unless otherwise determined by law or convention.

None of these provisions contribute, in our opinion, to shaping the autonomy of this contract. Moreover, art.2187 paragraph 3 states that the provisions outlined are applicable properly and in other cases of severalty between current account holders, unless otherwise provided by law.

In other words, the rules of derogatory nature will also be applied on grounds of analogy in the case of the current account, although this is considered a general typology.

3. Bank deposit.

The new regulation makes a clear distinction between the two forms: the deposit of funds and the deposit of titles.

According to article 2191 NCC, by creating a deposit of funds, the credit institution acquires ownership of the money deposited and is committed to repaying the same amount, of the same kind, upon the agreed deadline or, where appropriate, at any time, at the depositor's request, within the deadline established by the parties or, in its absence, within the deadline established by the practices.

The provisions outlined reproduce the content of art.1834 from the Italian Civil Code, according to which "nei depositi di una somma di danaro presso una banca, questa ne acquista la proprietà ed è obbligata a restituirla nella stessa specie monetaria, alla scadenza del termine convenuto ovvero a richiesta del depositante, con l'osservanza del periodo di preavviso stabilito dalle parti o dagli usi"[2].

[2] See on this matter Molle, *I contratti bancari,* (Milan: Giuffré, 1966), 87-91; id, *Per la gualificazione giuridica del deposito bancario*, in *Banca, borsa e titoli di credito,* 1948, I, p.7 et seg. Also, Hamel, II, 95.

In general, the deposits and the withdrawals will be made at the headquarters of the operative unit of the credit institution where the deposit has been created. As compared to art.1834 from the Italian code, which states that "salvo patto contrario, i versamenti e i prelevamenti si eseguono alla sede della banca presso la quale si e costituito il rapporto", the regulation contained in NCC highlighting the principle of performing all the operations by account in the agency or branch where the bank account was opened.

The credit institution is committed to ensure, free of charge, the information of the client about the operations performed in his accounts.

Unless the client requests otherwise, this information is made on a monthly basis, under the conditions and procedures agreed by the parties.

By creating a deposit of securities, pursuant to article 2192 NCC, the credit institution is entitled to their administration.

The Italian Civil Code comprises, within art.1838, a synthetic regulation of the obligation's content assumed by the credit institution: La banca che assume il deposito di titoli in amministrazione deve custodire i titoli, esigerne gli interessi o i dividendi, verificare i sorteggi per l'attribuzione di premi o per il rimborso di capitale, curare le riscossioni per conto del depositante, e in generale provvedere alla tutela dei diritti inerenti ai titoli. Le somme riscosse devono essere accreditate al depositante.

The NCC authors preferred to use a provision of reference, in the absence of special rules, at the institution of Administration of another person's goods (Title V, art. 792-857 NCC respectively).

Unlike the NCC regulation, art.1838 paragraph 2 requires the bank's obligation to request instructions in certain specified cases: Se per i titoli depositati si deve provvedere al versamento di decimi o si deve esercitare un diritto di opzione, la banca deve chiedere in tempo utile istruzioni al depositante e deve eseguirle, qualora abbia ricevuto i fondi all'uopo occorrenti. In mancanza d'istruzioni, i diritti di opzione devono essere venduti per conto del depositante a mezzo di un agente di cambio.

The credit institution is entitled to the reimbursement of the expenses incurred for the necessary operations, as well as to a remuneration, to the extent determined by agreement or by practices.

The text is a reproduction of art.1838 paragraph 3 from the Italian Civil Code: Alla banca spetta un compenso nella misura stabilita dalla convenzione o dagli usi, nonché il rimborso delle spese necessarie da essa fatte.

In order to avoid the possibility of limiting the liability of the bank, art.2192 paragraph 2 NCC sanctions by nullity any clause by which the credit institution would be relieved of liability for failure to comply with its obligations in managing the securities with care and diligence.

The correspondent regulation of the Italian code is more concise, broading the scope of the sanction and, upon any understanding, envisaging this scope outside the regular contractual framework: E' nullo il patto col quale si esonera la banca dall'osservare, nell'amministrazione dei titoli, l'ordinaria diligenza.

4. Credit facility.

The credit facility is defined according to art. 2193 NCC as the contract by which a credit institution, a non-banking financial institution or any other authorized entity by special law, called the financer, is committed to keep at the client's disposal an amount of money for a specified or indefinite period of time.

The term credit facility corresponds to the opening credit, as it is defined by art. 1842 of the Italian Civil Code: L'apertura di credito bancario è il contratto col quale la banca si obbliga a tenere a disposizione dell'altra parte una somma di danaro per un dato periodo di tempo o a tempo indeterminato.

The parties ensure, by contract, to put at the client's disposal an amount of money that he can use in certain circumstances to achieve various objectives previously established.

The credit facility, as defined by art. 2193 NCC is not a loan agreement since the customer acquires only the right to remove various amounts within a certain limit[3]. He does not have the obligation to use the full amount or to withdraw amounts of money once the contract has been closed.

Unless the parties have stipulated otherwise, the client may use the loan in several installments, according to the practices, and may, by successive repayments, renew the amount available.

The unilateral termination of the contract at the request of the bank cannot operate, unless provided otherwise, and before the expiry of the term unless it is for sound reasons and only if these relate to the beneficiary of the credit facility (art. 2195 NCC).

According to the Italian Civil Code, the termination may not occur unless it is for a just cause: Salvo patto contrario, la banca non può recedere dal contratto prima della scadenza del termine, se non per giusta causa (art. 1845 paragraph 1).

Similar to art. 1845 paragraph 2 from the Italian Civil Code, the Romanian regulation stipulates that the effects of a unilateral termination consist in the immediate termination of the client's right to use the credit, with the observation that the bank should provide at least a 15-day term for returning the amounts used and their accessories.

When the credit facility has concluded for an indefinite period, each of the parties may terminate the agreement, observing a 15-day notice, unless the agreement or practices indicate otherwise.

5. Rental of value boxes.

This service provided by the credit institutions is essentially a neutral operation, because its goal is to ensure the protection of small movables of small dimensions with great economic value.

It is relevant that despite the banking character of the operation, the rental of value boxes is not a typical contract, because the essential obligation is not of financial nature service.

With the exception of the Italian Civil Code, the rental of value boxes is not covered by the main European legal systems.

It can be said that the absence of legal definitions may well characterize this unnamed contract. The Italian Civil Code itself avoids defining the concept of contract, limiting itself by art.1839 to identifying the bank obligations: Nel servizio delle cassette di sicurezza, la banca risponde verso l'utente per l'idoneità e la custodia dei locali e per l'integrità della cassetta, salvo il caso fortuito.

In a close sense, art. 2196 NCC provides that in the execution of the rental of value boxes contract, the credit institution or other entity providing such services under the law, hereby referred to as the provider, responds to the client to ensure an adequate and safe room, as well as the box integrity.

The legal nature of the contract was the subject of several debates in recent Western doctrine[4].

Since the bank allows the use of a space by one if its customers for a period of time, whether or not agreed, and since the latter undertakes to pay a sum of money for the service provided, a variety of the rental contract is configured.

The terminology, which is found in the banking practice, would also be an argument to assimilate the civil lease contract.

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[3] See Molle, *I contratti bancari,* (Milan: Giuffré, 1966), 154.

[4] See on this matter Molle, *I contratti bancari,* (Milan: Giuffré, 1966), 607.

However, contrary to this thesis, one could argue that in fact the value box is only a good value property by incorporation, as it is fixed and cannot be moved from the bank building. If the rental of value boxes were merely a variety of the civil contract with the same name, the effects are felt including over the nature and characteristics of the contract, as the latter cannot be real because, regardless of the box usage, the client owes the payment of the sum of money.

Likewise, it is an impediment for such an assimilation the fact that the possession or detention of the box is impossible or, in the case of rental by material remittance, the tenant becomes the temporary holder of the lased asset, thus configurating a material relationship characterized by continuity.

In a completely different manner, in the case of the value boxes, the bank is required to allow access to such box whenever its client wants, within the public work hours. Therefore, the hypothesis when the client or the user of the box can be qualified as holder is excluded, because there is no material remittance of the leased asset.

In the systems based on the distinction between civil and commercial law, like the Romanian one before 2011, framing the contract in a civil or commercial profile is particularly relevant in the matter of the proof or the third party rights[5].

According to a second thesis, despite its name, the contract is a variety of the deposit, since the objective pursued by the depositor is precisely the one of preservation or conservation of a movable good of considerable value. However, the mechanism of using the value box is exactly what constitutes an impediment. Therefore, it is beyond any doubt that the purpose of the contract is to preserve an asset, thus showing some similarities with the civil or banking deposit, but nevertheless the depositary is not a temporary holder; in other words, the bank virtually cannot act over the asset and cannot trace the asset.

The essential obligation of the bank is that of providing an external safety for the value box, but depositing the asset in the value box does not determine its delivery to the bank as in the hypothesis of the deposit[6].

Precisely from this perspective the obligation of restitution, which underlies any typology of the deposit contract cannot arise because the bank does not receive the asset deposited in the value box.

At the time of closing the contractual relationship or before this moment, the user will collect the asset deposited in the box without having to report to the bank the material delivery of the asset. At the same time, in the case of the deposit the contractual obligations and implicitly the contractual relationship are terminated by returning the asset and repossessing it. In the case of the rental of value boxes contract the fact that the user collects the asset from the box has no effect on the contract itself.

Accordingly, the mixed nature of the contract is the only answer we can offer.

The rental of value boxes contract is a perfectly autonomous contractual illustration which cannot be assimilated to any other named contract.

Considering the objective pursued by the parties, the obligations assumed by the bank envisage the custody of the asset. In this perspective, we can say that the bank has two basic obligations:

- that of allowing the user the access to the value box and
- that of taking any safety measures for the external protection of the box.

Therefore, the first obligation requires a specific conduct; upon request, the user can enter the area where the value boxes are, deposit and collect the values he wishes to preserve. Clearly, in order to use a box the bank provides its customer with specific safe mechanisms such as ciphers, special keys etc.

[5] Garrigues, *Contratos bancarios*, (Madrid, 1958), 448.
[6] Garrigues, *Contratos bancarios*, (Madrid, 1958), 452.

The second obligation has a general and abstract character. The bank will provide the external permanent protection of the value boxes without being able to enter the 'private' space of the box. The main obligation of the user is that of paying the fee requested by the bank for providing such a service. As with the rental, a certain obligation of restitution of the space can be configured at the termination of the contract, by handing over the keys or other safety elements. A second obligation – obligation of not doing – requires the user not to introduce in the value box a series of assets which can either be degraded, thus affecting the space they are deposited in, or are dangerous for the safety of those using value boxes, or are forbidden to commercial traffic.

If the box is rented out to several people, art.2197 NCC provides that any of these may require opening the box, unless otherwise provided by the contract.

In case of death of the client or any of the clients using the same box, the provider, once he has been notified, cannot consent to opening the box without the consent of everyone who is entitled or, failing that, under the circumstances established by the court.

These provisions will also apply accordingly upon termination or reorganization of the legal person; in this case, the official receiver or judicial liquidator can require the opening of the value box.

The value box can be opened forcibly only under the requirements provided by art.2198 NCC. Thus, upon the completion of the term provided in the contract, following the expiration of the 3-month period since the notification to the customer, the provider may ask the court, by presiding judge's order, the authorization to open the value box. The customer notification may be done by registered letter with acknowledgement of receipt to the last home or office brought to the knowledge of the credit institution.

The opening of the value box will be made in the presence of a notary public and, where appropriate, in compliance with the prudential measures established by the court.

The court may also dispose measures of conservation of the objects discovered, as well as their sale to the extent necessary to cover rent and expenses incurred by the provider, as well as, if applicable, for the damage caused onto him.

6. Conclusions.

First of all, the recognition of the independent nature of the bank contracts was absolutely necessary, especially since the use of these legal instruments, though which financial intermediation operations were carried out, has become the exclusive activity of some subjects of law identified and supervised by the banking law.

However, although through the new Civil Code the bank contracts are identified, its authors did not include in them the bank credit agreement, although at this moment the credit agreement is one of the defining instruments of a commercial bank's activity; basically, in the case of analysis of any credit agreement, the applicable texts will be those regulating the loan in general.

It is also noted that unlike the Italian Civil Code which clearly regulated the discount of the commercial bills, an essential operation in the history of commercial law, the new Civil Code did not engage such an institution in the broader framework of the banking contracts.

We believe that despite the innovations brought by the new regulation, its improvement is absolutely necessary to adapt it to the requirements of the banking practices.

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THE IMPACT AND CONTROVERSIES OF THE NEW CIVIL CODE IN THE INSOLVENCY PROCEDURE – THE PATRIMONY SEPARATION

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Abstract
The law no. 287/2009 on the New Civil Code brings important changes to the law institutions and their principles, being established and acknowledged both by the judicial doctrine and by the legal practice.
Still, the theme of this paper is not addressed to the legislative technique approached by the legislator, but is rather aimed at highlighting the impact, the implications, the changes, the controversies and the difficulties in application, brought by the New Civil Code to the insolvency procedure regulated by the Law no. 85/2006.
The law no. 85/2006 on the insolvency procedure, as well as many other regulating laws belonging to the commercial law, have remained in force, as they are not included in the provisions of the Law no. 287/2009 on the New Civil Code, and as such we cannot ignore the changes in the national commercial legislation after the entering into force of the New Civil Code, namely after October 1st 2011.
The new regulations, such as the definition of the professional and the enterprise, the deed of trust, the mortgage and the administration of the mortgaged goods, the prescription of debts, the separation of patrimonies, the forfeiture of the term benefit, have an impact upon the enforcement of the procedure of insolvency.
Without pretending an exhaustive approach, this study shall reveal a possible interpretation and enforcement of the provisions of the New Civil Code with respect to the procedure of insolvency, being aimed at bringing a plus in the incipient doctrine in this field.
Just like in the study regarding the remand agreement called "The prediction and prevention of insolvency Law 85/2006 on the procedure of insolvency" presented and sustained in the 4th edition of the International Scientific Session - Challenges of the Knowledge Society – this paper shall tackle the provisions of the two laws through the eyes of the practitioner, of the professional who enters into direct contact with the court of law and the enforcement of the law, under a double aspect, of the lawyer and the practitioner under insolvency, trying to delimit their practical applicability.

Keywords: *New Civil Code, impact, change, insolvency procedure, separation of patrimonies.*

1. Introductory aspects

The adoption of a new civil code which regulates the doctrinal and jurisprudential provisions was necessary in the context of the evolution of society and the attempt to rally to the European legislation.

The law no. 287/2009 on the New Civil Code, brings important changes for the institutions of law and their principles, being established and acknowledged both by the judicial doctrine and by the legal practice.

In all certainty the New Civil Code brings necessary changes in the socio-legislative reality of Romania, but unfortunately it arises multiple controversies and creates the premises of some solutions which lack in equity.

The difficulty in the enforcement of the New Civil Code is given on the one side by the lack of its agreement with the laws on which it concerns, and on the other hand by the ambiguity of the legislator's method of expression.

Still, the theme of this paper is far from being addressed to the legislative technique approached by the legislator, but it aims at highlighting the impact, the implications, the changes, the

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controversies and the difficulties in application, brought by the New Civil Code with respect to the procedure of insolvency regulated by the Law no. 85/2006.

The law no. 85/2006 on the insolvency procedure, as well as many other regulating laws belonging to the commercial law, have remained in force, as they are not included in the provisions of the Law no. 287/2009 on the New Civil Code, and as such we cannot ignore the changes in the national commercial legislation after the entering into force of the New Civil Code, namely after October 1st 2011.

The new regulations, such as the definition of the professional and the enterprise, the fiduciary, the mortgage and the administration of the mortgaged goods, the prescription of debts, the separation of patrimonies, the forfeiture of the term benefit, have an impact upon the enforcement of the procedure of insolvency.

Without pretending an exhaustive approach, this study shall reveal a possible interpretation and enforcement of the provisions of the New Civil Code with respect to the procedure of insolvency, being aimed at bringing a plus in the incipient doctrine in this field.

Just like in the study regarding the remand agreement called "The prediction and prevention of insolvency Law 85/2006 on the procedure of insolvency" presented and sustained in the 4th edition of the International Scientific Session - Challenges of the Knowledge Society – this paper shall tackle the provisions of the two laws through the eyes of the practitioner, of the professional who enters into direct contact with the court of law and the enforcement of the law, under a double aspect, of the lawyer and the practitioner under insolvency, trying to delimit their practical applicability.

Certainly, the current reality prefigures many changes to the Law no. 287/2009 on the New Civil Code.

2. The field of applicability of the procedure of insolvency starting October 1st 2011

Since the adoption of the Law no. 85/2006 and up until the present, the sphere of applicability of the procedure of insolvency has extended its limits under the aspect of the recipients subject to it.[1]

In the first approach, the Romanian legislator reserves the procedure of insolvency exclusively for the trader.

Currently the procedure of insolvency applies to certain categories of professionals, as defined in the New Civil Code.

2.1. The form of the Law no. 85/2006 on the procedure of insolvency

In the current form of the Law no. 85/2006 on the procedure of insolvency, the procedure of insolvency concerns the following categories of debtors:

The companies;
The corporate companies;
The cooperative organizations;
The agricultural companies;
The economic interest groups;
Any other legal entity of private law which also develops economic activities;
Traders, natural persons, acting individually;

[1] Under the aspect of the evolution of the procedure of insolvency and bankruptcy, also see Stanciu D. Carpenaru, Vasile Nemes, Mihai Adrian Hotca, the Law no. 85/2006 on the procedure of insolvency, Hamangiu Publishing – 2008;

I. Turcu, The Bankruptcy – the current procedure, Lumina Lex Publishing – 2005.

Family businesses.

Without entering into details regarding the enforcement of the procedure of insolvency on the various categories of debtors, currently there also are categories of debtors subject to the procedure of insolvency under conditions regulated by special laws.

This is the case of autonomous administrations, administrative and territorial units, insurance companies, credit institutions, financial and banking institutions.

The Law no. 85/2006 is also aimed at the natural persons who hold the quality of trader acting individually, as well as to the family businesses.

The law no. 85/2006 on the procedure of insolvency states that any other legal entity of private law which also develops economic activities, can be subject to this procedure.

We can see that the legislator uses notions like trader, economic activities, commercial deeds, enterprise.

In this regulation, until the entering into force of the Law no. 287/2009, the notion of enterprise was defined as being an economic unit engaged in production, the provision of services or trade, currently the legislator giving another form, another regulation and applicability to the notion of enterprise.

2.2. The professional and the enterprise in the sense of the New Civil Code

The art. 3 par. (1) of the New Civil Code itself regulates the field of applicability, respectively the professionals, as well as the relationships between professionals and any other subjects of civil law.

Further, the same article, through the next paragraph, defines the notion of "professionals" as being all those who exploit an enterprise.

The exploitation of an enterprise is represented by the systematic exercise, by one or more people, of an organizational activity consisting in the production, management or alienation of goods or the provision of services, irrespective of it having a lucrative purpose or not.

As such, a professional is a person who exploits an enterprise, this being the only definition given to it by the New Civil Code.

We can see that the legislator does not offer an explanation of the newly-introduced notion, namely the "professional" - through the definition of the enterprise, a professional is he who exploits it.

We draw the conclusion that the professional is not in all cases the holder of the enterprise, but it is sufficient for him to have the quality of explorer of the enterprise.

The sphere of professionals includes all those who, during the exploitation of an enterprise, develop a systematic activity related to production, management, alienation of goods or provision of services, these including the categories of trader, entrepreneur, economic operator, as well as any other person authorized to develop trading or professional activities, according to the provisions of art. 8 of the Law no. 71/2011 for the enforcement of Law no. 287/2009 on the Civil Code.

From the economics of the previously mentioned text we can conclude that the liberal professions also fall under the incidence of the New Civil Code, being included in the category of professionals, as they develop professional activities in the meaning of art. 8 of Law no. 71/2011.

Under these circumstances, the professional is not mistaken for the trader, as the latter is only a category of professional.

2.3. The trader-professional

Starting from those shown in the previous section, we shall se that together with the entering into force of the New Civil Code, the trade is also extended to the persons who, according to the old regulations, did not perform deeds of commerce.

To this respect, the art. 6 of the Law no. 71/2011 gives a definition of the trader, showing that the references to traders are considered to be performed for natural persons or, as appropriate, for legal entities subject to the registration in the trade register.

As such, the category of traders is determined as being all natural persons or legal entities subject to registration in the Trade Register.

The simple obligation of registration in the trade register transfers the quality of trader on the natural person or legal entity.

So, if before the adoption of the New Civil Code, for example the certified natural persons subject to registration in the Trade Register were not subject to the legal conditions of the trader, the former developing economic but not trading activities, but currently they receive the quality of trader.

What is more, we can see the method of expression of the legislator with respect to the condition imposed so that a person be assigned the quality of trader, respectively not that of being registered in the Trade Register, but being subject to registration in the Trade Register.

This provision, be it intentional or not, can be interpreted only in the sense that a simple obligation of registration in the Trade Register confers to a natural person or legal entity the quality of trader even until the performance of the formalities of registration and publicity, and thus until the moment the respective person begins to be an entity.

This interpretation leads to a series of legal effects, having as period of birth the initial moment of exploitation of the new enterprise in a systematic way of an organized activity which consists of the production, management or alienation of goods or the provision of services, irrespective of them having a lucrative purpose or not.

Thus, it is irrelevant if we find ourselves in the presence of an irregularly created company or of a natural person who develops trading activities, or who is engaged in the provision of services or a productive activity which is not yet registered in the trade register, as they have an obligation to register and shall be subject to the legal conditions applicable to the trader.

2.4. The professionals subject to the procedure of insolvency

The procedure of insolvency, until the date of entering into force of the New Civil Code, was applicable to the categories of natural persons or legal entities mentioned in art. 1 of the Law no. 85/2006.

The law which regulates the procedure of insolvency states the possibility of it being enforced on the traders which are natural persons and act individually.

By extending the notion of trader to the certified natural persons, currently they too can be applied the procedure of insolvency.

We must keep in mind that until now, the certified natural persons responded for their obligations with the assignment patrimony, if created and, in addition, with the entire patrimony.[2]

In case of insolvency, the certified natural person can be subject to this special procedure, stated by the Law no. 85/2006 on the procedure of insolvency, through the simplified procedure only

[2] The Emergency Ordinance no. 44 as of April 16th 2008 on the development of the economic activities by authorized natural persons, individual enterprise and family businesses, with the subsequent modifications and integrations

ART. 20 (1) The ANP is responsible for its obligations with the assignment patrimony, if created and, in addition, with its entire patrimony or, in case of insolvency, it shall be subject to the simplified procedure stated by the Law no. 85/2006 on the procedure of insolvency, with the subsequent modifications, if it has the quality of trader, according to art. 7 of the Commercial Code.

(2) The creditors shall execute their debts according to the common law, if the ANP does not have the quality of trader.

(3) Any interested person can make the proof of the quality of trader within the procedure of insolvency or separately, through action in observation, if justified by a legitimate interest.

if the debtor – CNP makes the proof that he has the quality of trader, according to the definition of trader included in art. 7 of the Commercial Code.[3]

As such, this was the exception in terms of insolvency, the rule being that all creditors shall execute the debts according to the common law, if the certified natural person does not hold the quality of trader.

In the light of the new provisions brought by the New Civil Code, even though the traders-natural persons are still not given the possibility of performing a judicial reorganization, they can recur to the simplified procedure of bankruptcy, thus creating the advantage for them that they can be released from their debts at the conclusion of the bankruptcy, thus being able to restart their initial professional activity.

The method of elaboration of the New Civil Code leads to certain controversies and positive discriminations with respect to the other professionals which continue to be excluded from the procedure of insolvency.

The discriminatory role between the various categories of professionals is obvious, for if we performed an analysis of the people registered in the trader register as developers of a professional activity under the form of a certified natural person, we would notice that, apart from the actual traders, there are journalists, singers, taxi drivers, bloggers, as well as other categories which obtain incomes from copyrights, who are registered.

Still, as we all know, the intellectual property does not have a trading nature, either in the old sense given to the notions of trader and trade or even in the current regulations.

Although it is difficult to guess the reasons for which the legislator transformed into a trader any person subject to registration in the trade register, until a possible explanation or change, all that is left for us is to enforce the law as it is currently in force and thus hold open the way of the procedure of insolvency for other categories of debtors than those expressly listed by the Law no. 85/2006 on the procedure of insolvency.

3. The separation of patrimonies in the procedure of insolvency. The creditors of the patrimonial assets.

The tendency of the legislator through the adoption of the New Civil Code aims at separating the patrimonial assets of a person, which means that from the general patrimony a part of it can be dislocated through special assignment.

Thus, through the separation of patrimonies, the creditors of a person's general patrimony cannot go after the goods corresponding to a distinct patrimonial asset.

In their turn, the creditors of the patrimonial asset with special assignment can only go after the goods corresponding to the patrimony in relation to which the debt was born and only to the extent that their debt is not covered in this way, can they foreclose the goods belonging to their debtor's general patrimony.

The separation of patrimonies springs either from the deed of trust and the complete administration of goods, or from the matrimonial conventions, the succession rights or the patrimony with professional assignment.

It is important to notice that the deed of incorporation of a class of goods affected by a special patrimony, is not usually affected as a consequence of the debtor's insolvency.

To this respect, the creditor of the respective assets, not only has a guaranteed debt, assigning a preferential degree before the other creditors, but can also manage the goods corresponding to the respective patrimonial assets.

The New Civil Code forfeits the restrictive provisions regarding the use of clauses which forbid the alienation of the buildings instituted through the regime of circulation of real estate

[3] Idem 2.

properties and even gives the possibility to institute over them a conventional inalienability[4], which leads to the legal imperceptibility.

The latter can have a major effect on the debtor's general patrimony and can prejudice its general creditors, as they will not be able to go after these goods.

3.1. The deed of trust

The deed of trust regulated by art. 773-791 of the New Civil Code, is an institution which does not have a correspondent in the old regulations.

It applies in the procedure related to a debtor's insolvency, as we will clearly see, being an instrument which is able to create separations of patrimonies.

Considering that the rule of separation of patrimonies is still valid in a case of insolvency, this new element is able to lead to the remission if not even the annihilation of its purpose.

Surely the deed of trust in the current regulation presents a value for the development of business, as it can be used both as a legal instrument for the management of goods and as a guarantee, but undoubtedly it will also be a means to fraud the creditors, to launder money and hide values, as well as to avoid certain legal provisions through its creation.

The institution of the deed of trust shall produce effects which shall be felt by the personal creditors of the debtor subject to the procedure of insolvency.

The deed of trust is defined by the regulating law as being the legal operation by means of which one or more constitutors transfer real rights, liability rights, guarantees or other patrimonial rights or an ensemble of such rights, present or future, to one or more fiduciaries which exercise them with a determined purpose, for the use of one or more beneficiaries.

This springs from the law or from the fiduciary agreement concluded under an authenticated form.

The fiduciary agreement is one of the oldest real agreements, having its origins in the Roman law, where it was called *pactum fiduciae*.[5]

For an analysis of the institution of the deed of trust through the perspective of the implications in the insolvency procedure, it is necessary to start from the definition given to this institution by the legislator.

As such, the deed of trust is the transfer of real rights, liability rights, guarantees or other patrimonial rights or of an ensemble of such rights, present or future, to the fiduciary for a period of time limited to a maximum of 33 years.

By concluding a fiduciary agreement, the fiduciary is transferred the property over a good which is the object of the deed of trust for a determined period of time.

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[4] The law no. 287/2009 on the New Civil Code

Art. 627 - The inalienability clause. Conditions. Field of enforcement.

(1) The alienation of a good can be forbidden by convention or testament, but only for a duration of maximum 49 years and if there is a serious and legitimate interest for it. The term starts at the date of acquirement of the good.

(2) The acquirer can be authorized by the court to dispose of the good if the interest which justified the clause of inalienability of the good has disappeared or if a superior interest imposes it.

(3) The nullity of the clause of inalienability stipulated in an agreement attracts the nullity of the entire agreement, if determined at its conclusion. In the onerous agreements, the determining characters is presumed, until the contrary is proven.

(4) The clause of inalienability is implied in the conventions from which arises an obligation to assign a property in the future towards a determined or determinable person.

(5) The assignment of the good by succession cannot be stopped through the stipulation of inalienability.

[5] A. Bureau, Le contract de fiducie: e′tude de droit compare′, Allemagne, France, Luxembourg, www.juripole.fr.

After the creation of the deed of trust, the creator forfeits the right given as fiduciary, assigning the property to the fiduciary, for a determined period of time, for administration purposes.

For the regulation of the deed of trust, the legislator expressly states that the rights which arise from the deed of trust constitute an autonomous patrimonial asset, different from the other rights and obligations in the fiduciaries' patrimonies.

In an interpretation of these provisions we notice that the fiduciary rights do not make a distinct patrimonial asset, autonomous with respect to the patrimony of the creator but only with respect to the patrimony of the fiduciary.

At a theoretical level and strictly as a legal operation, the deed of trust might be interpreted as being the division of the creator's general patrimony into two patrimonies, respectively the patrimonial asset with special assignment and the patrimonial asset of the remainder of the general patrimony after the constitution of the deed of trust.

Still, as effects, the fiduciary patrimonial asset is taken out of the creator's patrimony for the entire period of existence of the fiduciary agreement, in order to create for the fiduciary an autonomous patrimony, distinct from the other rights of its patrimonies.

I consider that given the express provisions of the norm, we find ourselves in the presence of a derogation from the principle of intra-patrimonial transfer, as the latter is incompatible with the transfer from a patrimony – that of the creator – into another patrimony – that of the fiduciary – the essence of the principle being the transfer through division, within the same patrimony.

There are contrary opinions with respect to the compatibility of art. 32 and art. 2324 of the New Civil Code with that of art. 773 of the New Civil Code.[6]

This is how the creator's personal creditors cannot go after the goods included in the fiduciary patrimonial asset, even through the enforcement of the provisions of art. 2324 of the New Civil Code.

In order to avoid as much as possible the situations of fraud and circumvention of certain legal provisions, the quality of fiduciary is limited to certain categories of professionals, namely the credit institutions, the investment and investment management companies, the companies performing services of financial investments, the insurance and reinsurance companies, as well as the lawyer and notaries public.

Still, the creator or the beneficiary of the deed of trust can be any legal entity or natural person.

The separation of patrimonies thus defends the debtor from creditors, others than the creditors of the patrimony of the fiduciary asset.

In this situation, the creator's personal creditors cannot foreclose the goods in object of the deed of trust, not even through the procedure of insolvency.

The deed of trust creates the premises for a safeguard of the debtor's estate, both in the case of its own insolvency and in the case of the fiduciary's insolvency.

This happens because, when starting a procedure of insolvency against the fiduciary, the fiduciary agreement is terminated, this being a derogation from the provisions of art. 86 of the Law no. 85/2006, which expressly forbids the introduction into the contracts of any clause which might lead to the termination of the agreement in case of insolvency.

I consider that in this case of termination it is necessary to merge the provisions of the New Civil Code with the special regulating norms of the institutions which can hold the quality of fiduciary, which state special procedures for their recovery or bankruptcy.

Furthermore, it is necessary to take into account the provisions of the laws for the organization of the professions of lawyer and notary public, which do not give these categories of

[6] Mihaela Paraschiv – Judge in the Court of Appeal of Bucharest, The New Civil Code – Notes; Correlations; Explanations, C.H. Beck 2011 Publishing, page 13.

professionals the possibility to be traders, thus not being subject to the procedure of insolvency under any of its forms.

Considering that the deed of trust can also be terminated at the moment of reorganization of a legal entity, without mentioning that it is applied to a legal entity which is a fiduciary or a creator – and where the law does not make distinctions, we must not make any either – we can consider that the legislator applies this case of termination in relation both to the effects of the creator's reorganization and to that of the fiduciary-legal entity.

Also, the legislator does not make any distinctions between the reorganization of the legal entity through procedures of division, fusion, etc and the legal reorganization through the procedure of insolvency.

As such, the fiduciary agreement is terminated through the start of the procedure of insolvency against the fiduciary, which according to the Law no. 85/2006 can be in simplified procedure – bankruptcy or general procedure – a legal reorganization (thus covering a form of reorganization) or when there are effects of the reorganization of the legal entity of the fiduciary through the subjection to certain procedures of transformation, division, fusion, etc. – another form of the reorganization of the legal entity.

With respect to the termination of the deed of trust through the reorganization of the creator's legal entity, we notice that the deed of trust does not stop at the beginning of the procedure of insolvency against the latter, but only when there appear effects of the reorganization of the legal entity inasmuch as within the procedure of insolvency a legal reorganization is discussed.

At the same time, the deed of trust stops when there appear effects of the reorganization of the legal entity other than the legal reorganization, respectively the reorganization through division, fusion, etc.

No other solution would be possible if we apply the theory of incompatibility of the principle of intra-patrimonial transfer in the creation of the deed of trust, as the fiduciary good is not under the creator's patrimony but under that of the fiduciary, and as such it cannot be part of the assets and liabilities of the debtor-creator.

These remain valid because, as shown, the fiduciary agreement is not terminated at the beginning of the creator's procedure, both from the perspective of art. 86 of the Law no. 85/2006 and from that of art. 790 of the New Civil Code.

Definitely, we shall not exclude other interpretations of the art. 790 of the New Civil Code.[7]

Starting from these premises, a conclusion would be that the beginning of the procedure of insolvency against the debtor who is also the creator of a deed of trust, does not have effects on the patrimonial assets of the fiduciary, until the moment of production of the effects of the reorganization of the legal entity, which is the only case in which the deed of trust would be terminated by means of the procedure of insolvency.

Thus, when starting a procedure of insolvency through simplified procedure and bankruptcy, the fiduciary patrimonial asset cannot be part of the assets and liabilities of the debtor subject to insolvency.

The theory is sustained on the one hand by the fact that the deed of trust also exists beyond the moment of opening of the creator's procedure of insolvency, and only to the extent that the procedure of insolvency follows the general procedure for legal reorganization, there is the possibility of returning the goods afflicted by the deed of trust into the debtor's general patrimony through the termination of the deed of trust, and on the other hand the legislation lists, expressly and with limitation, the causes of termination of the deed of trust.

[7] Alexandru-Serban Ratoi – lawyer Piperea & Asociatii, The New Civil Code – Notes; Correlations; Explanations, C.H. Beck 2011 Publishing, page 276.

We can see that the legislator, willingly or not, from the express and limited list of causes for the termination of the deed of trust, has excluded the possibility of its termination through the creator's bankruptcy, but only through its reorganization, as previously shown.

In the other case, that of the reorganization of the creator-legal entity, the deed of trust stops, which means that together with its termination, the goods corresponding to the fiduciary return into the debtor's general patrimony.

This might be an effect of the termination of the deed of trust through reorganization only in one case, that of the inexistence of the person of the beneficiary from the fiduciary agreement.

Inasmuch as the fiduciary agreement stipulated a beneficiary – other than the person of the creator and the fiduciary agreement is terminated at the moment of production of the effects of the creator's reorganization, beyond this moment, the effect of the termination is that of transferring the fiduciary patrimonial assets existing until then, to the beneficiary.

As such, the goods in object of the deed of trust are definitely taken out of the fiduciary's special autonomous patrimony and enter into the beneficiary's general patrimony thus operating the transfer of property over the respective goods.[8]

In these conditions, the possibility of satisfying the liabilities of the general creditors of the debtor-creator from the fiduciary goods, is limited to the return of these goods, as an effect of the reorganization, on condition of the inexistence of the beneficiary in the fiduciary agreement or when there is an identity between the beneficiary and the creator of the deed of trust.

All these can be considered to be either derogations from the principles instituted through art. 31-32 of the New Civil Code, or disagreements of the legislator within the same norm. I previously sustained that, according to the principle of separation of patrimonies, the creditors cannot go after the goods subject to the deed of trust.

Article 786 of the New Civil Code imposes two exceptions from this principle:

- the case of the special creditors of the liabilities arising from the goods in object of a deed of trust through the cumulative fulfilment of two conditions, namely the liability needing to be encumbered by a real warranty and the forms of publicity for the opposability of this warranty be fulfilled prior to the establishment of the deed of trust.

- the case of the general creditors of the creator, but only based on a definitive court decision for the admittance of the action through which the fiduciary agreement was cancelled or turned non-opposable in any way, with retroactive effect.

The first exception applies through the opposability of a warranty inscribed prior to the establishment of the deed of trust which is preferred instead of the warranty created with the deed of trust, the second exception applying as an effect of the return of the fiduciary good into the creator's general patrimony which shall be responsible for its debts according to art. 2324 of the New Civil Code.

By merging the provisions of art. 31-32 of the New Civil Code[9] with those of art. 2324 of the New Civil Code[10] we interpret that the pursuit of the patrimonies must be performed in a

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[8] The New Civil Code

Art. 791. The effects of the termination of the fiduciary agreement

(1) When the fiduciary agreement is terminated, the fiduciary patrimonial assets existing at that respective time is transferred to the beneficiary or, in the absence of the latter, to the creator.

(2) The merging of the fiduciary patrimonial assets into the beneficiary's or the creator's patrimony shall take place only after the payment of the fiduciary debts.

[9] The New Civil Code

Art. 31. The patrimony. Patrimonial assets and assignment patrimonies

(1) Any natural person or legal entity is the holder of a patrimony which includes all the rights and debts that can be evaluated in cash and which belong to them.

(2) It may be the object of a division or an assignment only in the cases and under the conditions stated by the law.

certain order, namely once the general patrimony is divided into several patrimonial assets with special assignment, the creditors will be able to pursuit for the satisfaction of the debt, the patrimonial asset which gave birth to that debt and only to the extent to which the debt was not cancelled through the valuation of the goods corresponding to the respective patrimonial asset, as such being able to pursuit the goods of another patrimonial asset belonging to the debtor and only until the value left uncovered is reached.

There is a single exception from these provisions, which is expressly stated by the legislator, respectively the patrimonial asset afflicted by the exercise of the profession can be only followed by the creditors whose liabilities arose in relation to the profession and, at the same time, they cannot pursuit those goods belonging to the debtor, even if the entire value of the debt was not covered.

Furthermore, not even the debtor's general creditors can pursuit the patrimony corresponding to the profession.

The institution of the fiduciary also holds those unenforceable provisions because, as shown, the legislator has created an absolute exception, even if it was not expressly explained, from the pursuit of this patrimonial asset by other creditors except for the fiduciaries, both through foreclosure and through the procedure of insolvency.

I conclude with a rhetorical question - does the interpretation previously given to the institution of the deed of trust represent a legal manner to fraud, an error of vision of the legislator or of the author of this study?

3.2. The inalienability and imperceptibility of the goods

We are the observers of a new conception of the Romanian legislator on the legal circulation of goods.

If until October 1st 2011, the date when the New Civil Code entered into force, we were subject to the legal regime of the circulation of goods which claimed that all goods enter into the civil circuit except for those which are expressly declared by the law as being inalienable and imperceptible, the New Civil Code brings an element of novelty in the regulation of this regime, through the institution of the conventional inalienability.

According to the latter, through a convention or a will the alienation of a good can be forbidden for a duration of a maximum of 49 years.

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(3) The assignment patrimonies are the fiduciary patrimonial assets, created according to the provisions of title IV and book III, those affected by the exercise of an authorized profession, as well as those patrimonies determined according to the law.

Art. 32. The intra-patrimonial transfer

(1) In case of division or assignment, the transfer of the rights and obligations from a patrimonial asset to another, within the same patrimony, is performed based on the conditions provided by the law and without bringing any prejudice to the creditors' rights over each patrimonial asset.

(2) In all cases stated in par. (1), the transfer of the rights and obligations from a patrimonial asset to another is not an alienation.

[10] The New Civil Code

Art. 2.324. The creditors' common guarantee

(1) He who has a personal obligation is responsible with all his assets and real estates, both present and future. They serve as common guarantee for his creditors.

(2) The imperceptible goods cannot be the object of the guarantee mentioned in par. (1).

(3) The creditors whose debts were born in relation to a certain division of the patrimony, authorized by the law, must firstly go after the goods in object of the respective patrimonial asset. If they are not sufficient for the satisfaction of the debts, other goods belonging to the debtor can be followed.

(4) The goods in object of a division of the patrimony corresponding to the exercise of a profession authorized by the law can be followed only by the creditors whose debts were born in relation to the respective profession. These creditors cannot go after the other goods belonging to the debtor.

The inalienability can be instituted inasmuch as there is a serious and legitimate interest for it.

The clause of inalienability is implied in the conventions which give birth to the obligation to assign in the future the property to a determined or determinable person.

If the inalienability is created through convention or through will, only the acquirer has an active legitimacy in a law suit based on the authorization of the disposition of the good, which means that a debtor's creditor, under the protection of the clause of inalienability, cannot request the acceptance or authorization of the execution over the respective good.

Still, the nullity of the clause of inalienability stipulated in an agreement attracts the nullity of the entire agreement if it was determined on its conclusion. In the onerous agreements, the determining character is presumed, until the contrary is proven.

The effects of the clause of inalienability are reflected in the consequences borne by those who act against the interdiction of alienation, namely, the resolution of the agreement in which the clause was stipulated, the obligation to pay damage or even the nullity of the agreement concluded with the violation of the clause. The latter sanction is, though, conditioned by the satisfaction of certain opposability conditions.[11]

Also as an effect of the institution of conventional inalienability there is the legal imperceptibility of the good for which the clause was stipulated for the duration of its validity, respectively maximum 49 years.

To this respect, the imperceptibility of the good protected by the clause of conventional inalienability was legislated, which means that the good cannot be followed by the creditors of the beneficiary of the clause, for the entire period in which it produces effects in a valid manner.

As a rule instituted by the New Civil Code, the inalienable and imperceptible goods are imposed certain conditions related to the validity of the clause of inalienability according to the provisions of art. 2329 of the New Civil Code.[12]

As an effect of this new regulation in the procedure of insolvency, the inalienable and imperceptible goods cannot be foreclosed by the creditors and cannot be included in the assets and liabilities of the debtor subject to the procedure of insolvency.

As a consequence of the modifications brought by the regulation of the principle of specialty of the capacity of use of a legal entity, previously regulated by art. 34 of the Order no. 31/1954, by the art. 206 and the art. 208 of the New Civil Code, the legal entity can be the holder of any right and obligation, except for those which through their nature or by law can only belong to natural persons.

As such, the legal entity has obtained, since October 1st, the capacity to receive liberalities under the conditions of the common law, from the date of the deed of creation, except for the testament foundations which ca receive liberalities only from the date of opening of the testator's inheritance.[13]

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[11] Bogdan Dumitrache, Legal Executor, The National Union of Legal Executors.

[12] The New Civil Code

Art. 2.329. Clauses of imperceptibility

(1) The conditions required for the validity of the clauses of inalienability apply accordingly to the clauses in which the imperceptibility of a good is stipulated.

(2) All goods which are, according to the law, inalienable, are also imperceptible.

(3) In order for them to be opposable to third parties, the imperceptibility clauses must be included in the public registers or in the real estate registers, as appropriate.

[13] The New Civil Code

Art. 208. The capacity to receive liberalities

By exception from the provisions of art. 205 par. (3) and if the law does not dispose otherwise, any legal entity can receive liberalities in the conditions of the common law, from the date of the deed of registration or, in the case of the testamentary foundations, from the moment of opening of the testator's inheritance, even in the case when the liberalities are not necessary so that the legal entity be legally created.

We find ourselves again in the impossibility to include in the assets and liabilities a good belonging to the patrimony of a debtor afflicted by a clause of inalienability and imperceptibility.

Definitely, during the following period we shall see more donations with "duties" justified by a "legitimate and serious interest", for the benefit of legal entities, which will have as an effect, be it intended or not, the decrease of the assets and liabilities for the detriment of the good-faith creditors.

4. Conclusions

As stated in the introductory part, this study is far from covering all the implications, changes and difficulties arising together with the entering into force of the New Civil Code and especially in relation to the procedure of insolvency.

The study was limited to the impact of the separation of patrimonies over the procedure of insolvency, but the changes and problems arisen by the enforcement of the New Civil Code are multiple, even if we are still in the incipient phase of its enforcement.

The newly implemented legal norm is, at least in its current form, defective, leaving space for interpretations through the claim of certain notions which constituted doctrinal and jurisprudential springs since 1864 and until the present day.

An enforcement can obviously not be performed unless by claiming well-known notions, by bringing additions from the old regulations, inasmuch as they are still compatible.

It is important to observe the space allowed by the new legal norm for the speculations and for the "removal" of the patrimonial goods from the procedure of insolvency.

The changes brought by the New Civil Code to the procedure of insolvency seem to obstruct more than sustain the purpose of the Law no. 85/2006 and tend, without a full and deep analysis, towards a lack of efficiency.

All these without insisting on the legislator's awkwardness in the elaboration of the New Civil Code, which apart from the legal technique approached, equals the notions of bankruptcy and insolvency, insolvency and insolvability, etc.

The separation of patrimonies, through the division of the general patrimony of the person in various patrimonial assets subject to a special assignment such as the deed of trust, the management, represent only an approach of the "bankrupt" impact on the Law concerning the procedure of insolvency.

In a future approach of the impact of the New Civil Code on the Law no. 85/2006 on the procedure of insolvency, we shall tackle the provisions of the institution of the decay from the term benefit, the mortgage and, especially, the taking over of a mortgaged good for administration, the prescription of debt, the special obligations and agreements – part of them being terminated at the beginning of the procedure of insolvency and all of them bringing significant changes and derogations to the procedure of insolvency.

We are still trying to support the efforts to enforce, improve, modify this norm, by searching, as practitioners, legal solutions in the sense that a norm should produce legal effects without ceasing to believe that our efforts from the initial stage of the Law no. 287/2009 shall lead to certain results, the contribution of each of those involved directly in its enforcement being materialized into a doctrine, a practice or in jurisprudence.

De lege ferenda imposes the intense cooperation with the various categories of practitioners under direct contact with the enforcement of the laws, not only with theoreticians, as a vision of ensemble and interpretation, which can be possessed profoundly by the lawyer, but also by the practitioner under insolvency, the magistrate and other similar practitioners.

At the same time, it is necessary to explain the institutions with a regime of absolute novelty for the Romanian legal system, the correlation of the norms still in force with those regulated by the New Civil Code.

Mainly with respect to the procedure of insolvency, it is very important not to lose sight of the purpose of the law which, as already seen, tends to be eluded, through the creation of levers which shall secure the debtors' goods, thus encouraging illegal, disloyal practices performed with the purpose of committing "legal" fraud, as well as for the development in ill-faith of "clean" practices for money laundering, all these in the detriment and damage of the contractual partners – the creditors.

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CONTROVERSIAL ASPECTS REGARDING APPOINTING AND REVOKING THE LEGAL ENTITY ADMINISTRATOR

CARMEN TODICA*

Abstract
Having as main objective the analysis the provisions of Company Law and the New Civil Code regarding the management of a trading company by a legal person, the study offers several solutions to a number of controversial issues with strict reference to two aspects: appointing and revoking the legal entity administrator. Can the administrator be any entity with a legal personality or just a trade company? Is the administrator subject to legal requirements of good repute, characteristic to a representative natural person? Can the legal person fulfill the president position in a collective administrative body? Can he be revoked ad nutum? Regarding the administrator legal person representative, may the company revoke the administrator, on its own? There are several questions outlining the juridical status of the administrator legal person, and to which the paper tries to find answers, introducing some jurisprudence solutions, comparative law issues and controversial doctrinal views.

Keywords: *administrator revocation, appointing the administrator, honorability, legal person, permanent representative.*

Introduction

In the current legislative framework, established by the Law on trading companies no. 31/1990 and by the New Civil Code, as we shall see later, it is undeniable that the position as a trading company administrator shall be performed by a legal entity administrator. But, both normative acts are limited strictly to allowing such a possibility, without detailing what should be the appointment method, the conditions that should be met and how to revoke the administrator legal person.

In the silence of the law on trading companies, in the approach taken, it has been tried to indentify some problems that may occur, in practice during the company's life span related to the aspects like appointing and revoking the legal entity administrator. Namely: what would be the appointment procedure through the constitutive act or by the ordinary general assembly decision, if the legal entity administrator must meet the honorability conditions and independence requested by the law for the appointment of the administrator and to what extent he could be appointed chairman of the collective administrative bodies? Regarding the revocation of the legal entity administrator two issues are put under discussion, if the legal entity administrator mandate can be revoked ad nutum or only in the context of failure to meet certain duties expressly stipulated in the management contract signed with the company and if the legal representative of the legal entity administrator can be revoked by the associates of the managed trading company.

In addressing these issues solutions from judicial practice, the views often divergent outlined in theory are considered, and also a corroborated interpretation of the legal texts on trading companies, at times poor, with the provisions of the New Civil Code on the usage capacity specialty (art. 206) and the trader quality (art.8 para.2) but also of the Criminal Code on criminal liability of the legal person. While making use of the lawmaker's inconsistency in drafting legal texts, and also of the legal void regarding a number of issues related to the appointment and revocation of the legal entity administrator, the study attempts to cover the gaps and the legislative inadequacies.

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The possibility for a legal entity administrator to exercise its administrative powers and to represent a trading company has been relatively recent introduced in the Romanian legislation, the aspects regarding its appointment and revocation have been subject to only few specialty papers and only isolated in relation to the overall context on managing a trading company[1]. But the practical impact of the proposed solutions is to be related to the provisions of the New Civil Code with general applicability for any legal person who considers the managing opportunity by another legal person. Although Law 31/1990 is limited to mentioning such a possibility expresis verbis such a possibility only in regards to the joint stock companies, starting from the principle provision of art. 209 para (2) of the New Civil Code, in what follows we will try to offer arguments in the sense that also in other types of companies the administration and representation duty can be assigned to a legal person.

1. The current legal framework on the possibility to appoint the legal entity administrator

Law 31/1990 on trading companies, in its original form, didn't contain any provisions that would allow the appointment of a legal person to the administrator position. Also, the law made no difference between legal and natural persons, as administrators of trading companies. In addition, at that time, major part of theory argued that, considering the way the company law was drafted it actually was in support of this legislative act that the administration would be done by a natural person. The conclusion follows mainly from the interpretation of the legal provisions, which didn't expressly provided the possibility of exercising the administration duties for a trading company by a legal person, and on the other hand from the legal prohibition that the incapable or dishonorable persons to exercise the administrator duty, prohibition that only concerned natural persons. However, rarely[2] it was admitted that based on logical argumentation where the law didn't prohibit, it allowed, a legal person to exercise the administrative mandate of a trading company under the provisions of Law no. 31/1990.

Later, based on the provisions or art. 139 (legal text introduced by Government Emergency Ordinance no.31/1997, currently repealed)[3] the Law on trading companies expressly allowed for a legal person to be appointed or elected as the administrator of a trading company, provided that the rights and obligations of the parties shall be drafted in a management contract.

In the current legislative context, the issue regarding the management of the trading company by a legal person is no longer an issue, related to the provisions of art. 153^{13} para.1 and 2 (introduced by Law no.441/2006) according to which *" (1) the managers of the joint-stock company, in an unitary system , or the members of the management, in a dual system, shall be legal persons.*

(2) *A legal person may be appointed administrator or member of the supervisory board of a joint-stock company. (...)"*

Therefore, the law (art. 153^{13} para.2) expressly allows a legal person to be appointed administrator or member of the supervisory board of a joint-stock company. If among the Board of directors, respectively the supervisory board can be both legal and natural persons, in respect to the

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[1] Emanoil Munteanu, "The legal status of joint-stock companies' administrators", *Commercial Law Magazine* 4 (1997): 122-123; Marius Şcheaua, *Company Law no. 31/1990 commented and annotated*, (Bucharest: Publishing House Rosseti, 2002): 313; D.M. Daghie, "Theoretical considerations on the appointment of the administrator," *Commercial Law Review* 5 (2010).

[2] C.I. Stoica "Exercising the administrative duties in a trading company by a legal entity administrator", *Commercial Law Review* 1 (1995): 87-91. The author claims that "*if the associates or shareholders, as appropriate, agree that their company will be managed by a legal person, they can do so either through the constitutive acts or subsequently through the General Assembly's decision*".

[3] According to art. 139, in a previous regulation *"(1) A legal person may be appointed or elected administrator of a company, (...)".*

managers of the joint-stock company, in unitary system, or the members of the management, in the dual system can only be natural persons (art. 153^1, para. 1).

At the same time, in the current legislative framework, established by the New Civil Code[4], the legal person is also an administrative body, which by law, by constitutive act or statute is empowered to act in relations to third parties. Indeed according to art 209 para.(2) *" has the status of administrative bodies….the natural or legal persons who, by law, constitutive act or statute are empowered to act in relation to third parties, in the name and on behalf of the legal person"*. Thus, when regulating, in principle, the afore mentioned legal text, the New Civil Code, indirectly, besides the qualification as an administrative body, generally recognizes the possibility of a legal person to be appointed administrator of another legal person.

2. Practical issues concerning the appointment of a legal entity administrator

2.1. With reference to the fact that legal texts above alleged are relevant in the field of joint-stock companies, ***a first problem*** arises, namely: if for the other types of trading companies- the limited liability company and the general partnership- the administrator position can be assigned to a legal person?

Provided that the legal regulations applicable to the administrators of limited liability companies and general partnership make no distinction, **we consider that both the natural and legal person can be appointed as the administrator of the company[5]**. Moreover, to the extent to which the lawmaker would have wanted to exclude the legal person from the administrative duties of the trading companies, he would have expressly prohibited through a provision of the law.

The conclusion follows also from the provisions of art. 81 corroborated with art.7 letter. e) which regulates the administrators' identification data, needed to be mentioned in the constitutive act of the general partnerships and of limited liability companies, separately, both for administrators and for legal entities administrators.

Indeed art. 153^{13} para.2, regulating the possibility to appoint a legal entity administrator for the company, is placed among the provisions on joint-stock company[6], but, compared to the provisions of art. 209 para.(2) of the Civil Code **we appreciate that the failure to regulate this possibility for the other types of companies is just an inadvertence[7]**, so that together with the entry into force of the Civil Code, art. 153^{13} para.2 of Law 31/1990 has general applicability.

2.2. Noting only in a general manner that: *"the legal person can be appointed administrator or member of the supervisory board"*, art.153^{13} para.2 of the Law raises ***a second problem***: which of the legal persons could exercise the administrative mandate? In other words, can any entity with a legal personality be an administrator?

According to the legislative changes introduced by Law no. 44/2006, art.81, letter b) of Law no.31/1990 provides as identification data for the legal persons, including administrators or members

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[4] Law no. 287/2009 of the Civil Code, published in the "Official Gazette", Part I, no. 505 of July 15th, 2011, pursuant to Art. 218 of Law no. 71/2011 for the implementation of Law no. 287/2009 of the Civil Code ("Official Gazette", Part I, no. 409 of June 10th , 2011).

[5] In a contrary opinion, the possibility for managing a trade company by a legal entity administrator is limited only to the joint-stock companies. Consequently the author states distinctly that one of the conditions to be appointed as an administrator for the other types of companies, is being a natural person. See D.M. Daghie, *quoted work*, 97.

[6] For a contrary view, see Stanciu D. Cărpenaru, *Romanian Commercial Law*, VIII th Edition (Bucharest: Universul Juridic, 2008): 232. According to the author, Law no. 31/1990, in its current form, allows the appointment as administrator of a legal entity, but only for the company joint-stock. Prior to the amendment, the appointment of an administrator legal person was allowed in any trading company, regardless of their legal form.

[7] Stanciu .D. Cărpenaru, Cătălin. Predoiu, Sorin David, Gheorghe Piperea*, Company Law. Review on articles* (Bucharest: C.H, Beck Publishing House, 2006): 325. To decide otherwise would mean to empty the content of art. 7 letter. e), and in addition, among all companies, the joint stock company is the one that requires best, professional administration through a specialized legal entity.

of the supervisory board: the name, head office, registration number in the National Trade Register of the sole registration code. Since these are identification data specific for traders**, we consider that the Law takes into account only the legal entity as "administrator-legal person"[8].**

At the same time, the legal person, appointed administrator or member of the supervisory board, must comply with the specific conditions imposed by the specialty principle legal capacity of the legal person. Starting from this principle, regulated in art 34 of Decree no. 31/1954[9] on natural and legal persons, according to which the legal person can only have those rights that meet their main scope established by law, constitutive act or statute, the administrator- legal person must have within the object of activity this management activity. Since this is a commercial activity based on mandate contracts and not on isolated commercial activities, the legal person-administrator is, necessarily, a commercial company, whose main scope and activity is the management of trading companies[10]. Otherwise, a commercial company which hasn't stated amongst its object of activity the activity of managing other companies, could not carry out such activity, without infringing the specialty principle of the legal capacity of the legal person.

In other words, the provision of art. 61 related to art.73^1 shall apply to the legal entity administrator, in the sense that cannot be administrators the "persons which, by law, are incapable". In this case, the legal entity administrator's capacity must allow the representative (natural person) appointed by him, to conclude any legal act needed for carrying out a commercial activity having as a main scope obtaining profit. Thus, termination of the legal capacity of the legal person by dissolution, dissolution followed by liquidation, reorganization entails the revocation of the right to manage. In the new Civil Code, yet the speciality principle of the legal capacity is regulated only in terms of the legal person with non-profit activity. Thus according to art. 206 para. 2 "the legal persons with non-profit activities may have just those rights which are necessary to meet their scope set by law, by the constitutive act or by statute", for the legal person in general the new legal provisions giving the plenitude of civil rights and obligations. In this sense, art. 206 para.1 states that" the legal person may have any rights and obligations, except those which by their nature or by law, can only belong to the natural persons". Considering that a legal person, among which the commercial company, in fact, can only have rights and obligations specific to its scope and can only carry out those activities that meet the goals of the object of activity provided in the constitutive act, we believe that the specialty principle of the legal capacity should find a well deserved legal regulation on all the legal persons, without any distinction.

2.3. A final issue raised in theory[11] was whether the administrator/ member of the supervisory board- legal person can be appointed chairman of the board of directors, respectively of the supervisory board? The question arises considering at least two aspects: a legal person may be appointed administrator or member of the supervisory board of a joint-stock company (art. 153^{13} para.2), and the board of directors appoints amongst its members a chairman of the board (art 140^1 para.1 thesis I) respectively the supervisory board chooses among its members a chairman of the board (153^{13} para.5).

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[8] In a contrary view it is considered that a non-profit legal entity may act as an administrator of a commercial company, since the Law does not prohibit expressly, but that the law when it introduced art. 139 (in the previous regulation), did not take into account NGOs , but trading companies (Marius Şcheaua, *work quoted*, 313.

[9] Decree regarding the natural person and legal person published in BO no. 8/30 January 1954 was repealed upon the entry into force on October 1st of the New Civil Code - Law no. 287/2009.

[10] Specifically the constitutive act of the administrator legal entity shall provide as object of activity also the operations listed in Class 7022 CAEN Code - "*business consulting activities and management*".

[11] C.I. Stoica, *quoted work*, 87-91.

Considering the provisions of the French law[12] where a legal person cannot be the chairman of the board of directors, it has been argued that the legal person cannot be appointed chairman of a board of directors. However, **in relation to the provisions of the law on trading companies, that do not prohibit, not expressly and not indirectly, the appointment of a legal person for the chairman of the board of director position, respectively supervisory board, we consider this to be possible. This, especially since these boards elect their chairman among its members and the legal entity can be legally appointed as a member of these bodies.**

3. Legal terms regarding the appointment of the legal entity administrator

3.1. in the previous form of the law (art. 139, repealed by law no. 441/2006) the statute of the legal entity administrator was very well outlined. Therefore, the law on trading companies required legal persons, in order to be appointed administrator, they were supposed to meet the special conditions required for the administrator natural person (in this sense art.139 para.1 was referring to the conditions provisioned by art.138). Also, on the modality for appointing the legal entity administrator, art.139 para.2 stated that, the rights and obligations of the parties were established through a management contract.

Under these aspects, the current regulation of art 153^{13} para. 2 is deficient. In respect to the manner for appointing the administrator-legal person, the law no longer contains any provisions in this sense, and is limiting itself to state that the legal person may be appointed administrator, respectively member of the supervisory board. **Compared to the regulation on appointing the administrator- natural person, and in the silence of the law regarding the appointment of the administrator-legal person, we believe that for the same reason, the appointment by constitutive act or by decision of the general assembly shall also apply to the administrator-legal person.** Consequently, the administrator- legal person may be appointed by constitutive act, during the set up of the company or later, during the company's existence, by the decision of the general assembly, and exercise its duties under the provisions established in the instrument of appointment. Having as main attribution managing the activity of the company, in the name and on the behalf of the trading company, the mandate given to the administrator-legal person is a remunerated one. Of course, it is possible to conclude a contract (management) between the commercial company and the administrator natural person, contract that will become an annex to the appointment agreement.

An important clause in the administrator- legal person's appointment agreement is the one regarding the appointment of the natural person, permanent representative of the latter. Thus, according to art. 153^{13} para.2, thesis II, once appointed administrator or member of the supervisory board (of a joint-stock company) the legal person is bound to appoint a permanent representative, natural person. And as far as the permanent representative is revoked, the legal person is bound to appoint a replacement.

3.2. In respect to the permanent representative, the law expressly provides that "he is subject to the same conditions…as an administrator or a member of the supervisory board, natural person action on his behalf", without referring to the conditions that the legal entity administrator should met. In this context, shouldn't the legal person meet also certain similar conditions to those to which the natural person is subject to? In the silence of the law we believe that he is subject to the same conditions as the natural person, with certain particularities.

Separately from the citizenship condition for the natural person, among the identification data of the administrators, that the constitutive act should contain, art.81 letter b) of the Law lists for the

[12] French law explicitly prohibits to legal persons to hold the position of chairman of the board of directors (Article 110 of Law no. 66-537 from 24th July 1966 on commercial companies), only the natural persons receive recognition for such rights.

legal persons the **nationality**. Therefore, the legal entities administrators can be both legal persons with Romanian nationality and foreign legal entities. Of course, through the constitutive act the possibility to appoint as the administrator of a foreign legal entity can be limited. In regards to the **honorability of the legal person-administrator**, in theory[13], it has been argued that it can only affect its permanent representative, to whom the provisions established for the administrator- natural person shall apply.

However it has been suggested as a solution[14], in the absence of any provision in this sense of Law 31/1990, applying, by similarity the provisions of Law on management agreement no. 66/1993 (currently repealed) which in art. 4, point 2 and art. T section 2 established the conditions that were supposed to be met by a legal person to become "manager" (to have experience in the management field; to prove by acts their creditworthiness; should not be declare bankrupt; has not been sanctioned for breach of the legal provisions on taxation; should not appear on the list of managers who were revoked). In a contrary opinion[15], these conditions would concern also the administrator-legal person, only to the extent to which there would be an express reference of the Law on trading companies to the rules regulating the management agreement, and as Law no.31/1990 didn't comprise such a reference, the provisions of the management contract law could not be applied. Additionally, it was argued that managing the company by a legal person should have been made through its permanent representative, which was, in fact, the person who concluded juridical acts with third parties.

Following the recent amendments made to the Criminal Law[16], we appreciate that, since the legal persons is criminally liable for the offenses committed in achieving the object of activity or for the benefit or on behalf of that legal person, if the offense has been committed with the form of guilt provided by the criminal law (art.19^1 para.1), therefore, the provisions of art. 73^1 and art.6 para.2 are directly applicable. Thus, the legal person cannot be administrator/member of the supervisory board if he has been convicted for the offenses established by art. 6 para.2 law no.31/1990.

Consequently, **we don't believe that in a future regulation (*de lege ferenda)* would be necessary the express regulation of some morality conditions towards the administrator- legal person, since he is subject to art. 73^1 and art. 6 para.2 of the Law**. Thus, Law no. 278/2006 amending the Criminal code[17] adopted, in art. 19^1 , the solution on the criminal liability of the legal person, which can be invoked, in principle, for any offense. The lawmaker offered also guidelines for establishing the offenses that could lead to a criminal conviction of the legal entity, adding that the offenses must be committed while achieving the object of activity or in the interest or on behalf of the legal person. Therefore, all the more so, the offenses provided at art.6 para.2 of the Law 31/1990 fall within this limits, since the object of activity of the legal person- administrator is the management of the trading company.

Since no expressly stipulated distinction has been made between the natural person and the legal person, we consider that there are no impediments that, when appointing the administrator-legal person, some of the independence criteria of art. 138^2 para.2 of the Law should be considered, especially those stated at letter c) and e), respectively that they shouldn't have received form a company or a company controlled by it an additional remuneration or other advantages, other than those corresponding to its capacity of administrator, and should not have or had in the last year labor relations with a company or a company controlled by it, either in person, or as associated, shareholder, administrator.

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[13] V. Papu, "Becoming an administrator of a joint-stock company ", *Romanian Journal of Business Law* 7-8 (2004): 143-150.

[14] Marius Scheaua, *quoted work*, 193.

[15] V. Papu, *quoted work,* 145.

[16] Law no. 278/2006 for amending and supplementing the Criminal Code and to amend and supplement other laws (Gazette. No. 601/12th July 2006).

[17] Published in the Official Gazette. no. 601 of 12/07/2006.

3.3. At the same time, the administrator-legal person of a commercial company is also a trader, given both the manner for obtaining the legal personality, and the specific object of activity. In theory[18], the conditions necessary for a person to acquire the legal personality as a trader have been outlined, namely: to commit acts of trade, to perform acts and facts of trade as an ordinary profession carried out in his name.

As a result of entry into force of the New Civil Code, art. 8, para. 2, the terms "commercial acts" and "facts of commerce" will be replaced by "activities of production, trade or services". Although, he carries out commercial acts and facts (activities of production, trade or services) as his main field of action, the administrator don't become a trader because he doesn't carry out these activities in his name and at their own economic risk, but on behalf of the company they manage. Thus, the administrator-natural person meets only the first two conditions required in order to be a trader, which is not sufficient to acquire this status[19]. Of course, neither the legal entity administrator carries out services activities in its own name, but in nomine alieno for the managed company. But, since it is about commercial acts carried out on a regular basis and not isolated commercial acts, subsidiary to the main object of activity, the legal entity administrator is necessarily a trade company and consequently is a trader.

As a commercial company the administrator-legal person acquires the trader status from the very moment of its registration with the National Trade Register and without carrying out commercial acts (production activities, trade or services). Moreover, interpreting art. 6 of Law no 71/2011 for the implementation of Law 287/2009 of the Civil Code[20] are considered to be traders the legal person subject to the registration with the National Trade Register, according to art. 1 of Law no.26/1990 on the National Trade Register[21], thus including the legal entity administrator that carries out its activities as a trade company and is obliged to register with the National Trade Register.

4. Controversial issues on the revocation administrator legal entity

As shown above, the administrator or member of the supervisory board of a joint-stock company can be also legal person. Once appointed, the legal person is obliged to designate a permanent representative.

Pursuant art 153[13] para.2 of Law on trading companies, this permanent representative "it shall be subject to the same obligations and conditions and shall have the same civil or criminal liability as the an administrator or a member of the supervisory board, natural person, action in its own behalf (…) When the legal person dismisses its representative, shall be under obligation to appoint at the same time a substitute."

Unlike the previous regulations[22], the legal text no longer provides the obligation to conclude a management agreement between the managed company and the legal entity administrator on the rights and obligations. However, in order to exercise properly these rights and obligations, it is

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[18] Cărpenaru D. Stanciu, "Legal Regime of traders in the, Romanian commercial law", *Law* 6 (1992): 3.

[19] In early jurisprudence it has been agreed that the administrator-natural person is not a trader (Commercial Decision no. 19/September 2nd 1934, Muscel Court of Justice, in *Pandectele Române* (1935). It was considered that those who do not carry out commercial activities proprio-nomine cannot be considered traders, and thus the servants, trade peddlers, directors or administrators of joint-stock companies, their representatives cannot have this quality.

[20] According to art. 6 para.1 of Law no. 71/2011 " *within the content of the juridical acts, upon the entry into force of the Civil Code, the reference made to traders are considered to be made to natural persons, or as appropriate to legal person subject to registration in the National Trade Register according to art.1 Law no. 26/1990 on Trade Register*".

[21] In the accordance with art. 1 of Law no. 26/1990, with amendments and supplements, "*traders, before starting, trade ... before they start their activities are obliged to request the registration in the trade register ....*".

[22] Prior to the repeal by Law no. 441/2006, art. 139, which regulated the possibility for a legal entity to be appointed an administrator of a commercial company, it also stated that, in para. 2 "*the rights and obligations of the parties shall be determined by a management contract.*"

necessary that the legal relationship between the two entities should be written down in a contract, regardless of its name- administration contract, management agreement(most commonly used at present), or even contract of mandate.

The quoted text is likely to raise two issues. Primarily it would be on whether the right of a trade company to revoke ad nutum its administrator would apply also for the case of a legal entity administrator, and secondly concerning the representative of the legal entity administrator, if the company may be capable of dismissing him on its own.

4.1. Regarding the 1st problem, since the trading company is the one that appoints the legal entity administrator, the mandate being given intuitu personae, the company is entitled also to revoke this mandate. But, considering that between the two entities usually a contract is concluded where the rights and obligations are stipulated, in practice, it was considered that this revocation can't operate ad nutum, because the principal's right to revoke the mandate *"is not discretionary and not censorable, but a conditional right, within the limits well established by contractual clauses"*[23]. Similarly, in another case, it has been decided[24] that "*the contract concluded by agreement of both parties will cease under the conditions established for the contract termination. Therefore, the contracting parties and not the general assembly of the shareholders, have the power to set the termination of the management contract".*

Therefore, the revocation of the mandate of the legal entity administrator cannot be a revocation ad nutum, but a revocation under the conditions, limits and contractual clauses agreed upon with the managed company, reason for which in legal literature the revocation has been described as a cause for contract termination[25].

However the doctrine[26] recognizes the company's right to revoke ad nutum the legal entity administrator, considering the principle of contractual freedom and of the binding force of the contract (pacta sunt servanda). In this respect, by contract, the parties may agree, at most, on an estimation of damages for the case where an irrevocable decision of the court would qualify the revocation measure as abusive, but their agreements regarding the circumstances and motives for which revocation may occur will be considered as unwritten.

4.2. With respect to the company's possibility to revoke the representative of a legal entity administrator, the opinions diverge. Thus, according to a 1st opinion[27] it was considered that even though the law doesn't expressly provide, the trading company may by itself revoke the natural person in question, since he is subject to " *the same obligations and conditions and it shall have the same civil or criminal liability as an administrator",* and it was even stated that by reference of the

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[23] December. no. 60/Ap from May 30, 1996, the *Commercial Law Review* 6 (1998): 93-94. In this case, the revocation measure did not target, an administrator, according to Law. 31/1990, but a manager according to the Law on management agreements no. 66/1993, but the principles are identical. Therefore, the court awarded priority to the contractual terms, considering that termination of the mandate occurs as a result of non-compliance to the contractual obligation: "by contract, it has been established as a cause for termination of the contract and dismissal of the administrator the failure to meet the contractual obligations, therefore it was not agreed upon a discretionary and uncensorable right of the mandate, but a conditional right, within well established rights for contractual clauses".

[24] December. no. 744/6.02.2002 of C.S.J. *Curierul Juridic* 11 (2003). " the termination of the management contract decided by the general assembly of shareholders is illegal, the provisions of Law no.31/1990 regarding the appointment and revocation of the administrators being inapplicable. The management agreement may terminate only based on the decision adopted by the commercial company and by the majority of the managerial board, under the terms stipulated by the contractual clauses, in this case, if it is proven that the contractual obligations haven't meet met."

[25] Emanoil Munteanu, *quoted work*, 122-123

[26] F. Ţuca, "Revocation of the company's administrator ', *Commercial Law Review* 6 (1999): 94-95. On the same line of ideas, see Dan Clocotici, "Commercial mandate", *Commercial Law Review* 11 (1996): 32 ("*the General Assembly of shareholders may revoke the administrator even without a clear and explicit proof on the fulfillment of the contractual obligations*").

[27] Idem.

law to the "obligations and conditions" to which the administrators in general are subject to, represent an evidence in the sense that the administrator (thus including the permanent representative- A/N) represents foremost the company's body.

In a different point of view, the juridical relationships between the legal entity administrator and its representative natural person are subject to the rules of a trust mandate. Given this particularity for the case of the management agreement termination by the managed trade company with the legal entity administrator it occurs by default a revocation of the mandate of the representative natural person in relation with the managed company[28].

We appreciate that the company, specifically the general assembly of directors may not revoke the natural person, permanent representative of the legal person- administrator or member of the supervisory board of the company. Firstly, because the general assembly can revoke only their own administrator or member of the supervisory board pursuant art. 111 para.2 letter b) of the law.[29] Second, even if the legal text (art.153[13]para.2) establishes *the exclusive competence of the legal entity administrator to revoke the permanent representative,* along with the obligation to appoint at the same time a substitute *("when the legal person is revoking its representative, it shall be under the obligation to appoint in the same time a substitute*").

Conclusions

In the approach taken we tried to analyze, based on the legal possibility of a legal person to perform administration duties for a trade company, aspects which define the status of the legal entity administrator the appointment process, the legal requirements for appointment, revocation from the administrator position. Summarizing the answers to the questions raised throughout the paper we can conclude the following:

Although the law on trading companies strictly regulates the possibility of a legal person to manage only a joint-stock company, together with the entry into force of the New Civil Code (art.209, para. 2) and considering the general applicability of this legal text, currently we are not wrong to consider that any type of trading company can be managed by a legal person, including the general partnership and limited liability companies. Also, keeping in mind that the administrator concludes any juridical act necessary for carrying out activities having as main objective obtaining profit, we consider that only a commercial company can be appointed "legal entity administrator" in the sense of Law no.31/1990. In the absence of an expressly stipulated distinction between the natural and legal person, we consider that there exists no impediment for the administrator-legal person to meet, on appointment, the independence and honorability criteria. At the same time the legal entity administrator cannot be revoked ad nutum by the general assembly of the shareholders like in the case of the natural person administrator, but only under the conditions, limits and terms of the contract agreed upon with the managed company, the revocation acting as a termination of this contract.

Although this paper was related to the issues regarding the appointment and revocation of the administrator of the trading company, the issues are currently relevant in the context where the New Civil Code recognizes in general the possibility of appointing a legal entity administrator to other legal personality entities, and not only strictly limited to trading companies. Therefore the difficult task to implement the provisions of the new Civil Code and to offer solutions to the problems considered and regarding other categories of legal person, who will carry out, in practice, the administrative position, lies upon the court.

[28] Emanoil Munteanu, *quoted work*, 123.

[29] According to art 111 para.2 *" the genera assembly is obliged: […] b) to appoint and to revoke the member of the board of directors, respectively of the supervisory board…*"

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THE EUROPEAN MECHANISM FOR FINANCIAL STABILITY AND THE EURO-PLUS PACT

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Abstract

The economic crisis that has affected countries from all continents has generated, among others, also a strong financial crisis, which in turn, has caused serious imbalances in the economic and financial environment of EU Member States.Under these circumstances, the Council, being in an exceptional situation, "outside the control of Member States", as it itself states in the Preamble to Regulation No. 407/2010, considered necessary, "the immediate establishment of a stabilization mechanism at EU level in order to maintain the financial stability in the European Union", mechanism that "would enable the Union to respond in a coordinated, rapid and effective way to the serious difficulties undergone by a certain Member State".

Keywords*. The European Financial Stabilization Mechanism; the Euro-Plus Pact; European Union; The Council Conclusions; EU Member States.*

1. Introduction

Without claiming to develop a specialized analysis on the financial crisis that not just Europe has crossed through the last three years and still crosses, it is impossible not to observe the concerted efforts of Member States of the European Union in order to overcome it, or, at least, to maintain it at the same level. Thus, further on, we propose an overview of what is happening now in the EU, while trying an economic recovery in Europe. This presentation is however limited only to the legal aspects, leaving time to decide whether all these efforts have been successful or not. In this sense, we bring in the forefront two measures at EU level, namely the European Financial Stabilization Mechanism and the Euro-Plus Pact.

2. The European Financial Stabilization Mechanism (EFSM)

The economic crisis that has affected countries from all continents has generated, among others, also a strong financial crisis, which in turn, has caused serious imbalances in the economic and financial environment of EU Member States.

Aware of the fact that it witnesses a financial crisis and an economic downturn "without precedent which has brought serious damage to the economic growth and financial stability, leading to a strong deterioration in the deficit and debt situation of Member States"[2], the European Union legislature has been put in the situation of facing new challenges. One of these challenges is the fact that the financial crisis has also deteriorated the loan conditions in Member States, situation which, unregulated in time would result in the emergence of a new threat "against the stability, unity and integrity of the Eurozone, as a whole"[3].

Under these circumstances, the Council, being in an exceptional situation, "outside the control of Member States"[4], as it itself states in the Preamble to Regulation No. 407/2010, considered necessary, "the immediate establishment of a stabilization mechanism at EU level in order to

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[2] Paragraph (3) of the Preamble to Regulation No. 407/2010 of the Council of May 11, 2010 establishing a European mechanism of financial stabilization.

[3] Paragraph (4) of the Preamble to Regulation No. 407/2010.

[4] Paragraph (5).

maintain the financial stability in the European Union"[5], mechanism that "would enable the Union to respond in a coordinated, rapid and effective way to the serious difficulties undergone by a certain Member State"[6]. The mechanism is activated in the context of a joint support EU / International Monetary Fund (IMF). Therefore, on May 13, 1010, Regulation no. 407/2010 for establishing a European financial stabilization mechanism[7] came into force; through this regulation, "strict economic policy conditions to maintain the sustainability of public finances of the beneficiary Member State and to rebuild its capacity to finance itself on financial markets"[8] were imposed.

The mechanism established by Regulation no. 407/2010 reproduces, in the 27 EU Member States, the basic principles of operation of Regulation no. 332/2002 for establishing a facility providing medium-term financial assistance for Member States balances of payments, applicable to Member States outside the Eurozone.

The rules contained in the Regulation determine the conditions and the procedure under which a Member State that is affected or is in a situation that ultimately leads to severe economic or financial distortions may obtain financial assistance from the Union. We mention that the situation where that State is in must be caused by exceptional occurrences resulted beyond its control.

If a Member State wishes to obtain financial assistance from the Union, pursuant to Regulation no. 407/2010, it shall notify the Commission institution of its intention, presenting also a draft program of economic and financial adjustment. Discussions are being held with the European Commission, in cooperation with the European Central Bank (ECB). The financial assistance which may take the form of a loan or a credit line is granted by a Council decision adopted by qualified majority, based on a proposal from the Commission.

Under article 3, paragraph (3), letters a), b) and c), the decision to grant a loan include the following:

- the amount, the average maturity, the pricing formula, the maximum number of instalments and the period of availability of the financial assistance from the Union, as well as other rules necessary for the implementation of the assistance;

- general economic policy conditions attached to the financial assistance from the Union in order to restore a sound financial or economic situation in the beneficiary Member State and to rebuild its capacity to finance itself on financial markets; these conditions will be determined by the Commission, in consultation with the ECB;

- an approval of the adjustment program prepared by the beneficiary Member State in order to fulfil the economic conditions attached to the financial assistance received from the Union.

Regarding the decision to grant a credit line, article 3, paragraph (4), letters a), b) and c) sets out its content, namely:

- the amount, the fee for the credit line availability, the pricing formula applicable for the release of funds and the period of availability of the financial assistance from the Union, as well as other rules necessary for the implementation of the assistance;

- general economic policy conditions attached to the financial assistance from the Union to restore a sound financial or economic situation in the beneficiary Member State; these conditions will be established by the Commission, in consultation with the ECB;

- an approval of the adjustment program prepared by the beneficiary Member State in order to fulfil the economic conditions attached to the financial assistance received from the Union.

"When the mechanism is activated, it allows the Commission to loan from financial markets on behalf of the Union, under cover of an implied warranty from the EU budget. The

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[5] Idem.

[6] Idem.

[7] This Regulation shall not affect the validity of Regulation No. 332/2002 establishing a facility providing medium-term financial assistance for Member States balances of payments.

[8] Paragraph (7) of Regulation No. 407/2010.

Commission loans then the receiving funds, to the beneficiary Member State. This special credit arrangement involves the absence of charges afferent to the debt service for the Union. The interest and the loan capital are fully reimbursed by the beneficiary Member State, through the Commission. The EU budget guarantees the redemption of bonds by a p.m. line, in the event of default by the debtor"[9].

In addition to this mechanism, the European Facility for financial stability[10], such funds guaranteed by the Euro area, as well as IMF funding are available for Member States of the Eurozone. If a Member State wants funding from the International Monetary Fund, the State must first notify the European Commission. Following the notification, the Commission shall examine the possibilities within the mechanism of financial assistance from the Union, as well as the compatibility conditions on economic policy for commitments envisaged by the Member State to implement the recommendations of the Council and the decisions of the Council adopted under articles of the Treaty on the functioning of the European Union[11].

Member States outside the Eurozone are also eligible for assistance under the Regulation on the balance of payments.

According to The Communication of the European Commission on the European financial stabilization mechanism[12], "on November 21st, Ireland requested financial assistance from the European Union and Member States of the Eurozone. In the context of a joint program EU / IMF, the financial assistance package for Ireland will be funded through the EFSM and FESF, supplemented by bilateral loans to be negotiated by Member States". According to the same document, "in 2010, most Member States of the Eurozone registered large public deficits, which resulted in substantial increases of total issuances of government bonds denominated in Euro and in further growth of public debt. That overall increase in the offer of sovereign bonds increased the difficulties in accessing the market for some smaller issuers, which also involved the persistence of a future refinancing risk. Amounts to be attracted from the market in 2011 are, generally the same as in 2010 and will remain at least as high for many years"[13].

3. The Euro-Plus Pact

The European Council from March[14] this year took place on the background of a sensitive economic recovery in the global economic crisis. Heads of State or Government, meeting in Brussels, adopted, among other things, a package of measures designed to help overcome the financial crisis. The package aims at strengthening the economic governance of the European Union and at ensuring the sustainability of the Eurozone, as a whole.

In Annex I of the Conclusions presented at the end of the meeting from March, we find details about the Euro-Plus Pact[15]. The Pact is nothing else but an agreement concluded between Member States of the Eurozone and was joined by Bulgaria, Denmark, Latvia, Lithuania, Poland and Romania. Besides these countries, others are also invited, but voluntarily.

The purpose of the Pact, as agreed by Heads of State or Government is the strengthening of the "economic pillar of monetary union in order to achieve a new quality of economic policy

[9] According to the Commission Communication to the Council and to the Economic and Financial Committee on European financial stabilization mechanism, COM (2010) 713 final of November 30, 2010, p. 2.

[10] FESF.

[11] Articles 121, 126 and 136 TFEU.

[12] COM (2010) 713 final, p. 6.

[13] Idem.

[14] 24 to 25 March 2011, Brussels. The Council Conclusions are also found on the website of the European Council: (http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/RO/ec/120300.pdf).

[15] Annex I is entitled "Euro-Plus Pact - closer coordination of economic policy for competitiveness and convergence".

coordination, to enhance competitiveness, leading thus, to greater convergence"[16]. The Pact focuses mainly on areas of national competence and which are essential for enhancing competitiveness and preventing further disturbances.

The Pact is based on ***four guiding rules***, as it follows:

1. The Pact will be *conform to the existing economic governance* within the Union and will strengthen it. At the same time, the Pact is conducted using tools already available, namely: Europe 2020, the European Semester, the Integrated Guidelines, the Stability and Growth Pact and the new framework for macroeconomic surveillance;

2. The Pact will cover *priority policy areas essential for promoting competitiveness and convergence*. In the policy areas chosen, the Heads of State or Government will agree on some common objectives[17];

3. *"Participating Member States will pursue these objectives through their own policy mix, taking into account the specific challenges faced*. Every year, each Head of State or Government will take concrete national commitments;

4. *The Pact will fully respect the integrity of the single market"*[18].

The Pact objectives can be achieved only if the participating States are able to fulfil their obligations, namely: promoting competitiveness, employment, strengthening the public finance sustainability and strengthening the financial stability. Each participating Member State must present specific measures that it considers necessary and that must adopt in order to meet these obligations. If a Member State can prove that it is not necessary to act in one area, it will not take measures in this direction. Each State is free to identify and establish by itself, nationally, measures to be adopted, but to the identification and promotion of national actions, the State participating to the Pact must take into consideration concrete policy and monitoring commitments provided in the Pact. Therefore, "choosing the strategic actions necessary to achieve the common goals is connected to the liability of each country, but special attention will be paid to possible measures being referred to further on"[19]:

A. Promoting competitiveness. Under the provisions of the Pact "the progress will be evaluated based on the evolution of wages and productivity and on the adjustment need, in the area of competitiveness. To assess whether wages evolve in accordance with productivity, unit labour costs (ULC) will be monitored over a period of time, in relation to developments from other Eurozone countries and comparable to the major trading partners. For each country, unit labour costs will be assessed in the economy, as a whole and separately for each major sector (manufacturing, services and the commercial and non commercial sectors). Significant and sustained growth can lead to erosion of competitiveness, particularly if it is accompanied by a growing current account deficit and by the diminishing of market shares for exports. Actions to increase competitiveness are needed in all countries, but special attention will be paid to those facing serious difficulties in this regard. To ensure balanced and widespread growth across the Eurozone, specific tools and joint initiatives will be considered in order to promote productivity in regions lagging in development. Each country will be responsible for the specific policy actions that it chooses to take in order to promote competitiveness, but special attention will be paid to the following reforms:

(i) complying with national traditions of social dialogue and business relations, measures to ensure cost developments consistent with productivity, such as:

• reviewing procedures for determining wages and, where appropriate, the degree of centralization in the process of negotiation and mechanisms for indexing, while maintaining the autonomy of social partners in the process of collective negotiation;

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[16] Annex I to the European Council Conclusions, 24 to 25 March 2011, p. 13.
[17] Under the Pact, pp. 14-15.
[18] Idem.
[19] P. 15 of the European Council Conclusions, the document cited above.

• ensuring that the agreements establishing wages in the public sector support the competitiveness efforts from the private sector (taking into account the important barometer effect that wages from the public sector have).

(ii) measures to increase productivity, such as:

• further opening up of sectors protected by measures taken at national level to remove unnecessary restrictions on professional services and retail sector, to promote competitiveness and efficiency, by totally complying with the EU acquis;

• specific efforts to improve the educational systems and to promote research and development, innovation and infrastructure;

• measures to improve the business environment, especially SMEs, in particular by eliminating bureaucracy and improving the regulatory framework (for example, laws on bankruptcy, the commercial code)"[20].

B. Promoting employment. In this respect, it is stated that "a properly functioning labour market is essential for the Eurozone competitiveness. Progress will be assessed based on the following indicators: long-term unemployment rates and, among young people, employment rates. Each country will be responsible for the specific actions referring to policies that it chooses in order to promote employment, but particular attention will be paid to the following reforms:

• labour market reforms to promote "flexicurity", to reduce undeclared work and to increase employment;

• lifelong learning;

• tax reforms such as reducing taxes on labour, to increase work profitability, while maintaining the overall fiscal revenues and adopting measures to facilitate the labour force participation of the second contributor to the family income"[21].

C. Strengthening the public finances sustainability. "To ensure full implementation of the Stability and Growth Pact, special attention will be paid to:

- the sustainability of the pension systems, health care and social benefits.

This fact will be assessed, in particular, based on the sustainability gap indicators. These indicators show if debt levels are sustainable, based on current policies, especially on pensions systems, health care and social benefits and taking into account the demographic factors. Necessary reforms to ensure sustainability and adequacy of pensions and social benefits could include:

• aligning the pension systems to the national demographic situation, for example by aligning the effective retirement age to life expectancy or by increasing the participation rates;

• limiting early retirement schemes and using targeted incentives to employ older workers (especially the age group over 55 years).

- National fiscal rules. Participating Member States undertake to transpose the European fiscal rules, as set out in the Stability and Growth Pact, into national legislation. Member States will have the right to choose a specific national legal instrument to be used, but they will have to guarantee that it is required and has a sustainable character (for example, by Constitution or by a framework Law). Also, the exact wording of the rule will be decided by each country (for example, it could take the form of a "debt brake", a primary balance related rule or of a norm of expenditure), but it should ensure fiscal discipline at national and sub-national level. The Commission will be able to be consulted on the tax legislation in question before adoption, with the total compliance with prerogatives of national Parliaments to make sure that it is compatible with EU rules and that it assists them[22].

D. Strengthening the financial stability. "A strong financial sector is the key-element to the global stability of the Eurozone. A comprehensive reform of the EU framework for financial

[20] The European Council Conclusions, the document cited above, pp. 16-17.
[21] Ibid, p. 17.
[22] Ibid., p. 19.

sector supervision and regulation was developed. In this context, Member States undertake to adopt national legislation to solve the banking crisis, by fully complying with the Community acquis. Strict simulations of banking crisis, coordinated at EU level will be regularly done. In addition, ESRB President and the President of Eurogroup will regularly be invited to inform the Heads of State or Government on matters relating to macro-financial stability and macroeconomic developments in the Eurozone, requiring special attention. In particular, for each Member State, the private debt of banks, households and non-financial companies will be closely monitored"[23].

Once established the guidelines of the participating States' commitments, the action is transferred from the European Union, at States level. Consequently, the participating states gradually include in their national reform programs (NRP), as well as in the stability and convergence programs, a number of commitments covered by the regular supervisory framework, framework established by the Pact.

On June 21, 2011, the General Secretariat of the Council published the first document of Member States Ministers participating in the Euro-Plus Pact. Under the Report[24], "despite the short time interval between the agreement on the Euro-Plus Pact and the PNR transmission, and the stability and convergence programs, the majority of participating States have succeeded to provide measures in their programs in relation to commitments under the Euro-Plus Pact. In total, more than a hundred different measures, focusing in particular, on the four objectives of the Euro-Plus Pact were announced: competitiveness, promoting employment, strengthening public finance sustainability and strengthening the financial stability". Next, we shall present the commitments and national policy measures adopted in Romania, as they are listed in the Annex[25] to the Report.

1. Promoting competitiveness

- the declining share of GDP with wages in public sector by one percentage point in 2012 compared with 2010, through gradual recovery until the end of 2012 of nominal reductions with 25% made in 2010. Therefore, the development of the unit labour cost will be below the level of the labour productivity development;

- strengthening the capacity and performance of the research, development and innovation sector (RDI), by implementing the new system of institutional financing;

- developing the European cooperation in the RDI area by promoting two strategic projects: the International Centre for Advanced Study Danube - Danube Delta - Black Sea and the Extreme Light Infrastructure (ELI);

- the national strategy for lifelong learning;

- creating the reference curriculum skills upgrading oriented;

- prioritizing the public investment in order to achieve competitiveness by creating a high-level working group under the direction of the Prime Minister, including a list of priority investment projects for which funding may be provided in the next 3-5 years;

- the sale on financial markets of major packages of shares in state companies;

2. Promoting employment:

- creating a unitary waging framework in the public sector by adopting the framework Law on the staff's unitary salaries paid from public funds;

- strengthening the social dialogue and rendering more flexible the system of collective work agreements;

- measures to promote flexicurity and employment through amendments to the Labour Code;

- implementing the national strategy on reducing the incidence of undeclared work for 2010-2012;

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[23] Idem.

[24] It can be accessed on: http://register.consilium.europa.eu/pdf/ro/11/st00/st00024.ro11.pdf

[25] Pp. 31-36.

- adopting the draft law on the exercise of occasional activities performed by labourers;
- amending and supplementing the legal framework for the unemployment insurance system and employment stimulation;
- amending and supplementing Law no. 279/2005 on apprenticeship to the workplace;
- the reform of the legal framework for adult training;
- implementing the simplified European framework for the recognition of professional qualifications, in terms of reciprocity, between Member States;
- initiating procedures for the classification of universities into categories, based on the evaluation of study programs and on their institutional capacity: mostly educational universities, universities for scientific research and artistic creation and universities for advanced research and education.

3. Strengthening the sustainability of public finances:

- implementing the Law on the unitary pension system providing:
- (i) the gradual increase of the retirement age to 65 years for men and 63 for women until 2030, as well as the gradual increase of the complete contribution period to 35 years for women and men, by 2030;
- (ii) the introduction of stricter criteria for the access to partial early retirement;
- (iii) the gradual introduction of a mechanism for indexing pensions depending on inflation, by introducing into national law, a numeric rule for the general budget deficit under the Maastricht Treaty;
- further fiscal consolidation given a budget deficit of 5% of GDP in ESA terms for 2011 and less than 3% of GDP in 2012;
- reducing the arrears of the general budget by restructuring the health sector and by strengthening the budgetary discipline at local authorities level, by applying the recently approved amendments to the Law on local public finances;
- the implementation of the parental allowance program;
- improving the flexibility of the school educational system;
- defining the legislative framework on social assistance including also social services and benefits.

4. Strengthening the financial stability:

- Romania has applied since 2004, a series of measures to reduce the vigour of forex loans, using a wide range of tools, some of which still remain in force, even after the adjustments undertaken in connection with the accession to EU requirements;
- additional measures to ensure the comprehensive implementation of IFRS (International Financial Reporting Standards) by the banking sector since 2012;
- by the end of June 2011, the NBR will issue recommendations for prudential filters to further ensure a prudent policy in terms of solvency and bank reserves;
- amending the legislation for the purpose of allowing the use of Fund resources of the Bank Deposit Guarantee (FRBDG) to finance the restructuring approved by the NBR on the transfer of deposits, including the operations of assets transfer and assuming liabilities;
- develop procedures necessary to implement the new duties of the central bank and FRBDG in restructuring the credit institutions, as well as the FGBDG immediate access to government funds, if necessary;
- reconsidering the regulations of the legal framework on the liquidation of credit institutions to take measures, if necessary, in order to ensure their consistency;
- the increase, by NBR, of the scope of instruments accepted as guarantees in refinancing operations by including the bonds issued in lei by international financial institutions listed on BSE and Sovereign Eurobonds;
- establishing a prudential treatment of the temporary holding of equity, resulting from the restructuring of loans in order to avoid the weakening of the financial position of banks;

- monitoring the loans in foreign currency and making the necessary arrangements for their price to reflect accurately and transparently the risk of granting them to debtors at risk; - failing to transpose the draft legislation on insolvency of individuals and debt recovery, which could undermine the debtors' discipline;

- adopting additional measures by the Central Bank on the contingency plan, in order to avoid systemic risk in the banking sector.

Chronologically, concerning the documents developed in the European Union, we notice that one month after the presentation of the Report of Ministers participating in the Euro-Plus Pact, on July 21st, 2011, Ministers of the Eurozone, together with representatives of EU institutions, signed the "Declaration of the Heads of State or Government of the Eurozone and EU institutions"[26]. Since this is a declaration, that is, a document not legally binding, but a document of principles, the legal commitments lack, but it is worth mentioning some provisions related to our subject. Thus, those who signed the Declaration, inter alia, required "the rapid completion of the legislative package strengthening the Stability and Growth Pact and the new macroeconomic surveillance. Eurozone Member States will fully support the Polish Presidency to reach an agreement with the European Parliament on voting procedures in the preventive component of the Pact"[27]. However, they agree "that it would be needed in the EU regulatory framework" to rely "less on external credit ratings, given the recent Commission proposals in this direction"[28]. In the end of the Declaration, the European Council President, after consultation with the European Commission President and the Eurogroup President, is invited until October 2011, to make proposals on how to improve working methods and enhance crisis management in the Eurozone.

At the completion date of this brief presentation of some EU initiatives on the financial crisis, the economic and financial situation in Europe, and not only, worries the world, again. This is why, at the meeting of September 12, 2011, the so-called "package of six proposals" was adopted, "package" which refers to six pieces of legislation designed to strengthen the economic governance in the EU. Four of those proposals relate to tax issues, including a reform to the Stability and Growth Pact of the EU, while the other two are intended to identify and effectively approach the economic imbalances within the EU and the Eurozone.

In the margins of the European Council meeting on 1-2 March 2012, 25 European leaders signed the Treaty on Stability, Coordination and Governance (TSCG) aimed at strengthening fiscal discipline and introducing stricter surveillance within the euro area, in particular by establishing a "balanced budget rule". The content of the treaty had been endorsed at the last European Council meeting in January[29].

4. Conclusions

We conclude our brief presentation, by reproducing two statements of those who attended the meeting of September 12, 2011, namely Herman Van Rompuy, the European Council President and Donald Tusk, Prime Minister of Poland. The first said that "We face a difficult period and this new set of rules and procedures, which were discussed in the Task Force last year, and have subsequently been transposed into law, represents an important step in the process of strengthening the macroeconomic surveillance and fiscal discipline"[30]. Donald Tusk said: "Our main task at this time - in cooperation with the European Council President, European Commission and European

[26] It can be accessed on: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/RO/ec/124001.pdf.
[27] Paragraph 13 of the Declaration.
[28] Paragraph 15 of the Declaration.
[29] http://european-council.europa.eu/eurozone-governance/treaty-on-stability?lang=ro
[30] http://www.european-council.europa.eu/home-page/highlights/on-the-way-to-agreement-on-the-six-pack.aspx?lang=ro

Parliament - is to work towards adopting, already in September, all regulations necessary for economic governance, meaning the so-called "package of six proposals"[31].

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4. The Council Conclusions 24 to 25 March 2011, Brussels;
5. http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/RO/ec/120300.pdf);
6. http://register.consilium.europa.eu/pdf/ro/11/st00/st00024.ro11.pdf;
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9. http://european-council.europa.eu/eurozone-governance/treaty-on-stability?lang=ro

[31] Idem.

REVOCATION OF ADMINISTRATIVE ACT

MARTA CLAUDIA CLIZA *

Abstract
Because the revocation is totally specific for administrative law principles, I chose to talk about in this study and its impact on the cancellation of administrative acts. Revocation will be explored, in terms of the authorities which it may provide but also of the effects caused.It also would examine if revocation has a legal basis, as well as real cases to provide the impact of this principle in administrative law.

Keywords: *revocation, administrative act, the principle of parallelism of forms, the rule of contrarius actus, Romanian Constitution.*

Introduction

Administrative action is, for administrative law, the living essence of public authorities.

Government activity can take many forms, which can be classified from several points of view, depending on different criteria: ability to produce legal effects, number of stakeholders, applicable legal status, etc. Fundamental tripartite division of the forms of government activity is that presented in legal documents - legal and material facts - material-technical (administrative) operations. To these are added, according to some authors[1], and public documents. We will define them in turn and then we will make the necessary connections.

1.1 Administrative action - main form of activity of public administration authorities

Juridical acts are the wills of an administrative body, made in order to produce legal effects. A building permit, a government decision for pension indexing, a title of ownership issued with a view to reconstruction of a private property right, a local council decision to accept a donation, etc. fall into this category.

Material and juridical facts are those forms of government activity which, although not made in order to produce legal effects, they produce such effects under the law. As examples, we may generally give a misconduct or contravention of an official, failing to settle a request within the due term, etc.

Material and technical (or administrative or technical-material) operations are those forms of activity that do not produce any legal effect in themselves, they preparing an administrative action[2], giving them an enforceable character[3] or serving to the achievement of advertising formalities for the already issued deed: approvals, notification addresses, consent given by an individual in order to be issued a building permit operations are examples of such material operations.

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[1] R.N. Petrescu. *Administrative law*, (Editura Hamangiu, Bucharest, 2009), p.276.

[2] That is why some authors call them preparatory actions - see, for example, C.G. Rarincescu, *Romanian administrative court, 2nd edition,* (Editura "Universala" Alcalay & Co.., Bucharest), p. 249- 251. The author speaks of them in the context of analyzing action subject in administrative court, which must be an administrative act and not a preparatory one.

[3] It's about formalities (administrative operations) leading to the formation of complex administrative acts: administrative agreement, proper approval, acknowledgement as a synonym of the latter.

Political acts are wills of an administrative body, issued in order to produce political (but not legal) effects: message of the Romanian President addressed to Parliament (Article 88 of the Constitution), the declaration of the Prime Minister concerning the general policy of the Government [art. 107 paragraph (1) of the Constitution], etc..

As a rule, political acts come from authorities situated at the top of administrative pyramid.

Actually, the categories that matter are the legal act, as well as material - technical (administrative) operation. The other two categories are generally only mentioned, but not analyzed by the authors of administrative law. This is due to the fact that, as concerns the political acts, once defined, they fall within the subject of constitutional law rather than within administrative law.

On the other hand, *material and legal facts* (i.e. those material facts to which the law attaches legal effects[4]) have not so great practical importance. And this happens because, if we talk about illegal acts of civil servants (real wills which, by the will of the legislature produce legal effect), have too little importance to a general theory of administrative act and if we speak of unjustified refusal to settle an application, we must note that under Article 2 paragraph (2) of Law no.554/2004 of administrative court[5], it is assimilated to administrative act, as regards the legal status; therefore creating a separate category would be purely formal[6].

Fundamental difference between the legal act and material-technical operation is, as can be seen in their definition, that of the legal effect that only acts can produce. On the contrary, administrative operations do not produce such effects[7]. At most, in some cases of forming complex acts, we could say that such operations contribute to the production of legal effects by the administrative acts. Therefore, essential for such distinction are the legal effects that the expression of will of the government produces or not. Thus, as noted in legal practice[8], to the extent that the document reviewed produces legal effects, being therefore "likely to harm the rights of whom enjoyed by exercising of certain powers up to that point," it is an authority administrative act, censored in the administrative courts, even if it bears a designation specific to material-technical operations (address)[9].

If we analyze the activity of public administration structures, we find that most of their work deals not with the legal acts, but government operations and material facts, those that make up the second category mentioned above.

As we find out from the interwar doctrine, the concept of “act” comes from the Latin “actum”, meaning to work, to do, to act[10].

According to an opinion expressed in the interwar doctrine, in carrying out its essential duties of law enforcement, the executive makes a series of acts, not all being of the same nature, nor the

[4] T. Drăgan, *Administrative law acts*. (Editura Ştiinţifică, Bucharest, 1959), p.11 et sequens.

[5] Published in the Official Gazette, no. 1154 of tth December 2004 and amended by Law no. 262/2007 (Official Gazette no.510 of 30th July 2007).

[6] However, we note that, theoretically, legal documents, as well as material and legal facts differ in that, in the first case, there is a perfect concordance between the expression of will, its purpose and effects, which are not found in the case of material and legal facts - I Iovănaş, *Administrative Law*, (Ed Servo Sat, Arad, 1997), p.14.

[7] For example, in case of an assent procedure, the issuing body is free to issue or not the administrative act (in the same sense, see T. Drăganu, *Administrative law acts*, (Editura Stiintifica, Bucharest, 1959), p.127; RN Petrescu, *Administrative law,* (Ed. Hamangiu, Bucharest, 2009, p.321).

[8] C.A. Cluj, *Administrative and tax court*, civ. Dec. No. 1493 of the 9th October 2006, in (B.J. 2006, Editura Sfera Juridică, Cluj-Napoca, 2007), p.463-465.

[9] O. Podaru, *Administrativ law, vol. I. Administrativ act (I), Reference points for a different theory*, (Editura Hamangiu, Sfera Juridică, 2010) p.7.

[10] M. Văraru, *Administrative law treaty*, (Editura Librăriei Socec & Co, Societate Anonimă, Bucharest 1928), p. 182.

same meaning and legal value, nor the same scope, they being delimited into: proper administrative acts, jurisdictional administrative acts and preparatory administrative acts[11].

To evoke the idea of administrative act in the meaning of authority act, both literature and law have used several formulations, of which two asserted to be dominant, namely:

- ***Aadministrativ law acts*** (School of Cluj, by prof. Tudor Drăganu),
- ***Administrative*** acts (School of Bucharest, by prof. Romulus Ionescu).

In the optics of authors from Cluj, it was stated that the proposed formulation is likely to evoke the legal regime applicable to the act, ie elaboration regime, as well as the effects of acts of state administration bodies, issued in achieving state power. It is intended to reveal that these acts are subject to the legal regime different from that of civil acts of state administration bodies.

Authors within School of Bucharest argued that the name of administrative act evokes just the purpose for which this act is issued, namely the achievement of the administration.

According to Professor Antonie Iorgovan, one may say as well *administrative acts,* focusing on the idea of activity, in the way that are evoked acts that make public administration, or *administrative law acts,* emphasizing the idea of applicable legal regime.

It should be noted that art. 52 of the Constitution chooses the idea of an administrative act.

By administrative act shall be meant the main legal form of public administration activity, which consists of a unilateral and express willingness to create, to modify or extinguish rights and obligations, in implementing public power, under the main control of legality of the courts.

Administrative act was defined as unilateral act, expression of will of a single subject of the legal relationship, in this case that endowed with public power, issued by public authorities in order to execute or organize the law, being essentially a legal act, creating, modifying or extinguishing legal relations.

1.2 Forms of termination of the effects of administrative acts – administrative act revocation

Revocation is the legal operation by which the issuing body of an administrative act or its superior body abolishes this act. Revocation is therefore a special case of cancellation, thesis supported mainly by Prof. A. Iorgovan. If the revocation is ordered by the issuing body, it was imposed the term "withdrawal". Although there is no text to explicitly enshrine the principle of revocation, if the judiciary can correct administrative acts, it is normal that this right be owned by the government itself. Admitting that the organizational structure of government is based on certain rules, including administrative hierarchical subordination, the principle of revocability appears as a rule of functional structure of public administration. Some authors have admitted the thesis according to which the objective necessity of revocation leads to the idea according to which public authorities only have to justify this operation, that is the contrary legal act contrary of cancellation. But it must be admitted that the problem of revocation motivation is required when the administrative act created a number of legal relationships other than administrative ones. No less, the rule of *contrarius actus* requires that the revocation be ordered by an act of at least the same legal force, in compliance with the procedure of issue and in any case, by admitting the possibility of contentious action.

The principle of parallelism of forms

The content of the principle of parallelism of forms (also called of correspondence of forms or reciprocity of forms[12]) is closely linked to that of parallelism of skills[13]. The two principles are so

[11] A. Teodorescu, *Administrative law treaty, volume I, third edition*, (Institute of Graphic Arts „Eminescu" S.A., 1929) p. 376.

similar, because both establish a link between the initial act and the act of revocation, except that one does it in terms of skills and other in terms of issue formalities. Consequently, according to the principle of parallelism of forms, "the act of revocation must be given with the same forms and conditions that cover the very act whose removal is sought.[14]". So, when an administrative act must be issued under certain forms or accompanied by certain formalities, the act of revocation may not be legal unless it is issued under the same forms and according to the same procedure[15].

Defense right principle

French doctrine has emphasized the existence of an important principle under which the Government may find itself obliged to observe certain formalities in issuing acts of revocation, even in the absence of explicit legal provisions in this regard. It is about the general principle of complying with the right of defense, which, under certain conditions, it also applies in the field of administrative revocation[16].

The existence of this principle is closely related to the contradictory principle, which enjoys a full commitment in the activity of courts. But the latter principle has also extended progressively to the Government activity. Administrative procedure requires in some cases the observance of the mentioned principle. The most common such cases are found in civil function and occur especially when an administrative act has the character of a penalty. The civil servant affected by such an act have to be recognized, under the contrary principle, a few rights, such as those by which he should be notified the data of his file, to be given the opportunity to discuss the reasons justifying the measure against him.

It was also noted the fact that the contrary principle should apply whenever the revocation of administrative acts occurs as a sanction against the beneficiary of the act[17]. Such circumstances often arise, for example in connection with the revocation of an act of appointment to a public office, caused by the disciplinary violations by such official[18] or related to the revocation of various permits, whose provisions were not complied with by their beneficiaries. In the absence of legal texts, an appeal should be made to the principle of the defense right, under which recipients of revoked

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[12] G.Vlachos, *Le retrait des actes administratifs*, (RA, 1970), p.420

[13] Many times, the principle of parallelism of forms is used in a broad sense, also including the principle of parallelism of skills.

[14] Gh. Nastase, "Around revocation of administrative acts, in, the (RGP, no.3-4/1943), p.404-405. The same author also presents an interesting analysis of meanings that the notion of "form" shows in administrative law, while expressing at the same time: physical form under which administrative act appears, all conditions to be met by the administrative act to be valid; category of administrative acts to which the said act belongs, each characterized by a certain legal value, depending on the place the issuing body occupies in the hierarchy of administrative authorities.

[15] .M. Auby, *L`abrogation des actes administratifs*, (AJDA, 1967), p.135, R. Hostiou, *Procédure et formes de l`acte administratif unilatéral en droit français,* (L.G.D.J., Paris 19740, p.245-246; C. Rarincesu, *Romanian administrative court,* (Editura „Universala", Alcalay, Bucharest, 1936), p.128; R.N. Petrescu, *Administrative law*, (Editura Lumina Lex, Bucharest, 2004), p.325; I. Santai, *Administrative law and administration science,* volume II, (Editura Risoprint, Cluj-Napoca, 2003), p.181.

[16] M. Auby, *L`abrogation des actes administratifs*, (AJDA, 1967), p.135, P. Bringuier, E.Guillon, *Le puvoir de retrai des actes administratifs,* (AJDA, iunie 1978), p.309-310; Ch. Debbasch, *Droit administratif*, (Economica, Paris, 2002), p.409-492.

[17] J.M. Auby, *L`abrogation des actes administratifs,* (AJDA, 1967), p.135; C. Yannakopoulos, L*a notion de droits acquis en droit administratif français,* LGDJ, Paris, 1999, p.445.

[18] Law no.188/1999 provides a number of safeguards for the public servant liable to be disciplinary sanctioned (including dismissal action). Article 78 paragraph 3 states that "disciplinary sanctions may apply only after a preliminary investigation of the offence committed after the hearing (subl. ns. IB) of the civil servant". Such hearing is an indicative example of warranty provided by law for a better observance of the right to a viewpoint. We note that our discussion focuses only on those situations where the legal text does not provide anything in this regard or has insufficient provisions.

administrative acts should be granted some guarantees[19]. These guarantees are materialized in a series of formalities, which the Government is obliged to observe during the procedure of issuance of the revocation act, such as: informing interested parties about the proposed measure, their hearing, motivation of issued revocation acts.

Although the incidence of the defense right principle in the field of administrative act revocation is confirmed only in the French administrative law, we consider that it requires its application and the Romanian law. Its beneficial effects on the protection of administration recommend it. It should be used whenever the act of revocation has the character of a penalty. In such circumstances and in the silence of the law, the act of revocation shall be subject to additional formalities considering them as guarantees of the compliance with the defense right principle.

Revocation occurs then for all conditions of illegality, but especially for conditions related to opportunity. Grounds for revocation may be prior, simultaneous or subsequent to issuing the administrative act. In the first two hypotheses, the revocation shall produce retroactive, *ex tunc* effects, and in the third hypothesis, it would produce *ex nunc* effects.

There is a fairly widespread viewpoint in the specialized literature, according to which the revocation of administrative acts is a particular case, a species of cancellation[20]. In addition, confusion between cancellation and revocation is also produced at the level of legislation[21] and jurisprudence[22]. Such facts seem to discourage any attempt to clear delineation that could be achieved between the two methods. Revocation and cancellation are two totally separate ways from each other, with a completely independent existence, as an author of modern generation asserted, whose theory we shall present below. The main difference lies in the different authors of these transactions, to which is added a significant difference on the reasons that can justify their use.

The holder of privilege for cancellation of administrative acts is easily identifiable, it being expressly stated by the constitutional and legal texts. According to Article 52 paragraph (1) of the Romanian Constitution, "the person injured in any of its rights or in a legitimate interest, by a public authority through an administrative act or by failing to solve an application within the legal term, is

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[19] P. Bringuier, E. Guillon, *Le puvoir de retrai des actes administratifs*, (AJDA, June 1978), p.309.

[20] A. Iorgovan, *Administrative Law Treaty*, vol.II, (Ed. All Beck, Bucharest, 2005), p. 58; V. Vedinaş, *Administrative Law,* (Ed. Lumina Lex, Bucharest, 2004), p.68; D.A. Tofan, *Administrative Law,* vol . II, (Ed. All Beck, Bucharest, 2003), p.58. It should be noted that the terminology used is "special case of nullity" and from the immediate context results that the authors put the equals sign between the cancellation and nulity (being also used the phrase "particular case of cancellation"). We deem that this overlap is not correct, being actually made a confusion between a way to get out of force (cancellation) and a penalty which may affect the provisions of a specific administrative act (nullity). Likewise, O. Podaru, "Lapse of expression of will in the Romanian public law, doctoral dissertation, ("Babes-Bolyai" University of Cluj-Napoca, 2002,) p. 9.

[21] Law no.90/2001 on organization and operation of the Romanian Government and ministries (published in the Official Gazette of Romania, Part I, no. 164 of April 2nd, 2001) contains an interesting provision in Article 28, second paragraph, according to which "in exercising hierarchical control, the Government has the right to cancel illegal or inappropriate administrative acts issued by public authorities subordinated to it, as well as those of the prefects". Since this is an abolition of an administrative act arising from an authority of the Administration, the correct name of this operation would have been, as we shall see below, that of revocation. The same confusion is reflected by GEO no. 194/2002 on the aliens regime in Romania (republished in the Official Gazette of Romania, Part I, no. 201 of March 8th, 2004 and substantially amended by Law nr.56/2007), which, at art. 32 shows that the cancellation and revocation of the Romanian visa (which is an authorization, undoubtedly an administrative act, as is stated in the Article 2 letter (d) can be done by the same administrative authorities (diplomatic missions or consular offices of Romania, the General Directorate of Consular Affairs within the Ministry of Foreign Affairs), the difference between these two operations being that cancellation produces retroactive effects and the revocation produces effects only for the future.

[22] For example, decision of the Supreme Court no. 2800 of the 1st October 2002 which provides that a Land Ownership Certificate, entered into civil circulation, can not be canceled by the issuing body, such a power belonging to the administrative court. Or Supreme Court decision no. 666 of the 28th February 2000, according to which "if at the appointment of a lawyer, the said lawyer's situation is known, that is his conviction, subsequent cancellation of appointment for this reason is illegal".

entitled to obtain the recognition of the claimed right or legitimate interest, the annulment of the act and repair of damage". Supplementing this provision to those contained in Article 21 paragraph (1) and Art. 126, paragraph (6) of the same law, but also with the provisions of organic law, namely Law no.554/2004 of administrative court, it clearly results the author of cancellation of an administrative act: court exclusively[23]. If the texts of the Constitution and organic law reserve this terminology to describe the retroactive abolition of administrative act by the courts, we believe this option should be strictly complied with. Consequently, the cancellation of administrative acts must evoke only the dissolution of administrative act by the competent court.

As regards the revocation, there have been some uncertainties regarding the precise determination of the competent authority to rule it. Revocation is a way of abolishing an administrative act whose holder is only the Government.

First, it must be mentioned the numerous legal provisions using the term "revocation" to describe the abolishing of an administrative act by a Government authority. Administrative court law regulates the possibility of revocation of administrative acts only by issuing public authority or the hierarchically superior one. Generally, this fundamental act of administrative law promotes distinction between the revocation and cancellation based on different holders of two ways: the court in case of cancellation, the Government in case of revocation.

Exceptions to the revocability principle - categories of documents:

- ❖ administrative acts declared irrevocable by an express disposition of law;
- ❖ administrative acts of a judicial nature;
- ❖ administrative acts for applying appropriate sanctions for the forms of liability in the administrative law;
- ❖ administrative acts for enforcement of criminal procedural acts;
- ❖ administrative acts giving rise to civil contracts;
- ❖ administrative acts which are issued as a result of the existence of civil contracts;
- ❖ administrative acts giving rise to subjective rights guaranteed by law in terms of stability;
- ❖ administrative acts that have been materially performed.

Exception of administrative acts which give rise to civil contracts concerns the relationship between administrative law and civil law. Civilist thesis states that individual administrative act, which conditions the creation of civil relations, may be revoked until the conclusion of civil contract. But administrative acts giving rise to such contracts are more than just legal conditions of the contract, they continuously conducts the civil law effects. Therefore, such acts will be always subject to revocability principle. The civil law ability of the parties in such cases is subject to administrative law capacity of the body who has issued the document. Professor T. Drăganu supports the thesis of civil law authors, admitting as arguments: the principle of civil law according to which the contract may be terminated only by judicial proceedings and that government body was able to verify the legality and appropriateness of a civil legal relationship when it issued the administrative act. This argument can not cover all categories of administrative acts prior to concluding some civil contracts

[23] It can also be mentioned other regulations which expressly provide the possibility of cancellation of an administrative act by the court. For example Law no. 401/2006 for the approval of GEO no.35/2006 (published in the Official Gazette of Romania, Part I, no. 911 of November 9th, 2006 which provides that "the Competition Council shall request the competent courts to cancel the administrative acts by which ..." . Law no. 95/2006 on Health Reform (published in the Official Gazette of Romania, Part I, no. 372 of May 2nd, 2006), whose art.451 states that "Against the decision of sanctioning the superior discipline commission, within 15 days from notification, the sanctioned doctor may institute an action of repeal at the administrative department of the court in whose jurisdiction it operates." Law no. 360/2002 on the policeman statute (published in the Official Gazette of Romania, Part I, No. 440 of the 24th June 2002): "policeman who is unsatisfied by the sanction applied may appeal the administrative court, requesting the cancellation or amendment, where appropriate, of sanctioning order or disposition "(art. 61 paragraph 3).

by individuals. Administrative acts which do not cease their effects upon termination of civil contract remain revocable anytime. These types of contracts are subject to a legal regime controlled by public law, that is a legal regime derogating from the common law, without being exclusively about a power regime. In some cases, civil contract and administrative act form a unity and therefore, any change in the sphere of the administrative conditions of legality of administrative act directly impacts the civil contract. The withdrawal of an assent procedure entails, for example, revocation of the administrative act and consequently, the civil contract termination. The individual which is part in the civil contract, has opened the action in the administrative court against the act of revocation and may request its cancellation and compensation or just compensation. As long as the law provides otherwise, the Government body will have a patrimonial liability for the revocation of administrative act for exclusively opportunity reasons.

Exemption from revocability principle of administrative acts issued based on a prior civil contract. This time, administrative legal regime is made available to the parties by a contract, its effects being attached to those of the contract. In this case, the administrative act is a legal instrument, strictly necessary to fulfill the contract and revocation of the administrative act would be similar to a termination of the contract. Administrative act can not be abolished in its legal existence, except once with the contract and on the means provided by law for this purpose, but not by revocation of the administrative body.

Exemption of administrative acts which gave rise to a subjective right is guaranteed by law through stability. These acts are irrevocable and are divided into two categories, as the subjective right occurs in the sphere of an administrative legal relationship (eg. birth certificates), as well as a civil one. In case of civil subjective rights, the law understood to give them a special protection, except for the administrative act underlying them, from the revocability principle, because they require the recipient's engaging to substantial expenses. It would be unfair that the administrative body revoke the act after performing such expenses. But not every administrative act creating subjective rights is irrevocable, the act acquires such character only when the subjective right which it generated is protected by law so effectively that, from its content or its purpose results that it understood to deprive the administrative body from the possibility of dismembering it.

Exemption of acts that have been materially made. The most common administrative acts within the scope of this category are authorizations, giving rise to subjective rights that are not specially protected. For example, our law protects residential construction made without permits, which can not be demolished except by an authorization document, issued by municipalities or prefectures. This category of exceptions regards only individual administrative acts that are carried out materially by means of an operation (action) or several specific operations. In this category do not fall those administrative acts that are made by actions or inactions on a continuing basis (for example the authorization for the exercise of a job). Such documents are revocable, because the rights and obligations of the beneficiary of act require continuing and successive operations. It's about free permits, which, being given on a basis of a right of appraisal of the government body, are precarious and revocable by definition. Beneficiary of such permit, as well as parts of civil contracts conducted by an administrative act, have assumed the risk of some damages when requesting authorization, as well as conclusion of the contract and thus it cannot be invoked the issue of patrimonial liability of the government bodies. The injured party has the way open for submitting an action to the administrative court, as well as for an indemnification action, according to common law.

Finally, we stress once again that "This principle of revocability[24] of administrative derives from the Constitution and Administrative Litigation Law, no.554/2004[25]. Although in the Romanian

[24] Elena Emilia Stefan, *Revocation of administrative acts- theoretical and practical aspects*, published in CKS -eBook, p. 669-676 and in Lex et Scientia International Journal (LESIJ) no. XVIII. Vol 1/2011, (Ed. Prouniversitaria), p.121-128, ISSN 1583-039X.

Constitution, it is not expressly regulated, however it derives from the corroboration of several articles: 52, 21, 126, etc."

"Regarding the reflection of legality principle into the European legislation, we mention that, at European level, there is the right to a good administration[26] in operation of public authorities.

The right to a good administration is laid down in the EU[27] Charter of Fundamental Rights proclaimed within Nice Summit in December 2000, but also in the European Code[28] of Good Administrative Conduct approved by Parliament on the 6th of September 2001 and currently it serves as a guide and source[29] of information for the staff of all Community institutions and bodies. "

1.3 Conclusions

This study aimed at highlighting the importance of the concept of revocation, as a specific form of termination of effects for administrative law.

There were thus spotlighted the implications of revocation, the authorities who have the jurisdiction to pronounce it, effects produced in the legal circuit, and in synthesis were presented exceptions to the revocability principle, just to emphasize the importance of the concept of revocation in administrative law. We hope that this analysis will be useful to specialists in administrative law by trying to highlight all the characteristic notes of this institution.

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[25] Law no.554/2004 on administrative proceedings, published in the Official no. 1154/2004 (with latest amendment by Law nr.202/2010 on measures to accelerate settlement processes and Constitutional Court Decision no. 302/2011, published in Official Gazette 316/2011).

[26] Elena Emilia Stefan, *quoted work,* p.121-128*;* For complete details, see also Elena Stefan, *European Ombudsmnaul in the light of European Constitution,* Public Law Magazine no. 1/2006, (Ed. CH Beck, Bucharest, 2006), p.106 .

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THE INFLUENCE OF THE CONSTITUTIONAL JURISDICTIONS ON THE BASIC LAWS

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Abstract
This paper intends to reveal the role played by the constitutional courts or other bodies entitled to perform the constitutional review of normative acts in enhancing the significance of the National Basic Laws and in developing their content. The research will try to show that the case-law created by the constitutional jurisdictions can shape the perception of the society on the Basic Law, offering a different perspective over its meaning. This is the effect of the interpretation of the Basic Law provisions, which is an inherent part of the constitutional jurisdictions' activity.

Keywords: *basic Law, supremacy, constitutional review, constitutional courts, amending of the Constitution*

1. Introduction

Constitutional jurisdictions are entitled to perform the constitutional review of normative acts. In order to do that, the constitutional judge has to evaluate the wording of the contested legal provision and, in the same time, the significance of the constitutional rules comprised in the Basic Laws which serve as benchmarks for the comparison. So, the interpretation of the Constitution is an inherent operation of the constitutional review. It has the potential to enhance its significance and to offer the efficiency required by the supreme character of the Basic Law. Due to the legal binding force of this interpretation, the content of the Basic Law is sometimes expanded and magnified. The constitutional jurisdictions case-law is taken into consideration especially by the legislative bodies that have the legitimacy to amend the Constitutions. The paper will study how different constitutional jurisdictions are involved in the process of supplementing the provisions of the national Basic Laws, with a special look to France, Germany, Italy and Spain. The comparative study includes Romania, as well, and analyzes to what extent the Constitutional Court has the possibility to improve the Romanian Basic Law and to make its provisions more protective for the citizens, for their fundamental rights and liberties.

The present study has been inspired by the recent idea that the traditional concept of "negative legislator" established by Hans Kelsen regarding the impossibility of constitutional jurisdictions to modify the reviewed normative act has to be reconsidered. This affirmation is proved by the increasing activism of various Constitutional courts. One of the most incisive study has been accomplished by Christian Behrendt[1]. It has been drafted from the point of view of the reviewed normative acts which can be supplemented this way. The present study tries to highlight the influence of the constitutional case-law on the Basic Law itself.

2. Overview of the legal theory concerning the supremacy of the Basic Law

Every state's legal system consists of a sequence of legal norms that spring one from another, organized in a pyramidal structure where the superior norms regulate the product of the inferior norms. This spatial image has been suggested by Hans Kelsen, the founder of the normative school of law in Wien. According to his theory, the unity and stability of this edifice is due to the interrelation established among its elements. More precisely, on the fact that the validity of a norm is

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[1] Christian Behrendt, *Le juge constitutionnel, un legislateur-cadre positif – Une analyse comparative en droit francais, belge et allemand*, (Bruxelles, Editura Bruylant, Paris, L.G.D.J.), 2006.

based on the validity of the norm that regulated its creation and which, at its turn, has been generated by another norm. In other words, the validity ground of a legal norm lies in the positive superior norm that regulates its producing.

This concatenation has the supreme reason of validity in a hypothetical fundamental norm: the so-called *Grundnorm* on which is based the entire system[2] and ensures an adequate balance to the whole juridical edifice. This basic law is the Constitution of one state and represents the primordial source of every legal norm. Within the legal state's order, the Constitution has the highest position in the positive law, meaning the actual, vivid law, which is in force in a certain state, in a certain period of time[3].

The supremacy of the Constitution is a complex concept, which incorporates a range of specific features and elements and a diversity of political and legal values which express its prevalence not only in the legal system, but also in the whole social and political system of a state[4]. The essential consequence of the supremacy of the Constitution is the compulsory compliance of each and every legal norm with the constitutional provisions. Any deviation from its prescriptions has as a result the invalidation of the named legal norms[5].

This supreme character has been raised to the rank of a basic, fundamental rule, being, in most of the cases, specified in the constitutional content itself[6].

3. The importance of the constitutional review

The respect of the Basic Law's provisions and its supremacy is a duty that incumbes to all individuals, legal persons - private or public - and to all authorities, regardless of the field of activity. That is why it appeared the necessity of imposing an efficient control system in what concerns its observance. This mechanism resides in reviewing the conformity of the normative acts with the provisions and principles comprised in the Constitution. Thus, the constitutional review represents an effective guarantee of the supremacy of the Constitution.

The constitutional review is circumscribed to two models that are governing to different types of constitutional jurisdictions. On one hand, there is the so called „American model", typical for the United States of America and adopted also by countries like Denmark, Greece, Norway or Sweden. This kind of review is performed by courts which are part of the judiciary. On the other hand, there is the „European model", characterized by the existence of a specialized authority, distinct and detached of any other public authority. Hans Kelsen has developed this concept. The model he promoted had the advantage to prevent two major shortcomings of the American model: the fact that different courts could render divergent solutions over the same legal provision and the relative value of the judgements which had only *inter partes litigantes* effects. Setting up a unique constitutional court that could centralize the whole constitutional review and which could materialize its assessing in a generally binding decision regarding the validity of a normative act represented a viable idea, which has been extended, in time, at a European level[7].

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[2] Hans Kelsen, *Doctrina pură a dreptului*, (Bucharest, Humanitas, 2000), p.272.

[3] According to Mircea Djuvara, "The positive law is the secretion of the juridical conscience of a certain society" in *Teoria generală a dreptului*, 2nd vol., (Bucharest, All, 1995), p.406.

[4] Ioan Muraru et al., *Constituția României – Comentariu pe articole*, (Bucharest, C.H.Beck, 2008), p.18.

[5] Ibidem.

[6] For instance, in the Romanian Constitution it appears in Article 1 paragraph 5.

[7] As a matter of fact, Hans Kelsen was the one who, based on the Austrian Basic Law of 1920, has the most significant contribution to the establishment of the Constitutional Court of Austria. He has also been member of the Court between 1920 and 1929.

Louis Favoreu offered a revealing definition of this kind of authority: „A constitutional court is a jurisdiction especially and exclusively invested with the constitutional contentious issues, which is situated outside the ordinary jurisdiction and completely independent"[8].

As the famous professor noticed, the history of constitutional courts build on the European model is not very long. It began in 1920 with the establishment of the Czech Constitutional Court (by the Constitution of the 29th of February 1920) and of the High Constitutional Court of Austria (by the Constitution of the 1st of October 1920). The Spain Constitution of 1931 has created a Tribunal of Constitutional Guarantees which would last until the beginning of the general Franco's dictatorship. There is a second stage, situated after the Second World War: after the re-establishment of the Austrian Court in 1945, Constitutional Court of Italy has been founded in 1948 and the German Federal Constitutional Court in 1949. A few years later, in 1959, appeared the French Constitutional Council and then the Constitutional Court of Turkey in 1961. A third stage took place in the first years of the 70's and included the creation of the Portuguese and Spanish Constitutional Tribunal in 1976 and, respectively, in 1978. This movement extended in Belgium where has been founded La Cour d'Arbitrage in 1983 and had a great development in the Eastern European countries: Poland (1985), Hungary (1989), Czech Republic (1991), Romania (1991), Bulgaria (1991) and the ex-soviet republics (Moldova, Belarus, Armenia, Georgia etc).[9]

The Romanian Constitutional Court has been established by the provisions of the 1991 Constitution and it is the guarantor for the supremacy of the Constitution. The need of such an institution in the Romanian juridical landscape has been confirmed by the experience of the European countries having a much stronger constitutional tradition.

In most European countries, the constitutional courts - a general name for the bodies that perform the review of constitutionality, no matter if they are courts, constitutional tribunals or constitutional councils – are not part of the judiciary, *stricto sensu*. Their place in the constitutional ensemble of the state is different of the one hold by the ordinary or administrative courts. Many of them are *sui generis* court, opposite to the other three traditional authorities – legislative, executive and judicial. Only in isolated cases they are part of the judiciary, being juxtaposed to other state powers, including the highest courts.[10]

The constitutional review is a creative task and the constitutional judge has a much wider ability than the ordinary judge in what concerns the possibility to enrich the significance of legal provisions by means of interpretation and, most important, they are not bound to the inflexible application of the law[11].

Instead of being "negative legislators" as Hans Kelsen defined them, the constitutional courts are slightly turning into a positive legislators or, at least, co-legislators.[12] Relevant in this respect is the case of Italy, Hungary or Portugal, countries where the constitutional authorities are entitled to review also legislative omissions of normative acts submitted to their jurisdiction.[13]

4. The impact of the constitutional review on the Basic Law

In order to perform the constitutional review, the constitutional courts extract the correct meaning not only of the checked legal provisions and also of the text of the Constitution to which the

[8] Louis Favoreu, *Les cours constitutionnelles*, coll. „Que sais-je?", la 2eme edition, (Paris, Press Universitaires de France, 1992), p.3.

[9] Ibidem, 4.

[10] Michel Melchior, Andre Alen şi Frank Meersschaut, General Report on the XIIth Congress of the Constitutional Courts in Europe, Bruxelles, 14-16 mai 2002, *The Relations Between the Constitutional Courts and the Other National Courts, Including the Interference In This Area Of the Action of the European Courts*, (Brugges, Vanden Broele Publishers, 2002), p.73.

[11] Cappelletti, cited by Louis Favoreu in op.cit., p.463.

[12] Ion Deleanu, *Justiția constituțională*, (Bucharest, Lumina Lex, 1995), 47.

[13] Michel Melchior, op.cit., 75.

conformity of the norm is compared. Within the decision, the constitutional court offers an interpretation of the significance of their content. It has the ability to clarify their sense, in a manner suitable to shape a certain view regarding its approaching, to linger into the society a certain way of thinking, but also to facilitate the perception of their normative content. Starting from the remark of two famous constitutional scholars, according to whom "the interpreter of the law has a legislative power and the interpreter of the constitution has a constituent power"[14], there might be taken into consideration the creative valences of the constitutional courts case-law. There are also some scholars who affirmed that revealing the significance of the interpreted constitutional norm represents an act of creation and is the result of a cognitive process of evaluation of the meaning of the interpreted norm. One can say that the constitutional judge re-creates the norm in the specific circumstances of the situation referred to its jurisdiction[15]. From this point of view, the constitutional judge sometimes reshapes the content of the Basic Law, offering a new perspective over its provisions. The constitutional judge notices its deficiencies and resorts to the classical fundamental principles of law in order to establish the bench-marks necessary to perform the constitutional review.

For instance, in **Romania**, prior to the amendment of the Basic Law in 2003, the Constitutional Court has acknowledge by praetorian way the principle of check and balance of the powers[16] and the principle of the fair trial[17]. These have not been included *in terminis* in the 1991 Constitution. Still, the Constitutional Court has oftenly mentioned them in its decisions and they have been explicitly inserted in the amended Constitution[18]. In this respect, the Constitutional Court of Romania has acted in a similar way with other European constitutional courts which, on their turn, during their activity, have felt the need of innovation in what concerns the content of national Basic Law itself.

The **German** case could be suggestive in this regard, taking into consideration the fact that expressions like „the objective order of the fundamental rights values" (*objective Wertordnung der Grundrechte*), "the principle of proportionality" (*Verhältnismassigkeits-prinzip*), „effectiveness of the fundamental rights" (*Grundrechtseffektuierung*) do not appear in the wording of the German Basic Law, but they are the creation of the German Federal Constitutional Court which gave them constitutional value[19].

France also offers a relevant example in this regard. Due to the constitutional review, the juridical security became a fundamental legal principle and the Constitutional Council has recognized its effects regarding the foreseeability and the quality of the law. Rendering the decision 2010-4/17 QPC[20], the Council has confirmed the existence of an implicit constitutional value consisting in the intelligibility and accessibility of the law.

There are constitutional benchmarks that can be invoked as grounds for priority preliminary ruling on the issue of constitutionality which can be divided into two categories[21]: some of them refer to the general interest and, in this respect, can be mentioned preservation of public order (Decision

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[14] Georges Burdeau et al., *Droit constitutionnel*, Ediția 26, (Librairie Générale de Droit et Jurisprudence, 1999, Paris), p.59.

[15] Ioan Muraru et al., *Interpretarea Constituției. Doctrină şi practică*, (Bucharest, Lumina Lex, 2002), 37.

[16] Decision no.96 of 1996, published in the Official Gazette of Romania, Part I, no..251 of the 17 th of Octombre 1996.

[17] Due to Article 11 and Article 20 of the Romanian Basic Law.

[18] For example, Decision no.183 of 2003, published in the Official Gazette of Romania, Part I, no.425 of the 17th of June 2003.

[19] A. Dyèvre, „La place des courts constitutionnelles dans la production des normes: l'étude de l'activité normative du Conseil Constitutionnel et de la Court Constitutitonnelle Fédérale (Bundesverfassungsgericht)", in *Annuaire international de justice constitutionnelle*, *2005*, (Marseilles, Economica, Presses Universitaires, 2006), 40.

[20] http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2010/2010-4/17-qpc/decision-n-2010-4-17-qpc-du-22-juillet-2010.48784.html.

[21] Bertrand Mathieu, "Neuf mois de jurisprudence relative à la QPC: un bilan" in *Pouvoirs, Revue française d'etudes constitutionnelles et politique*, 137(2011), p.67-68.

80-127 DC)[22], the benchmark of ensuring continuity of public services (Decision 79-105 DC)[23] or the finding the criminal offenders (Decision 99-411 DC)[24]. The other category includes the constitutional rights concerning the social and economical field, like the right to health, the right to a decent dwelling (Decision 94-359 DC)[25] or the right to employment (affirmed by the 5th paragraph of the 1946 Constitution Preamble. These benchmarks can be used by the French Constitutional Council in order to review a normative act that appears to be contrary to them.

In the same respect, illustrative for the creative potential of the constitutional case-law is the fact that, more recently, the French Constitutional Council has stated that the human dignity represents a constitutional value, even if it is not *expressis verbis* mentioned in the French Constitution[26].

In a decision which became famous[27], the Constitutional Council has extended its review by reference to the Preamble of the French Constitution of 1958 and to the Declaration of the Rights of Man and of the Citizen of 1789. It is the so-called „block of constitutionality". This decision was the consequence of a previous one[28] which answered two important questions. The first one was if the provisions of the Preamble of the 1958 Constitution have normative value and the second one referred to power of the constitutional Council to assess the conformity of legal acts with the provisions of the Preamble of the Constitution. The answer was affirmative for both questions[29].

There is also in **Spain** a similar "block of constitutionality" that contains even more referential normative acts having constitutional value. It includes laws issued in order to distinguish between the powers of the State and those of different autonomous communities or in order to regulate and harmonize the powers of the latter. The State's territorial structure is not, in fact, defined only by provisions of the Basic Law[30], but also by frame-laws issued by the State in certain fields, relevant for its competence that provide the guiding lines which has to be respected in drafting the legislation of the autonomous communities.[31]

5. The influence of the Romanian Constitutional Court's case-law on the Romanian Basic Law due to its creative interpretation

Following the stream of thinking created by the constitutional authorities from different European countries, the Constitutional Court of Romania has rendered a series of eloquent decisions in this regard.

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[22] French Constitutional Council, Decision 80-127 DC of 20th of January 1981 on the Law of reinforcing security and protecting personal liberties, http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/1981/80-127-dc/decision-n-80-127-dc-du-20-janvier-1981.7928.html.

[23] http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/1979/79-105-dc/decision-n-79-105-dc-du-25-juillet-1979.7724.html.

[24] http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/1999/99-411-dc/decision-n-99-411-dc-du-16-juin-1999.11843.html.

[25] http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/1995/94-359-dc/decision-n-94-359-dc-du-19-janvier-1995.10618.html

[26] Decision 343-344DC of the 27th of July 1994, known as „bioetica" (cons. no.2), http://www.conseil-constitutionnel.fr/decision/1994/94-343/344-dc/decision-n-94-343-344-dc-du-27-juillet-1994.10566.html?version=dossier_complet.

[27] Decision 71-44 DC of the 16th of July 1971, known as „freedom of association" (cons.no.2): http://www.conseil-constitutionnel.fr/decision/1971/71-44-dc/decision-n-71-44-dc-du-16-juillet-1971.7217.html?version=dossier_complet.

[28] Decision 70-39 DC of the 19th of July 1970.

[29] Christian Behrendt, *Le juge constitutionnel, un legislateur-cadre positif – Une analyse comparative en droit francais, belge et allemand*, (Bruxelles, Editura Bruylant, Paris, L.G.D.J.), 2006, 113.

[30] Decision 10/1982 of 23rd of March 1982.

[31] Pierre Bon, "La question d'inconstitutionnalité en Espagne", in *Pouvoirs, Revue française d'etudes constitutionnelles et politique*, 137(2011), 130.

5.1. For instance, being asked to rule on whether there is a constitutional legal conflict between some state's authorities[32], the Constitutional Court has clarified the meaning of Article 109 of the Constitution, used an extensive interpretation, able to expand its normative content, but which, in the same time, is not distorting the will of the constituent power. On the contrary, it explains and reveals its genuine goal.

In that case, the Court has found the existence of a legal dispute of a constitutional nature between the Public Ministry – the Prosecution Office attached to the High Court of Cassation and Justice, on the one hand, and the Parliament – Chamber of Deputies and Senate –, on the other hand, in connection with the procedure to be followed for claims relating to the prosecution of members and former members of the Government for acts committed in the exercise of their office and who, at the time of referral, are also Deputies or Senators. The dispute has been generated by the different way of interpreting of the mentioned constitutional provisions. According to Article 109 paragraph 2 of the Basic Law, *„Solely the Chamber of Deputies, the Senate, and the President of Romania have the right to demand criminal prosecution be taken against Members of the Government for acts committed in the exercise of their office".* Analyzing this constitutional provision, the Constitutional Court assessed «that the term *„solely"* means that: „no one" other than the three public authorities may require prosecution and that it can not be initiated without referral to the Chamber of Deputies, Senate or the President of Romania, as appropriate. As for the conjunction *„and"* in the text of Article 109 paragraph 2, it signifies the end of a listing, which gives each of the three authorities it own competence. The constitutional text excludes both the cumulative power of requests of the three public authorities and the alternative power between the three authorities».

Regarding the meaning of this constitutional provision, the Constitutional Court has noticed that "the submission of referral to one of the three authorities to require prosecution can not be preferentially or randomly made by the Public Ministry – the Prosecution Office attached to the High Court of Cassation and Justice" The Court stated that "the solution is varied, depending on his quality of Deputy or Senator at the time of referral". It concluded that, consequently, the Prosecution Office attached to the High Court of Cassation and Justice must address the Chamber of Deputies or the Senate – for members of Government or former members of Government who at the time of referral, are also Deputies or Senators or the President of Romania – for members of Government or former members of Government who at the time of referral, are not also Deputies or Senators.

In this way, it is established, unequivocally, a benchmark according to which the Prosecution Office attached to the High Court of Cassation and Justice is going to refer one of the three public authorities in order to demand the prosecution of members of the Government in office or of former members the Government.

The Constitutional Court has also noted that "otherwise the provisions of Article 109 paragraph 2 first sentence of the Constitution would become inapplicable as concerns the right of the Chamber of Deputies and the Senate to demand prosecution of members and former members of Government who also act as MPs, leaving to the discretion of the Public Ministry to decide, by itself, to which of the three authorities it should address the referral".

5.2. On a different occasion, assessing over the existence of another legal dispute of a constitutional nature[33] the Constitutional Court has used a *par analogie* interpretation of a constitutional provision and has supplemented it in some way. Upon settlement of the legal dispute raised in the case, the Constitutional Court noticed that it has to give a proper interpretation to the texts of the Basic Law, as to grasp from their letter the spirit that governs the matter.

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[32] Decizia nr.270 din 10 martie 2008, publicată în Monitorul Oficial al României, Partea I, nr. 290 din 15 aprilie 2008

[33] Decision no.98 din 7 februarie 2008, published in the Official Gazette of Romania, Part I, no.140 of 22nd of February 2008.

In the case, it had to adjudicate on the request for the settlement of the legal dispute of constitutional nature between the President of Romania and the Prime Minister concerning the refusal of the President to appoint Mrs. Norica Nicolai to the office of Minister of Justice and on the legal grounds invoked by the parties.

Article 85 paragraph (2) of the Basic Law does not provide how many times is the President of Romania entitled to ask the Prime Minister to make another proposal or the Prime Minister's obligation to come with a different proposal than the initial one.

The Court stated that it must search the meaning of the rule under Article 85 paragraph (2) of the Constitution both in the letter of this text and in the basic principles and in the spirit of the Basic Law.

Regarding the number of cases in which the President of Romania may ask the Prime Minister to make a different nomination for the vacant office of minister, the Court found that, in order to avoid the occurrence of an institutional blockage in the lawmaking process, the constituent legislator provided under Article 77 paragraph (2) of the Basic Law, the President's right to return a law to Parliament for reconsideration, only once.

The Court found that "this solution acts as a constitutional principle in the settlement of legal disputes between two or several public authorities which have conjoint duties in the adoption of a measure provided by the Basic Law and that this principle can be generally applied in similar cases.

Applied to the process of government reshuffle and appointment of some ministers in case of vacancy of the offices, this solution could eliminate the blockage generated by the possible repeated refusal of the President to appoint a minister at the proposal of the Prime Minister.

[…] The limitation to a sole rejection of the proposal is justified by the fact that, further, the answerability for a different nomination rests exclusively with the Prime Minister.

[…] As in case of all the other prerogatives provided by the Constitution, the President is politically answerable before the electorate for the reasons for which he declined the proposal of the Prime Minister, such as the Prime Minister and the Government are politically answerable before the Parliament.

As concerns the Prime Minister's possibility to reiterate his first proposal, the Court finds that such possibility is excluded by fact that the President of Romania declined the proposal from the beginning. Therefore, the Prime Minister must nominate a different person for the office of minister."

5.3. In another decision[34], the Court has proceeded to an elaborate analyze of the ideas contained in Article 115 paragraph (4) of the Basic Law which comprises the conditions of legislative delegation of power according to which to the Government may adopt an urgency ordinance in the following conditions, met cumulatively: the existence of an exceptional situation; the regulation cannot be delayed; the ordinance must contain the reasons for that urgency. The Court noticed that «beside the trenchant character of the formula used by the constituent legislator, its intention or purpose, consisting in the restriction of the field in which the Government may substitute the Parliament, adopting primary norms for certain reasons which it is sovereign in determining, are clearly underlined by the difference between the constitutional text in force and the previous one, former Article 114 paragraph (4) of the Constitution, in its initial form. According to that text, Government's possibility to adopt urgency ordinances was conditioned exclusively by the existence of certain exceptional cases.

The term „exceptional cases" used in the former wording was replaced, in the new wording, with that of „exceptional situations". Moreover, although the difference between the two terms, from the point of view of the degree of deviation from ordinary or common which they express, is obvious, the same legislator felt that it is necessary to clarify these aspects and not to leave any interpretation that would minimize such difference, by adding the collocation „which call for regulations without delay", enshrining, thus *in terminis* the imperative of the regulation urgency.

[34] Decision no. 255 of the 11th of May 2005.

Finally, for reasons of legislative rigor, it instituted the exigency on the statement of the reasons for the urgency in the very content of the ordinance adopted outside a law of delegation.

Even under the empire of the previous constitutional regulation in the matter, the Court, referring to the exceptional case, of which was depending the constitutional legitimacy of the adoption of an urgency ordinance, was stating that this is defined in relation with „the necessity and urgency of the regulation of a situation which, because of exceptional circumstances, imposed the adoption of immediate solutions, in order to avoid a serious breach of the public interest"[35]. For the same purpose, of a better defining of the exceptional case, the Court mentioned this is characterized by its objective character, „in the sense that its existence does not depend on the Government's will, which, in such circumstances is compelled to react promptly in order to defend a public interest by urgency ordinance"[36].

The aspects stated by the Court in this matter, under the empire of the previous constitutional regulation, as a result of a interpretation that was transgressing the letter of the constitutional text, underlying its meaning in light of the intention of the constituent legislator and of the purpose, as well by using certain principles and constants of the law, are even more pertinent, today, if we have in view the fact that the viewpoint present has full support precisely in the letter of the constitutional regulation of reference, in its present wording.

The Court's influence over the legislator's activity is obvious in this kind of situations. When upholds the unconstitutionality of an urgency ordinance on the ground of the lack of sufficient reasoning of the urgency and on the failing in proving the necessity of such regulation, the Court invalidated, on utility grounds, the normative acts. In the same fore/mentioned decision[37], the Court held that in the preamble of the urgency ordinance approved through the criticized law, the urgency character is determined by the opportunity of identifying shortly a rational and long lasting situation for assuring the necessary means for the preservation, restoration and maintenance of the national, cultural and religious patrimony of Suceava county, issue that concerns the social interest and that constitutes exceptional situation.

The reproduced text underlines the reason and the utility of this regulation, but not the existence of an exceptional situation which regulation cannot be delayed, which it proclaims, without setting forth the reasons, as requested by the constitutional text.

Or, "invoking the element of opportunity, subjective by definition, to which is conferred a determinant contributing efficiency of the urgency, which, implicitly, converts it in exceptional situation, leads to the conclusion that it does not have, necessarily and unequivocally, an objective character, but it can give expression also to certain subjective factors, of opportunity, in which account, moreover, this regulation was adopted by means of ordinance. But as such factors are quantifiable, the affirmation of the existence of the exceptional situation, in their account or by converting them in such situation, confers it an arbitrary character, which would create insurmountable difficulties in the legitimacy of the legislative delegation. Thus, we would find ourselves in the situation in which a constitutionality criterion – the exceptional case –, which observance is by definition submitted to Court's review, to be, practically, not control as such, which would be inadmissible.

6. The influence of the constitutional courts' case-law in the case of revision of the Basic Law

6.1. Some constitutional courts of some countries, like Moldova, Ukraine, Romania or Turkey, are expressly empowered to review the constitutional amendments.

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[35] Decision no.65 of 20th of June 1995, published in the Official Gazette of Romania, Part I, no.129 of the 28th of June 1995.

[36] Decision no.83 of May 19th 1998, published in the Official Gazette of Romania, Part I, no.211 of the 8th of June 1998.

[37] Decizia nr. 255 din 11 mai 2005.

Others, like the German Constitutional Court, held that it can review the conformity of constitutional amendments with the substantial limits expressly written in the text of the Constitution[38].

Even if the constitutional review of Basic Law amendments is not listed among the powers granted by the Italian Constitution to the Italian Constitutional Court, the constitutional jurisdiction in this country has stated that it has the ability to check the compliance of procedural conditions required by Article 138 of the Basic Law for adopting constitutional laws[39]. Moreover, considering that the Basic Law contains "supreme principles" which has to be also respected on the occasion of amending the Basic Law, the Constitutional Court of Italy has verified the substance of the amendments[40].

On the contrary, the French Constitutional Council has chosen a different approach, adopting a self restraining attitude regarding the sovereign constituent legislator[41].

The Constitutional Court of Romania is one of the few constitutional authorities in the world that is empowered by the Basic Law's provision to perform the constitutional review over the constitutional amendments. The constituent power has offered to the Constitutional Court the opportunity to render valuable judgements meant to guide the Parliament in what concerns the drafting of proper amendments to the Basic Law. The new draft has to suit the level of democracy to which the Romanian State is making for, the present stage of European political development. This is the reason why the opinion of the Court expressed in its decisions has to found a reflection in the new drafting of the amended Constitution, Such a conclusion is the logical consequence of the role of the Constitutional as a guarantor of the supremacy of the Constitution.

The Constitutional Court has rendered several decisions based on this power and, every time, has expressed various critical remarks regarding the legislative project of amending the Basic Law. Some of the suggested solutions, meant to correct the deficiencies of the draft will be presented in the followings.

6.2. The contribution of the Romanian Constitutional Court at the improvement of the Romanian Basic Law on the occasion of its revision in 2003[42]

Assessing over the suggestion contained in the project regarding the right to the private property, the Court noticed that after the provision of Article 41 Paragraph 7 that provides that *"Lawfully acquired assets shall not be confiscated. Lawfulness of acquirement shall be presumed"* there has been inserted a new paragraph in which circumstantiates this presumption and establishes that it is not applied for *"any goods intended for, used or resulting from a criminal or administrative offence"*.

The Court held that this wording could be criticized and that it might lead to confusions. Thus, if the text meant to permit the confiscation of the goods acquired lawfully, but which was based on a quantity of money results from criminal offences, its wording was inappropriate. From the wording of the newly introduced Paragraph (7^1) resulted that it meant the reverse burden of proof on the licit character of the assets, being provided the illicit character of the goods acquired through the capitalisation of the incomes resulted from criminal offences.

The Court has reminded its own previous case-law adjudicated by Decision no.85 of September 3rd 1996, published in the Official Gazette of Romania, Part I, no.211 of September 6th

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[38] Kemal Gözler, *Judicial Review of Constitutional Amendments – A Comparative Study*, (Bursa, Ekin Press, 2008), 84.

[39] Jean-Jacques Pardini, "Question prioritaire de constitutionalité et question incidente de constitutionalité italienne: ab orgine fidelis" in *Pouvoirs, Revue française d'etudes constitutionnelles et politique*, 137(2011), p.116.

[40] Decision no.1146 of 15th of December 1988, cited by Jean-Jacques Pardini in op.cit., p.116.

[41] Jean-Jacques Pardini in op.cit., 116.

[42] Decision no.148 of the 16th of April 2003, published in the Official Gazzette of Romania, no.317 of the 12th of May 2003.

1996, occasion in which was stated that the juridical security of the right to property over goods that constitute wealth of a person is indissolubly connected of the presumption of the lawfully acquiring of the goods. The Court has underlined that the removal of this presumption has the significance of the suppression of a constitutional guarantee of the right to property, which is contrary to the provisions of Article 148 paragraph (2) of the Constitution. Therefore, the objective aimed on this way is unconstitutional.

Reexamining the project of amending law, the Parliament took into consideration the Courts conclusion and has kept untouched the presumption of lawfully acquired of the assets.

Nevertheless, only eight years after, the same issue has been raised again and the idea of rejecting this presumption reappeared in the contemporary political landscape[43]. The latest revision project of the Basic Law completely eliminated the fore-mentioned presumption. Consistent with its own case-law, the Court stated[44] that such a provision is unconstitutional.

The role played by the Court in the process of genesis of law and, in particular, of the Basic Law is also underlined by another idea contained in the Decision no.148 of 2003. The Court has sanctioned the legislative technique shortcomings contained in the body of Article 19 paragraph 1 of the Basic Law, namely its inner antinomical structure: in the first thesis is alleged Romanian citizen's right not to be extradited or expelled. Instead, in the second thesis is alleged the contrary, namely that Romanian citizens may be extradited based on the international agreements Romania is a party to, according to the law and on reciprocity basis, which reflects a wording fault/deficiency.

Following this remark, the Parliament has corrected the deficient drafting, introducing the possibility of extradition of the Romanian citizens only as an exceptional provision, on the grounds of reciprocity, based on the international treaties to which Romania is a party.

It is to be noticed also the Parliament's reluctance in taking into consideration of some suggestions expressed by the Constitutional Court which were meant to improve the normative content of the Basic Law. For instance, regarding the educational system in Romania, the Court has noticed that, according to the new wording of the provisions under Article 32 paragraph (5) the education may be carried out in State or private establishments, thus being instituted a dichotomy specific to the most profound legal constructions. The Court has stated that the insertion of this new criterion, the confessional one, is not connected with the dichotomy logic, adding to a logical criterion a new determination, inadmissible by the fact that it can be found in the two, defined in the present by the Constitution. Thus, confessional education neither is excluded from the private nor from the state education. Therefore, there is a confessional education both private and public, which justifies the amendment, under this aspect, of the Basic Law. The Court considered that the examined norm would have become coherent if the logical pair of confessional, respectively lay education is inserted in the text submitted for revision. Thus, the new constitutional text would have provide that education of all levels may be lay or religious and conducted in Stat or private institutions, according to the law.

Despite the lack of coherence highlighted by the Court, the Parliament has ignored the correction suggested by the Court[45].

6.3. The constitutional review of the legislative proposal for the revision of the Constitution of Romania in 2011

Assessing *ex oficio* on the recent initiative of amending the Basic Law, the Romanian Constitutional Court has rendered the Decision nr.799 din 17 iunie 2011[46] and has drawn a series of recommendations which represent, in fact, genuine proposals of amending the Basic Law.

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[43] This matter has been analyzed in the past through the Decision no.85 of the 3rd of Septembre 1996, published in the Official Gazzette of Romania, no.211 of the 6th of September 1996.

[44] In the Decision no.799 of the 11th of June 2011, published in the Official Gazzette of Romania, no.440 of 23rd of June 2011.

[45] According to Article 32 paragraph 5 of the constitutiona, tuition at all levels is conducted in public, private, or confessional schools, according to the law.

[46] published in the Official Gazzette of Romania, no.440 of 23rd of June 2011.

The suggestion concerned the national minorities right to identity, the State's liability for damages caused by judicial errors, the Parliament's Standing Orders, the fields regulated by organic laws, conditions for the nomination and removal from the office of the members of the Government, the conditions for organizing the referendum, the narrowing the possibility of assuming by the Government of responsibility before the Senat and the Deputy Chamber, legal disputes of a constitutional nature between public authorities

We shall see to what extent the Parliament will take into consideration the Courts opinions. It is to be noted that one of the solution rendered by the Court in a previous decision[47] has been inserted in the constitutional provisions, the constitutional norm prescribing that the President of Romania has not only the power to award decorations and titles of honor, but also to withdraw it.

7. Conclusions

The present study has been oriented on the revealing of creative potential of the constitutional jurisdictions case-law, especially in what concerns their possibility of intervening on the normative content of the Basic Law. The importance of the task performed by the constitutional courts is undeniable and the fact that the have a positive influence on the constitutional provisions should consolidate their authority in the State's institutional architecture. This potentially quasi-legislative power does not interfere with the sovereign power of the Parliaments or other similar legislative bodies to elaborate normative acts. That's because one of the most important goals of constitutional courts is to ensure the balance among the state's legislative, executive and judicial authorities. On the contrary, it has softens the conflicts and stimulates the fruitful collaboration among the states' authorities.

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[47] Decision no.88 of the 20th of January 2009.

THE ASYLUM, BETWEEN HUMANITARIAN RESPONSE AND POLITICAL INSTRUMENT

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Abstract

At 9 November 2010, the European Court of Justice, in a preliminary ruling, decided to depart from the interpretation promoted by the United Nations High Commissioner for Refugees, in the matter of the application of the exclusion clauses. The European Court considered that no proportionality test between human rights protection and gravity of a crime is to be applied in the case of a person suspected of having committed an act contrary to the principles and purposes of the United Nations. By eliminating this test, the Court is sending a signal on rethinking the asylum institution, from a humanitarian tool that it became, to a political instrument. This decision could not be read alone; corroborated to the concerns already raised on the suitable use of the asylum instrument to address massive humanitarian needs, it would indicate a reorientation in the interpretation of international norms governing the refugee law.

Still, the human rights organs and the European Court of Human Rights continue to refer to the asylum as a situation where a humanitarian perspective, reflected in the proportionality test, or for those mechanisms the risk of human rights violation probability test, is still valid. The two apparently divergent directions will need to converge in the implementation of the European Union regulations on asylum.

This paper is exploring the possible reinterpretation of the European norms, trying to identify the new trends in the political perspective of asylum and the limitations to these trends that the respect for human rights is establishing.

Keywords*: refugee status, serious non political crime, act contrary to the purposes and objectives of the United Nations, proportionality considerations, preliminary ruling*

1. Introduction

The refugee law is in quest of a redefinition. The last twenty years have shown that the humanitarian perspective, reflected primary in the work of the United Nations High Commissioner for Refugees, although very appreciated, is not succeeding in coping with, on one hand, the massive influx of refugees which do not always fulfill the criteria set down in the Convention Relating to the Status of Refugees, signed in Geneva on 28 July 1951 (here after "the Geneva Convention") and on the other hand with the restrictions imposed by the immigration regulations. The development of human rights law had a major impact on the interpretation and application of the refugee definition, extending it as far as the notion of discrimination and the standard of protection from the State of origin are concerned, but also weakening its political dimension. Against this background, new theories immerged, trying to rediscover the essence of asylum as refugee protection and to clarify its relation with the humanitarian approach[1].

This rediscover also determines a reinterpretation of the exclusion clauses, i.e. those provisions in the Geneva Convention that are establishing the persons who, although having a well-founded fear of persecution, are undeserving of international protection because they committed certain acts that show the are unworthy, undignified of such a response from a State.

Traditionally, the application of the exclusion clauses were conditional, at least in part, by the performance of a proportionality test; a person fulfilling the criteria laid down in Geneva Convention

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[1] Mathew E. Price, *Rethinking asylum: History, Purpose, and Limits* (Cambridge, CUP, 2009), p. 13.

would not be excluded from being a refugee if his or her need form protection overweighs the need to sanction the acts committed.

However, if one is approaching the refugee concept from a political perspective, the humanitarian considerations in the application of the exclusion clauses are no longer justified.

This trend seems to be adopted by the European Court of Justice in its recent case-law; in the context of the development of an European asylum law, where the European Court will play a major role as the only institution with the authority to interpret European Union regulations, it is clear that the direction she is offering is essential for all the Member States.

2. The context: factual background and questions referred

The judgment rendered on November 9th by the European Court of Justice in the cases Bundesrepublik Deutschland against B and D (joined cases C-57/09 and C-101/09)[2] was issued in a preliminary ruling proceeding generated by the German Federal Administrative Court, who asked the European Court to clarify the interpretation of the exclusion clauses from the refugee status, as stipulated by the Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (hereafter "Directive 2004/83"), in its article 12.

This European piece of secondary legislation had the aim of ensuring that Member States apply common criteria for the identification of persons genuinely in need of international protection and of guiding the competent national bodies of Member States in the application of the Convention Relating to the Status of Refugees, signed in Geneva on 28 July 1951.

According to its article 12, a person is disqualified from being a refugee where there are serious reasons for considering that, *inter alia*, he or she has committed a serious non-political crime outside the country of refuge prior to his or her admission as a refugee; or he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations[3].The questions referred to the European Court aimed at a clarification of the notion of a "serious non-political crime" and of an "act contrary to the purposes and principles of the United Nations", in order to determine if the participation as a member in an organization listed as a terrorist one could be qualified as entering into one of the two categories of deeds excluding the person from being a refugee; they were also requesting a response on the application of a proportionality test between the seriousness of the crime, and therefore the need to condemn it and its perpetrator, and the risk faced by the person if disqualified from being a refugee. Thirdly, the questions referred to the European Court were enquiring over the place, in the application of the proportionality test, of the existence in the national legal system, of protection against deportation under the prohibition of torture and other ill treatments rule.

The questions raised in fact some interesting issues relating to, on the one hand, the value of the United Nations High Commissioner for Refugees guide on implementation of the Geneva Convention and if this body's practice would be a source of inspiration for the European Court as it has been, for almost 35 five years for the national courts and, on the other hand, on the character of asylum, understood as protection for the refugees.

[2] European Court of Justice, judgment of 9 November 2010 (cases C-57/09 and C-101/09), available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=83756&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=365610 [accessed 20 February 2012]

[3] Article 12 is also stipulating that a person is excluded from being a refugee if there are serious reasons to consider that he or she has committed crimes against peace or security, but this hypothesis is outside the scope of the present study.

The German authorities seemed to have difficulties in determining whether, from the perspective of the European law, persons that belonged to organizations listed as terrorist were to be excluded from being a refugee; in fact, the lower German courts considered that an asylum seeker should not be excluded from being a refugee without a proper application of the proportionality test, even if he or she had committed, before being admitted on the German territory, a serious non-political crime. The two applicants in the domestic procedures were former members of organizations listed as terrorist in accordance with Common Position 2001/931/CFSP on the application of specific measures to combat terrorism[4].

The request for asylum filled by the first applicant, B., was rejected as he confessed that as a schoolboy he had been a sympathizer of the Revolutionary People's Liberation Army/Front/Party (DHKP/C). Engaged in guerilla fighting for this organization in the period between 1993 and 1995, he was arrested and sentenced to life imprisonment, after giving statements under torture. While in prison, he was again sentenced to life imprisonment for the killing of a fellow prisoner. Released from custody on heath grounds, he left Turkey and entered Germany.

The second case was generated by the decision of German authorities to revoke the status of refugee, previously recognized to D., a former guerrilla fighter for the Kurdistan Workers' Party and one of its senior officials. He was a member of this organization since 1990, but in 2000, following some political differences with other leaders, he decided to leave the organization.

Two preliminary remarks are worth making in connection to these cases: the first one is related to the qualification of their conduct by the domestic jurisdictions as serious non-political crimes; the second remark concerns the demarche of the Federal Administrative Court (the instance that requested the preliminary ruling of the European Court): although this tribunal is acknowledging the fact it is bound by the findings of the lower courts, nevertheless, it is requesting the European Court to clarify if the conduct of the applicants is a serious non-political crime or an act contrary to the purposes and principles of the United Nations.

The relevant rules of international law at the time of the judgment

As mentioned in the previous sections of this article, the Geneva Convention represents the cornerstone of the international legal regime for the protection of refugees. In fact, as recognized by the European legislation, the Geneva Convention represents both the source of inspiration but also the goal, as the Directive 2004/83 sets as objective to achieve a common application of the criteria for the identification of persons genuinely in need of international protection. Against this background, it is useful to recall the main rules regarding the exclusion of certain persons from being refugees, on account of their conduct that makes them undeserving of international protection. According to article 1 F of the Geneva Convention, 'the provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provisionin respect of such crimes;

(b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) He has been guilty of acts contrary to the purposes and principles of the United Nations.'

The first hypothesis is of no interest for the present study; the other two are invoked in the European Court's ruling and therefore deserve our attention. The intention of the drafters of the Convention was to ensure that important fugitives from justice are not able to avoid the jurisdiction

[4] Adopted on 27 December 2001, by the Council of the European Union in order to implement Resolution 1373 (2001) of the UN Security Council. Resolution 1373 was adopted on 28 September 2001, in response to the terrorist attacks committed on 11 September 2001 in New York, Washington and Pennsylvania, on the basis of Chapter VII of the Charter of the United Nations.

of a state in which they may lawfully face punishment [5] . As far as the exclusion clause relating to the perpetration of a serious non political crime is concerned, it is to be noted that not all the extraditable offences were to be considered serious; although no list, exemplificative or exhaustive was drawn up, the drafters were determined to exclude the offences punishable by three months' imprisonment and referred to capital crimes [6] as being covered by the exclusion clause. It is also interesting to note in connection to this exclusion clause, that its application is only possible if the punishment faced by the asylum seeker were to be or would be applied in a non discriminatory way and that receiving States are not to ignore the risk that would be done by returning the claimant to face prosecution or punishment[7] or, in other words "the well-founded fear of persecution".

The United Nations High Commissioner for Refugees has, over the years, and in the fulfilling the task of supervising the application of the provisions of the Geneva Convention, issued series of Background Notes and Guidelines on the interpretation to be given to the conventional norms. Its task was truly remarkable taking into consideration the fact that the Geneva Convention is international in the affirmation of the refugee status, but essentially national in its application. Therefore, the role of the High Commissioner was to ensure as broad uniformity as possible in the application, by domestic authorities and courts, of the disposition of the Convention. And to combat the risk of very divergent interpretation on the notion of a refugee, it even elaborated a Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention[8].

With respect to the exclusion clause for the commission of a serious non-political crime, the UNHCR firstly pointed out the offences that would attain the level of seriousness: crimes against the physical integrity of a person, crimes committed through the use of violence. The traditional interpretation of the UNHCR would place terrorist acts under this exclusion clause, as the alleged political objective of such acts is clearly annihilated by the violence of means and no longer predominant. The other exclusion clause of interest to this study refers to the commission of an act contrary to the purposes and objectives of the United Nations. Although there was agreement for the inclusion of this clause in the draft of the Convention, the reasons behind it were very diverse and confusing: some representatives limited its application to war collaborators in the Second World War or to acts similar to the gravity of war crimes, while others thought of it as a prohibition for refugees to engage in activities contrary to the country of origin. Another suggestion for the understanding of this clause refers to the commission of acts such as racial discrimination or denial of the right of self-determination.

As the terms of the purposes and objective are general and vague, the UNHCR recommended careful and narrow consideration of this exclusion clause. As the Charter of the United Nations bounds States, in principle only persons in positions of power would appear capable of committing such acts[9]. Still, the discussion is left open for the cases involving a terrorist act.

From the language of the 1951 Geneva Convention, it would appear that the application of the exclusion clauses is mandatory ("the provisions shall not apply"). Commenting on the proportionality considerations, the UNHCR in its analysis, is invoking the humanitarian object and

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[5] James Hathaway, *The Law of Refugee Status* (Canada: Butterworths Law, 1991), p. 221

[6] Statement of representative of Belgium, Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: summary Record of the twenty-ninth meeting, last visited at: http://www.unhcr.org/3ae68cdf4.html [accessed 20 February 2012]

[7] James Hathaway, *The Law of Refugee Status*, p. 224

[8] UN High Commissioner for Refugees, Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, December 2011, HCR/1P/4/ENG/REV. 3, available at: http://www.unhcr.org/refworld/docid/4f33c8d92.html [accessed 20 February 2012]

[9] UN High Commissioner for Refugees, Guidelines on International protection: Application of the Exclusion clauses: Article 1 F of the 1951 Convention relating to the Status of Refugees, HCR/GIP/03/05, 4 september 2005, p. 5 available at: http://www.unhcr.org/refworld/docid/3f5857684.html [accessed 20 February 2012]

purpose of the Convention to justify the necessity of assessing the respect for human rights in the application of the exclusion clauses. In the words of the UNHCR "as with any exception to a human rights guarantee, the exclusion clauses must therefore be applied in a manner proportionate to their objective, so that the gravity of the offence in question is weighed against the consequences of exclusion. Such a proportionality analysis would, however, not normally be required in the case of crimes against peace, crimes against humanity and acts falling under article 1F(c), as the acts covered are so heinous."[10]

Several consequences are to be drawn from the drafters' intention and the UNHCR interpretation. Firstly, although the terms of the Convention would support a mandatory application of the exclusion clauses (that is, any person having committed such acts should not recognize as a refugee), in fact, their application is subject, to a wider or narrower degree, to a proportionality test. This test would allow striking a fair balance between the seriousness of the crime and the need to see it punished and the risk the person is facing. It is to be noted that the result of the proportionality test would be either the revocation or cancellation or non-recognition of the refugee status or the maintenance or recognition of this status.

This is important to underline, because the proportionality test is similar to the one applied by the human rights organs in deciding if a measure restricting the exercise of a right represents a legitimate interference or a violation of that right. Still, its consequences in the field of refugees' protection go beyond the simple avoidance of a violation to someone's rights. A person who committed a serious non-political crime would face an inhuman punishment or an unfair trial. Two possibilities are opened to a receiving State at that point, according to the domestic practice: either to have recourse to proportionality considerations, either to consider that such a punishment or trial represents a violation of a human right so they should be dealt with from the human rights perspective. However, the consequences are not the same and therefore the two possibilities should not be seen as excluding each other, but as complementary, the second one being activated if the first one would lead to the exclusion from being a refugee. As to the consequences, the application of proportionality considerations would result in the maintenance of the refugee status, with all the rights it confers and with the guarantee of *non-refoulement* that is more protective that that prohibition to return under human rights law. In fact, in refugee law, the existence of a threat to the life or freedom of a person on account of race, religion, nationality, political opinion or membership to a particular social group is prohibiting any measure of expulsion or return: under human rights law, the individual must prove a real risk and concrete risk of being subjected to ill treatment[11].

The automatic exclusion, on the ground that the person is protected under human rights law, would simply mean the prohibition to expel or return, without any particular statue being afforded to that person; besides, the threshold of proof is higher that refugees' *non-refoulement*. Only a probability of individual application would stay the execution of the return measure.

Secondly, in general the test would apply only in connection with the perpetration of serious non-political crimes; still, although normally excluded from the application in the other hypothesis, the test is not completely ignored; in some extraordinary cases, the UNHCR applied the test even when crimes against humanity were committed[12]. We consider that this application is justified by the fact that the status determination officer and even the domestic courts dealing with the exclusion

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[10] UN High Commissioner for Refugees, Guidelines on International protection: Application of the Exclusion clauses, p. 7

[11] European Court of Human Rights – Press Unit, Factsheet - Expulsions and Extraditions, January 2012, available at http://www.echr.coe.int/NR/rdonlyres/211A6F9C-A4EC-4CF7-AB2E-42E9D49FB2EF/0/FICHES_Expulsions_and_extradition_EN.pdf [accessed 19 February 2012]

[12] UN High Commissioner for Refugees, *Advisory Opinion From the Office of the United Nations High Commissioner for Refugees (UNHCR) Regarding the International Standards for Exclusion From Refugee Status as Applied to Child Soldiers*, 12 September 2005, available at: http://www.unhcr.org/refworld/docid/440eda694.html [accessed 19 February 2012]

clauses are not criminal tribunal and their evaluation does not attain the strictness of a criminal procedure. It follows that the individual would be found "guilty" outside the normal guarantees of a penal procedure.

Thirdly, it is not definitively agreed as to the qualification of the terrorist acts, if they would fall under the "serious non-political crime" notion or the "acts contrary to the purposes and objectives of the United Nations" one. Still, the UNHCR seems to favor inclusion in the first category, as the methods and consequences are those of a serious non-political crime. This position is also more favorable to the individual, as in general, the perpetration of a serious non political crime is proved by the initiation of criminal proceedings, documents and evidence collected in the file, prosecution applications, and judicial decisions. A conclusion as to whether a person "is guilty" for an act contrary to the purposes and objectives of the United Nations, if that act is not at the same time a crime, is more difficult and the evaluation of individual responsibility, that does not benefit from the criminal standard, more fluid.

The judgment of the European Court of Justice

In responding to the questions referred by the German Federal Administrative Court, the European instance considered, in the first place, the qualification to be given to terrorist acts; it concluded that those acts could fall to be regarded both as serious non political crimes and as acts contrary to the purposes and objectives of the United Nations. Still, as the language employed both by the Geneva Convention and the Directive 2004/83 shows, it is not sufficient that the organization to whom the person belongs had perpetrated such acts; it must be shown that the acts were committed by the person in question. Recalling the principle of individual responsibility, the European Court underlined that "the mere fact that the person concerned was a member of such an organization cannot automatically mean that that person must be excluded from refugee status pursuant to those provisions"[13].

By way of consequence, although the domestic court provoked the re-qualification of the acts reproached to the applicants, the European instance refrained from making a choice; it is to be noted that this abstention from the European Court in not without consequences – as the first applicant had committed both acts as member of a terrorist organization but also murder. From the factual background, it follows that neither the domestic nor the European courts were interested with the second potential „serious non political crime", only with the acts committed while a member of the organization.

At the same time, the European Court's directions as to the assessment of the individual responsibility, without clarifying the notion she is dealing with (non political crime or act contrary to the purposes and objective of the United Nations), would imply that the same standard of proof applies for serious crimes that are generally discovered upon extradition requests (that is, a criminal proceeding is ongoing or has been completed) and for the other acts. Although this could be regarded as a guarantee and applauded as such and we genuinely acknowledge its importance, it is worrying however that a person is evaluated as being "guilty" in the absence of specific guarantees and a specific procedure[14].

However, the European Court, in answering the third question, considered that, once the domestic authority or court has determined that the person in question has committed a crime so falling under the exclusion clauses, their effect is mandatory and the person is excluded from being a refugee.

[13] European Court of Justice, judgment of 9 November 2010 (cases C-57/09 and C-101/09), para. 88

[14] Without entering into a lengthy discussion on the subject, it is worth noting that in the sanctions regime considering the events in the Cote d'Ivoire, some persons were listed on the visa-ban and assets freeze lists for incitement to racial hatred; should this also mean that they were to be excluded from being refugees, if the case may be? The standard of proof for the listing in restrictive measures is less strict and transparent.

The Court considered that no proportionality test is required, as the domestic instance has already, „in its assessment of the seriousness of the acts committed by the person concerned and of that person's individual responsibility, taken into account all the circumstances surrounding those acts and the situation of that person"[15] . But a few paragraphs earlier, when indicating the elements to be taken into consideration, the Court only remembered: the true role played by the person concerned in the perpetration of the acts in question; his position within the organization; the extent of the knowledge he had, or was deemed to have, of its activities; any pressure to which he was exposed; or other factors likely to have influenced his conduct[16]. The indication is correct as it only takes into account the demarche to determine whether the acts committed by the organization concerned meet the conditions laid down in exclusion provisions and whether individual responsibility for carrying out those acts can be attributed to the person concerned.

Still, the proportionality test, that the Court obviates, is not reduced to just assessing the role or the subjective state of mind of the person concerned and is applied after the qualification of an act as serious non political crime or act contrary to the purposes and objectives of the United Nations. Among proportionality considerations one should take into account the period of time elapsed from the perpetration of facts, the punishment already completed, the age of the perpetrator at the moment of the fact, the fairness of the trial. By using these tools, even if one is in the presence of a serious non-political crime of an act contrary to the purposes and objectives of the United Nations, could decide, after balancing different interests, not o exclude the person concerned from being a refugee.

The European Court is very firm in its position; the commission of a crime – against peace or humanity, war crime, non political one, contrary to the purposes of the United Nations – renders the perpetrator not worthy of the protection deriving from the refugee status. It is another way of proclaiming that refugee protection is for a person that is being persecuted, that suffering from a harm that is being illegitimately, maliciously and unjustifiably inflicted. The fact that a person is guilty of serious or - as the UNHCR put it - heinous acts, transforms him or her into an individual undeserving of protection. It is a clear vision of the refugee protection through asylum as a political instrument. In general terms, a political vision on asylum is concentrated on reaction for the protection of the persecuted (understood as persons chassed out of their political communities) but also for the chastising of the persecutory state for its conduct.

From the fact that the European Court did not qualified the acts described in the present cases, it follows that its position is one of principle; irrespective of the type of crime, the person considered to be guilty is to be excluded from being a refugee. This is in line with the political view on refugee status; the moment a person, although persecuted or fearing persecution, is, on serious grounds, considered to have committed such a crime, she is no longer or anymore in the position to invoke the risk of persecution in order to keep its status.

The revocation, cancellation or refusal to recognize the refugee status as a consequence for the application of an exclusion clause does not mean however the absence of all evaluation of the risk of a violation of fundamental human rights for that person, in case the exclusion clause is accompanied by an extradition request or by a decision to remove the person from the receiving State's territory. Still, as explained in more detail bellow, the decision to stay an extradition or a return order will not imply the recognition of a certain status and the presence of the risk must be real and concrete. The Court itself recognize it in paragraph 110 of its decision: "it is important to note that the exclusion of a person from refugee … does not imply the adoption of a position on the separate question of whether that person can be deported to his country of origin".

[15] European Court of Justice, judgment of 9 November 2010 (cases C-57/09 and C-101/09), para. 109
[16] European Court of Justice, judgment of 9 November 2010 (cases C-57/09 and C-101/09), para. 97

3. Conclusions

Divorcing the concept of refugee protection through asylum from the humanitarian goals promoted by the NHCR does not, in consequence, have the meaning of refusing all protection for a person confronted with a probable violation of her rights; it only tries to delimitate the refugee status from the humanitarian protection, that is subsidiary and non-distinctive, in the sense that is not sanctioning a distinctive kind of harm – persecution.

It is too early to say if the trend emerging from this judgment will be consolidated; there some signs of interest from the part of domestic instances as well, which, by the questions referred to the European Courts, are provoking a new interpretation of the meaning of "membership of a particular social group" or a distinction among human rights violations that would or would not amount to persecution. The current intention of the European Court is also suggested by the total absence of any reference to the work or works of the UNHCR; however, it will certainly be difficult for the European Court to change the trend in a short term, as for many years the UNHCR has been the trainer of the domestic authorities, including in Europe and its lines of interpretation are just consolidating in the case-law of national bodies.

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THE RELATION BETWEEN TERRITORIAL COLECTIVITIES IN FRANCE AND THE EUROPEAN UNION. THOUGHTS ON THE CROSS-BORDER COOPERATION

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Abstract

France, one of the founding members of the European Union, is a unitary state from the administrative-territorial point of view, based on deep centralism. Having territorial collectivities with highly complex structure (communes, departments, regions, sui-generis collectivities and overseas collectivities), France committed itself to cooperation not only between its own administrative structures, but also to cross-border cooperation within the European Union.

After showing reluctance to external actions underwent by territorial collectivities, France ended up with acknowledging this right of its territorial collectivities within the «decentralized cooperation», expressly brought under regulation by the Law of 6 February 1992. According to the law, there is no need for any ratification on behalf of the State to allow cooperation between territorial collectivities, within the boundaries of their competence. The Law of 1992 thus authorized the territorial collectivities to close agreements with other collectivities from abroad. Furthermore, the Law of 4 February 1995 allowed several treaties with the border states to be signed, thus creating the SAAR-LOR-LUX region (an European cross-border region that made way for cooperation between Germany, France and Luxembourg). The French legislation also allowed several European districts to be created, acting as local groups for cross-border cooperation, created on the initiative of territorial collectivities.

The aim of our study is to identify the main relationship between territorial collectivities in France and EU and to analyze the cooperation instruments used by the French collectivities in order to foster the cross-border cooperation.

***Keywords**: French collectivities, cross-border co-operation, co-operation instruments, euroregion, eurodistrict, structural funds*

Introduction

In these days, in Europe, the economical success often relies on the capacity of a region to develop cooperation networks with other regions. The cooperation and the exchange of experience between regions can be crucial in fostering a dynamic process for regional development. The European Union plays and important role in negociating and supporting partnerships across the Union's regions. The European Territorial Co-operation objective is financed by FEDER between 2007-2013. This objective supports cross-border, transnational and interregional co-operation programmes.

In the period 2007-13, the European Territorial Co-operation objective covers three types of programmes:

- 52 *cross-border co-operation* programmes along internal EU borders (ERDF contribution: €5.6 billion);

- 13 *transnational co-operation* programmes cover larger areas of co-operation such as the Baltic Sea, Alpine and Mediterranean regions (ERDF contribution: €1.8 billion);

- The *interregional co-operation* programme (INTERREG IVC) and 3 networking programmes (Urbact II, Interact II and ESPON) cover all 27 Member States of the EU. They provide

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a framework for exchanging experience between regional and local bodies in different countries (ERDF contribution: €445 million)[1].

The aim of our study is to identify the main relationships between territorial collectivities in France and the European Union and to analyse the cooperation instruments used by the French collectivities in order to increase the cross-border cooperation in particular, but also to highlight the way in which the funds granted by the European Union helped the French regions to develop.

The first step of our scientific approach is a brief presentation of the French administrative organization in order to highlight the role played by the regions in the administrative-territorial architecture of France.

In order to achieve the objectives of our research, the next step is to analyse how the French legislator regulated the cooperation instruments.

The importance of our study also consists in showing the way in which the French territorial collectivities, the regions in particular, understood the major role of cooperation in developing the communities and improving the relationships between the European Union's citizens. The cooperation instruments used by France can be regarded as models of good practice for Romania. The European funds absorption and a good management determined the French regions to experience an accelerated dynamic.

Under this consideration, we appreciate the subject we have propose is actual and our scientific approch is useful.

1. Preliminary thoughts on the administrative-territorial organization of France

The French political system is mainly based on the representative democracy, both at local and national level. The instruments of direct democracy are limited within the French system. We are talking here only about the referendum, there is no way for popular initiative or the power of veto. In its attempt to bring the citizen closer to the political decision, the French legislator inserted within the French legislation several elements of participatory democracy. We have to mention that this formula is not to be found *expresis verbis* within the French legislation, but we do fiind the concept of *local democracy* or *proximity democracy*[2].

The relationship between the French Republic and its constituent collectivities are regulated by Title XII and Title XIII of the Constitution, and also by special laws. According to Art. 72 of the Constitution, the territorial collectivities of the Republic are communes, departments, regions, sui-generis collectivities and overseas collectivities, provided by Art. 74[3]. Any other collectivity can be created according to the law, instead of one or several of the above mentioned collectivities, if necessary.

The administrative-territorial organization of France is complex[4]. One of the most debated issues in France concerns the optimal dimensions of territorial collectivities, but also the optimal number of „administration levels"[5].

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[1] http://ec.europa.eu/regional_policy/cooperate/cooperation/index_en.cfm

[2] On proximity democracy, participatory democracy and representative democracy, as they were conceptualized by French politicians, in Yves Sintomer, *Enjeux et attentes d'une démocratie participative*, p. 140 în *Conseil de quartier. Mode d'emploi*, Les editions d'Adels, 2003 (the material can be checked on: http://www.adels.org/edition/complement_guide_conseils_quartier_oct03.pdf

[3] Dominique Grandguillot, *Les collectivités territoriales après la réforme*, (Paris, Gualiano Publishing House, 2011).

[4] The restyle of the French society triggered an update of the complex administrative organization of France. In 2009, the French administration underwent a substantial reform, which will take place in several steps. The President of the Republic grounded the inception of this reform on the following reasons: „*French people criticize the jacobine centralization they feel like the Government administration doesn't come close to the citizens and their activities. French people are more and more critical as far as descentralization is concerned and the organization of local collectivities. From their perspective, the number of local collectivities is too high. They are browned of the increasing local inland revenue and costs of collectivities' activity. (...) The French citizens, our enterprises, our inland civil*

There are three levels of administration in France:

1. *the communes* – the basic unit of local public administration. It is the oldest level and the closest to the citizen. There are 36.682 communes and they succeeded in 1789 the old parishes. The mayor, who is elected by the municipal council, represents the state within the commune, but he also fills the local executive power. France is one of the countries with a high number of communes. In order to cope with the risk of plotting the local public policies, there has been developed an *intercommunal level*, which enables several communes to manage together certain public services and to develop certain policies. In order to meet this target, there have been created Public Institutions for Intercommunal Cooperation – EPCI[6], which are public persons, lacking the status of territorial collectivities. These Institutions are the outcome of the territorial collectivities' will;

2. *the departments* – they have been created in 1789. The 100 departments form one of the three levels of local government. 96 departments are metropolitan and 4 of them are to be found in the overseas territories. These territorial collectivities are administered by a General Council, elected once in three years. Each counsellor is elected for one canton. Furtehr on, there is a new territorial subdivision within a department – *the arondissment*, where a Subprefect represents the Government;

3. *the regions* (in number of 22) – the officially became territorial collectivities in 1982. The first election for the Regional Council took place in 1986, by means of universal vote.

The Government is represented by the mayor, prefect and regional prefect. In France, there are also the *sui-generis collectivities* and the *ovserseas collectivities* besides the territorial collectivities.

Within the Metropolis, *Paris*, *Lyon* and *Marseille* have a sui-generis status. These cities are divided into arondissments, which elect the arondissment mayors and counsellors. Paris has a double status: commune and department. *Corsica* also has a particular institutional organization.

French Polynesia and New Caledonia make the so-called *overseas countries* (*Pays d'outre mer au sein de la République*"). By means of local referendum, which is going to take place in 2014, these two entities will decide if they continue to part of the French Republic[7].

Following a simple analysis, we notice how complex is structured the local public French administration. The French territorial collectivities play a crucial role within the social life.

2. The relatinship between the French territorial collectivities and the European Union, regulated by the French legislation

Having territorial collectivities with a highly complex structure, France opened itself to cooperation not only between its own administrative structures, but also to cross-border cooperation within the European Union.

The cooperation between cross-border regions has been developed ever since 1970 in order to solve the actual problems that the citizens living in cross-border regions had to deal with (environment protection, issues related to cross-border workers etc.).

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servants, office holders, our contry on the whole, is waiting for a deep reform in terms of local organization. The French citizens want the structures to be simplified, the competences to be cleared up, the responsibilities to be identified and the local expenses to be reduced. It's a matter of effectiveness, but also of democracy. (...) We need to update the country more than ever We need challenging and innovative answers. The whole speech held by the French President can be checked on: *http://reformedescollectiviteslocales.fr*

[5] Dana Apostol Tofan, *European Administrative Institutions* (Bucharest, C.H. Beck, Publishing House, 2006), p.143.

[6] In 2010, in France there were 16 urban communities (with 413 communes and 7.6 mil. inhabitants), 181 conglomerate communities (with 3107 communes and 22,5 mil. inhabitants) and 2.409 communities of communes (with 31.224 communes and 27,5 mil. inhabitants). For further details, please check: http://www.dgcl.interieur.gouv.fr

[7] Marc Thoumelou, *Collectivités territoriales quel avenir?,* (Paris, La Documentation française Publishing House, 2011), p.13-24.

The law of 2 March 1982 regarding the rights and liberties of communes, departments and regions[8] used to regulate the *cross-border cooperation* in the Art. 2. By means of the Prime Minister (Pierre Mauroy) curricula of 26 May 1983, there has been created the institution of *The delegate for external actions* of local collectivities. This institution acknowledged the concept of external action of territorial collectivities.

Once the Law of 6 February 1993, regarding the territorial administration of the Republic, has been adopted, France legally acknowledges in Title IV the – *Descentralized cooperation*. Art 131 indent 1 of the above mentioned Law stipulates the following aspects: „the territorial collectivities were valid to close agreements with foreign territorial collectivities, within the boundaries of their specific competences and with the obligation to obey France's international commitments".

At first, France proved to be reluctant to the external actions of territorial collectivities, but it ended up by acknowledging this right of its territorial collectivities within the «descentralized cooperation», stipulated by Law of 6 February 1992. According to the law, the Government doesn't have to ratify the cooperation between territorial collectivities, within the boundaries of their competences. Cooperation is achieved in various forms: development support, institutional support, common management of goods and services, cross-border cooperation or inter-regional cooperation.

The Law of 4 February 1995 also enabled several treaties to be signed with the neighbor states, thus creating the SAAR-LOR-LUX region (it's about an European cross-border region which made way for cooperation between Germany, France and Luxembourg).

The law of 13 August 2004 regarding the local liberties and responsibilities issued the concept of „*European district*", a legal entity with financial autonomy. These districts are local groups for cross-border cooperation, founded at the initiative of territorial collectivities.

The Law of 2004 also enables the establishment of mixed groups with members from the neighbor country collectivities in order to commonly create and manage territorial projects, equipments and public services. The Law simplifies at once the authorization procedure for those collectivities that attend foreign structures. The legal norms authorize the transfer of structural funds management to territorial collectivities, transfer experimetally exercised by the Alsace region.

3. Instruments for cross-border cooperation used by France

The territorial collectivities are not regarded as leading actors within the European construction, they act at European level through the agency of the Committee of the Regions, created in 1992. As far as the lobby actions are concerned, the territorial collectivities use to associations: the Assembly of European Regions (AER) and the Council of European Municipalities and Regions (CEMR), two groups that originally created the Committee of the Regions.

Nowadays, all the French regions have an office in Bruxelles. These offices are working particularly on issues related to the competences of local and regional collectivities, such as: social problems, economical development, transports, environment, education (social mobility of young people), culture, research and innovation. Their mission is to initiate a dialogue with the European institutions, aiming to help the collectivities to build up a «cross-border» partnership. In order to use the resources on mutual basis or because they share the same problems, certain regions gather together so they could establish a commune structure designed to represent them. This would be the case of the following regions: Bretagne, Pays de la Loire and Poitou-Charentes.

In 2006, for better cooperation, several associations of the local power have established the European House of Local Authorities (Maison européenne des pouvoirs locaux[9]).

According to an account issued in 2010 regarding the cross-border policy[10], France has 3.000 km of border line, meaning 20% of the metropolitan territory is opend towards the neighbor

[8] Loi n°82-213 du 2 mars 1982 relative aux droits et libertes des communes, des departements et des regions (Loi Defferre), JOFR du 3 mars 1982 p. 730.

[9] http://www.pouvoirs-locaux-francais.eu/ (Accessed January 20, 2012).

countries. In France, 16 regions and 28 departments are facing the cross-border, while 10 mil. of French people live near the cross-border lines.

Instruments for cross-border territorial cooperation:

- LCCG – The Local Cross-border Cooperation Group – it's a legal instrument, made possible by the Karlsruhe Agreement in order to facilitate cross-border cooperation. The general code of territorial collectivities provides a number of forms of public inter-communal cooperation establishments, which might adjust to cross-border cooperation[11];
- ECCG – European Cross-border Cooperation Groups[12];
- ECG – Euro-regional Cooperation Groups.

France collaborated very well with its neighbor countries and created Euro-districts in the first place, which may function within the Euroregions. Most of the Euroregions turned afterwards into European cross-border cooperation groups.

France is involved in 21 programmes for territorial cooperation: there are 9 programmes for cross-border cooperation, 5 programmes for transnational cooperation within the metropolitan area and 3 programmes within the overseas departments. Other 4 programmes aim at inter-regional cooperation: INTERACT II, URBACT II, ESPON/ORATE and INTERREG IV C.

Here is a chart to serve this purpose:

N⁰	**EGCT[13]**	**Member States**	**Data of constitution**
1.	Eurometropool Lille-Kortrijk-Tournai	FR-BE	2008/01
2.	Amphictyony	GR- CY-IT-FR	2008/12
3.	West-Vlaanderen/Flandre-Dunkerque-Côte d´Opale	BE-FR	2009/04
4.	Euroregion Pyrénées-Méditerannée	ES-FR	2009/08
5.	Eurodistrict Strasbourg - Ortenau	FR-DE	2010/02
6.	GECT- INTERREG - Programme Grande Région (SaarLorLux)	FR-DE-BE-LUX	2010/04
7.	Cerdanya Cross-Border Hospital	ES-FR	2010/04
8.	Eurodistrict SaarMoselle	FR-DE	2010/05
9.	Espacio Portalet	FR-ES	2011/05

As far as the government level is concerned, the Government of France initiated a series of dialogues with the Governments of neighbor countries regarding the whole cluster of border issues. The Ministry of Foreign Affairs in France, Germany and Switzerland hold every year meetings with the administration of the border regions, lands and cantons. There has been established an inter-governmental committee regarding the cross-border cooperation with Luxembourg. There is a borderland committee with Italy. Several administrations in France and the neighbor countries have established committees or commissions which get together on a regular basis and discuss on topics

[10] The report can be checked on: http://territoires.gouv.fr/sites/default/files/datar/20100619-rapport-transfrontalier.pdf (Accessed January 10, 2012).

[11] Example: LCCG Euro-Institut, established in 2003 for six years, whose members are from Kehl and Ortenaukreis in Germany, the Alsace region, the Bas-Rhin department and the urban commune Strasbourg in France.

[12] 90% of the ECCG's located at the French borders are LCCG's with «governance» vocation, designed to create territorial cross-border projects (or integrated cross-border strategies). For instance: LCCG Lille/ Kortrijk/ Tournai (France – Belgium) is the first LCCG. For further details: *Synthèse du Séminaire GECT du 20 janvier 2011* (the material can be checked on: http://www.europe-en-france.gouv.fr/Centre-de-ressources/Etudes-rapports-et-documentation/Connaitre-les-programmes-europeens-Synthese-du-Seminaire-GECT-du-20-janvier-2011 (Accessed January 27, 2012).

[13] List of European Groupings of Territorial Cooperation: http://portal.cor.europa.eu/egtc/en-US/Projects/Documents/2011-10-10%20List%20of%20existing%20EGTC.pdf (Accessed January 20, 2012).

that fall under their competence, issues related to taxation and the transport infrastructure in particular.

4. The role of structural funds in the regional development of France

In France, the regional policy of the European Union is coordinated by the Interministerial Delegation for Territorial Planning and Regional Attractiveness - *Délégation interministérielle à l'aménagement du territoire et à l'attractivité régionale* (DTPRA). The structural funds are the main tool to put into practice the regional policies and aim to reduce the regional disparities in Europe. The European Union established in 1994 a cohesion fund designed for the countries with a national gross income lower than 90% of the communitarian average.

France ranged with the seven years calendar established by the European Union within the *plan contracts* State-Region, which later became *project contracts* State-Region (2000-2006, 2007-2013), in order to improve the relationships between regions and Europe. Between 2000 and 2006, nearly 140.000 projects received a contribution from one of the European funds (ERDF or ESF). This support given by the European Union led to 200.000 new jobs between 2000 and 2006.

In the Nord-Pas-de-Calais region, the European Union financed research programmes on technological innovation and launched the operation „Villes et territoires numériques".

The European supplies enabled the Lorraine region to establish a cross-border partnership with the Sarre Land (Germany) in order to develop the plastics industry, thus creating more than 2.000 new jobs within the two cross-border regions.

In Normandy, the operations of dragging the Mont Saint-Michel in order to preserve the marine patter of the area capitalized €21,5 million from European funds, that is 15% from the lump sum.

For 2007-2013, France benefits from an European investition of more than €14 billion:

- €10,3 billion under the regional competitiveness and employment in metropolitan regions objective (funds earmarked by ERDF and ESF);
- €3,2 billion under the convergence objective regarding DOM - Departements d'outre mer - (funds earmarked by ERDF and ESF);
- €860 million under the European territorial cooperation objective which finances the cross-border, trans-national and inter-regional cooperation projects (funds earmarked by ERDF)[14].

These investments are carried out within 36 operational programmes, of which 31 programmes are financed by ERDF and 5 programmes by ESF. The cohesion policy for 2007-2013 stipulates particular measures for those four overseas departments: Martinique, Guadeloupe, Réunion and Guyane.

Within the operational programme for regional cooperation INTERREG, for 2007-2013, there have been granted €1,15 billion for cross-border programmes that cover the French border territories. This financial support given by the European Union is a tremendous support that encourages the exchanges and the relationships between the collectivities and populations living near the border.

Financially speaking, between 2007 and 2013, 63% of the structural funds invested in convergence regions and 79% of those granted for competitivity regions will finance the priorities stipulated within the Lisbon Strategy, with a significant boost as far as the investments in research, development and innovation are concerned. France's priorities regarding the cohesion policy during the period 2007-2013 are as follows:

- to promote research, development and innovation, with a grant of €4,2 billion;
- to promote the entrepreneurial spirit and the small and medium enterprises, with a grant of €1,4 billion communitarian support
- accesibility and transport infrastructure, with a grant of €1,1 billion[15];

[14] http://www.europe-en-france.gouv.fr/Des-programmes-pour-qui-pour-quoi/A-chaque-programme-son-Fonds/La-cohesion-economique-et-sociale (Accessed January 30, 2012).

- to promote workers' formation and adaptation to the new economical environment[16];
- to develop informatics societies, for which France invested €636 million.

The cohesion policy for the period 2007-2013 encapsulates specific measures for the four overseas departments: Martinique, Guadeloupe, Réunion şi Guyane.

- to increase the assistance funds from the structural funds (ERDF and ESF) with 85%; (FEDER and FSE) cu 85%;
- to assign a special grant, worth of €481,6 million, in order to reduce disparities in the overseas departments[17] due to ultra-peripheral location.

The European Commission has adopted[18] a draft legislative package which will frame cohesion policy for 2014-2020. The new proposals are designed to reinforce the strategic dimension of the policy and to ensure that EU investment is targeted on Europe's long-term goals for growth and jobs („*Europe 2020"*).

The new elements in the package are:

- Concentration on *Europe 2020*;
- Better coordination of various EU actions;
- Rewarding performance;
- Sound macro-fiscal environment;
- *Reinforcing territorial cooperation;*
- Further simplification of the policy is a guiding principle[19].

Regions will continue to receive support within three (3) defined categories:

- *less developed regions*, whose GDP is below 75% of the Union average, will continue to be the top priority for the policy.
- *transition regions*, whose GDP is between 75% and 90% of the EU 27 average;
- *more developed regions*, whose GDP per capita is above 90% of the average.

Conclusions

In the report from March 2009, the Balladur Committee reached the conclusion that *region* is often perceived as a promising administrative level for the state authorities, thus making from this territorial level the center of the state services and actions reorganization.

Along with the reform of 16 December 2010 in France regarding the territorial collectivities[20], France brought the cooperation between its regions and the European Union to a new level.

Whether it is trans-national, cross-border or inter-regional, the cooperation with other territorial collectivities became the base line of the French regions policies and the European regional policy as a matter-of-course.

As a member state of the European Union, France managed to absorb substantial European funds, which led to a noticeable restyle of the French territorial collectivities and regions in particular.

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[15] The aim is to develop sustainable transport facilities in order to improve the quality of services designed for the users, the road safety and to support the fight against pollution and noise.

[16] With emphasis on developing programmes for professional training and encouraging continuous trening.

[17] For Martinique, the grant is €107 million, for Guadeloupe the grant is €120,3 million, for Réunion the grant is €206 million, and for Guyane the grant is €48,3 million.

[18] On 6 October 2011 in Brussels.

[19] http://www.ec.europa.eu (Accessed January 10, 2012).

[20] Loi n° 2010-1563 du 16 décembre 2010 de réforme des collectivités territoriales, JORF n°0292 du 17 décembre 2010 page 22146

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THE REGIME OF PUBLIC PROPERTY UNDER THE RULES OF THE NEW CIVIL CODE

MARTA CLAUDIA CLIZA *

Abstract

Law 213 from 1998 covered until now public property regime in Romania. Along with the entry into force of the new Civil Code,it have been affected and some rules on public property. These changes are just taken into account in this study which wants to illustrate what is currently public property regime in Romania and what are the rules that govern this system.

Keywords: *public property, the New Civil Code, domainiality, estate legal regime, perpetuity and transferability*

Introduction

In administrative law science, genesis of field theory is conferred by doctrine and jurisprudence[1].

Field category - especially the public estate - has a long history, receiving over time various scientific interpretations.

From ancient times it was felt the need that, certain goods, due to their nature or other reasons, be designed, by special regulations, to collective use.

The modern age has brought into question the concept of public service and for its provision, it was revealed again the need for the existence of a special categories of goods - public goods.

It was therefore outlined the idea according to which legally organized public communities - governmental or local - may possess, just as individuals, movable and immovable/, tangible and intangible assets - that they use in process of providing general interests. These are public goods that belong to a moral public legal entity.

1. Public property constitutional status

The legal status applicable to such goods includes specific form and content rules concerning their management, administration or alienation. Some of these goods belong to private property, others to public property[2].

"Estate" concept stems from the Latin "dominium", meaning possession, property.

The existence of estate, of property owned by the holders of public authority - state, local communities - is linked by the purpose of ensuring, by these authorities, of the general public interest of the community concerned.

Legal connection between owners of the field and assets that make up the field is constituted by means of property institution. Exercising ownership right by the state or local community on their own estate property is subject to specific rules that overlap or are added to the general property regime governed by common law.

Domainiality even require the regulation of a specific property form - public property - belonging only to the holders of power to manage public affairs, i.e. the State or local authorities.

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[1] M.Waline, *Manuél élémentaire de Droit administratif*, (Paris, Rousseau,1936), p.516.

[2] E. Bălan, *Property administrative law,* Master, (Editura C.H.Beck, Bucharest, 2007), p.3.

Legal rules governing this subject are exorbitant rules, derogating from the common law, belonging to public law[3].

For a better understanding of the investigated subject, a brief historical analysis is required.

In Roman law[4] there were goods forming the public sector- *res publicae*, making up all goods belonging to the Romanian people. These goods were divided into two categories:

a). goods which represented a source of income: *res publicae* in *pecunia populi,* in the composition of which also were included *ager publicus* - lands conquered from their enemies;

b). property intended for the public use, given for direct and immediate public use, called res *publicae in usu publico*, which includes *res comunis* - the sea shore, calculated up to where water reached in case of flow.

Under the feudal reign, the kings' estate was dismembered by the seniors, who had become owners of roads, streams and rivers, substituting in the rights of kings.

All feuds emanated from kings, which had created by various concessions and royal jurisdiction dispensation.

Later, the kings, by their fight against feudal lords, succeeded to reconstruct the royal sector (belonging to the Crown), resuming successively roads, rivers, mines, fairs, etc.

Wishing to preserve the property of the estate, kings have taken precautionary measures for that time, countermanding alienations previously made and forbidding them for the future. Thus, by Ordinance of February 1566, given by Moulins under the reign of Carol, the IXth - inalienability of estate property was raised to the rank of a true public law principle. Kings' property was thus subject to inalienability, on the grounds that were part of the Crown estate and not because they were beneficial for anyone[5].

The old French law did not know any distinction between the two estates, within the modern meaning. Thus, although the theory of the Crown estate accepted the heterogeneity of the estate due to the presence of incorporated rights (royal, seigniorial, tax), along with material elements (rivers, roads, places of battle, etc.), supported their joint legal condition, all considered to be the King's property, likely to bring income and equally subject to inalienability rule. This single legal regime was applicable even to goods that were acquired by the king as personal property, by the common law procedure.

An evolution in the field is marked by the French Revolution of 1789, when it was discussed the distinction between the national and the Crown estate. Since then, the nation not wishing be the same person as the king, it was asked to distinguish between the two estates.

Thus, by Law of 22nd November to 1st December 1780, although a distinction was not made between the public and private estate of the state, however, it is created the national estate, passing upon nation all properties producing income, along with those intended for the public use. So, *res publicae in pecunia populi* could be alienated by this law, according to certain forms, by virtue of a decree of the assembly sanctioned by the king and *res publicae in usu publico* were inalienable, because they were intended for the public use.

Napoleonic Civil Code mentioned the goods that were part of the public sector in the meaning of current doctrine.

Even the Romanian Civil Code, in art. 476, speaks of goods that are not private property, "as dependencies of the public sector", meaning the estate goods or state goods, without distinguishing

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[3] E. Bălan, *Property administrative law, Master*, (Editura C.H.Beck, Bucharest, 2007), p.4.

[4] St. Măndreanu, *Concessions on public sector. Their legal nature*, (Bucharest, Tipografia R.Cioflec, 943), p.9-14. Also, a historical analysis of the problems studied is found in: A. Iorgovan, *Administrative law treaty, vol.II, ed. a IV – a,* (Bucharest, Editura All Beck, 2005), p.128-145; D. A. Tofan, *Administrative law, vol. II*, (Editura All Beck, 2004), p.88-96.

[5] E. Bălan, *Property administrative law, Master*, (Editura C.H.Beck, Bucharest, 2007), p.4-5.

between public and private sector. Also, art.477 of the same Code considers as part of the public wealth also the vacant successions or unclaimed property, matter reviewed by Law 213/1998[6].

We note that the distinction between public and private sector work is especially the work of doctrine and jurisprudence, rather than objective law.

So, the sector category (administrative sector in the meaning of inter-war doctrine)[7] includes goods that the state or local communities as administrative entities[8] assign to the general interest tasks incumbent on them.

The sector represents a universality that allows its divisibility into two masses of goods: public and private sector. The distinction between the two sectors is not purely formal, but it involves a duality of legal regimes to which property is subject.

Beyond the differences in legal regime, public and private sectors have a common function, namely to not allow public persons fulfill their administrative missions[9].

Estate regime helps us give answer to questions such as those related to differences in legal regime applicable to identical goods, but belonging to different owners: one of them- the state and the other- a private entity.

Scientific language is and still remains the result of terminological conventions. For these reasons, we further present the conventional meaning of certain terms, given to them in light of this paper.

1. *sector*- ensemble of movable or immovable, tangible or intangible assets, belonging to the holders of power to manage public affairs: state, county, town, commune (synonym – estate goods);
2. *estate legal regime*- all form and content legal rules applicable to ownership right of the estate property;
3. *domainiality* - all features of ownership on sector assets (i.e. establishment of a specific ownership form applicable only to them - public property; printing of characters specific to private ownership exercised on estate assets).
4. *estate rights* - public ownership and private ownership on estate assets; real property rights established based on them, such as administration right, use right, concession right; rights of claim provided in connection with an estate good;
5. *estate code* – complex law including all regulations in the field of estate[10].

Public property constitutional regulation is suffering as a result of the generalism characteristic of these rules, but enjoys a precise and clear delineation of the great principles governing its legal status.

Constitution of Romania which came into force in December 1991 and revised in 2003 regulated the property, both public and private one, as a fundamental institution lying not only in public or private law, but we can say at the border between the two classical law branches.

The text of the Constitution contains two articles on the property, the one in Title II dedicated to fundamental freedoms, liberties and duties, entitled "Protection of private property" (Article 44), respectively that of Title IV "Public economy and finances" entitled "Property" (Article 136). Constitution drafting committee considered, by this two-headed arrangement, that the issue on property generally have an general establishment where property system be established in Romania, so the forms property take, as well as a special establishment of primary ownership, as a fundamental right.

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[6] According to art.25 of Law no. 213/1998 on public property and its legal status (Official Gazette no. 448 of 24 th November 1998), by phrase "public sector", contained in art.477 of the Civil Code, it is meant the private sector of the state or administrative units, as appropriate.

[7] E.D. Tarangul, *Romanian administrative law treaty*, (Tipografia Glasul Bucovinei, Cernăuți,1994), p.355 et sequens.

[8] E. Bălan, *Public law institutions*, (Editura All Beck, 2003), p.35-39.

[9] E. Bălan, *Property administrative law, Master*, (Editura C.H.Beck, Bucharest, 2007), p.7.

[10] E. Bălan, *Property administrative law*, Master, (Editura C.H.Beck, Bucharest, 2007), p.13.

The solution chosen by the constituent legislature that first it should be regulated the protection of private property and then the property regime in Romania was criticized by the doctrine. Although Title I requires to first highlight the supreme values of the Romanian state (constitutional state in which human dignity, rights and freedoms of citizens, free development of human personality, justice and pluralism are supreme and guaranteed values), we consider that it would be have been provided here an article entitled "Property" including two paragraphs:

1). “State protects property”

2).”Property is public or private”

Then it followed that, in a separate article, "Public property", it should provided its features, as provided and developed in art. 136.

Systematic analysis of constitutional rules in relation to property must start from art. 136:

1).”Property is public or private”.

2). Public property is guaranteed and protected by law and belongs to the state or administrative - territorial units.

3). Wealth of public interest of the subsoil, air space, waters with capitalized energy potential of national interest, beaches, territorial sea, natural resources of the economic area, and of the continental area, as well as other assets established by organic law shall be exclusively subject to public property.

4). Public property goods are inalienable. In accordance with the organic law, they can be managed by autonomous administrations or public institutions or may be leased or rented; they may also be given for gratuitous use to public utility institutions.

5). Private property is inviolable, under organic law. "

Thus, one can see that art. 136, after showing that, in the general meaning of the term, any property is guaranteed and protected by state, specifies the two forms of ownership (public and private), then it sets the regime of public property, because public property is the exception (the rule in the society is made by the private property) and finally to enshrine the principle of inviolability of private property.

From economy of Article 136, it results that that holders of public ownership are exclusively those listed in subsection 2 of art. 136 and no other person can have this property right in its patrimony. As regards administrative-territorial units, as owners of public ownership, it should emphasize that such notion defines commune, city, town, county as legal and administrative entities with jurisdiction, while the notion of state, as owner of public property, public authority defines those public authorities whose competence is general throughout the country.

Another general principle governing the legal status of public property is developed by art. 136 paragraph 3, which defines in an incipient manner the public sector, as a *sine qua non* element of public property.

In other words, the above-mentioned legal text states in a declarative specification (but not limitative) the main goods forming the object of public ownership right. Declarative, example character of this constitutional specification is given by the expression used by the legislature at the end of the text, namely that it may be subject to public ownership "other assets established by organic law". Organic laws have been thus designed to decide with great precise the composition of the public sector.

If we refer to the owners of public property, it results that the goods subject to public ownership is the public sector that can be owned by the state (the national interest), or property of administrative-territorial units (the local interest).

The term of “public sector” is not restricted only to goods subject to public property. In some respects, to public sector also belong the immovable assets (farmland, forests) or movable assets (paintings, sculptures), which are privately owned.

Integration of a good of public sector (object of the state or an administrative – territorial unit property) is made by ways specific to a regime of public law or, where appropriate, by means of the common law, but "ordered" by a public law regime. Our Constitution admits:

a). administration by public institutions;

b). autonomous administration;

c). rental or lease to any legal entity;

d). free commissioning to public utility institutions.

Although the Basic Law does not use "*expressis verbis*", the expression of public sector or public estate, it does not mean it is unknown to the spirit of the Basic Law. It can be inferred implicitly from some constitutional provisions, sustaining the thesis of a report of synonymy between the expressions of public sector and public property.

In terms of the legal status of such goods, art. 136 paragraph 4 of the Constitution establishes mandatory rules of exclusive applicability, namely the public property is inalienable.

Inalienability of public sector components, or in other words, the prohibition that they be subject to legal acts or deeds with property translative effect, generates other two principles, namely indefeasibility and intangibility of public assets.

Goods in the public sector are intangible, i.e. they can not be subject to enforcement proceedings by creditors, the liquidation of state debts and administrative-territorial units being based on specific rules derogating from the common law.

Goods from public sector are indefeasible, both prescriptively and possessively. This means, on the one hand, that the holder does not lose ownership on these assets as long as they would not exercise it (extinctive prescription) and, on the other hand, a third party can not obtain a right on these goods no matter how much time it would actually exercise, even if in good faith, their holder being entitled to claim them.

A very important rule, which refers to the acquisition of public property right, is that found in art. 136, Second sentence, according to which goods subject to public property "may be managed by autonomous administrations or public institutions, or may be leased or rented". It is the law text that lead the way for major legislation on exercising the public property right, by creating new rights: the right of management, leasing or renting.

Administrative area includes a universality split into two masses of private property, being able to speak of a public and a private sector of the state, respectively, of the local territorial community.

From the above mentioned constitutional text, it results that the holder of the public sector can only be the state or administrative-territorial units, the latter being understood as legally organized local communities.

It must be noted that the notions of public property in the public sector, as well as private property and private sector, are not synonyms. The property is a legal institution, and the sector represents the totality of goods that are subject to property, connected between them by the holder of real property right and their destination to serve the public interest.

As regards the scope of public property holders, we note that it is fully established in the Constitution [Article 136 paragraph (2) of the Romanian Constitution, republished], while the sphere of public property object is started by the Constitution [Article 136 paragraph (3)] and must complete by law, the same being the case as regards the legal regime of public assets for which the Constitution, Article 136 paragraph (4) establishes just a few basic guidelines.

The series of special rules derogating from the common law applicable to the public sector, are, according to Andre the Laubadere, "estate regime".[11]

[11] A. Laubadére ş.a, *Manuel de droit adminstratif*, (Paris, 1988), p.336.

Thus, the state and local public community, sometimes called administrative entities in the doctrine are, as individuals, goods ownership, which are distributed into two groups, forming public and private sectors.

Due to the belonging of such goods to some persons of public law, administrative people in interwar doctrinal beliefs, such as the State or its territorial dismemberments, they were generically called using the expression *administrative sector*.

The distinction between public and private sectors is not purely formal, but it involves a duality of legal regimes which the goods of both sectors are subject to.

Beyond the differences in legal regime, public and private sectors have a common function, namely to allow the public persons achieve their administrative tasks.

We may understand the administrative sector as a set of goods which the state or local communities use in achieving the general interests of state or local community.[12]

2. Public sector-public property relationship

To understand this issue, it should be noted that public property is currently regulated by the Constitution, as stated above and the New Civil Code, which entered into force on the 1st October 2011. So far, public ownership was regulated by Law no. 213/1998. Law no. 71/2011 for the implementation of Law no. 287/2009 on the Civil Code (read the New Civil Code) provides that as of 01/10/2011, it amends the Title (new title, Law on Public Property), art. 12 paragraph (5) and repeal art. 1, art. 2, art. 5, art. 7, art. 10 paragraph (1), art. 11, art. 12 paragraphs (1) - (4) and (6), art. 13, art. 17 of Law no. 213/1998, published in the Official Gazette no. 409/10.06.2011.

In the doctrine were expressed critical views towards organic legislature of 1998, which "comes and establishes the expression of public property in an identical meaning as that of public sector". Professor Dana Apostol Tofan, author of this opinion, emphasizes the conclusions drawn from the enumeration of art. 3, paragraph 1 of law, regarding the goods that make up the state public sector, according to which it can be found neither in law nor in the list contained in the Annex, belonging to the public sector of some goods that have been privately owned, but which are equally containing the public sector (e.g. the national cultural heritage held by different owners, individuals or legal entities) and it is not recognized as a principle, any possibility of existing some estate protection rules, towards other private assets, others than those belonging to the public sector.

A possible solution to this problem could be to establish certain rules that should represent special estate regimes, be it goods of national cultural heritage, be it lands, forests, etc.., belonging to individuals or legal persons, others than the state or administrative-territorial units. These special estate regimes lead to a restriction, in some respects, of exercising the private property rights.

As Professor A. Iorgovan asserts, in such situations, "the estate regime, in consideration of a private property good, appears as a public regime of limiting the exercise of private property right, enrolling in art. 53 of the Constitution".

Public sector, as a legal entity, known throughout the history of law in general and public law, in particular, a series of fluctuations in its content, fluctuations that have seriously left its mark upon the way of defining the criteria for delimitation from the private sector, as well as procedures for inclusion of some property in this area.

Both domestically and internationally, outlining the public sector idea has been done in parallel with the materialization of the concepts of ownership and right of ownership, as well as at the same time with the outlining of holders of such real right. When it was found that public property has its own autonomy, different from the private property and when the owners of both types of property were clearly individualized, it was required the delimitation of the two types of property - public and private.

[12] E. Bălan, Property administrative law, Master, (Editura C.H.Beck, Bucharest, 2007), p.41-42.

On this line of thinking, trying a more clear delimitation of the public sector from the private one, in the doctrine, the public sector was defined as being that consisting of "all movable and immovable property, which, being designed to an established public service, are directly used or consumed by it to enable achieving its purpose or to ensure its operation."

Referring to our literature of public law, we shall retain that in the concept of public sector were also included assets making up the national cultural heritage, which, however, could be subject to private ownership right. Thus, with a view to formulating a definition of the public sector, it should be considered both the public property assets, as well as private property assets which are of a particular importance for the history, culture, etc.

Thus, by public sector we understand "those public or private assets, which by their nature or express provision of law must be kept and transmitted to the future generations, representing values to be used in the public interest, directly or through a public service and subject to an administrative regime, as well as to a mixed regime, under which the power regime is determined, being in the property or, where appropriate, in the keeping of public legal entities".

3. Public ownership

In economic sense, property is the ratio of appropriation of material goods by the individual and it is a condition of any production and, therefore, a prerequisite for the existence of any society[13].

As an essential component of the production relations, the property is part of the society: it originated with the society and it will last as long it will exist.

In the legal sense, property right, part of the society superstructure, expresses in terms of law, the economic content of the appropriation social relation. Ownership has occurred at a certain stage of development of society, along with the occurrence of state and law, when the economic ownership relationship was covered by the legal form, when the ownership of material goods has become a right of ownership, appropriation, enshrined and provided by the force of state coercion.

According to Liviu Pop, "The property is, both in economic and law meaning, the supreme expression of people's access to the possession, use and disposal of goods "[14].

Ownership is a fundamental right of old tradition in the catalog of fundamental rights and freedoms guaranteed to citizens. The content comprises the right of individual to acquire a property, to use and freely dispose in connection with its property and ability to assign its right to someone else.[15] The Constitution may establish some limitations on the scope of property, limitations clearly and expressly defined and determined only in the interest of establishing a system for protecting and guaranteeing the public interest.

Achieving ownership entails the obligation of the state to guarantee and protect the property obtained by lawful means.

Given its legal content and the specific position of the owner, according to Liviu Pop, ownership is "that real right granting its holder the attributes of possession, use and disposition of a property, attributes that only he can exercise in their completeness, in its own power and interests, in compliance with the legal rules in force "[16]. We mention that these doctrinal considerations keep their actuality even in the light of the new provisions of the Civil Code and in substance there are no significant differences between the previous and current concepts.

Ownership has a series of own characters, which distinguish it from other real rights. Thus, ownership is absolute and inviolable, full and exclusive, perpetual and transferable.[17]

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[13] M. Costin and others, *Civil law dictionary*, (Editura Ştiinţifică şi Enciclopedică, Bucharest, 1980), p.410.
[14] L.Pop, L.Harosa, *Civil law. Non-ancillary rights in rem*, (Editura Universul Juridic, 2006), p.78
[15] L.Pop, L.Harosa, *Civil law. Non-ancillary rights in rem*, (Editura Universul Juridic, 2006), p.83-84.
[16] E. Bălan*, Property administrative law*, Master, (Editura C.H.Beck, Bucharest, 2007), p.63-64.
[17] L.Pop, L.Harosa, *Civil law. Non-ancillary rights in rem*, (Editura Universul Juridic, 2006), p.86 et sequens.

a). *Absolute and inviolable character*. Ownership is *absolute* in a broad meaning, as it is recognized to its holder or in its relations with all others who are obliged to do nothing for breaching it. In other words, the ownership is enforceable against everyone, *erga omnes*.

Inviolability of ownership supports and strengthens its absolute character, in other words, ownership can not be violated by anyone.

According to art. 136 paragraph (5) of the Constitution, "Private property is inviolable, in accordance with the organic law".

Inviolability of private property is not absolute, since the exercising of such right is affected by the tasks that, under the law or custom, are incumbent upon the owner of the ownership for environmental protection, provision of good neighborhood, compliance with the other tasks.

Exceptions to the inviolability are also those provided in art. 44 paragraph (3) of the Constitution on expropriation for public utility and art. 44 paragraph (5) which allow that, in general interest, public authority may use the subsoil of any real estate with the obligation to pay any damages caused.

b). *Full and exclusive character*. Full character shows that ownership confers on its proprietor all the three attributes: possession, use and disposal.

Exclusive character shows that attributes of this right are independent of any power of another person on such good, apart from cases where the property is dismembered. So, the full and exclusive character of ownership of the property is lacking when dismemberments are established on such ownership and some attributes of this right are exercised by another person (usufruct, use, habitation, servitude, superficies).

Exclusive character may also be understood by giving the holder a true *monopoly* of the possession, use and disposition of the property subject of ownership.

Perpetuity and transferability. By perpetual nature of ownership it is meant that it is unlimited in time and lasts as long as the good subject to it exists. Moreover, it is not lost through non-usage or non-performance.

Usually, the action claiming ownership is imprescriptible.

Ownership can be transmitted among the living ones, under the law. Furthermore, transmission of ownership is inevitable and binding mortis causa.

Transmissibility is the natural consequence of ownership perpetuity. Given the finite nature of human life, by transferring ownership right is made its transmission from a person property to another person's property, ensuring its perpetuity.

We will see below that public ownership, because of its inalienable right, is not transferable.

Public ownership as a form of ownership, shows, with certain nuances, general features specific to this real right[18].

Law no. 213/1998 on public property and its legal status has been prepared pursuant to art. 135 of the Romanian Constitution (currently art. 136, after review), according to which property is public or private.

It is important to reveal that according to art. 73 of the Constitution, this law, being a law governing the general legal status of public ownership, is an organic law.

This results unambiguously from the provisions of art. 5 paragraph 1) of Law 213/1998, which foresees that "the legal status of public ownership is governed by this law, unless provided otherwise by special laws". We mention that this text, currently repealed, cleared up the legal nature of this law.

Article 1 of the law defined the scope of public ownership, noting that "Public ownership belongs to the State and administrative units, on the property that, under the law or by their nature are of public interest or use." Thus, it came to defining the public property as being the ownership of the

[18] E. Bălan, *Property administrative law,* Master, (Editura C.H.Beck, Bucharest, 2007), p.66-67

state or administrative-territorial units, communes, towns and counties upon goods that, under the law or by their nature or intended use, are of public interest or use".

We note here that the first part of art. 1 of law coincides with art. 136 of the Constitution, except that, while the latter refers to public property, the legislature uses the formula of public ownership. From this we may conclude that the two concepts should have finally expressed the same thing, which was otherwise expressed trenchantly in the doctrine and jurisprudence, such idea being promoted particularly by the civilist specialists.

By law are enshrined the notions of public and private sectors of the state and administrative-territorial units, concepts that do not appear for the first time in a law that contains regulations in connection with public private ownership, but in this law it acquires a unitary regulation.

Evidently, the special law establishes general criteria underlying the qualification of a good as belonging or not to the public sector. Therefore, it is established that a good may be the subject of public ownership on *sine qua non* condition, that it should be (by law or by its nature) of public use or public interest.

Law makes the delimitation between "the state public sector which is composed of assets referred to in art. 136 paragraph 3 of the Constitution, those provided in section I of the Annex, as well as other national public interest goods, declared as such by law "," public sector of the counties comprising goods referred to in section I of the Annex and other county public interest goods, declared by the county council decisions, if not declared by law as goods of national public interest or use" and" public sector of communes, cities and municipalities which is composed of assets referred to in section III of the Annex, as well as other goods of local public interest or use, declared as such by the decision of the local council, if not declared by law as goods of national or county public interest or use".

Goods that are subject to the public sector are mentioned in the Annex of the law, which contains one list for each of the public sectors: state public sector, county public sector and public sector of the communes, cities and municipalities. This listing has a great practical importance, even if it has a declarative character, and not a limitative one, a fact stipulated *expressis verbis* in the preamble of Annex.

Article 858 defines public ownership as follows: "Public property is ownership that belongs to the state law or an administrative - territorial unit over the goods which, by their nature or by the declaration of law, are of public interest or use, provided that they acquired by one of the ways stipulated by law." One can easily see that the civil legislature did not alienate from the provisions of Law no. 213/1998.

The novelty of legal statement is found in art. 860, unambiguously talking about

"national, county and local public sectors."

As regards public ownership characteristics, according to art.861 we find the same characters: inalienability, indefeasibility and intangibility.

Article 862 stipulates what are the limits of exercising public ownership. Thus, public ownership is liable to any limits stipulated by the law or the New Civil Code for the private ownership, provided they are compatible with public use or interest to which assigned goods are intended. Incompatibility is established by agreement between the public property owner and the person concerned or, in case of divergence, in the court. In these cases, the person concerned is entitled to a fair and prompt compensation from the owner of public property. We may appreciate that these provisions are a novelty towards the primary regulation of Law no.213/1998.

4. Acquisition of public ownership

Article 7 of Law no. 213/1998, currently repealed, provides that public ownership is acquired in the following ways:

a). naturally;

b). by public procurement made under the law;

c). by expropriation for the public utility cause;

d). by acts of donation or legacy, accepted by the Government;

e). by the transfer of goods from the state private sector of its administrative-territorial units in their public sector, for public utility cause (the operation is called assignment):

f). through other ways provided by law;

Towards these provisions of Law no. 218/1998, as previously stated, they were repealed by art. 863 of the New Civil Code, the text listing the cases of acquisition of public ownership, as follows:

a). by public procurement, made under the law;

b). by expropriation for the public utility cause, under the law;

c). by acts of donation or legacy, accepted under the law, if the property, by its nature or by the will of its dispose, becomes of public interest or use;

d). by onerous convention, if the property, by its nature or by the will of its acquirer, becomes of public interest or use;

e). by transfer of a property from the state private sector in its public sector, or from the private sector of an administrative - territorial unit in its public sector, under the law;

f). by other means established by law.

One can easily see that the new provisions practically resume those of Law no. 218/1998, with slight amendments. It disappears the natural course as a means of acquisition, which is natural, as it was impossible to identify concrete ways considered by the legislature to be included in this text. Also under the new provisions, legacies and donations must be accepted under the law and not the government, as provided by law no. 213/1998.

A new provision is also introduced, from which it results the possibility of entry into public ownership of a property by an onerous convention, issue resulting by default from the provisions of Law no. 213/1998.

5. Termination / settlement of public ownership

Public ownership ceases if the property perished or passed into the private sector.

Law no. 18/1991 regarding the agricultural real estate, republished as amended, provides that lands belonging to the public sector, no matter who the owner of their property right might be, the state or administrative - territorial units, may be placed in the civil circulation only if, according to law , they are decommissioned from the public sector.

Passing of goods from the public into the private sector is made, where appropriate, by decision of the Government, of the county council, as well as of the General Council of Bucharest, or local council, unless otherwise provided by Constitution or law.

The decision of transferring of property in the private sector may be appealed to the competent administrative court in whose territorial jurisdiction is the property.

The New Civil Code provides in art. 864 that public ownership is extinguished if the property has perished or has been transferred to the private sector, if the use or the public interest has ceased, under the conditions provided by law.

In the New Civil Code[19] is regulated the settlement of public ownership, towards the previous provisions of Law no. 213/1998, currently repealed, which stipulated the methods for termination of public ownership.

[19] Elena Emilia Ştefan, *Administrative law manual, Part I, Seminar book. Theme 12. Public ownership*, (Editura Universul Juridic, Bucharest, 2012).

Conclusions

The new Romanian Civil Code defines private property in relation to the contents of this law, as follows: Private property is the owner right to possess, use and dispose of a good exclusively, absolutely and perpetually, within the limits set by law.

Currently, we find provisions on public ownership in the New Civil Code, Articles 858-875 (Title VI - Public property), provisions leading to the abolition of certain texts of law no. 213/1998.

In conclusion, this study aimed at highlighting what is currently public property regime in Romania and what are the rules that govern this system.

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SPECIFIC FEATURES OF THE LIABILITY FOR CONTRAVENTION IN ENVIRONMENTAL LAW

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Abstract
Along with civil liability and criminal liability, contravention liability comes to complete the classical forms of liability applicable in the environmental protection field. This form of liability, unlike the civil liability, which has a predominantly repairer character, has a sanction character, intervening in the case in which a subject of law does not comply with a conduct established by a rule of public law. Although contravention liability is not a specific liability of environmental law, it has an important economic role and constitutes a serious means of prevention, contraventions sanctions being the most often applied in cases of non-compliance of environmental rules.

Keywords: *contravention, liability, environment, rules, prevention*

Introduction

Next to civil and criminal liability, the liability for contravention completes the forms of classic legal liability applicable in environmental law. This form of liability, as opposed to civil liability which has mainly reparatory character, is predominantly penalizing, intervening when a subject of law does not comply with a conduct established by a rule of public law[1].

In the specialized literature, over time, there was and still is a controversy regarding the liability for contravention considered as a distinct form of legal liability, as an administrative liability or as a form of such liability. Thus, some authors[2] treat the liability for contravention as a form of administrative liability, next to the actual administrative liability and patrimonial administrative liability, naming it administrative liability for contravention[3].

Other authors of the specialized literature[4] state that administrative liability is not equal with liability for contravention, the latter being only a form of administrative liability and the contravention being a manifestation of administrative illicitness, its most serious form, in fact; the legal regime of this type of liability is predominantly an administrative law regime. The same authors are stating that this form of liability is an atypical and imperfect form of administrative liability, and the use, sometimes, of the administrative attribute is inappropriate, penalties for contravention applying not only by state administration bodies, but also by the court, so the term of administrative penalty does not keep anymore its proper meaning.

There is, however a unanimous opinion concerning the ground of the liability for contravention, namely the illegal fact that starts it, which actually represents the offense, and also it is stated that this form of liability is individual and personal; the active subject of the contravention is

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[1] Serban-Alexandru, Stanescu, *Marine environmental protection against oil pollution Prevention, damage control, liability*, (Bucharest, Hamangiu Publishing House, 2010), p.287.

[2] Antonie Iorgovan, *Treaty of administrative law*, fourth edition, volume II, (Bucharest, All Beck Publishing House, 2005), p.358; Verginia Vedinaş, *Administrative Law*, fourth Edition, (Bucharest, Universul Juridic Publishing House, 2009), 262; Dana Apostol Tofan, *Administrative Law*, Vol II, (Bucharest, All Beck Publishing House, 2004), p.175.

[3] Mircea Ursuţa, *Contravention proceedings*, second edition, (Bucharest, Universul Juridic Publishing House, 2009), p.51.

[4] Alexandru Ţiclea, Constantin Rujoiu, Ion Nita Stan, Ioan Doru Tărăcilă, Marin Corbu, *Liability for contravention*, (Bucharest, Lex Atlas Publishing House, 1995), p.5.

himself liable as this kind of liability is not transferable[5].

In this issue, we acquiesce to the opinion of authors of the specialized literature[6] that state that the liability for contravention is a distinct form of legal liability, Government Emergency Ordinance no. 2 /2001[7] on the legal regime of contraventions representing the source of law in the matter of the liability in question; the contravention benefits of its own sanctioning system, and not least, the liability for contravention is involved under a specific procedure, only if a person commits an act which has all features of the contravention.

Regarding the liability for contravention in environmental law, we consider, together with other authors[8], that it represents that form of legal liability which consists of the application of sanctions to persons guilty of violating environmental laws which provide and sanction offenses committed in connection with the protection and development of the environment.

Although the liability for contravention is not a specific liability of environmental law, it has an important economic role and it represents a serious means of prevention[9]; penalties for contraventions are most often applied in cases of non-compliance with rules of environmental protection.

The definition of contravention and the usefulness of it being defined by the legislature

Article 1 paragraph (2) of Emergency Ordinance no. 2 / 2001 generically defines the contravention as *"the act committed with guilt, established and sanctioned by law, ordinance, Government decision or, where appropriate, by decision of the local council of the village, town, municipality or district of Bucharest, the county council or the General Council of Bucharest"*.

As for the utility of defining the contravention by the legislature, the doctrine[10] asserts that it represents a tool that practitioners use in applying the law for offenses, reflects some of the principles of the law for offenses, and also helps to delineate the scope of the contravention illicitness from the field of other species of illicit.

Thus, although there is no legal act defining the ecological contravention, this has been defined in doctrine[11] as *the act committed with guilt, representing a social risk lower than the crime, and which prejudices environmental factors.*

Features of the contravention

From the definition given in art. 1 of Government Emergency Ordinance no. 2 / 2001, two specific features of the contravention result, namely[12]:

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[5] Alexandru Ticlea, *Regulation for contraventions*, sixth edition, (Bucharest, Universul Juridic Publishing House, 2008), p.7.

[6] Mircea Ursuța, *Contravention proceedings*, second edition, (Bucharest, Universul Juridic Publishing House, 2009), p.54.

[7] Published in Official Gazette no. 410 of July 25, 2001, approved by Law no. 180/2002 as subsequently amended and supplemented.

[8] Ernest Lupan, *Law treaty for environmental protection*, (Bucharest, C.H. Beck Publishing House, 2009), p.539.

[9] Daniela Marinescu, *Treaty of environmental law*, fourth edition, (Bucharest, Universul Juridic Publishing House, 2010), p.654.

[10] Mihai Adrian Hotca, *The legal regime of contraventions. Comments and explanations*, fourth edition, (Bucharest, C.H. Beck Publishing House, 2009), p.14.

[11] Valentin-Stelian Badescu, *Environmental law. Environmental management systems*, (Bucharest, C.H. Beck Publishing House, 2011), p.246.

[12] Other features of the contravention have been highlighted in the specialized literature, namely, *typicity* (the correspondence that must exist between the actual facts committed by the offender and the abstract model described by rules of criminalization of the contravention), *anti-juridicity* (characteristic of an act of being contrary to the existing legal order) *guilt* (requires the existence of a typical fact, the need for the person who committed the act incriminated to

- the act committed with guilt;
- the act provided and punishable under laws and other regulations expressly determined by law.

Below, we shall briefly present features of the contravention.

The act committed with guilt

As known, any unlawful act, in our case the contravention, is important only if committed with guilt.

Indeed, the objective liability is predominant in the environmental field; however, we consider that in the case of liability for contravention in this area, given the nature of most offenses provided in regulations, only a subjective liability based on fault can be drawn.

The legislation for contravention does not define guilt[13]; this is why its forms and ways were taken from criminal law, but they are not important (and therefore we shall not analyze them) as long as the legislation in force provides that the liability for contravention is involved, whether the act is committed intentionally[14] or by negligence[15].

Regarding the relapse into contravention, as an institution that has implications in terms of guilt, it is important to mention that there is no provision on the matter in Government Emergency Ordinance no. 2 / 2001, but according to expert authors[16], the relapse has specialized nature, consisting of the repetition of unlawful conduct in a particular field, with no general relapse into contravention; also to be noted is that the relapse into contravention remains in the contraventions area, without becoming a crime.

In the field of environmental protection, two laws are regulating the relapse into contravention, namely:

Government Decision no. 984/2005[17] on establishing and punishing contraventions to veterinary and food safety rules provides in art. 8, three situations when the relapse into contravention applies:

(1) Contraventions referred to in art. 4[18] and art. 6 letter b) section 1[19] shall be sanctioned,

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have realized the implications of his/her act and to have determined its effects) and *legality* (the feature of the offense to be prescribed by law). Ovidiu Podaru, Radu Chirita, *Government Ordinance no. 2 / 2001 on the legal regime of contraventions. Commented and annotated*, (Cluj-Napoca, Sfera Juridică Publishing House, 2006), 7-9.

[13] The specialized literature in the field has defined guilt in the matter of contravention as *"the state of consciousness of the perpetrator while breaching a statutory provision, the violation of which is considered contravention"* (Alexandru Ticlea, *Regulation for contraventions*, sixth edition, (Bucharest, Universul Juridic Publishing House, 2008), 9) or another definition, *"the subjective state of the author of the illicit fact while infringing upon the rule of law, expressing its negative mental attitude towards social interests and values protected by legal rules"* (Mircea Preda, *Administrative law. General Part*, third edition, (Bucharest, Lumina Lex Publishing House, 2004), 290).

[14] The fact is considered committed intentionally when the perpetrator anticipated the result of his action, pursuing its occurrence by committing the act in question (direct intention) and when the perpetrator foresaw the result of his action, and, although he did not pursue it, he accepted its occurrence (indirect intention). (Dana Apostol Tofan, *Administrative law*, *volume II*, second edition, (Bucharest, C.H. Beck Publishing House, 2009), 206)

[15] The fact is committed negligently when the perpetrator foresaw the result of his action, but did not accept it, believing without reason that it will not happen (easiness or fault with anticipation), as well as when the perpetrator did not anticipate the result of his action, although he had to and could anticipate it (negligence or fault without anticipation) (*Ibid.*)

[16] Corneliu-Liviu Popescu,"Relapse into contravention", Law 3 (1997), p.62.

[17] Published in Official Gazette no. 814 of September 8, 2005.

[18] Article 4 of Government Decision no. 984/2005 provides several offenses, among which, for example: handling food and feed for animals with breach of veterinary and food safety rules; conducting hunting activities in areas with veterinary restrictions or without announcing the official veterinarian, as well as the consumption of venison without veterinary expertise and without veterinary documents; the storage, outside places specially prepared, of

next to a fine, also by *the suspension of the activity of production*, processing, storage, transport and recovery of products, sub-products of animal and non- animal origin, imported or indigenous fodder, for a period of one year, provided that they are committed for *the second time within 6 months from the application of the fine*.

(2) The contravention referred to in art. 6 letter a) section 9[20], committed by possessors of the permit for distribution of veterinary medicinal products within the activity of distribution to third parties, shall be sanctioned next to a fine, also by *the suspension of the wholesale trade* of veterinary pharmaceuticals, for a period of one year, given that it is *committed the second time within 6 months from the application of the fine.*

(3) Contraventions referred to in art. 31, if they are committed *the second time within 6 months from the application of the fine*, shall be sanctioned, next to a fine, also by:

a) cancellation of the deliverer's authorization, for those provided to letter b) section 4[21] and letter d) section 3[22];

b) cancellation of the control point authorization for those provided to letter c) section 6[23] and letter d) section 4[24];

c) cancellation of the certificate for professional competence for those provided to letter b) sections 5[25] and 6[26], letter c) sections 1, 5 and 6 and letter d) sections 1[27] and 2[28].

The second piece of legislation is Government Ordinance no. 37/2002[29] for the protection of animals used for scientific or experimental purposes, which provides in art. 26 paragraph 3, the relapse into contravention which will be applied to the repeating of contraventions provided in paragraph 1[30] of the same article:

(4) In the case of repeating the contravention *within one year from finding the previous contravention*, *the penalty of canceling the authorization for pursuing the activity* of growth, supply and use of animals used for scientific or experimental purposes is also applied, next to a fine.

Two observations can be made to the above mentioned. First, in regard to penalties for the

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residues and animal wastes, as well the failure of companies to evacuate them to companies in charged with their processing; not complying with the technological flow and not limiting dirty areas from clean areas;

[19] Article 6 letter b) section 1: refusal to allow the access of inspectors of the authorities for animal health and food safety, in units audited for food safety and animal health control or obstructing veterinary and food safety authorities competent in exercising the powers provided by law;

[20]Article 6 letter a) section 9: breaking sanitarian rules on the production, registration, circulation and marketing of veterinary medicines, fodder additives and other veterinary products.

[21] Article 31 letter b) section 4: rearranging or changing the means of transport in a way that affects the welfare of animals.

[22] Article 31 letter d) section 3: the absence of a navigation system, for means of transport used for long journeys, as required by law.

[23] Article 31 letter c) section 6: not respecting the balance of space for each animal species.

[24] Article 31 letter d) section 4: the functioning of control points without holding the veterinary documentation provided by law.

[25] Article 31 letter b) section 5: the non-compliance with transport practices for loading, unloading, handling and separating animals.

[26] Article 31 letter b) section 6: not respecting watering and feeding intervals, the journey duration and periods of rest.

[27] Article 31 letter d) section 1: the infringement of provisions contained in the contingency plan.

[28] Article 31 letter d) section 2: the transportation of animals injured, sick or that manifest physiological weaknesses, without the official veterinarian's approval.

[29] Published in Official Gazette no. 95 of February 2nd, 2002.

[30] G.O. no. 37/2002 art. 26 paragraph 1: Under this ordinance, the following facts represent contraventions:
a) causing pain, suffering, anxiety and disability committed by the user, outside obligations assumed by him when approving the experiments;

b) the violation of instructions for housing and care of experimental animals, approved by joint order of the Minister of Agriculture, Food and Forests and of the Minister of Waters and Environmental Protection;
c) the delivery of unregistered and unmarked animals without veterinary certificate.

relapse into contravention in the cases above presented, one can notice that they are diverse and can consist, next to a fine, of the penalty of suspending or canceling some administrative authorizations. The second observation concerns the existence of a period when the contravention must be committed in order for it to be considered relapse; the period for the cases mentioned above is of 6 months, respectively one year[31].

Concerning the environmental protection, we agree with the opinion of professional authors[32] who say that the great shortcoming of the liability for contravention is to allow the relapse into contravention (besides the two acts mentioned above, which we consider insufficient), allowing, by the repetition of illegal acts, to perpetuate a state with negative environmental impact with the costs of a repeated payment of fines, situation which is much more convenient to the offender.

In this regard, we propose that, in the future, the Law for environmental protection and special laws concerning environmental protection should be modified for the purpose of introducing some situations regulating the relapse, instituting severe penalties, differentiated depending of the severity of the repeated offense, and also taking into account if the relapse into contravention was committed by a natural or legal person, in order to discourage the repetition of such illegal acts.

The act provided and punished by law and other regulations expressly determined by law

A person can be held liable for a certain act only if this act is provided and sanctioned as such, expressly, in a regulation issued by a competent body of the state, which is called legality for establishing and sanctioning contraventions[33], established in art. 1 and art. 3 of G.O. no. 2/2001.

Thus, we notice[34] that the legality imposes the compliance with certain requirements:

- the regulation for offense must be published, ensuring thus the true accessibility of every individual to its text;
- the regulation for offense can not retroactivate;
- the regulation for offense must be stated with sufficient clarity so that any person should be able to understand which actions or inactions are prohibited.

In this regard, under art. 1 and art. 2 of the Ordinance, *the offense is established and sanctioned as such under law, ordinance, Government decision or, where appropriate, by decision of the local council of the village, town, municipality or district of Bucharest, the County Council or the General Council of Bucharest, and under laws, ordinances or decrees of the Government, offenses in all fields may be established and punished.*

In the contravention field, we find in art. 12 of the Ordinance, the application of the most favorable regulation in criminal law, which states that *"if by a legislative act, the fact is no longer considered contravention, implicitly it is no longer sanctioned, even if it was committed before the effective date of the entering into force of the new regulation. If the penalty provided in the new bill is easier, it will be applied. If the new regulation provides a more serious punishment, the contravention committed before will be punished under regulations in force at the time of its commission".*

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[31] In other areas, sanctions may consist of increasing the fine, and as for the period within which one new offense must be committed in order to be considered relapse, it may lack; any new offense committed, regardless of the period of time from the penalty application for the first offense, leads to the relapse situation. (Corneliu-Liviu Popescu, "Relapse into contravention", Law 3(1997): 62)

[32] Valentin-Stelian Badescu, *Environmental law. Environmental management systems*, (Bucharest, C.H. Beck Publishing House, 2011), p.251.

[33] Alexandru Ticlea, *Regulation for contraventions*, sixth edition, (Bucharest, Universul Juridic Publishing House, 2008), p.12.

[34] Ovidiu Podaru, Radu Chirita, *Government Ordinance no. 2 / 2001 on the legal regime of contraventions. Commented and annotated*, (Cluj-Napoca, Sfera Juridică Publishing House, 2006), p.10-11.

Constitutive elements of the liability for contravention

Since the contravention is nothing but a crime that in a time of social and cultural development is felt to be less serious, constitutive elements of the contravention are the same as those of the crime, namely, the subject, the object, the objective and subjective sides[35].

Below we shall briefly present the constitutive elements of the liability for contravention, taking into account its specific features of environmental law.

Subjects of the liability for contravention

Except for minors under 14 years and for permanently irresponsible persons, all members of society are likely to commit contraventions. For the child who turned 14 years, the penalizing regime is less severe, the minimum and maximum of the fine established under law for the fact committed is reduced by half, and the minor who has not reached the age of 16 can not be penalized with performing an activity for the community[36].

Active subject of the contravention may be a natural person, as well as a legal person.

In environmental law, *the passive subject* of the liability for contravention, the victim of the contravention, is the whole community, because of the general interest for environmental protection and preservation of nature[37].

The active subject of ecological offenses is represented by the natural and legal persons carrying out activities contrary to the rules or provisions on environmental protection or not meeting the legal obligations arising from legal relations of environmental law[38]. Certain additional sanctions, as we shall see in subchapter 5.4, can be applied only to legal persons, such as closing the unit, suspending the activity etc.

Another feature of subjects of the liability for environmental contraventions is that they can be, next to natural and legal persons, also some circumstantial subjects, such as public local authorities (By the complaint registered by this court under no. 9023/236/29.09.2008, the complainant C.G., requested through the Mayor, in contradiction with the respondent G.N.M.G., the cancellation of the contravention report, series GNM, no. 008370 drawn up by the respondent, on September 11, 2008. As grounds for the complaint, the complainant showed, essentially, that the penalty was unfairly applied, as C.G. had achieved measures established, and the fine of 100,000 lei was excessive and evidence of bad faith. The defense motivation showed, in essence, that the petitioner was punished because she had failed to comply with the legal obligation to establish the sanitation service. The entire report was showing that the locality Gostinari did not realize measure no.1 established by finding note no.458/01.02.2008, concerning the establishing or granting of the sanitation service. According to this finding note, a deadline was given until February 29, 2008, for establishing the sanity service in the village. The complainant annexed to the file, two decisions of the local council, no. 23/04.07.2008 and no. 27/13.08.2008. By decision no. 27/2008 of the local council, the association of C.G. with other administrative units from the county, within the Intercommunity Development Association, "Efficient management for a clean county" was approved, and by decision no. 23/2008 of the local council, the participation of C.L.G. in setting up the "Eco Walachia" Intercommunity Development Association was also approved. The court commended initiatives implemented by those decisions, but mentioned that the combination of the two associations could not replace the sanity service, therefore it can be concluded that the obligation

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[35] Mircea Ursuţa, *Contravention proceedings*, second edition, (Bucharest, Universul Juridic Publishing House, 2009), p.86.

[36] Article 11 of G.O. no. 2 / 2001.

[37] Mircea Dutu, *Treaty of environmental law*, third edition, (Bucharest, C.H. Beck Publishing House, 2007), 543.

[38] Daniela Marinescu, *Treaty of environmental law*, fourth edition, (Bucharest, Universul Juridic Publishing House, 2010), p.654.

established by commissioners of the Environmental Guard was not accomplished, being met the constitutive elements of the offense for which the sanction was applied. Compared to those shown, the court accepted, in part, the complaint and disposed the reduction of the fine imposed by the report, from 100,000 lei to 50,000 lei[39]), owners and possessors of land with or without title etc[40].

The object of the liability for contravention

The object of the liability for contravention is represented by social values, property or legitimate interests protected by legal rules that are affected or endangered by the illegal act, in our case the contravention.

The exact knowledge of the contravention object is relevant from the perspective of legal classification of the fact constituting a contravention, especially in the case of similar contravention rules[41].

Generally, contraventions are divided into regulations depending on their subject, this fact resulting from the very title of the regulation[42], for example: G.D. no. 127/1994[43] on the establishment and sanctioning of infringements of rules for environmental protection, G.D. no. 984/2005[44] on the establishment and punishment of contraventions to veterinary and food safety rules, Law no. 171/2010[45] on the establishment and sanctioning of forest contraventions etc.

The objective side of the liability for contravention

It is well known that the objective side is the action or inaction described in the rule for establishing and sanctioning the contravention, in the result that the unlawful conduct has, as well as in the causal relationship that must exist between the two elements above[46].

Contraventions can be committed either by action or by omission, as the crimes. *Action* means to do what the rule for contravention forbids (*burning stubble, woody and herbaceous vegetation, irrespective of land and ownership, including adjacent land of passageways, except for cases permitted by environment authorities[47], unlawfully flooding land from the national forest fund, by building dams, rapids or others alike, on the beds of streams or valleys[48]*), and *inaction* means the abstentation to perform an action that the law pretends to have performed, violating in this way, a onerative rule (*failure, by the public services and responsible economic agents, of taking street cleaning measures, maintenance and management of green spaces, markets and public parks[49], the non-delimitation, by owners, of forest land which they possess, according to property documents and / or the inappropriate maintenance of property boundary signs[50]*)[51].

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[39] Civil Sentence no. 396/2009 at Giurgiu Court in Alexandru Paul Coman, Nicoleta Moroşanu, *Contravention. The legal regime of contraventions G.O. no. 2 /2001. Legal practice 2008 -2009*, (Moroşan Publishing House, 2010), p.419-421.

[40] Mircea Dutu, *Treaty of environmental law*, third edition, (Bucharest, C.H. Beck Publishing House, 2007), 544.

[41] Mihai Adrian Hotca, *The legal regime of contraventions. Comments and explanations*, fourth edition, (Bucharest, C.H. Beck Publishing House, 2009), p.19.

[42]Alexandru Ticlea, *Regulation for contraventions*, sixth edition, (Bucharest, Universul Juridic Publishing House, 2008), 14.

[43] Published in Official Gazette no. 94 of April 12, 1994.

[44] Published in Official Gazette no. 814 of September 8, 2005.

[45] Published in Official Gazette no. 513 of July 23, 2010.

[46] Ovidiu Podaru, Radu Chirita, *Government Ordinance no. 2 / 2001 on the legal regime of contraventions. Commented and annotated*, (Cluj-Napoca, Sfera Juridică Publishing House, 2006), p.24.

[47] Article 1, paragraph 1), letter j) of G.D. no. 127/1994 on the establishment and sanctioning of contraventions to the rules for environmental protection, published in Official Gazette no. 94 of April 12, 1994.

[48] Article 9, letter a) of Law no. 171/2010 on the establishment and sanctioning of forest contraventions, published in Official Gazette no. 513 of July 23, 2010.

[49] Article 1, paragraph 1), letter c) of G. D. no. 127/1994.

[50] Article 3, letter b) of Law no. 171/2010.

The subjective side of the liability for contravention

The subjective side concerns the offender's mental attitude towards the contravention committed and its consequences that are expressed by guilt. Therefore, we agree with the professional author's appreciation[52] indicating that, in light of current regulations, there can be no contravention committed without guilt, and as shown in the first pages of this chapter, there can be no objective liability.

Penalties for the contravention

The penalty for contraventions was defined in the doctrine[53], as a measure of restraint and rehabilitation, being applied to the offender for straightening him and for preventing the committing of other contraventions.

The penalties applicable to violations of environmental protection activities are generally, *main and complementary*[54].

The *main* penalties for contraventions are: warning, fine for offenses and providing a community service activity.

It should be noted that all main legal provisions relating to the main sanction of prison for contraventions[55] were repealed by Government Emergency Ordinance no.108/2003[56].

The *complementary* penalties for contravention are: confiscation of assets intended, used or resulting from contraventions, suspension or cancellation, as appropriate, of the permit, agreement or authorization to pursue an activity, closing the unit, blocking the bank account, suspension of the economic unit, withdrawal of the license or permit for certain operations or activities of foreign trade, temporarily or permanently, the dismantling of works and bringing the land to its initial state.

Application of the penalty for contravention

Applying the penalty is the second stage of the liability for contravention, which comes, naturally, after finding the fact. Without the application of the penalty, the finding report[57] of the contravention does not produce any legal effect to the offender; it is necessary for the offender to be informed on the penalty through a report ordering that penalty[58].

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[51] Mircea Ursuța, *Contravention proceedings*, second edition, (Bucharest, Universul Juridic Publishing House, 2009), p.93.

[52] Ernest Lupan, *Law treaty for environmental protection*, (Bucharest, C.H. Beck Publishing House, 2009), 547.

[53] Mihai Adrian Hotca, *The legal regime of contraventions. Comments and explanations*, fourth edition, (Bucharest: C.H. Beck Publishing House, 2009), p. 94.

[54] Ernest Lupan, *Law treaty for environmental protection*, (Bucharest, C.H. Beck Publishing House, 2009), 540.

[55] The penalty of imprisonment for contravention is a criminal penalty which was taken exclusively from the criminal law, in the matter of contraventional law. The imprisonment for contravention consists of the offender's deprivation of freedom, for a period of one to six months and it is applied only by the court; the inspector is the body that proposes its application. Currently, under the Constitution, the imprisonment can only be of criminal nature. (Mihai Adrian Hotca, *The legal regime of contraventions. Comments and explanations*, fourth edition, (Bucharest, C.H. Beck Publishing House, 2009), 96, note 2).

[56] Published in Official Gazette no. 747 of October 26, 2003.

[57] Complaints against the official finding report of the contravention and the application of sanction may be appealed within 15 days after being handed or communicated. Complaints shall be resolved by the court in whose jurisdiction the offense was committed. The report uncontested within the term and the irrevocable court decision resolving the complaint shall be enforceable.

[58] Mircea Ursuța, *Contravention proceedings*, second edition, (Bucharest, Universul Juridic Publishing House, 2009), p.175.

In the field of environmental protection, the application of penalties for contravention pursues the achievement of the following purposes[59]:

- compelling the pollutant agent to precisely respect the law, in other words, to promote technologies and techniques that would protect the environment, preventing pollution or reducing its consequences as much as possible;
- usually, the amounts paid as a fine enter into separate special funds for financing anti-pollution investments, supporting research, providing incentives to entrepreneurs who invest in this field and for ecological reconstruction etc.;
- the fine for pollution also fulfills the role of factor of economic balance between pollutants and those that do not pollute the environment. In this way, it is intended that pollutants do not obtain, following the avoidance of investment in order to prevent or reduce pollution, higher profits than units complying with the social requirements.

Persons competent to apply penalties for contravention

The framework law in contravention matter, G.O. no. 2 / 2001 provides the application of the penalty, by the inspector.

In the field of environmental protection, G.E.O. 195/2005 establishes, in art. 97, the competent persons that can find and punish contraventions:

- commissioners and persons authorized under the National Environmental Guard and the "Danube Delta" Biosphere Reservation;
- public local authorities and their authorized personnel;
- the National Commission for Nuclear Activities Control, Ministry of National Defense and Ministry of Administration and Interior, by authorized personnel, in their fields, in accordance with powers established by law.

Paragraph 2 of the same piece of legislation provides that, finding contraventions and applying penalties is performed also by the personnel of management structures and custodians of natural protected areas, only within the protected area managed.

Applying the penalty for contravention, by the competent body, requires an accurate appreciation of the social danger of the act, in order to achieve a correct individualization of the penalty, taking into account the causes that exclude or remove the character of the contravention or the perpetrator's liability for contravention[60].

Conclusions

In this study we reached the following conclusions:

- the liability for contravention completes the forms of classic legal liability applicable in environmental law;
- this form of liability is predominantly penalizing, intervening when a subject of law does not comply with a conduct established by a rule of public law;
- liability for contravention in environmental law represents that form of legal liability which consists of the application of sanctions to persons guilty of violating environmental laws which provide and sanction offenses committed in connection with the protection and development of the environment;
- although the liability for contravention is not a specific liability of environmental law, it has an important economic role and it represents a serious means of prevention;
- penalties for contraventions are most often applied in cases of non-compliance with rules of environmental protection

[59] Daniela Marinescu, *Treaty of environmental law*, fourth edition, (Bucharest, Universul Juridic Publishing House, 2010), p.655.

[60] Alexandru Ticlea, *Regulation for contraventions*, sixth edition, (Bucharest,Universul Juridic Publishing House, 2008), p.47.

Therefore we believe that the Law for environmental protection and special laws concerning environmental protection should be modified for the purpose of introducing some situations regulating the relapse, instituting severe penalties, differentiated depending of the severity of the repeated offense, and also taking into account if the relapse into contravention was committed by a natural or legal person, in order to discourage the repetition of such illegal acts.

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NEW ANALYSIS OF INTERNATIONAL PROTECTION OF REFUGEES

MĂDĂLIA COCOŞATU*

Abstract
Throughout the entire world and along centuries, the human beings lived within states, under whose protection, as citizens, they exercised the entirety of the fundamental rights and liberties recognized to them on the grounds of this legal status. In spite of the increasingly accentuated development of the international regulations in the matter of the protection of human rights, even now, in the whole world is abundant in refugees[1], determining a constant concern of the international community in the area of their protection.

Keywords: *Statue of refugees, asylum, international protection, asylum-granting procedures, regulations.*

Introduction

The paper „New analysis of International Protection of Refugees" aims to analyse in an inter-disciplinary manner the tendencies and causes of the increase of the refugee phenomenon and to conduct a preliminary delineation of the concepts that govern this area.

Also, the aims of this study is to analyse the content of the international protection of refugees and to present special cases of refugees.

In our days, when the phenomenon of globalization is more and more actual and has many social implications, I consider that the study of this subject s very important and actual. This idea is sustains from many specialists, professors and practitioners and also from the number of studies realized by international authorities and institutes involved.

Considering that the topic of the international protection of refugees has been and still remains a crucial issue of humanity, in the paper at hand, we aim to analyze some of the most important elements necessary for outlining an overview of the current process of the international protection of refugees.

But, what determines a person to leave his/her own country? The fear of persecution, torture, prison or even death, represented the reason why the citizens lacking the fundamental human rights and liberties were forced to seek protection and assistance in a state other than their country of origin. In this situation, the protection of refugees has proven to be the responsibility of the host states; however, while the individuals were determined in increasingly large numbers to flee from the path of the dangers threatening their lives, liberty or dignity, the governments of the host countries started to face, more and more often, economic problems. Thus, the states found themselves forced to allow the performing of different activities by means of which the international organizations to be able to grant socio-legal and material assistance to the individuals who found refuge on their territory.

Although, nowadays, the tendency is to place the equal sign between the international protection of refugees and the system based on the UN Convention of year 1951, respectively the Protocol of year 1967 regarding the statute of refugees, in reality, the problem of the international protection of refugees emerged much earlier, at the end of the First World War, and continues to exist afterwards, determining the adoption of numerous instruments applicable at the regional level.

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[1] In year 2008, approximately 10 million persons of the 31 million persons of interest for the United Nations High Commission for Refugees needed international protection under the benefit of the statute of refugee;

1. CONCEPTUAL OUTLINING REGARDING THE STATUTE OF REFUGEES

Establishing the fact that, within the national regulations adopted in the matter of refugees, there is the tendency to put the equal sign between the state of the refugee, the statute of the immigrant and the statute of the asylum seeker[2], the analysis of the international protection of refugees based on the UN Convention of year 1951 cannot be debated correctly and comprehensively without making a precise outline of the concepts governing this field.

Thus, a first step in the analysis of the problematic of the international protection of refugees will be represented by the differentiation of the statute of refugee in the wider frame of the migration process and in comparison to the right to asylum.

Population mobility at the world level is an economic and social phenomenon which has significantly increased in the last decade of the 20th century. Thus, at the level of the European continent, the fall of the Iron Curtain in year 1989 and the breaking of the Soviet Union in year 1991 marked the best moment in which men, women and children chose to leave their own countries and to migrate towards the western states. Faced with the numerous waves of migrants, the western states were forced to adopt a new policy regarding the statute of aliens, characterized by the diminishing of the number of assistance programs for the refugees, which no longer allowed for a clear differentiation between them and migrants. From the interpretation of the dispositions comprised in the UN Convention of year 1951 regarding the conditions a person must fulfill in order to be granted the statute of refugee and, implicitly, in order to benefit from international protection[3], it is derived the fact that the persons willingly leaving their country of origin as a result of economic conditions, famine, natural disasters, cannot benefit of this statute. Therefore, while the majority of migrants travel in order to improve their life standard, level of education, or in order to join their family members, the refugees are those who were forced to leave their countries of origin, because of the persecutions they were subjected to. We consider, however, that, when they can demonstrate the fact that the precarious economic situation in which they lived in their country of origin is a result of the persecution resulted from discrimination, oppression or breach of human rights, capable of putting their life or liberty in danger, the migrants can be granted the statute of refugees.

The statute of the refugee must not be mistaken for that of the asylum petitioner or for the right to asylum, per say. The refugee is the person who, recognized through the prism of „justified fears of being persecuted due to the race, religion, nationality, belonging to a certain social group or his/her political opinions, is outside the country whose citizenship he/she holds and who cannot or, because of this fear, does not wish to have the protection of that country; or who, not having any citizenship and being outside the country where he/she had his/her usual residence as a consequence of such events, cannot or, because of the respective fear, does not wish to return"[4], benefits of the right to asylum. The right to asylum is recognized at the international level as having a special importance in the field of refugees because it ensures both a framework for protection, and the guarantee that solutions will be sought with respect to their situation. If the statute of the refugees is regulated at the international level by means of the UN Convention of year 1951, which comprises dispositions regarding the procedure for granting the statute, the refugee' rights and obligations, the termination, withdrawal or annulment of the privileged statute, the asylum institution is regulated only at the national level and in some regional conventions[5]. However, it must be mentioned that the granting of the statute of refugee and of the right to asylum does not automatically derive from the

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[2] According to Law no. 122/2006 regarding asylum in Romania, published in the Official Gazette no. 428 of May 18th, 2006, rectified in the Official Gazette no. 68 of January 29th, 2007, last modified through Law no. 280/2010, published, in its turn, in the Official Gazette no. 888 from the date of December 30th, 2010, which regulates the statute of refugees;

[3] See infra p. 25-29;

[4] According to art. 1 letter A para. 2 of the UN Convention of year 1951;

[5] According to art. 22 para. 7 of the American Convention of Human Rights, art. 27 of the American Declaration on the Rights and Duties of Man, art. 12 para. 3 of the African Charter on Human and Peoples' Rights;

fulfillment of the conditions listed in art. 1 letter A para 2. of the UN Convention of year 1951. Thus, any person who has committed a crime against peace, a war crime or a crime against humanity, a serious common law crime outside the recipient country, respectively facts contrary to the UN goals and principles, will be excluded from the protection granted on the basis of this international document[6].

On the other side, the asylum seeker is a generic term which designates the person who has not yet benefitted from a final decision regarding his/her application to determine the statute of refugee; the term can include either a person who has not submitted an application yet, or a person who submitted an application and is waiting for an answer. In spite of the fact that the asylum seeker is not recognized as refugee, in his/her favour is consecrated the principle of not returning as derived from the dispositions of the UN Convention of year 1951, principle which will be detailed in the pages that follow. Therefore, the asylum seeker benefits from the right to not be returned from the moment of submitting the petition and until when it will be examined equitably.

Therefore, in order to benefit of the international protection consecrated by the UN Convention of year 1951, a person, who is not on the territory of the country whose citizenship he/she holds or on whose territory he/she has his/her usual residence, as a consequence of a justified fear of being persecuted due to the race, religion, nationality, belonging to a certain social group or as a result of his/her political opinions, must go through the following steps: asylum seeker, refugee, beneficiary of the asylum right.

2. THE CONTENT OF THE INTERNATIONAL PROTECTION OF REFUGEES

2.1. Access to the territory and access to asylum-granting procedures

At the international level, an important role in the protection of human rights belongs to the activities performed by the High Commission.

According to art. 35 of the UN Convention of year 1951 and to art. 2 of the Protocol of year 1967 regarding the statute of refugees in the burden of the signing states is established the obligation to apply the dispositions of the Convention and of the Protocol, under the careful supervision of the High Commission. The persons of interest for the High Commission, for whom it is obligated to ensure the fundamental rights, are both the refugees and the related groups, such as the asylum seeker or the voluntarily repatriated refugee. The practical modalities for achieving this objective start with the safe admission to the territory of a state of the asylum seeker, where he/she can exercise his/her right to have access to the procedures for granting asylum and continue with the identification of sustainable solution such as local integration, resettlement, or voluntary repatriation. In this sense, the Executive Committee of the High Commission acknowledged the need for the national governments, the High Commission, respectively the entire international community to continue to answer to the need for asylum and assistance of refugees, until finding sustainable solutions[7].

The access to the territory of a signing state of the UN Convention of year 1951 is performed, as previously indicated, on the basis of the principle of non-return, non-discrimination, respectively family unity. What needs certain nuances and explanations in this matter is the access to the asylum granting procedure. Although there is no unitary legislation at the level of the signing states and the UN Convention of year 1951 does not expressly regulate the procedure for granting asylum, the High Commission has issued certain recommendations. In this sense, it was established that within the asylum granting procedure, an essential element is represented by the personal documents with the role of proving the identity and statute of the protected person. From this point of view, the asylum applicants must benefit of legal assistance and representation, in order to submit the asylum petition as soon as possible. On the basis of the asylum petition, the applicants will benefit of an identity document and of the proof to have submitted the petition, which will allow them access to the

[6] According to art. 1 letter F of the UN Convention of year 1951;
[7] UNHCR, Conclusion on International Protection, (Geneva, 2000), p.1

territory of the asylum state until the making of a final decision with respect to the application submitted. In spite of this need, the asylum seekers face difficulties, most times, in submitting the application within a reasonable time, as a result of the psychological traumas suffered in the country of origin or as a consequence of their inability to find or pay legal assistance in the matter. Once the asylum application is submitted, both the petitioners and the asylum country gain if it is rapidly examined, such as the people in need of protection to be able to benefit from it, and those who cannot be classified in the statute of refugee to benefit of the procedures made available to the immigrants. Before the authority competent to grant or refuse the statute of refugee makes a decision in the first stage, it is important that the applicant is able to personally defend his/her case before a qualified worker entrusted with analyzing the data and making an objective and impartial decision. At the same time, the asylum seekers whose petition was rejected must be given the right to formulate recourse in view of the re-examination of the application before an authority independent and impartial from the one who first decided the matter.

Following the granting of the statute of refugee, the role of the recipient states to protect the persons in question extends beyond the obligation to have access to the territory and to the asylum granting procedures, targeting, mainly, the discovery of sustainable solutions, either in the countries of origin, or in the countries of asylum or the states of resettlement.

2.2. Voluntary repatriation

At the international level, the return to the country of origin represents for the great majority of refugees the best solution to end their tragic situation. For this reason, voluntary repatriation is the sustainable solution enjoying the greatest support both from the countries of asylum and from the international community. In this sense, the Executive Committee of the High Commission established that while „ voluntary repatriation, local integration and resettlement are traditional sustainable solutions for refugees ... voluntary repatriation is the preferred solution"[8].

As derived from the conclusion of the Executive Committee, international support is given not to the process of voluntary resettlement or of repatriation, but only the voluntary repatriation process. From this point of view, we believe that we must outline the three concepts, such as to not be mistaken one for another, since they have numerous common elements.

Therefore, voluntary resettlement presupposes the return of the refugee in the country of origin, following a free decision, in spite of the fact that the risk of being persecuted still persists. Given the fact that the country of origin is not capable of offering the adequate living conditions, we consider that resettlement in the country of origin cannot be considered a sustainable solution with respect to the refugee, but only from the perspective of the host country, the protection obligation ceasing with the refugee's decision to assume the risks in the state of origin. The refugee's possibility to resettle voluntarily in the country of origin comes from the interpretation of art. 1 letter C point 4, according to which the UN Convention will cease to apply to persons who benefit of the statute of refugee, if they willingly return to their country of origin, in view of resettlement. Since the refugees benefit of the right to establish when they do and don not need international protection, the state of asylum cannot intervene in the refugee's decision to return to the country of origin, in spite of the dangers he/she is subjected to. Most times, the states of asylum can only offer refugees current and clear information regarding the condition in the country of origin. For this purpose, the refugees' representatives can benefit of the possibility to make visits in the country of origin and to present the reports drafted to the refugees in the asylum communities.

On the other hand, repatriation targets the return of the refugee in the country of origin, but, this time, against his/her will, with the mention that the risk to which he/she was subjected in country of origin ended. According to art. 1 letter C points 5-6, the Convention provisions will not apply in case the circumstances that led to the granting of the statute of refugee ceased and the person in

[8] UNHCR Executive Committee, Conclusion on International Protection, (Geneva, 2000), p.2;

question benefits of the protection of the state of origin. When these conditions are fulfilled, the state of asylum has the right to ask the refugee to leave its territory, even if the only option the latter has is to return to the territory of the state of origin. In order for the previous provision to be invoked, in the doctrine it was established that the change occurred at the level of the state of origin must fulfill three conditions: to be truly fundamental, to be long-lasting, to presuppose not only the elimination of the justified fear of being persecuted, but also the re-establishment of protection[9].

In what concerns voluntary repatriation, it is similar to the voluntary resettlement and is different from repatriation through the fact that the return to the country of origin is performed following a free decision; it is different from the voluntary resettlement and similar to repatriation through the fact that the risk to which the person was subjected in the country of origin has ceased to exist. Hence, by voluntary repatriation we understand the return of the refugee to the country of origin as a consequence of a freely expressed decision, at the moment when the danger of persecution ends, and the country of origin is capable of offering national protection.

Voluntary repatriation is guaranteed through a tripartite agreement concluded between the state of asylum, the state of origin and the High Commission, which undertake different international obligations, in view of the refugee's return in safety and dignity. If the asylum state and the state of origin have the obligation to contribute to the promotion of voluntary repatriation as a sustainable solution, respectively the obligation to allow its citizens to return safely, without fear of harassment or discrimination, the role of the High Commission can be summarized in terms of promotion and facilitation of voluntary repatriation. Thus, in case the asylum state cannot achieve voluntary repatriation due to the high costs it cannot cover, it can resort to the high Commission, in order to organize transport and to provide assistance necessary for reintegrating the refugees in their country of origin.

Therefore, voluntary repatriation is not limited to the process of returning to the country of origin, the High Commission also having the obligation to ensure refugees access to material resources, opportunities and services in condition equal to the other citizens, from the social, economic and cultural point of view.

2.3. Local integration

In search of sustainable solutions for the refugees, when voluntary repatriation is not possible, at the international level there is mentioned the possibility of local integration. In spite of the fact that this concept does not differ much from the states' obligation to observe the refugees' rights, established through the UN Convention of year 1951, once the right to asylum is granted, the person in question benefits from the possibility to remain in the asylum state for undetermined time, without feeling marginalized.

The rights enjoyed by the refugees in the asylum country differ from one region to another, depending on their level of development. Thus, the less developed regions do not put at the disposal of refugees the same material and social advantages of which benefit refugees in states belonging to Western Europe, North America or Australia. Therefore, most refugees targeting other sustainable solutions, such as those made available by member states, are those who have as asylum state a country in the less developed areas. Hence, in order for the integration process to be successful, it is necessary that at the international level responsibilities are divided, in view of increasing the capacity of less developed states to help refugees interact as equal members to the citizens of the host country.

On the other side, in the developed areas, the integration programs, such as foreign languages classes, professional training and the occupation of the work force, housing, have allowed refugees and their children to adapt, weakening their desire to return to the country of origin. The refugees' desire to remain in the developed countries for undetermined time was also consolidated by other

[9] James Hathaway, The Rights of Refugees under International Law, (New York: Cambridge University Press, 2005), p.922

factors, such as the states' practice of not withdrawing the right of stay to persons whom asylum was granted or the low number of voluntary repatriation programs made available. Although the UN Convention regulates the possibility of the signing states to withdraw the statute of refugee in case the respective person has the possibility to safely return to the country of origin, the developed states did not apply this disposition, not even in what concerns the refugees from countries where the persecution regime was replaced with a democratically elected government[10].

The national policies of local integration make available to the refugees a wide range of rights, such as the freedom of movement, access to education and to the labour market, which, on the long term determines the refugees to become less dependent on the state aid and to contribute to the development of the state of asylum.

Since local integration targets, first of all, the obligation of the states to respect all refugees' rights, as regulated by the UN Convention of year 1951, we consider that in this section of the paper the focus must be placed on art. 34[11] which establishes the possibility of the refugees to gain the citizenship of the asylum state. The granting of the citizenship of the asylum state implies both the end of the refugee statute, with all its advantages and disadvantages, and the benefit of all rights recognized to the state's own citizens. For example, the naturalized refugee will granted the right to participate to the political life of the asylum state, right which is not recognized today through the UN Convention of year 1951.

In spite of the fact that it is not expected for the states to proceed to the granting of citizenship in mass or to substantially reduce the requirements necessary for granting the statute of citizen, art. 34 institutes two specific forms by means of which this process would be facilitated for the refugees. Therefore, it is expected that the states accelerate the process of analyzing the naturalization applications submitted by the refugees and reduce the fees and costs for such as procedure, as much as possible.

Therefore, the process of local integration of refugees represents a sustainable solution combining three dimensions. Firstly, it is an economic process through which is aimed to ensure to the refugees subsistence means and a level of living comparable to the citizens of the asylum state. Secondly, it is a social and cultural process of adaptation and acceptance in the social life of the host country and of living without fear of discrimination. Thirdly, it is a legal process by means of which the refugees have a wide range of rights in the asylum state, reaching the point when they are ensured all economic, social and political rights, as a consequence of naturalization.

2.4. Resettlement

In case a refugee cannot be voluntarily repatriated and not even naturalized in the country where he/she found refuge, at the international level was developed a third sustainable solution meant to protect the persons in a situation so difficult, by granting them the possibility to transfer to another state which accepted to receive and protect them.

As refugee, a person first requires a country of asylum, which to ensure conditions of safety; however, in numerous situations, the state where he/she goes first is not capable or is unwilling to offer him/her the protection he/she needs. Therefore, the causes that determine a refugee's resettlement to a third country target either the refugee's special needs, which cannot be fulfilled in the country that granted the right to asylum, or the state's refusal to grant protection, since the acceptance of the refugees would determine a threat to national security or public order. For instance,

[10] UNHCR, The State of The World's Refugees 1995: In Search of Solutions, Chapter 2, (Oxford University Press, 1995), p.18;

[11] The contracting states will facilitate, as much as possible, the assimilation and naturalization of refugees. They will especially try to accelerate the naturalization procedure and to reduce, as much as possible, the fees and costs of this procedure.

since Turkey does not acknowledge non-Europeans as being refugees, settlement into a third country has long represented the only viable solution for the refugees from Iran[12].

The UN Convention of year 1951 indirectly regulates the possibility of the refugee to resettle in a third country in art. 30[13] which recognized to him/her the right to transfer the assets he/she introduced on the territory of the state he/she reached first, to the territory of another state, which admitted him/her in view of resettlement. Taking into account the fact that in year 2001 almost two third of the countries identified by the High Commission as being asylum states are between the first 40 countries identified through the UN Development Program as being the poorest in the world, their inability to offer long-term sustainable solutions determines the need to resettle refugees with the aid of the High Commission, to states which are capable and willing to commit national financial resources in order to integrate refugees[14].

The refugees' resettlement process presupposes a close cooperation between the state on the territory of which the refugee first fled, the resettlement third state, and the High Commission, for the purpose of sharing the responsibilities of the refugees; protection between the countries throughout the world, signatories of the UN Convention of year 1951 and of the UN Protocol of year 1969.

According to art. 2 letter f of the Statute of the High Commission, the state on whose territory the refugee arrives first must issue travel permits and other documents in view of facilitating the resettlement of the refugees. In what concerns the role of the High Commission, it targets, among other things, the capacity to encourage states to develop resettlement programs, to introduce more flexible resettlement criteria. On the other hand, the third state, although it uses its own criteria to establish who is eligible to resettle on its territory, must take into consideration the proposals made by the High Commission and analyze each separate case.

The resettlement countries benefit, however, of the possibility to refuse certain resettlement cases, as a consequence of the problems and special needs of the refugees, which would require costs much higher than the funds available. In spite of these factors, there are third parties motivated in resettling refugees difficult to place, both for humanitarian, and for economic, social, cultural reasons. Therefore, on the long term, the refugees can have an important contribution at the level of the resettlement society as a consequence of creating new enterprises and jobs, of improving productivity, the intellectual, social and cultural capacity specific to their area of origin.

3. SPECIAL CASES

3.1. The international protection of female refugee

The female refugees have, to a high extent, the same protection needs against forced repatriation, armed attacks and other violence, prolonged and unjustified detention, similar to all other refugees. In comparison with men, the women refugees have also a series of specific needs resulted from their vulnerable physical and psychic condition[15]. The High Commission, recognizing the fact that the statute of refugee has different effects on women, compared to men, prepared in year 1991 the document entitled „Guidelines on the Protection of Refugee Women", with the role of

[12] Simeon James, Critical Issues in International Refugee Law, (New York: Cambridge University Press, 2000), p.194;

[13] „A Contracting State shall, in conformity with its laws and regulations, permit refugees to transfer assets which they have brought into its territory, to another country where they have been admitted for the purposes of resettlement.

A Contracting State shall give sympathetic consideration to the application of refugees for permission to transfer assets wherever they may be and which are necessary for their resettlement in another country to which they have been admitted";

[14] UNHCR, Refugee Resettlement: International Handbook to Guide Reception and Integration, (Geneva, 2002), p.7;

[15] UNHCR, Guidelines on the Protection of Refugee Women, (Geneva, 1991), p.3-4;

identifying the problems and risks that women refugee face, in view of outlining specific measures which can be taken in order to improve their protection.

The document adopted by the High Commission targets first the problems faced by women refugee in the asylum state and does not regulate to the same extent the risks to which they are subjected at the moment of reintegration in the country of origin, as a result of repatriation. Since the risks to which women are subjected as a consequence of reintegration cause the same massive breaches of human rights as the risks to which they are subjected in the asylum country, in the paper at hand we attempt to analyze the problems and the risks, respectively the applicable measures, in view of reducing them from the two possible perspectives.

Once arrived in the asylum state, the women refugees are, most times, separated from the male family members, as a result of the chaos or as a consequence of their death during the hostilities in the country of origin, which makes the women refugees susceptible of sexual aggressions or other forms of violence. The authors of the acts of violence can be represented either by the military staff of the male citizens of the asylum state, or by the male refugees. For example, in case in the refugee camps a certain group of men control the distribution of aid, women can find themselves forced to have sexual intercourse in order to obtain food for themselves, respectively for their more vulnerable family members, such as children and the elderly, left in their care. In case a woman refugee from Somalia is subjected to rape, she will be a victim of both the attack itself, and of the social values in the country of origin which condemn a raped woman to living her entire life in shame. Also, there are cultures that establish that women cannot feed until the men have ensured all necessary surpluses, and in the refugee camps where supplies are limited, women end up insufficiently hydrated, which may lead, in certain cases, even to death[16]. In spite of the fact that women are accompanied by male family members, they can still be subjected to aggressions, either of a psychic nature, or of a physical nature. For instance, in case the man's application for asylum was rejected, the women refugee has the possibility to submit a separate application, as a result of the sexual persecution in the country of origin. At the moment when the person before who the woman refugee must have her interview for granting the right to asylum is a man, the mentioning of the aspects of a sexual nature may determine a psychic aggression, as a consequence of the details means to affect her honour. Even if sex is not explicitly mentioned in the UN Convention of year 1951 as representing grounds for justified fear of persecution, at the international level, many times, the applications for granting the statute of refugee for reasons pertaining to sex which presuppose acts of sexual violence, genital mutilation of the woman, force family planning, were accepted. In addition, some women refugees, together with their male family members, in Nepal, found themselves forced to accept to continue to live together with them, in spite of the violent and abusive relations exhibited, because the internal law presupposed that the food products and the other aids destined to refugees be distributed through the male family members[17].

In order to protect women refugees before sexual aggressions or other forms of violence, the High Commission, targets, among other things, the identification of the aggressors and their criminal prosecution, for the crimes committed. Also, the women refugees subjected to aggressions of any kind may resort to social counselors and psychologists made available to them by the high Commission. We believe that this mechanism is not efficient in the protection of female refugees because it presupposes the punishment of the aggressors as a consequence of a previous breach of the rights of women refugees, respectively the aiding of women already assaulted, and not the prevention of such criminal facts. From this point of view, the mechanisms proposed by the High Commission evolved towards a preventive system, which starts with the persons targeted by aggressors. Thus, the education of female refugees with the help of non-governmental organizations regarding their rights, guaranteed both in the national and in the international system, which not all women refugees end up

[16] Hathaway, The Rights of Refugees under International Law, p. 475;
[17] Hathaway, The Rights of Refugees under International Law, 476;

knowing, may often represent a solution to the problem of aggressions to which they are subjected[18]. For example, in Pakistan, the High Commission, with the help of the local partners, established a legal assistance service of which to benefit, mainly, the female refugees, and, also, is constantly supporting workshops regarding human rights, including women's rights. In order to ensure that women refugees are not forced to offer sexual favours for the purpose of obtaining food, it is targeted that they benefit from the direct distribution of food. Also, the High Commission targets the reunification of separated families, such as the number of unaccompanied women to be reduced, and the number of women subjected to sexual assault or to other forms of violence to implicitly decrease.

The return of the female refugees to their country of origin does not represent, most times, the best applicable sustainable solution. In some situations, the female refugees must repatriate as a consequence of the decisions made for them by the male family members, and in other situations the absence of information regarding the situation in the country of origin determines them to make the decision to repatriate without knowing the real situation[19]. Since the problems women refugee face are not reduced only to the period during which they are on the territory of the asylum country, once returning to their country of origin, the women refugees risk becoming again targets of sexual aggressions or of other physical or psychic violence. For instance, they can be subjected to aggressions by the Government, the army or other persons, due to revenge for having fled the country of origin or they can be susceptible of sexual blackmail, in exchange for material assistance or in view of obtaining the documents required by the governmental officials[20]. From this perspective, the High Commission wishes to ensure women refugees equal access to the repatriation procedures, such as those who fear the situation existing in the country of origin to be protected on the grounds of art. 33 para. 1, which forbids the return. In order to allow women refugees the knowing of the situation existing in the country of origin and in order to help them make a correct choice regarding voluntary repatriation, they will be given correct and current information.

Since the role of the High Commission is to supervise the protection of refugees both in the asylum country and in the country of origin, in case of repatriation, the female refugees will benefit of international protection regardless of the country on whose territory they are, providing them legal, material and social assistance, meant to prevent possible physical or psychic aggressions.

3.2. The international protection of children refugees

As a consequence of their dependence on parents or on other adults capable of supplying them all needed for survival, as well as of their development needs, which make them more vulnerable to certain breaches of human rights, the children refugees, as the women refugees, need special protection and care. In this sense, the High Commission and the entire international community developed a multitude of international norms and policies in order to protect children refugees, both in the asylum country and in the country of origin, in the situation in which they are repatriated. The treaty establishing the standards applicable to children is the UN Convention of year 1989 regarding children's rights. In spite of the fact that this treaty does not target expressly the refugee children, the obligation of the signing states to apply it to persons under the age of 18, without any discrimination, determines the High Commission to consider the Convention regarding human rights and being the reference normative act for its actions[21]. Recognizing the fact that the statute of refugee has different effects on children, compared to adults, the High Commission prepared in year 1994 another special document called „ Refugee Children: Guidelines on Protection and Care".

[18] UNHCR, Guidelines on the Protection of Refugee Women, paragr. 52;
[19] UNHCR, Guidelines on the Protection of Refugee Women, paragr. 68;
[20] UNHCR, Sexual Violence Against Refugee: Guidelines on Prevention and Response, (Geneva, 1995), paragr. 1.4;
[21] UNHCR, Refugee Children: Guidelines on Protection and Care, (Geneva, 1994) 19;

The risks to which children refugees are subjected in the asylum country vary from the ones of psychological nature, such as the act of suddenly leaving the country of origin, the leaving behind of family and friends, until those of social nature, such as the forced interruption of education, the lack of time or places for play, the pressures for recruitment from the armed groups. For the children separated from their family, these risks amplify, in comparison to the other children refugees. In a new society with different cultural characteristics, children refugees learn to adapt with the help of their parents, separation from one or the other of the parents depriving the child from the right to have a model in life[22]. The absence of either parent determined the children refugees to undertake many of the parents' responsibilities, their development needs being ignored. For instance, in case a female child refugee is in the asylum country with her brother and other smaller siblings, the daughter is forced to replace her mother in the process of caring for her siblings, thus being deprived of her right to play or to go to school. Also, female children refugees often face protection problems greater than the male children. In some societies, girls being considered inferior to boys, they risk being subjected to neglect and, in more serious cases, even to physical or sexual abuse.

The protection and assistance of children refugees before the above-mentioned dangers follows the „triangle of rights" regulated by the Convention regarding the rights of the child (the rule of the best interests, non-discrimination and participation), by promoting both the direct aiding actions and the indirect aiding actions, through the families and the entire asylum community.

The activities by means of which the direct protection of children refugees is targeted may comprise the creation of play spaces, the establishment of support groups, the granting of the right to participate in making the decisions regarding their future. In the healthy development of a child, an important place is represented by the possibility to play. Therefore, the refugee camps or the refugee admission centers must put at the disposal of the children refugees places for play, without danger, which to help their integration in the community together with the citizens' children. The establishment of support groups allows the children refugees to understand that they benefit of moral support from the persons before who they can express their thoughts and can search for advice for the problems troubling them. Together with the development of the children refugees, it is important that those who can formulate their own opinions have the opportunity to express them and to have them taken into account, and in case when the depression specific to the statute of refugee prevents them to make objective decisions, they must benefit of professional counseling.

Considering the fact that, usually, children refugees are dependent on the adults, both for physical survival and for their psychic and social welfare, one of the most beneficial protection modalities includes indirect protection by means of the family and of the asylum community. Therefore, the High Commission aims, first of all, to prevent the separation of children refugees from their families and to promote family unity. In the situation when the family members have already been separated, there are developed programs for the search and re-establishment of the contact between them. The identification of the parents or of other relatives is very important for children refugees because it offers them the hope of reuniting the family. The role of the community in the protection of children refugees derives, first of all, from the granting of the right to education, school proving to be one of the best solutions in the creative stimulation of children, respectively the development of their social skills[23]. The quality of education for the children refugees must be, though, of the same quality as that supplied for citizens of the same age. For example, in year 2004, many of the 65,000 Sudanese children refugees discovered in Uganda what in their country of origin proved to be a luxury for the majority of them, namely free primary education.

In spite of the fact that voluntary repatriation also represents in case of children refugees the sustainable solution that enjoys the greatest support at the level of the international community, the return to the country of origin does not imply the cease of the obligation of the High Commission

[22] UNHCR, Refugee Children: Guidelines on Protection and Care, 31;
[23] UNHCR, Refugee Children: Guidelines on Protection and Care, 45;

to offer protection and assistance. Once returned, the children refugees must have access to basic resources and services, enjoying the fundamental rights and liberties to the same extent as their fellow countrymen. Hence, it is essential that the High Commission establishes partnerships with the social assistance services, the governmental and non-governmental organizations in the country of origin, in order to ensure the welfare of children refugees after their return. In this sense, there must be intensified the activities for tracing the parents or other relatives of the children refugees separated in the country of origin. In addition, since access to education represents one of the most important measures allowing children refugees to reintegrate, the High Commission must contact the Ministry of Education in the country of origin, such as upon their repatriation their studies completed in the asylum country are recognized.

In conclusion, the obligation to protect children refugees exceeds the territory of the asylum state at the moment when they are repatriated, being ensured legal, material and social assistance, meant to prevent the possible physical or psychic aggressions, regardless of the country of whose territory they are.

3.3. The international protection of elderly refugees

In spite of the fact that there is no express definition of the notion of elderly refugee, since the age starting with which persons can be classified in this category varies between 40 years old in some countries in Africa and 70 years old in certain states of Latin America, the older refugees wherever face common problems, both in the asylum country, and in the country of origin, following repatriation.

Elderly refugees are more difficult to integrate in the asylum country. While youngsters leave the refugee camps searching for jobs, the elderly refugees are most often left behind, abandoned by the family members who feel they do not have the resources necessary for caring for them. Because of their age, they have reduced access to the forms of occupation or the work force, to the information regarding the rights, services and facilities placed at their disposal by the national or international legislation. Often, the older refugees are not even aware of the existence of the High Commission or of the agencies entrusted with their protection or, in the situation in which they are aware of the existence of these services, they do not feel confident enough to resort to them[24]. Therefore, the elderly refugees end up facing in the asylum country extreme situations such as marginalization as beggars, horrible life conditions, absence of medical care making them vulnerable to different illnesses.

In order to avoid such situations, the High Commission must, first of all, take into account the special needs of the elderly refugees when elaborating social and legal assistance programs. The reduction of the vulnerability characteristic to the elderly refugees does not necessarily target the creation of special services for them, but it aims to ensure equal access with the other refugees to the services vital for them[25]. Since the elderly refugees may often have difficulties in accessing the clinical services or the food and aid distribution points, as a result of mobility problems, the High Commission may conclude partnerships with non-governmental organizations in sectors such as health, law, professional training in the asylum countries, through which to ensure that the elderly refugees receive the care they need. The most beneficial modality of helping the elderly refugees in the local integration process remains, however, the granting of the possibility to become involved in the projects at the level of the asylum community. In this sense, the elderly refugees can be involved in the process of teaching or caring for children. The active persons should, also, be included in non-formal educational programs or in professional training programs.

In spite of the efforts made at the level of the asylum states, the older persons are most affected by the phenomenon of social disintegration, often being forced to repatriate. Once in the

[24] UNHCR, Protecting Refugees: A Field Guide for NGOs, (Geneva, 1999), 62;
[25] UNHCR, Policy on Older Refugees, (Geneva, 2000), paragr. 14;

country of origin, the problems of the elderly refugees are not solved, in many cases these persons remaining dependent on the High Commission for long periods of time. Therefore, upon repatriation, the High Commission must first facilitate the reunification of the family when needed, requesting the support of the countries of origin in the process of local reintegration. For example, in Croatia, the vast majority of the elderly refugees who repatriated contributed to the peace and reconciliation measures at the community level.

Thus, the goal of the High Commission in what concerns the elderly refugees is to offer them the possibility to live their last years in dignity and security, regardless of the country on whose territory they are, either by means of an active contribution within the asylum community, as much as possible, or by offering case and support when they become fragile from the physical or psychic viewpoint[26].

Conclusions

As a consequence of the research performed in view of achieving this paper, we can state that the adoption of the UN Convention of year 1951 regarding refugees represented an important moment within the process of the international protection of refugees, marking both the codification of all international norms in the matter, until that date, and their development by means of elaborating new rules. The character of fundamental norm of the international protection that the UN Convention of year 1951 enjoys could not, however, prevent the adoption of complementary regulations at the regional and national level.

In spite of all efforts made at the international, regional, respectively national level, the regulation of the statute of refugee experiences even today numerous gaps that determine a weak quality of the protection granted on long or short term to persons exiled from their country of origin as a result of fear of persecution.

On the one hand, we can state that through the adoption of the UN Convention of year 1951 it was not created the desired unitary international system which to allow all needy persons equal access to international protection.

First of all, the dispositions of the international document generated from the moment of the adoption and until today a variety of interpretations in the national doctrine and jurisprudence, the imprecision of the language often preventing the attorneys or judges to argue their pleas or decisions. An eloquent example is represented by art. 1 letter F of the UN Convention of year 1951, which regulates the institution of the exclusion from international protection. In the absence of express definitions, in the text of the international document, regarding fundamental notions of the process of exclusion from protection, such as crime against peace, war crime, crime against humanity etc., the interpretation of the international dispositions in the matter may differ radically at the level of the signing states, by granting extended senses, as a consequence of the national interest. Therefore, the applicant for international protection may be deprived of his/her rights recognized by the UN Convention of year 1951 and may even be forcefully returned to the state of origin, where there is a risk of persecution. An important role in the unification of the interpretations of the dispositions in the matter belongs to the United Nations High Commission for Refugees, since the documents adopted by it have a guiding role for the domestic doctrine and jurisprudence of the signatory states. Still, we believe that this guiding character is not sufficient in order to completely unify the international system of refugees' protection and, in this sense, we would propose an obligatory character of the documents for the signatory states. We consider that together with the international obligations undertaken as a consequence of signing UN Convention of year 1951, the obligatory character of the documents adopted by the United Nations High Commission for Refugees would place refugees' protection in the foreground, and the national interest would not prevail.

[26] UNHCR, Policy on Older Refugees, paragr. 11;

Secondly, in spite of the increasing number of states parties to the UN Convention of year 1951, respectively to the Protocol of year 1967, at the international level there continue to exist numerous states that did not undertake the international obligation to protect refugees. It is also true that some states host the largest part of refugees without being party to the international mechanisms regarding the refugees, but this fact does not ensure the observance of all right that this social category should enjoy. In this sense, we can take into account the case of India, which, although it is not a party to the UN Convention of year 1951, stated, through its representatives that it has always been generous with the refugees. In spite of these declarations, analyzing the legislation regarding aliens at the level of the Indian state, we will see that in order to enter the Indian territory, the foreign citizens must present at the border a valid passport and a proper visa, documents that, most often, the refugees do not have, and, therefore, their entry into India is denied. In the situation in which the refugees are able to enter the Indian territory, they can resort to the regional office of the United Nations High Commission, located in New Delhi, the refugee certificates issued by it being actually recognized by the Indian government. Still, the United Nations High Commission is not allowed to perform its activity in other regions of India, except for New Delhi and Tamil Nadu, and, therefore, the refugees located in remote parts of the country do not have access to international assistance, risking to be returned, since the Law regarding aliens, ignoring the principle of non-return, recognized both at the level of the international legal instruments, such as the UN Convention of year 1951, and at the level of custom, allows the Indian government to return aliens, including the applicants for the statute of refugee. We believe that these situations should be avoided, the United Nations High Commission having the obligation to positively influence the states in expressing their consent for becoming parties to the UN Convention of year 1951.

On the other hand, the UN Convention of year 1951 can be considered inefficient, since it is not flexible before new risks to which the refugees are subjected. From this point of view, we believe that the dispositions of the UN Convention of year 1951 are not eternal, such as, in order to not become obsolete and a relic of the Cold War, they should be modified in view of adapting to the new socio-legal conditions met today at the international level. The necessary direction for developing a system of refugees' protection by means of which to provide answers to the new requirements in the matter must be given by the High Commission as international organization with the role of searching for sustainable solutions regarding the statute of refugees.

First of all, we consider that the definition offered to the notion of refugee, based on the justified fear of persecution due to race, religion, nationality, belonging to a certain social group or political opinion, is incomplete before the new flows of refugees. Starting with year 1980, the refugee movements had a new basis, namely certain civil wars, ethnic conflicts, generalized violence, which put numerous applicants in impossibility to prove their justified fear, as regulated by art. 1 of the UN Convention of year 1951. Moreover, of the international protection promoted by the UN Convention of year 1951 can only benefit the persons outside their country of origin, thus ignoring the needs of the persons displaced internally, which are often of the same nature as that of refugees. In this sense, we can remember the millions of people relocated as a result of the civil war in Sudan and in the Democratic Republic of Congo.

Secondly, the UN Convention of year 1951 is the only major treaty regarding human rights which does not benefit of a mechanism for promoting the obligations undertaken by the states, by establishing an independent organism at the international level, with the role of contentious court. We consider that the role of the United Nations High Commission for Refugees, which targets exclusively the supervision of the observance of the dispositions comprised in the UN Convention of year 1951 is not sufficient and it should be extended such as to have elaborated a mechanism by means of which to facilitate the access of the refugees whose rights recognized by the UN Convention of year 1951 have been breached. In this sense, Government would be under the obligation to justify the measures taken, and in case of breach of the convention dispositions, to by applied drastic sanctions, in the form of money, which to enter the budget of the High Commission.

We believe that in this way would be ameliorated another important problem seen at the level of the international protection of refugees, namely the increase of the financial funds, insufficient at present, in order to find and apply sustainable solutions.

Therefore, we consider that the establishment of the international system of refugees' protection represents an important step in the development of humanitarian law and, therefore, must be properly appreciated since the first regulations and until the advanced system based on the UN Convention of year 1951, respectively on the complementary and additional regional regulations. Still, without denying the role played on the scene of the international protection of refugees and taking into account the historical changes, the UN-based system must not remain static, but must evolve in parallel with the different needs of the persons of interest to the United Nations High Commission for Refugees.

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TERRITORIAL AND NON-TERRITORIAL AUTONOMY: "ROMANIAN PARADOX"

CRISTIAN JURA*

Abstract
Whereas in Romania there are 19 national minorities officially acknowledged by Romanian state, up to present, one did not manage to adopt a special law of national minorities. We identify special disposals related to national minorities in Romanian Constitution, in the law of local public administration, the law of education, the law concerning the election of the Chamber of Deputies and Senate, the law related to political parties, the law for the election of the authorities of local public administration, the law concerning the combating of all forms of discrimination.
In the last project of the Law concerning the statute of national minorities in Romania, a new concept is introduced: cultural autonomy of minorities. The cultural autonomy is a form of non-territorial autonomy.
Nevertheless, Romania is criticised by some international organisations for the fact that the organisations of national minorities represented in the Parliament of Romania have instituted a monopole, therefore no other organisation of any minority is allowed to participate to the elections.

Keywords*: non-territorial autonomy, persons who belong to national minorities, inherent rights, Council of Europe, United Nations Organization.*

Introduction

In Romania, there are 19 national minorities officially acknowledged by Romanian state: Albanians, Armenians, Bulgarians, Croatians, Greeks, Jews, Germans, Italians, Hungarians, Poles, Roma, Russians, Serbs, Czechs and Slovaks, Tartars, Turks, Ukrainians, Macedonians and Ruthenians. Disposals related to the national minorities of Romania were included in the national legislation starting with 1991. Also, Romania has ratified the most important international treaties concerning the protection of national minorities.

However, up to present, one did not manage to adopt a special law of national minorities. We identify special disposals related to national minorities in the Romanian Constitution, in the law of local public administration, the law of education, the law concerning the election of the Chamber of Deputies and Senate, the law related to political parties, the law for the election of the authorities of local public administration, the law concerning the combating of all forms of discrimination.

In the last project of the Law concerning the statute of national minorities in Romania, a new concept is introduced: cultural autonomy of minorities. The cultural autonomy is a form of non-territorial autonomy.

Nevertheless, Romania is criticised by some international organisations for the fact that the organisations of national minorities represented in the Parliament of Romania have instituted a monopole, therefore no other organisation of any minority is allowed to participate to the elections. These criticisms appear in the Report presented by Romania during the 77th CERD Session – August 2nd – 27th 2010, Annual Report of USA State Department related to the practices in the field of human rights – 2009 and the third ECRI Report about Romania adopted in June 24th 2005 (point 24).

Practically, a paradoxical situation appeared. There are minorities in Romania, but we do not have a law of national minorities, nevertheless, one requires a form of non-territorial autonomy.

The study intends, in the first part, to clear up conceptually the notion of national minorities and the evolution of this notion, and, in the second part, to analyse the inherent rights of national

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minorities and the role of autonomy in this situation. In the last part one presents the criticisms presented with respect to Romania in the foregoing international documents.

Evolution of the notion of «national minority»

In order to refer to persons that belong to national minorities, we have to discuss first about the apparition, crystallisation and formation of nations, as they are currently appear on the map of Europe. A particularly important principle for the formation of nations, principle with an extremely high number of supporters, was the principle of nationalities. The promotion and application of this principle, mainly in the inter-war period, had to consequences extremely important on the international plan:

- formation of modern states-nations;
- crystallisation of the awareness of affiliation to another nation, awareness manifested in case of the persons that belong to national minorities.

The apparition of the knowledge of affiliation to another nation, as joint collective awareness, generated not only several conflicts in history, but it caused as well major transformations of positive law, since 1648 – date considered by some doctrinaires as inaugural for the application of the principle of nationalities in Europe[1], up to present.

Therefore, in a scientific approach, one must firstly analyse the manner of formation of nationalities and subsidiarily the formation of modern states, and therefore the manner of separating certain segments, that formed the subsequent national minorities.

Another extremely important aspect for the analysis of the evolution on international plan of legal regulations related to the rights of persons belonging to national minorities is represented by the attempt to define the „national minority", as well as the „rights of the persons belonging to national minorities", definitions to which we shall refer during the entire work.

The issue of defining such notions is controversial and up to present no unanimously approved definition was determined. The terms related to such definitions are often ambiguous and sometimes even absent. Most of the times, one uses homonyms or synonyms, with different signification depending on the nature of the situation, with different shades, which are merged sometimes, without determining clearly the senses or without presenting enough data that may suggest the correct sense, therefore the final conclusions are sometimes ambiguous or confused.

The clear definition of senses is a key condition, since it is the only manner to emphasize the limits of the notion of rights of the persons belonging to national minorities, during the evolution of their protection on international plan.

Since 1937, it was outlined the fundamental connection between the persons belonging to national minorities and the mother nation. Therefore, the minorities are characterised by affiliation to a nation different to that which forms the main substance of such state. And here appears the controversy, as the issue of minorities is thus reduced to the problem so much discussed and unsettled, of knowing what a nation is[2].

During the same inter-war period, another doctrinaire noticed with respect to the nation that this cannot be considered but an entity belonging to the psychological field, being the creation of heart, of the feeling and of the will of each individual that forms it.

The language, the race and the common religious beliefs have, definitely, a major influence over the national feeling, however, it may happen, and it happens often, that such elements are special and there is the willing of living together. The United States of America and Switzerland are good examples in this respect.

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[1] Al. Ovidiu Vlădescu, *Principle of minorities*, (Copuzeanu Tipography, Bucharest, 1935), p. 28.
[2] Radu Meitani, *Protection of minorities*, (Ph. D. Thesis, Bucharest, 1931), p. 45.

First of all, one must thus consider the willing of living together expressed by individual. It is the key factor of a nation[3], as well as of a minority.

Georges Scelle[4] expressed an opinion about this definition: „What is a minority? It is almost impossible to provide an accurate definition of this". Further on, the same author analyses the case of Switzerland, model of inter-ethnic living, where the population is spread in groups of different race, language, religion and they form thus different political, autonomous and federalised divisions, without mentioning a relation between the majority and minority population.

Without attempting to provide a definition, the International Permanent Court of Justice delimits the rights of the persons belonging to national minorities, when it passes a judgement on the protection of minorities: „firstly, make sure that those belonging to the minorities of race, religion or language are, from all points of view, equal to the other population of state. Secondly, provide the similar means for the maintenance of ethnical characters, of traditions and of national physiognomy"[5].

During the same period of the League of Nations, Paul Fauchille, in his treaty of public international law, it is made for the first time a distinction between the rights belonging to minorities and the rights of national minorities, drafting thus the theory related to individual rights and collective rights.

He stated that: „It seemed that the treaties would have been better inspired if they had provided under the protection of minorities as individuals and not as communities, the character of a universal principle, applicable to all states, regardless their rank or situation, be it large states or small states, reduced pursuant to the war or created by it, victorious, defeated or neuter. Thus, becoming indeed a fundamental rule of contemporaneous law, it would have produced everywhere its beneficial effects, without the secondary states to experience a humiliation feeling related to the idea that the protection of minorities is imposed only to them, without a state being entitled to consider it a kind of *capitis diminutio*, as an unfair and unilateral restriction of its suzerainty"[6].

The definitions provided to national minorities were numerous during the inter-war period, both on the level of Romanian doctrine, and on the level of foreign doctrine, and mainly of French doctrinaires. All these definitions became on a certain moment sterile, since the only thing they did was to resume, under a form or another, certain characteristic traits of minorities. Such definitions, referred to, were almost unanimous in considering that by national minority is understood a group of individuals who are living on the territory of a state and who are different from the majority of population by few distinct characteristics: race, language, religion, and which must be mainly protected. A characteristic trait of such range of definitions is the fact that minority opposes a living resistance to assimilation and does not have, as community, international rights[7].

This incoherence in defining national minorities, in fact the incapacity of states of approving a definition, continued as well after 1945, after the end of the Second World War.

The bipolar model of post-war society determined the issue of the rights of persons belonging to national minorities to be less promoted, preferring rather the promotion of non-discrimination principle on international plan, than granting, by conventional means, of some rights to the persons belonging to national minorities. However, the block policy made almost impossible the approach of such specific issue, until 1975, when, in the Final Document from Helsinki, was introduced, as a counter-weight to the principle of non-interference in the internal business of states, the principle of promotion and protection of human rights as fundamental principle of public international law. From

[3] Robert Redslob, *The law principles of modern people*, (Paris, 1937), p. 214.
[4] Geoges Scelle, *Law synopsis of people. Principles and methods,* (1st Part, Paris), p. 230.
[5] CPJI, series A/B, no. 64, p. 17.
[6] Paul Fauchille, *Treaty of Public International Law,* (Tome I1st Part, Paris), p. 809.
[7] I. Vintilă Gaftoescu, *Legal positions in the international law. Issue o minorities,* („Curentul" printing shops, Bucharest, 1939), p. 154.

this point of view, we may consider that the principle of observing the human rights was extremely important as well for the protection of the rights of individuals belonging to national minorities, the latter being included in the general system of protection of human rights.

The most important achievements for the promotion and protection of the rights of individuals belonging to national minorities were obtained after the disappearance of what was called bipolar international society, namely at the end of `90s. We consider the most important documents related to the protection of the rights of individuals belonging to national minorities the following: **Declaration on the rights of individuals that belong to national or ethnic, religious or linguistic minorities**[8] on universal level, within the Organisation of United Nations, as well as the **European Charter of regional or minority languages** of 1992 and the **Frame-Convention for protection of national minorities** of 1994, both documents having a regional dimension, being adopted within the Council of Europe.

During the period 1990-1994, one did not agree either on a definition related to national minorities, preferring either apophantic definitions, or definitions similar to that provided by the International Permanent Court of Justice[9].

However, as stated, the issue of national minorities is not new; a definition of national minorities unanimously approved wasn't provided yet. It is noticed that the rights of the individuals that belong to national minorities are approached in documents related to the range of human rights, in separate articles, parallel to disposals that stipulate the same rights for all persons. We notice as well that, beside the documents that refer to national minorities, one speaks about minorities in general, the national minority being one which, regarded from a certain angle, may incorporate the others as well, countrywide. Thus, a cultural minority may be integral part of a national minority, whereas the latter may include several cultural minorities.

A shading of such approach of the issue of minorities is definitely enforced. Opposite to the manner of approaching such field in Central and Eastern Europe, where national minorities represent an important segment of social-political life – situation influenced as well by the historical conditions faced by this geographical area, in Western Europe, we may practically say that no one speaks about national minorities, but about the so-called „ethno-cultural groups", category which includes both ethnical minorities and the migrants.

Returning to the definition assigned to national minority, it must be said that in the preamble of each international document one states the signification that such document provides to a certain concept, in this case to national minorities, fact which supports the idea that one did not agree yet a definition of national minorities.

The recommendation 1134 with respect to the rights of national minorities, adopted by the Parliamentary Meeting of the Council of Europe on October 1st 1990 defines the minorities as „ separate or distinct, well-defined groups, settled on the territory of a state, the members being citizens of such state and presents certain religious, linguistic, cultural, or other traits that distinguish them of the majority of population (art. 11)".

In terms of the Recommendation 1177 related to the rights of minorities, adopted by the Parliamentary Meeting of the Council of Europe on February 5th 1992, the national minorities are „citizens that share specific cultural, linguistic or religious traits" and who „may want to be acknowledged and secure the possibility to express them", following that, in the next paragraph, to

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[8] Adopted by Resolution no. 47/135 of December 18th 1992.

[9] The International Permanent Court of Justice defined minority as a „group of persons who are living in a country or locality, having their race, religion, language and traditions, united by their identity in a solidarity feeling, with a view to maintain the traditions, the religious forms and providing education and raising children in the spirit and traditions of their race and mutual help"; see P.C.J.I., series B, no. 17, p. 19, quoted by Raluca Miga-Beşteliu, *International law. Introduction in public international law,* (All Publishing House, Bucharest), 1998, p. 192; taken over from F. Capotorti, *Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities,* (United Nations, New York, 1991), p. 5.

be stipulated that „these are groups sharing such specifications inside a state, which the international Community, after the first world war, calls them minorities, without implying any inferiority in any field".

Also, in the meeting report, CSCE of experts on national minorities' issues (Geneva, July 19th 1991), it is tried another approach of defining minorities, outlining that „not all ethnic, cultural, linguistic or religious differences entail necessarily the creation of national minorities".

It is known the fact that, submitted to influences during the formation process, the language of a people has many dialects, in some countries the differences being higher, in other smaller, but, on a whole, without differences meant to create a new language, different of that of the country where such area is situated. Concerning the cultural differences, by a brief historical incursion, we shall notice the influences of migrants and then the feudal division of territories, division that determined these to be successively submitted to several cultural influences. With respect to religion, it must be stated that, pursuant to international consecration of religious liberty, each individual is free to choose any officially acknowledged religious cult, the enfranchising of the concept of religious minority generating a religious intolerance, that should be abandoned in the immemorial times of Middle Ages. One may definitely speak, from a strictly statistic point of view, about religious minorities, however a national minority cannot and must not be defined in terms of religion.

The U.N.O. subcommission for the prevention of discrimination and protection of minorities, in 1950, proposed the following definition: „The term of minority includes only those non-dominant groups of population, which possess and want to maintain stable ethnical, religious or linguistic traditions or characteristics, obviously different from those of the rest of population. Such minorities must properly include an appropriate number of individuals, in order to be able to develop such characteristics. The members of such minorities must be loyal to their citizenship state". In this approach, what draws the attention is the fact that it is imposed a so-called relative limit, that of an „appropriate" number of persons so a group may be considered a national minority. At the same time, in the last part is determined as well an obligation meant to secure and determine the frame of manifestation of the rights of national minorities.

Leaving from this definition, twenty years later, in a study related to minorities, Francesco Capotorti said about a minority that it is: „A group numerically inferior to the rest of population of a state, in a non-dominating position, the members – citizens of state – possessing, from an ethnic, religious, or linguistic point of view, different characteristics than those of the rest of the state and expressing even implicitly a solidarity system with respect to the purpose of preserving their culture, traditions, and religion".

A wide definition, maybe the broadest one, is provided in a document project submitted to the Council of Europe in 1993, as Annex to the Recommendation 1201 of the Parliamentary Meeting of Council, respectively the project of Additional Protocol to the European Convention of human rights related to the individuals that belong to national minorities:

„In terms of this convention, the expression of national minority designates a group of individuals in a state, who:

a) have the residence on the territory of such state and are citizens of it;

b) maintain old, solid and durable relations with this state;

c) present specific ethnical, cultural, religious or linguistic traits;

d) are enough representative, although they are less numerous than the rest of the population of such state or region;

e) are inspired by the will to maintain together what forms their common identity, mainly their culture, traditions, religion and language".

Pursuant to such definitions, one may conclude that the basic criteria to define a group as national minority are:

- the proper number of individuals to be considered national minority;
- citizenship of the state where they are living;

- the maternal language, ethnie, culture or religion, to be different than that of majority of population.

An interesting position, relevant to be mentioned herein, is that of European Union which, on the institution level, does not operate a concept of national minority. It is a signal for the future to waive this concept, to eliminate the privileged status of all national minorities, comparatively to ethnical groups, and to focus on the protection of specificity of ethnical diversity.

One must state as well the Instrument of Central European Initiative of 1994 for the protection of the rights of individuals belonging to national minorities. In this document, one defines national minority in art. 1 par. (1) as follows: „For the purpose of this instrument, the term of national minority will have the signification of group which is less numerous than the rest of the population of a state, having citizen-members with ethnic, religious or linguistic traits different of those of the rest of population and who are animated by the will to safeguard their culture, traditions, religion or language".

Pursuant to analysing the definitions assigned to individuals belonging to national minorities, we propose the following definition: *the individual belonging to a national minority is that person who is a part of a group on the territory of a state and having the citizenship of such state, representative, but numerically inferior, distinct from the majority in terms of specific, ethnic, linguistic, religious traits and who exercises its rights individually, with the other members of the group culturally related to.*

Rights inherent to individuals belonging to national minorities

Considering that an individual belonging to national minorities is a person related to a minority group, but citizen of a state, it enjoys thus all rights provided to the citizens of such state. Thus, it is raised the question whether such person needs special protection, to be granted by the state to which it belongs as citizen, either directly, by the internal legislation of such state, or indirectly, through the participation of such state to specific international conventions.

In order to be able to answer this question, it is necessary to analyse whether there are inherent rights of the persons belonging to national minorities, different from those of majority.

During the inter-war period, such issue was weakly theorized. It was the principle of non-discrimination that one applied in the peace treaties, for instance art. 9 of the special Treaty between the Main Powers Allied and Associated as well in Romania[10].

After the second world war, the **Declaration on the rights of individuals who belong to national or ethnic, religious and linguistic minorities** dated 1992 is the first document that clearly enumerates the specific rights of the persons belonging to national minorities.

According to this document, the inherent rights are:

- the right to its own culture, to its own religion, to use its own language;
- the right to organize and manage its own organisations;
- the right to entertain relations with the other members of the same group;
- exercising such rights individually and jointly.

In the text of this Declaration is stipulated as well the obligation of states to the protection of existence and national or ethnic, cultural, religious, linguistic identity of minority.

The Frame-Convention for protection of national minorities relies to a great extent on the application of non-discrimination principle opposite to individuals that belong to national minorities, but the specificity of such Convention consists in instituting a mechanism of supervision by the Committee of Ministers of the Council of Europe to apply it.

In the specialised doctrine[11] it is considered that a right inherent to the individuals belonging to national minorities is the right to identity and the correlative obligation of the states to protect such right. Thus, there are several kinds of identity:

[10] The Treaty was signed in Paris on December 9th 1919 and was effective on September 4th 1920

- cultural identity;
- linguistic identity;
- religious identity.

In this context, it is deemed that protection of identity represents a synthesis of the protection of the rights of individuals belonging to national minorities. It is also distinguished between „common field", as a range of rights and obligations incumbent upon all citizens and secured to all, without discrimination, and the "specific field", including specific rights of individuals belonging to national minorities, related to the protection of different issues of their identity.

The identity balance must be attached a fair balance between rights and obligations.

Pursuant to the analysis of the range of inherent rights and correlative obligations of individuals belonging to national minorities, it results a certain legal paradox: the individuals belonging to national minorities have inherent rights that are not different from those of majority, but they need a special protection.

1. Right to use maternal language[12]

The realities show that several populations from all states remain loyal to their language, different from that of majority or from other languages. The prediction of some specialists, a few decades ago, that a universal law will be determined, which, being better adapted to a harmonious collaboration with the computers, would impose upon humanity, proved to be an utopia. The maternal languages maintain an important social function meaning that they represent the ground of national identity.

With respect to the right to use maternal language, the European Charter of Regional or Minority Languages stipulates in the preamble that „the right to practice a regional or minority language in the private and public life represents an imprescriptibly right, according to the principles included in the International Pact related to civil and political rights of United Nations and in conformity to the spirit of Convention for the protection of human rights and fundamental liberties of the Council of Europe".

Therefore, the right to use maternal language is a fundamental right of national minorities, breaching it entailing, eventually, its disappearance.

However, it is known the fact that, although language is an indispensable element of culture, maintaining and developing one's own culture depends on the study of maternal language or even on the education in such language.

Nevertheless, there is a difference between studying maternal language and education in such language, difference worth to mention and analyse. The study of maternal language involves that the educational process to be carried out in the official language of a state following that, in the education curriculum, to be introduced courses study maternal language. Regarded from this point of view, the right to use maternal language could seem limited. It must be considered however the fact that, since infancy, the children belonging to national minorities learn the maternal language both within the family and in the community.

The education in maternal language is a more complex process, which involves adjusting the legislative frame in several fields, as proved in the situation from Romania. It worth mentioning the fact that the educational process in maternal language cannot be carried out on the highest level in all specialisations as long as the constitutions of states stipulate the existence of an official language, language used in justice, medicine, research etc. At the same time, in the areas with high concentration of national minorities, one may allow, by law, the use of the language of such minorities on official level in the relations determined by them in the foregoing fields. If knowing the official language is an obligation of the citizens belonging to national minorities, the European

[11] Ion Diaconu, *Minorities. Identity. Equality*, (Romanian Institute for Human Rights, Bucharest, 1998).
[12] Same, p. 65.

Charter of Regional or Minority Languages stipulating that „protecting and encouraging regional or minority languages must not be done in the detriment of official languages and of the need to appropriate them".

There are cases when persons belonging to national minorities do not know the official language of the state of their citizenship. This may generate problems mainly when the work carried out involves multiple connections with the citizens of other minorities or of majority or in technical fields where knowing specific terms is a must.

The problem is delicate, far of being settled, generating several polemics and even tensions inside a mixed community, mainly where the communities of national minorities are a majority. The faulty application of this right or the existence of a legal frame rather unclear and incoherent lead inevitably to discrimination, exclusion of national minorities from certain fields of public rights, separation and isolation of communities, absence of dialogue and occurrence of interethnic tensions.

In the last years, it was attempted in Romania[13] to promote some measures in order to support the protection of national minorities' languages by adopting highly liberal laws (for instance, law of local public administration, law of education, statute of public officers), laws that did not solved yet entirely the problem.

2. Right to its own culture[14]

As seen in the previous section, the cultural criterion is an important one in terms of including a group in the national minorities.

Consequently, the observance of such criterion generates a legitimate right both for the person belonging to the national minority, and for the communities in this category.

The Universal Declaration of Human Rights and the International Pact related to the economic, social and cultural rights stipulate the right of every individual „to get involved in cultural life". The Pact adds the obligation of member states „to take the measures necessary to maintain, develop and spread science and culture". In order to conclude, we may add the Declaration related to the principles of international cultural cooperation, proclaimed in the general Conference of UNESCO in 1966, where it is mentioned that „Any culture has its own dignity and value that must be observed and maintained; (...) in their fecund variety, diversity and mutual influence that they exercise one over the others, all cultures are a part of common patrimony of humanity".

Both pacts related to human rights stipulate several rights that more or less concern the benefit of one's own culture, such as the right of parents to enrol their children to any school, on their discretion, the liberty of expression, the liberty of press, of reunions, religious liberties and others. All these are elements of the right to culture of any individual.

However, this position generally expressed of application of the right to culture, reported to all communities regardless if they belong or not to national minorities. The problem is to find the specificity of such right opposite to minorities and the components included by it during the process of its manifestation.

Some authors refer, in this respect, to customs, habits, traditions, rituals, kinds of dwelling, as well as to the manufacture of pieces of art, cultivation of music, founding cultural organisation, publication of books in their own language, as well as the right of transmitting one's own culture by education to future generation, either by separate schools, or by providing respect to the cultures of minorities in public schools, and, with respect to indigene populations, to their ancestral connection with the land.

Returning to national minorities, it must be stated that, in the performance of such right, the state authorities must firstly provide the conditions necessary for the manifestation of such specific

[13] For details, see Present in the education of national minorities of Romania. Achievements of school year 2001-2002 and perspectives, Ministry of Public Information, Ministry of Education and Research, 2002.

[14] Ion Diaconu, *Minorities. Identity. Equality*, (Romanian Institute for Human Rights, Bucharest, 1998), p. 31.

customs in the sense of securing a «controlled permissiveness» related to the freedom of using maternal language in the education of children belonging to national minorities, access to information and free circulation of it in the language of minorities, as well as the encouragement of their cultural manifestations.

I have used the term of « controlled permissiveness » to outline the fact that the existence of this right entails obligations of both parties, meaning that exercising the minority specific rights, in general, and that to its own culture, with everything it involves, must be included in the sphere of national interest, principle synthesized in the collocation «policy of minorities subscribed to national policy».

The frame convention concerning the protection of national minorities adopted by the Council of Europe in 1994 includes much more complex and detailed disposals. The member states undertake to promote the necessary conditions so the minority persons may maintain and develop their culture and to maintain the essential elements of their identity, mainly the religion, the language, the traditions and cultural inheritance. It is resumed the obligation member states to observe the right of such individuals to peaceful reunion, freedom of association, expression, thinking, consciousness and religion. Examining thoroughly this field, the Convention stipulates the freedom of having opinions, of receiving and sharing information and ideas in the language of minority, without the interference of public authorities. This interference of public authorities must be construed in terms of not controlling the circuit of information, but, on the other hand, it is necessary a minimum supervision related to that information concerning the national safety.

The member states undertook, as well, to adopt the measures necessary in order to facilitate the access of such persons to the means of information and to allow cultural pluralism. In this respect, the member states undertook to encourage the spirit of tolerance and intercultural dialogue, to take effective measures in order to promote the mutual respect, understanding and cooperation between all persons on their territory, mainly in the field of education, culture and means of information.

It must be outlined as well the fact that the origin of a national minority is important, meaning that the past and the manner of arriving on the territory of a state acquiring the capacity of minority, highly influence the manner of manifestation and the customs. Therefore, we distinguish several categories of minorities:

a) *historical national minorities* – those minorities on the territory of a state for several centuries, arriving there pursuant to some historical events (Hungarians, Germans in Romania);

b) *migrants* – those minorities on the territory of a state for a short period, arriving there pursuant to social, economic conditions in their origin country (Arabians in Western Europe);

c) *national minorities originated from slaves* – those minorities brought from their origin countries as slaves, obtaining subsequently their freedom (Roma in Romania, Afro-Americans in USA).

Synthesising the foregoing, we may conclude that exercising the right to one's own culture is performed within an organised state frame governed by international rules, but considering the interests specific to each geographical area and the characteristics of national minorities in such area.

3. Right to practice and profess one's own religion[15]

As determined, religion does not represent a distinguishing criterion of a minority group from a majority. The Universal Declaration of Human Rights[16] stipulates in art. 18 that „any person has the right to freedom of thinking, consciousness and religion, this right involves the liberty to change its own religions and beliefs, individually or collectively, both publicly and privately, by education, practices, cult and performance of rituals". This concept was taken over by the majority of world's

[15] Same, p. 32

[16] Declaration of Human Rights available at: http://www.un.org/en/documents/udhr/

Constitutions, the religious liberty not being discussed in democratic countries. The religious liberty involves, first of all, the acknowledgement by state of the religion or cult practiced by a religious community. This right cannot survive alone, but with other fundamental human rights such as liberty of expression or freedom of consciousness.

It must be outlined the fact that religions are universal. They are not limited to the territory of a state, but, given the free circulation and freedom of consciousness, they have supporters worldwide. Therefore, it is erroneous the assertion according to which we may speak about religions specific to national minorities and, implicitly, assimilation of the term of national minority with that of religious minority

From the point of view of the supporters of a religion on the level of a state, the right to practice the religion in the language of a minority is fully grounded meaning that, where a minority community represents a religious majority, one may adopt the language of such minority in practicing such cult, this involving as well the preparation of clerks in this respect. However, the officials of the clerk of such cult are competent in this respect, the state having the obligation to provide the frame of manifestation of religious liberty and to combat the manifestation of intolerance of other religious communities.

4. Autonomy[17]

Enumerating the rights specific to national minorities, we must analyse as well the concept of «autonomy» much claimed currently.

The term of «autonomy» represents a delegation of central power to local authorities, offering them a wider range of competences in settling the problems of interest for the territorial units of the state.

In the democratic countries, in their great majority, the autonomy is the result of power decentralisation, many attributions belonging to the local authorities elected by the communities in such area.

The same is valid as well in the case of federal states, however, due to the system, the signification of the term of «autonomy» is rather different, involving several components than in the case of unitary states.

It must be emphasized the fact that the issue of autonomy, referring directly to the constitutional field, represents an internal problem of every state, any external involvement being rejected, in terms of suzerainty principle.

Referring to autonomy in the context of national minorities relies on the idea according to which adopting autonomy on ethnical bases would create the proper frame for the development of a minority and for exercising its specific rights.

This idea is wrong, the development of the communities of national minorities as well as the exercising of their rights cannot be done by excluding other minorities or even the majority. The frame for the manifestation of citizens' rights is unitary, any attempt to ignore it being sanctioned by society.

However, in terms of this issue, the report of CSCE[18] meeting of experts with respect minorities (Geneva July 1-19th 1991) shows that „considering the diversity and variety of their constitutional systems, which determine that no approach is generally-applicable, the participating states notice that some of them have obtained positive results in a democratic manner, such as:

- local and autonomous administration, as autonomy on territorial base, including the existence of some consulting, legislative and executive bodies, elected by free and periodical elections;

[17] Ion Diaconu, *Minorities of third millennium – between globalism and national spirit*, (Romanian Association for Democratic Education, 1999), p. 237.

[18] See the tansformation of CSCE see http://www.osce.org/

- self-administration by a national minority of the issues related to its identity, in situations when territorial autonomy does not apply;

- forms of decentralised or local government".

The track followed by Romania is local autonomy relying on territory, the legislation determining this principle.

It would be interesting to analyse, briefly, the three models of autonomy proposed by the states participating to CSCE meeting of experts concerning the minorities.

The first model relies on local elections that may lead, by increasing the attributions, to bodies competent to solve locally the issues in their sphere of attributions, such as to adopt a certain strategy for the development of the area.

The second model, created mainly for national minorities, stipulates the existence of a system specific to the communities of national minorities, able to solve their particular problems, problems known better by persons belonging to a minority. But this does not involve eluding the attributions of the bodies of local public administration, liable for a wider community, which may include several minorities and majorities.

Eventually, we believe that the last model refers to federal states, the term of local government involving the delegation of the most important attributions of the executive, in the unitary states, this model not being able to operate satisfyingly.

Against the autonomy relying on ethnical criteria, it is adopted the European Charter of Local Autonomy in Strasbourg on October 15th 1985, defining the concept of «local autonomy» as „effective right and capacity of local communities to settle and manage in terms of law, under their own liability and in the advantage of such populations, an important part of public works". It is stipulated that this right is exercised by councils or meetings formed of members elected by free, secret, equal, direct and universal vote and who may dispose of executive bodies subordinated to them. It is expressly stipulated that the exercise of such rights has a territorial base, namely the administrative-territorial units for which such bodies are elected, by vote.

Also, the Charter stipulates expressly the application of the principles of local autonomy opposite to local communities from all administrative-territorial state units, without exception. No connection is determined between the ethnical and minority dimension and the local autonomy, between ethnical origin of the inhabitants of a territorial unit and the concept of local autonomy.

Local autonomy is thus defined as principle of internal organisation of states, as manner of performance of decentralised government system, integral part of democracy, without ethnic or minority connotations.

Discussing about local autonomy, we cannot ignore the Recommendation 1201/1993 of the Parliamentary meeting of the Council of Europe, entitled „referred to an additional Protocol to the European Convention of human rights, concerning the rights of national minorities"[19].

In the „Proposal of additional Protocol", which is integral part of the recommendation, it is stipulated, in art. 11, that: „In the areas where they form a majority, the individuals belonging to a particular national minority are entitled to dispose of proper local or autonomous administration, or of a special statute, in terms of the national legislation of the state".

We must outline here the legal character of recommendation which is not obligatory, according to Communitarian Law, the disposals therein may be applied by each state according to its own interpretation.

Concluding, the concept of «local autonomy» does not refer directly to national minorities, by transposing it in practice, one must consider the constitutional issues of a state, the ethnic structure of an area, as well as the regional social-economic realities.

In the last law project related to the status of national minorities, one attempts to introduce a new form of autonomy, namely the cultural autonomy. Therefore, such form of autonomy is non-

[19] About Parlamentary Assambley of the Council of Europe see http://assembly.coe.int/defaultE.asp

territorial. According to the foregoing project, cultural autonomy is defined as being the capacity of the community of a national minority to have decisional competences in the problems related to its cultural, linguistic and religious identity, for councils elected by its members. For the operation of the disposals of such project, the organisations of citizens belonging to national minorities may initiate the incorporation of the National Council of Cultural Autonomy. The National Councils of Cultural Autonomy are administrative autonomous authorities, with legal personality.

The cultural autonomy of national minorities refers to the following categories of competences:

a) elaboration of strategies and priorities with respect to the education in the maternal language of national communities;

b) organisation, management and control of education in the maternal language in private institutions of education, or participation in partnership with competent public authorities to the accomplishment of such attributions, in case of the institutions from the public system of education;

c) organisation, administration and control, in terms of law, of cultural institutions of private law in maternal language, or of research and development of one's own culture, or, if the case, the participation in partnership with competent public authorities to the accomplishment of such attributions, in case of cultural institutions of public law;

d) incorporation and management of one's own means of mass communication, or participation in partnership with competent public authorities to the organisation of some positions, sections, editorial offices, or programs within public companies of radio and television;

e) participation to the elaboration of strategies and protection priorities and the valuation of historical monuments, respectively of movable cultural patrimony of such national minority;

f) management or, if the case, participation in partnership with competent public authorities, or supervision of management of funds meant for financing specific activities in the field of maintaining, developing and expressing cultural, linguistic and religious identity of national minorities;

g) designating the management of private institutions of education teaching in the language of national minorities, as well as of cultural institutions of private law of such national minorities;

h) approving the designation of the management of state institutions of education teaching in the language of national minorities, as well as of the public institutions of culture of such national minorities, in terms of law;

i) proposing the designation of the management of state institutions of education, where are operating subunits with teaching in the maternal language;

j) proposing to designate some representatives of such national minorities within the Ministry of Culture and Cults and the Ministry of Education and Research, within some departments with attributions related to the culture of national minorities and education in the maternal language of national minorities;

k) setting-up and offering some grants and cultural and scientific prizes.

l) determination of some special fees for persons belonging to national minorities, in terms of law, with a view to provide the operation of the institutions of cultural autonomy.

5. System of protection of national minorities in Romania in terms of some international institutions.

Disposals of the 3rd report of ECRI about Romania, adopted on June 24th 2005[20]

A law project related to the statute of national minorities is being currently discussed in Romanian Parliament. This project, elaborated in 1995 and amended several times since then, includes in Article 3 a definition of Romanian national minorities. They are defined as communities living in Romania for at least a century, having their own national, ethnic, cultural, linguistic and

[20] The full report available at http://www.coe.int/t/dghl/monitoring/ecri/default_en.asp (28th of January 2012)

religious identity, and intend to maintain, express or promote such identity. This law project includes a chapter about cultural autonomy which guarantees the right of national minorities to have their own institutions in fields such as culture, education and mass-media. Moreover, this chapter defines the manner of operation and supervision of such institutions and stipulates the right to education in the languages of minorities, the political representation of national minorities and a more supported involvement of them in the process of adopting decisions. This law project proclaims the non-discrimination principle, forbidding any kind of discrimination and instigation to discrimination.

However, ECRI notes concernedly that the section of such law project referring to the organisations of national minorities determines all new organisations willing to represent minorities to be governed as well by the conditions stipulated by Law No. 67/2004 concerning local elections. This chapter includes thus a range of conditions that such organisations cannot practically accomplish. It maintains as well the status quo principle, stipulating that all organisations of national minorities already members of the Council for National Minorities and represented in parliament, will maintain their legal status and will hold the rights and duties stipulated in the law project related to the status of national minorities. Since one of the effects of such conditions is that of obstructing the right of national minorities to elect their representatives, ECRI considers that national minorities are on a disadvantaged position opposite to the majority of population, free to elect its political leaders on all levels.

Disposals of the report of USA State Department related to human rights published in 2011[21]

Organizations representing ethnic minorities may also field candidates in elections. If the minorities in question are "national minorities," defined as those ethnic groups represented in the Council of National Minorities, their organizations must meet requirements similar to those for political parties. For organizations representing minorities not represented in the parliament, the law sets more stringent requirements than those for minority groups already represented in the parliament; they must provide the Central Electoral Bureau with a list of members equal to at least 15 percent of the total number of persons belonging to that ethnic group as determined by the most recent census. If 15 percent of the ethnic group amounts to more than 20,000 persons, the organization must submit a list with at least 20,000 names distributed among at least 15 counties plus the city of Bucharest, with no fewer than 300 persons from each county.

According to the constitution each recognized ethnic minority is entitled to have one representative in the Chamber of Deputies even if the minority's organization cannot obtain the 5 percent of the vote needed to elect a deputy outright, but only if the organization received votes equal to 10 percent of the average number of votes nationwide necessary for a deputy to be elected. Organizations representing 18 minority groups received deputies under this provision. There were 49 members of minorities in the 471-seat parliament, nine in the Senate and 40 in the Chamber of Deputies. At the end of the year, there were four members of minorities (all ethnic Hungarians) in the 17-member cabinet. Ethnicity data was not available for members of the Supreme Court.

Ethnic Hungarians, represented by the Democratic Union of Hungarians in Romania, an umbrella party, were the sole ethnic minority to gain parliamentary representation by passing the 5 percent threshold. Only one Romani organization, the Roma Party-Pro Europe, was represented in the parliament, by one member of parliament. Low Romani voter turnout likely resulted from a lack of awareness, inability to demonstrate an established domicile, and absence of identity documents.

Conclusions

In Romania, there is no doubt that human rights and the rights of individuals belonging to national minorities are observed. In this respect there are several guarantees, some deriving from

[21] Text available at http://romania.usembassy.gov/

internal rules, others from transposing some international norms in the internal legislation by ratification.

Nevertheless, the initiators of the law project concerning the statute of national minorities follow to reach two objectives. The first objective refers to the introduction of a new concept in the national legislation: cultural autonomy, as non-territorial form of autonomy. The second objective concerns the maintenance of stats – quo for the organisations belonging to national minorities represented in parliament. As may be noticed in the analyses of some international documents, Romanian state is criticised on international level for such initiative in the field of the rights of individuals belonging to national minorities.

The future will reveal as whether this legislative proposal is to concretize and which is going to be the final form of initiative or whether it remains a simple law project never adopted.

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THE RESULT OF THE FIRST CASE AGAINST ROMANIA REGARDING THE IMPLEMENTATION OF THE RACIAL EQUALITY DIRECTIVE (2000/43/EC) AND OF THE EQUAL TREATMENT DIRECTIVE (2000/78/EC)

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Abstract
The main objective is to present and analyze the final result of the first case against Romania regarding the transposition of The Racial Equality Directive (2000/43/EC) and of The Equal Treatment Directive (2000/78/EC) into national legislation: preliminary ruling C-310/10 (Agafiței and Others, Romania) and the possible impact of this case.
In 2011 I published in CKS 2011 an article regarding the firs case against Romania regarding the transposition of The Racial Equality Directive (2000/43/EC) and of The Equal Treatment Directive (2000/78/EC) into national legislation.
Meanwhile the European Court of Justice decided in this case.

***Keywords**: transposition, discrimination, European Court of Justice, preliminary ruling, TFUE.*

Introduction

In 2011 CKS, I analyze the first case introduced against Romania in front of Court of Justice of European Union, Case C-310/10[1].

In 2010 there was introduced Reference for a preliminary ruling from the Curtea de Apel Bacău (Romania) lodged on 29 June 2010 — Ministerul Justitiei si Libertătilor Cetătenesti v Ştefan Agafitei and Others[2]. The case was about salary rights of judges - Discrimination on grounds of membership of a socio-professional category or place of work - Conditions for compensation for the harm suffered - Directives 2000/43/EC and 2000/78/EC.

This was the first case first case against Romania regarding the transposition of The Racial Equality Directive (2000/43/EC) and of The Equal Treatment Directive (2000/78/EC) into national legislation: preliminary ruling C-310/10 (Agafiței and Others, Romania).

On 7th of July 2011 the Judgment Court (Fourth Chamber) ruled that the reference for a preliminary ruling from the Curtea de Apel Bacău (Romania) is inadmissible.

Based on the facts mentioned above, I took the decision to analyze the whole C-310/10 case for CKS 2012. This research could be one of the fewest on the cases submitted to Court of Justice of European Union.

In order to have a clear picture of this case, I will introduce also the procedure for the preliminary ruling in front of Court of Justice and the EU legal frame work on combating discrimination.

The preliminary ruling in front of Court of Justice of European Union

The procedure of preliminary ruling is based on the Chapter 9 Preliminary Rulings and other References for Interpretation, art. 103 – 104 from Consolidated Version of the Rules of Procedure of

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[1] For the full research see CKS 2011. Challenges of the Knowledge Society, 5th Edition, (ProUniversitaria Publishing House, 2011).

[2] Text of the preliminary ruling available in OJ C234/27 from 28.08.2010

the Court of Justice (2010/C 177/01)[3] and on Information Note on References from National Courts for a Preliminary Ruling (2009/C 297/01)[4].

Under the preliminary ruling procedure, the Court's[5] role is to give an interpretation of European Union law or to rule on its validity, not to apply that law to the factual situation underlying the main proceedings, which is the task of the national court. It is not for the Court either to decide issues of fact raised in the main proceedings or to resolve differences of opinion on the interpretation or application of rules of national law.

8. In ruling on the interpretation or validity of European Union law, the Court makes every effort to give a reply which will be of assistance in resolving the dispute, but it is for the referring court to draw the appropriate conclusions from that reply, if necessary by disapplying the rule of national law in question.

Under Article 267 TFEU[6], any court or tribunal of a Member State, in so far as it is called upon to give a ruling in proceedings intended to arrive at a decision of a judicial nature, may as a rule refer a question to the Court of Justice for a preliminary ruling

All national courts must therefore refer a question to the Court when they have doubts about the validity of such an act, stating the reasons for which they consider that that act may be invalid.

A national court or tribunal may refer a question to the Court for a preliminary ruling as soon as it finds that a ruling on the point or points of interpretation or validity is necessary to enable it to give judgment; it is the national court which is in the best position to decide at what stage of the proceedings such a question should be referred.

A reference for a preliminary ruling calls for the national proceedings to be stayed until the Court of Justice has given its ruling.

Base on these rules of procedure Curtea de Apel Bacău introduced Reference for a preliminary ruling[7]:

1. Do Article 15 of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (1) and Article 17 of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (2) — both transposed into national law by OG (Ordonanta Guvernului (Government legislative decree)) No 137/2000, as republished and amended — preclude national legislation or a judgment of the Constitutional Court (Constitutional Court) prohibiting the national judicial authorities from awarding to claimants who have been discriminated against the compensation for material and/or non-material damage which is considered appropriate in cases in which the compensation for the damage caused by discrimination relates to salary rights provided for by law and granted to a socio-professional category other than that to which the claimants belong (see, to that effect, judgments of the Constitutional Court No 1325 of 4 December 2008 and No 146 of 25 February 2010)?

2. If the answer to Question 1 is in the affirmative, are the national courts required to await the repeal or amendment of the provisions of national law — and/or a change in the case-law of the Constitutional Court — which are, ex hypothesi, contrary to the provisions of Community law, or are the courts required to apply Community law, as interpreted by the Court of Justice of the European Union, directly and immediately to the proceedings pending before them, declining to apply any provision of national law or any judgment of the Constitutional Court which is contrary to the provisions of Community law?

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[3] Text available in OJ C177/1 from 02.07.2010

[4] Text available in OJ C297/1 from 05.12.2009

[5] See also http://curia.europa.eu/ (27th of January, 2012)

[6] Text of article 267 TFEU available in: Consolidated Treaties. Charter of Fundamental Rights, (Published by Publications Office of the European Union, Luxembourg, 2012).

[7] Text available at http://www.csm1909.ro/CJUE/C310_10RO.pdf (27th of January, 2012)

Basically the question asked is Do Article 15 of Council Directive 2000/43/EC and Article 17 of Council Directive 2000/78/EC preclude national legislation or a judgment of the Constitutional Court prohibiting the national judicial authorities from awarding to claimants of the Constitutional Court prohibiting the national judicial authorities from awarding to claimants?

Legal Framework of European Union on Combating Discrimination

It is well known that the combating discrimination legislation lies at the level of European Union in three distinct Directives. The three Directives are:

- Council Directive 2000/43/EC – Racial Equality Directive: establishes a framework against discrimination based on racial or ethnic origin inside and outside the labour market[8];

- Council Directive 2000/78/EC – Employment Equality Directive: establishes a framework for equal treatment in employment and occupation, and in Article 1 lays down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation[9];

In addition to the Council Directives, European Union considers combating discrimination one of the top priorities. In 2008 was issued another proposal for a new Directive, so called Horizontal Directive, on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation.

There are another two documents important for this issue, both Communications From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions: 2008 Non-discrimination and equal opportunities: A renewed commitment[10] and 2008 Renewed social agenda: Opportunities, access and solidarity in 21st century Europe[11].

The referring court, Curtea de Apel Bacau, refers to only 2 EU directives out of the three mentioned above. The referring court refers to Directive 2000/43/EC – Racial Equality Directive and to Directive 2000/78/EC – Employment Equality Directive: establishes a framework for equal treatment in employment and occupation.

More precise Curtea de Apel Bacau refers to the art. 15 of Directive 2000/43/EC – Racial Equality Directive: establishes a framework against discrimination based on racial or ethnic origin inside and outside the labour market and to art. 17 of Directive 2000/78/EC – Employment Equality Directive

The content of the two articles mentioned are very much similar.

The art. 15 of Directive 2000/43/EC is named "*Sanctions*" as has the following content: "*Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied. The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive. The Member States shall notify those provisions to the Commission by 19 July 2003 at the latest and shall notify it without delay of any subsequent amendment affecting them*."

The art. 17 of Directive 2000/43/EC is named "*Sanctions*" as has the following content: "*Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied. The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive. Member States shall notify those provisions to the*

[8] Text of the Directive available in OJ L180/22 from 19.07.2000
[9] Text of the Directive available in OJ L303/16 from 02.12.2000
[10] Text available under COM (2008) 420
[11] Text available under COM (2008) 212

Commission by 2 December 2003 at the latest and shall notify it without delay of any subsequent amendment affecting them."

Preliminary ruling of Court of Justice of European Union in case C-310/10 (Agafiței and Others, Romania)

After Curtea de Apel Bacău referred the question mentioned above to the Court of Justice of European Union for a preliminary ruling, the Court of Justice asked the romanian Government and other interested EU member states to make observations related to the question referred.

The Romanian Government[12] and Ireland entertain doubts in their written observations as to whether the questions referred are admissible, in particular on the ground that the situation at issue in the main proceedings does not fall within the scope of Directives 2000/43 and 2000/78 or, more generally, of European Union law.

In that regard, under Article 267 TFEU[13], the Court of Justice has jurisdiction to give preliminary rulings concerning the interpretation of the Treaties and of acts of the institutions of the European Union.

According to settled case-law, the procedure provided for in Article 267 TFEU is a means of cooperation between the Court of Justice and national courts. It follows that it is for the national courts alone which are seized of the case and are responsible for the judgment to be delivered to determine, in view of the special features of each case, both the need for a preliminary ruling in order to enable them to give their judgment and the relevance of the questions which they put to the Court.

Consequently, where questions submitted by national courts concern the interpretation of a provision of European Union law, the Court is, in principle, obliged to give a ruling.

Nevertheless, the Court in exceptional circumstances, can examine the conditions in which the case was referred to it by the national court, in order to confirm its own jurisdiction. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of European Union law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to enable it to give a useful answer to the questions submitted to it.

It is therefore apparent from settled case-law that a reference by a national court can be rejected if, *inter alia*, it is obvious that European Union law cannot be applied, either directly or indirectly, to the circumstances of the case.

In the present case, it should be noted at the outset that the Curtea de Apel Bacău is not asking the Court whether a situation such as that at issue in the main proceedings falls within the scope of Directives 2000/43 and 2000/78, in particular Articles 15 and 17 respectively thereof, to which the questions referred relate.

Article 1 of Directive 2000/78 states that the purpose of the directive is to lay down a general framework, as regards employment and occupation, for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation. The purpose of Directive 2000/43, as is apparent from Article 1 thereof, is to lay down a framework for combating discrimination on the grounds of racial or ethnic origin.

However, it is apparent from the order for reference that the discrimination at issue in the main proceedings is not based on any of the grounds thus listed in those directives, but operates instead on the basis of the socio-professional category, within the meaning of national legislation, to which the persons concerned belong, or their place of work.

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[12] Text available at http://www.dae.gov.ro/admin/files/Raport%20de%20activitate%20DAE%20-%202010.pdf (27th of January, 2012)

[13] Text of article 267 TFEU available in: Consolidated Treaties. Charter of Fundamental Rights, (Published by Publications Office of the European Union, Luxembourg, 2012).

It follows that a situation such as that at issue in the main proceedings falls outside the general frameworks established by Directives 2000/43 and 2000/78 respectively for combating certain forms of discrimination.

As is apparent from Article 2(1) of those directives in particular, the principle of equal treatment enshrined in the directives applies by reference to the grounds exhaustively listed in Article 1.

It should also be recalled in that connection that Article 13 EC – now Article 19 TFEU[14] – which contains only rules governing the competences of the Community and on the basis of which the directives in question were adopted, does not refer to discrimination on grounds of socio-professional category or place of work, so that neither Article 13 EC nor Article 19 TFEU can even constitute a legal basis for Council measures to combat such discrimination.

It follows from all the foregoing that a situation such as that at issue in the main proceedings falls outside the scope of measures adopted on the basis of Article 13 EC, in particular Directives 2000/43 and 2000/78, so that Articles 15 and 17 respectively of those directives, to which the reference for a preliminary ruling refers, do not relate to such a situation.

However, since the Curtea de Apel Bacău has stated, both in the grounds of the order for reference and in the first question referred, that Legislative Decree No 137/2000 transposes Directives 2000/43 and 2000/78 into national law, it is necessary also to consider whether an interpretation by the Court of Articles 15 and 17 is capable of being justified, as submitted by the Commission, on the ground that those provisions were rendered applicable by domestic law to circumstances such as those at issue in the main proceedings as a result of the reference made by that law to those provisions.

The Court has repeatedly held that it has jurisdiction to give preliminary rulings on questions concerning European Union provisions in situations where the facts of the cases being considered by the national courts were outside the scope of European Union law and therefore fell within the competence of the Member States alone, but where those provisions of European Union law had been rendered applicable by domestic law due to a reference made by that law to the content of those provisions.

The Court has stated in particular in that regard that where, in regulating purely internal situations, domestic legislation seeks to adopt the same solutions as those adopted in European Union law in order, for example, to avoid discrimination against foreign nationals or any distortion of competition or to provide for one single procedure in comparable situations, it is clearly in the European Union interest that, in order to forestall future differences of interpretation, provisions or concepts taken from European Union law should be interpreted uniformly, irrespective of the circumstances in which they are to apply.

As has just been pointed out and is admittedly clear from the order for reference, the purpose of Legislative Decree No 137/2000 is, inter alia, to transpose Directives 2000/43 and 2000/78 into national law and Article 27 of the decree, which provides that discrimination prohibited under the decree gives rise to liability on the part of those responsible for it and to the right to obtain compensation on the part of victims of such discrimination, implements Article 15 of Directive 2000/43 and Article 17 of Directive 2000/78. None the less, it does not follow that the interpretation of Article 27 of the decree, in cases in which it is applicable to discrimination which is prohibited under national law alone and falls outside the scope of those directives, should be contingent on the provisions of the directives or, more generally, those of European Union law.

Indeed, it has not in any way been established that, in the present case, it is clearly in the European Union interest that provisions or concepts taken from European Union law should be interpreted uniformly, irrespective of the circumstances in which they are to apply, in such a way as

[14] Text of article 19 TFEU available in: Consolidated Treaties. Charter of Fundamental Rights, (Published by Publications Office of the European Union, Luxembourg, 2012).

to confer jurisdiction on the Court to answer the questions referred to it for a preliminary ruling by the national court.

First of all, the order for reference does not contain sufficiently precise information from which it can be inferred that, by making infringements of rules prohibiting discrimination under Directives 2000/43 and 2000/78 and infringements of rules prohibiting discrimination under national law alone subject to one and the same compensation scheme, the national legislature intended, as regards infringements of the national rules, to refer to the content of provisions of European Union law or to adopt the same solutions as those adopted by those provisions.

Next, it should be noted, first, that rules on sanctions such as those which the Member States are required to implement under Article 15 of Directive 2000/43 and Article 17 of Directive 2000/78 constitute an adjunct to the substantive rules prohibiting discrimination laid down by those directives, such rules on sanctions being intended to ensure that those substantive rules are effective. However, as pointed out at paragraphs 31 to 36 above, those directives do not contain any rule prohibiting discrimination on the ground of professional category, such as the rule at issue in the main proceedings.

Second, Article 15 of Directive 2000/43 and Article 17 of Directive 2000/78 simply require the Member States to introduce rules on sanctions applicable to infringements of the national provisions adopted pursuant to those directives and state that such sanctions must be effective, proportionate and dissuasive and that they may comprise the payment of compensation. It follows that the various specific measures required to implement the provisions of European Union law concerned can hardly be regarded, where they are intended to apply to situations which fall outside the scope of those provisions, as referring to concepts used in those provisions or as adopting the same solutions as those adopted by those provisions, which it would be necessary to interpret in a uniform manner irrespective of the circumstances in which they are to apply.

In the present case, the questions referred do not in essence seek an interpretation of the substantive content of Article 15 of Directive 2000/43 and Article 17 of Directive 2000/78. They seek rather a determination as to whether the principle of the primacy of European Union law precludes a rule of domestic law having constitutional status, as interpreted by the constitutional court of the Member State concerned, which, in a situation falling outside the scope of those provisions of European Union law, requires the domestic rule which moreover transposes those provisions of European Union law to be disapplied or that rule to be interpreted in a way that would be contrary to those provisions if that situation fell within their scope.

The need to ensure uniform interpretation of the provisions of European Union law may, as pointed out above, justify extending the Court's jurisdiction in matters of interpretation to the content of such provisions, including in situations in which, because a rule of national law refers to such provisions, they are applicable indirectly to a given situation. Such a consideration cannot, however, without disregarding the divisions of powers between the European Union and its Member States, confer on that provision of European Union law primacy over higher-ranking provisions of domestic law which would require that, in such a situation, the rule of national law or any interpretation of it must be disregarded.

It follows from all the foregoing that the questions referred by the Curtea de Apel Bacău, the purpose of which is not to ascertain whether a situation such as that at issue in the main proceedings falls within the scope of Article 15 of Directive 2000/43 or Article 17 of Directive 2000/78, but which are in fact based on the assumption that that is the case in order to seek an interpretation from the Court, even though those provisions of European Union law clearly cannot be applied, either directly or indirectly, to the circumstances of the case, are inadmissible.

On those grounds, the Court (Fourth Chamber) ruled on 7th of July 2012 that the reference for a preliminary ruling from the Curtea de Apel Bacău (Romania) is inadmissible[15].

[15] Decision of the Court available in JO C 234, 28.8.2010

Conclusion

On July 7th 2011 the European Union Court of Justice passed a judgement in the cause **C-310/10, Agafiței and others, declaring inadmissible the preliminary questions formulated in terms of article 267 TFUE Bacău Court of Appeal, Romania.**

The purpose of preliminary questions was the UE Court to determine whether art. 15 of Directive 2000/43 and art. 17 of Directive 2000/78 oppose to a national legislation and to some decisions of the Constitutional Court of Romania to forbid the national courts to grant to some salary discriminated persons depending on social-professional category or the job the salary rights stipulated by law and granted to other social-professional categories that that of such persons, with a view to amend the prejudice caused.

If the answer is positive, it is asked to be determined whether a national court has the obligation to remove the application of such disposal of internal law or constitutional jurisprudence without expecting that such disposal forms the object of a legislative amendment or of a new interpretation provided by the constitutional court able to assure the conformity of it to the Union law.

With respect to the application admissibility, **the Court showed that it may refuse to pass a judgment on a preliminary petition submitted by a national court if it is obvious that, considering the circumstances of the case, the Union law applied directly or indirectly to the situation that forms the object of dispute presented to the national court**.

Thus, the Court considers that, given such discrimination, not grounded on any of the reasons stipulated by the Directives 2000/43 and 2000/78, but on the criterion of social-professional category that includes the interested persons or by their work place, a similar situation to the one discussed on the docket of Romanian court exceeds the application field of the foregoing EU directives.

Simultaneously, the Court considers that, relying on the case data, we do not conclude that the norm of transposing the art. 15 of Directive 2000/43 and art. 17 of Directive 2000/78, when it is applicable with respect to the discriminations forbidden by the national law and which do not belong to the field of application of the two directives, is conditioned by the disposals of the foregoing directives or of the EU law in general. Therefore, the Court considers that it was not proved „*a certain interest to provide uniformity to the interpretation of some disposals or of some notions taken over by EU law, regardless the conditions of application, which authorises the Court to answer to the preliminary questions submitted by the sending court* ".

Within its observations, the Romanian Government, by the governmental agent for the European Union Court of Justice, supported the inadmissibility of the demand of passing a preliminary judgement, formulated by Bacău Court of Appeal.

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THE ROLE OF THE EUROPEAN EXTERNAL ACTION SERVICE IN THE EU'S INSTITUTIONAL SYSTEM

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Abstract
European External Action Service (EEAS) is a new institution of the European Union, whose foundation was laid by the Treaty of Lisbon with the role to support the High Representative of the Union for Foreign Affairs and Security Policy in fulfilling his mandate and, also to assist the President of the European Council, European Commission, President and other Commissioners to exercise their powers in international relations. Since the establishment of the European External Action Service (EEAS) is relatively recent, this article tries to highlight the crucial role of the European External Action Service (EEAS) in the European Union's institutional system and its contribution to strengthening the coherence and increasing impact and visibility of European Union action at international level and thus the one of the Member States.

Keywords: *European External Action Service, European Union institutions, diplomatic services, external action, Foreign Affairs and Security Policy.*

1. Introduction

Following developments for nearly sixty years, the European Union today is an economic power, the largest donor of humanitarian aid and a reference point for stability, democracy and human rights.

Under these conditions, to increase political and economic influence of the European Union in the world, we need a common foreign and security policy more effective and with higher impact, contributing to better promotion of the values and the interests of the Union and hence, its Member States.

To achieve this goal, the Lisbon Treaty envisaged the establishment of the European External Action Service (EEAS), with the role of supporting the High Representative for Foreign Affairs and Security Policy in fulfilling his mandate.

Given the recent date of establishment of the European External Action Service (EEAS) and, thereby, the relatively small number of papers describing the organization, functioning and tasks of the new European diplomatic service, this study attempts to highlight the important role of European External Action Service (EEAS) in the EU's institutional system and its contribution to strengthening the coherence and impact of growth and international visibility of EU action.

How it is treated researched theme highlights concerns about its analysis both from a general perspective, but also an analysis was gradually directed to evidence on the establishment, organization and functioning of the European External Action Service (EEAS).

Starting from the fact that specialized literature is particularly poor in terms about EEAS activities, currently being published only one book that describes in detail this issue, we believe that is much to say about this subject and consider that addressing a topic in the field of European Union foreign policy is an attempt both, bold and useful.

2. The evolution of EU foreign policy

The idea that EU countries should act together to promote and protect their strategic interests is as old as the very idea of European Union.

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The roots of current foreign and security policy can be found in the final Communiqué of the summit in The Hague (1 to 2 December 1969) of the Heads of State or Government of Member States of the European Communities, which reaffirmed the imperative to strengthen political ties between the Member States. On this basis, the following year, the foreign ministers meeting of the six member states in Luxembourg (27 October 1970) adopted the Davignon report, which marked the beginning of European Political Cooperation (EPC).

Following the Davignon Report on 23 July 1973 in Copenhagen, the Foreign Ministers of the Member States of the European Communities adopted a second Davignon report on political cooperation, which highlighted the need for Europe to establish itself as a distinct entity on the world arena, especially in international negotiations, to identify common positions on major international issues and to consider their impact on international politics[1].

A decade later, the Heads of State or Government meeting within the European Council in Stuttgart (19 June 1983), have signed a solemn declaration on European Union, which is known as "Declaration in Stuttgart." According to this document, seeking to consolidate the progress achieved so far both in economics and in politics, the Heads of State or Government have established a series of objectives to be achieved, including: increased consultation between Member States, progressive development and defining common principles and objectives and identify common interests, coordinate positions of the Member States relating to political and economic aspects of security, and closer cooperation between their diplomatic missions in third countries[2].

Official consecration of European cooperation in foreign policy took place in February 1986 with the adoption of the Single European Act (SEA). According to Article 30 of SEA, the signatory states undertook to inform and consult on any foreign policy issues of general interest so as to ensure that their combined influence is exerted as effectively as possible by coordinating the convergence of their positions and implementation of joint actions.

According to Article B of the Maastricht Treaty (TEU), signed on 7 February 1992, one of the objectives of the European Union was that of the affirmation of an identity on the international scene, particularly through the implementation of a common foreign and security policy, including defining a common defense policy which might lead in the future time, to a common defense.

Fundamentals of foreign policy and security policy can be found in Title V of the TEU, which established a Common Foreign and Security Policy (CFSP). According to Article J.1 TEU[3], the Union and Member States shall define and implement a Common Foreign and Security Policy covering all areas of foreign policy; its security objectives are: to safeguard the common values, fundamental interests and independence of the Union, to strengthen security Union and its Member States in all forms, maintaining peace and strengthening international security in accordance with the principles of the UN Charter, Helsinki Final Act and Paris Charter objectives, promote international cooperation, development and strengthening of democracy and the rule of law, and respect for human rights and fundamental freedoms.

With the adoption of the Amsterdam Treaty were a number of changes to the Maastricht Treaty regarding CFSP. According to Article J.2 TEU was created a new tool in the field of CFSP, common strategies[4] respectively. It was also created a position of "High Representative for CFSP"

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[1] *Second report on European political cooperation on Foreign Policy*, in (Bulletin of the European Communities, No 9/1973), p. 14-21.

[2] *Solemn Declaration on European Union. European Council, Stuttgart 19 June 1983*, in (Bulletin of the European Communities, No. 6/1983). pp. 24-29.

[3] According to the amendments made by Article 1.10 of the Treaty of Amsterdam (TAM), Article J.2 TEU became Article 12 and partially reproduced the old text Article J.1, Section 3 of the TEU.

[4] According to Article 13 TEU (former Article J.3 by renumbering adopted by TAM), common strategies were decided by the European Council, which also serve to develop principles and guidelines of the CFSP. Common strategies are adopted in areas where Member States have important interests in common. In one common strategy objectives are set, the time covered and the tools to be used by the European Union and its Member States. Common

having the role to assist the Council in matters of common foreign and security policy, particularly through contributions to the formulation, preparation and implementation of decisions and, where appropriate, acting on behalf of the Council and at the request of the EU Council Presidency, through conducting a political dialogue with third countries[5].

Also Declaration no. 6 annexed to the Treaty of Amsterdam established a "Policy Planning Unit and Early Warning" within the Council Secretariat, which consists of diplomats and officials attached to the Council of Member States, Commission and the Western European Union (WEU) as well as of officials coming from the General Secretariat. The Nice Treaty also brought a number of changes to the CFSP. Thus, Article 17 TEU[6] provides that the foreign policy and security policy shall include all aspects of EU security including the progressive framing of a common defense policy, which could lead to a common defense if the European Council decides it. In this case, the European Council recommends Member States to adopt that decision in accordance with their respective constitutional requirements. Union policy for the purposes of this Article shall not affect the specific character of the security and defense of individual Member States and will meet their obligations under the North Atlantic Treaty for those countries who felt that their common defense through NATO perform better. Progressive framing of a common defense policy was to be supported, provided that Member States will consider appropriate, by their cooperation in the production of weapons. Matters referred to by Article 17 TEU included humanitarian and rescue tasks, peacekeeping and crisis management missions, including peacemaking. The provisions of Article 17 TEU is not an obstacle for the development of strengthened cooperation between two or more states at bilateral level, in the WEU or NATO to the extent that such cooperation does not conflict with those referred in respective article. To promote these objectives defined in Article 17 TEU, its provisions were revised to agree with Article 48 TEU (former Article N of TEU[7]).

Article 25 TEU (as amended in accordance with Article 1 of the Treaty of Nice) provides that, without conflict with Article 207 TEC, a Political and Security Committee monitor the international situation in the relevant areas of common foreign and security policy and contribute to the definition of policies by delivering opinions to the Council, at its request on its own initiative. The Committee also exercises, under the responsibility of the Council, political control and strategic direction of crisis management operations. Council authorizes the Board to take appropriate decisions regarding the exercise of political control and strategic direction of operations without affecting the art. 47 (former Article M of TEU).

In the *Declaration on European Security and Defense* annexed to the Treaty of Nice it is shown that in accordance with the texts approved by the Nice European Council on European Security and Defense Policy (Presidency report and its appendices), the Union's objective was to make it operational as soon as possible. A decision in this regard was to be taken by the European Council in 2001 and later by the European Council in Laeken / Brussels based on existing provisions in the TEU, the entry into force of the Treaty of Nice not being a prerequisite condition.

For a more firm position on the world stage and greater coherence in EU external action, the Treaty of Lisbon has brought a number of changes and additions to the TEU. According to Article 24 TEU (consolidated version following the adoption of the Lisbon Treaty) EU competence in matters of common foreign and security policy shall cover all areas of foreign policy and all questions relating to the Union's security, including the progressive framing of a common defense policy which can lead to a common defense.

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strategies are applied by the EU Council, in particular by adopting joint actions and common positions. Also, the EU Council may recommend the adoption of a European common strategy in a particular field.

[5] Dan Vătăman, *History of the European Union* (Bucharest, "Pro Universitaria" Publishing House, 2011), p.54-55.

[6] Former Article J.7 TEU

[7] In its original form, the Treaty on European Union (TEU) had articles indexed with letters. The Treaty of Amsterdam introduced a new numbering system, with digits.

Pursuant to Article 25 TEU (consolidated version following the adoption of the Lisbon Treaty), the Union Common Foreign and Security Policy is defining the general guidelines by adopting decisions defining Union positions and actions and ways of implementing them and by strengthening systematic cooperation between Member States on policy. Thus, the European Council shall identify the Union's strategic interests, determine the objectives and define general guidelines for the common foreign and security policy, including matters with defense implications. If international developments so require, the President of the European Council shall convene an extraordinary meeting of the European Council to define the strategic lines of the Union in relation to this development.

The Council also formulates foreign policy and security policy and takes decisions necessary for defining and implementing it on the basis of general guidelines and strategic lines defined by the European Council.

For the implementation of the CFSP, the Treaty of Lisbon has created the post of High Representative of the Union for Foreign Affairs and Security Policy which, together with the Council, ensure the unity, coherence and effectiveness of Union action. According to Article 27 TEU (consolidated version following the adoption of the Lisbon Treaty), the High Representative chairs the Foreign Affairs Council and contributes by his proposals to the common foreign and security policy and ensures the implementation of decisions adopted by the and Council. The High Representative shall also represent the Union for matters relating to common foreign and security policy, carrying out, on behalf of political dialogue with third parties and expressing the Union's position in international organizations and international conferences. In fulfilling his mandate, the High Representative shall be assisted by a European External Action. This service shall work in cooperation with the diplomatic services of Member States and shall comprise officials from relevant departments of the Secretariat of the Council and Commission and staff seconded from national diplomatic services. Organization and functioning of the European External Action Service shall be established by Council decision. European Council on a proposal from the High Representative after consulting the European Parliament[8] and Commission approval[9].

3. Establishment of the European External Action Service (EEAS)

As noted above, by the reform implemented by the Treaty of Lisbon it was created the post of High Representative for foreign affairs and security policy, which, according to Article 27 (3) of TEU, is supported in its mandate by a European External Action Service.

Considering that on 13 November 2009 it was completed the process of ratifying the Lisbon Treaty by the deposit of the last instrument of ratification, it took a summit in order to determine who will occupy key positions created under the Treaty[10]. Thus, during the informal meeting of Heads of State or Government of Member States held in Brussels on 19 November 2009, it was reached a political agreement on the appointment of Catherine Ashton as High Representative for Foreign Affairs and security policy.

Also, on 30 October 2009, the European Council agreed on guidelines for European External Action Service (EEAS), during which the future High Representative was asked to submit a proposal for the organization and functioning of the EEAS as soon as possible after coming into force of the Treaty of Lisbon on the adoption by the Council, no later than the end of April 2010. This proposal

[8] According to Article 36 TEU, the High Representative shall regularly consult the European Parliament on the main aspects and basic choices of CFSP and Common Security and Defense Policy (ESDP) and inform on their evolution. It also ensures that the views of the European Parliament are duly taken into account. Special representatives may be involved in briefing the European Parliament.

[9] For details on the evolution of CFSP see Dan Vătăman, *European Union Law* (Bucharest, "Universul Juridic" Publishing House, 2010), p.177-181.

[10] It is about the positions of President of the European Council and of the High Representative of the Union for Foreign Affairs and Security Policy.

was made on 25 March 2010 as a project for a Council Decision on the organization and functioning of the EEAS. The structure was agreed in the General Affairs Council in April 2010 and will consult European Parliament and the European Commission.

On 21 June 2010, there has been a quadripartite meeting between representatives of the Council presidency (represented by Foreign Minister Miguel Moratinos and Spanish Secretary of State Lopez Garrido), the European Commission (represented by Maros Šefčovič, vice president for institutional relations and administration), the High Representative for Foreign and Security Policy - Catherine Ashton, as well as representatives of the European Parliament, who met in Madrid to discuss about the establishment of the European External Action Service. Following discussion, it was a political agreement on the proposal for a Council Decision on the organization and functioning of the European External Action Service and the text of two statements by the High Representative on political responsibility, namely the basic structure of the central government. Based on the agreement, participants pledged to seek approval of package by the institutions they represented, in order to move to adopt provisions concerning the organization and functioning of the EEAS.

During the plenary meeting of 8 July 2010, European Parliament passed the agreement reached by the quadripartite negotiations on the European External Action Service (EEAS). Although European Parliament was only consulted on the establishment and functioning of the European External Action Service, MEP-s negotiated major changes in the initial proposal in March 2010 of Catherine Ashton. Resolution to the Council decision on the organization and functioning of the European External Action was adopted with 549 votes for, 78 against and 17 abstentions[11].

Having consulted the European Parliament and the European Commission approval on 26 July 2010, the Council adopted Decision 2010/427/EU on the organization and functioning of the European External Action Service (EEAS)[12].

In accordance with Council Decision, the EEAS is placed under the authority of the High Representative of the Union for Foreign Affairs and Security Policy and has its headquarters in Brussels and is a functionally autonomous body of the European Union, separate from the General Secretariat of the Council and from the Commission with the legal capacity necessary to perform its tasks and attain its objectives.[13]

4. European External Action Service Tasks

European External Action Service (EEAS) support the High Representative in exercise of its mandate, particularly as provided in Articles 18 and 27 of the TEU:

- In fulfilling his mandate to lead the Common Foreign and Security Policy (CFSP) of the European Union, including the Common Security and Defense Policy (CSDP) to contribute by his proposals to develop the policy, which he conducted in accordance with the mandate granted by the Council and ensuring the consistency of EU external action;
- In his capacity as chairman of the Foreign Affairs Council, without prejudice to the normal tasks of the General Secretariat of the Council;
- In his capacity as Vice-President, in carrying out within the Commission, the responsibilities incumbent on it in external relations and for coordinating other aspects of the Union's external action, without prejudice to the normal tasks of the Commission services.

[11] In the legislative resolution of 8 July 2010 on the draft decision on the organization and functioning of the European External Action Service, the European Parliament invited the Council to notify Parliament if it intended to depart from the text approved, requesting Council to consult Parliament again if you intend to amend the proposal from the High Representative for Foreign Affairs and Security Policy - for details see www.europarl.europa.eu

[12] Official Journal of the European Union L 201/30 of 03.08.2010.

[13] Article 1 of Council Decision 2010/427/EU.

The EEAS shall also assist the President of the European Council, the President of the European Commission, and the European Commission in exercising their respective functions in the area of external relations.[14]

As part of its contribution to EU`s external cooperation programs, the EEAS shall ensure as far as possible that programs meet the objectives of external action as set out in Article 21 TEU, in particular in paragraph (2) (d) thereof, and that they respect the objectives of the Union's development policy in line with Article 208 of the Treaty on the Functioning of the European Union (TFEU). In this context, the EEAS should also promote the fulfillment of the objectives of the European Consensus on Development[15] and the European Consensus on Humanitarian Aid[16].

5. Cooperation of the European External Action Service (EEAS)

European External Action Service (EEAS) support and cooperate with the diplomatic services of Member States and the Secretariat General of the Council and the services of the Commission to ensure consistency between different areas of EU external action and between those areas and its other EU's policies.

The EEAS and the services of the Commission shall consult on all matters concerning the Union's external action in exercising their respective functions, except for matters covered by CSDP. The EEAS take part in the preparatory work and procedures relating to acts to be prepared by the Commission in this area[17].

The EEAS may enter into service-level arrangements with relevant services of the General Secretariat of the Council, the Commission, or other offices or interinstitutional bodies of the Union.

The EEAS provides support and cooperate with other EU institutions and bodies, in particular to the European Parliament. Also, the EEAS can receive support and cooperation from these institutions and bodies, including agencies, as appropriate. The internal auditor of the EEAS will cooperate with the Commission's internal auditor to ensure consistency of audit policy, particularly given the responsibility of the Commission on operational costs. In addition, the EEAS cooperate with the European Anti-Fraud Office (OLAF) in accordance with Regulation (EC) no. 1073/1999[18]. In particular, the EEAS should immediately take the necessary decision under that regulation on the terms and conditions for internal investigations. As stated therein, the Member States in accordance with their national institutions as well as provide the necessary support to enable OLAF officials to perform their tasks[19].

6. Organization of the European External Action Service (EEAS)

According to the establishing act, the EEAS is composed of a central administration and the Union delegations in third countries and international organizations.

6.1. Central administration of the EEAS

The EEAS is managed by an Executive Secretary General, acting under the authority of the High Representative. The Executive Secretary General shall take all measures necessary to ensure the smooth functioning of the EEAS, including administrative and budgetary management. Executive

[14] Dan Vătăman, *Institutions of the European Union* (Bucharest, "Universul Juridic" Publishing House, 2011), p.197.

[15] Official Journal of the European Communities C 46/1 of 24.2.2006.

[16] Communication from the Commission to the European Parliament and the Council — Towards a European Consensus on Humanitarian Aid (COM(2007) 317 final). Not published in the Official Journal.

[17] These provisions are implemented in accordance with Chapter 1 of Title V of the TEU (General provisions on the Union's external action), and with Article 205 TFEU.

[18] Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) - Official Journal of the European Communities L 136/1, 31.5.1999.

[19] Article 3 (4) of Council Decision 2010/427/EU.

Secretary General ensures effective coordination between all departments of the central administration and the Union delegations.

Executive Secretary General is assisted by two Deputy Secretaries General.

Central administration of the EEAS is organized in directorates-general, including in particular:

- Some directorates-general that include geographical desks covering all countries and regions in the world, as well as multilateral and thematic desks. These departments work together, as necessary, with the General Secretariat of the Council and the relevant services of the Commission;

- A directorate-general for the issues of administration, personnel, budget, security and information systems and communications operating within the EEAS, managed by the Executive Secretary General[20]. The High Representative shall appoint, in accordance with customary rules of recruitment, a director general for budgetary and administrative aspects of their tasks under the authority of the High Representative. It will be responsible to the High Representative for the administrative and internal budgetary management of the EEAS;

- The crisis management and planning directorate, the civilian planning and conduct capability, the European Union Military Staff and the European Union Situation Centre, placed under the direct authority and responsibility of the High Representative, and which assist him in the task of conducting the Union's CFSP in accordance with the provisions of the Treaty while respecting, in accordance with Article 40 TEU, the other competences of the Union.

The specific nature of these structures, including features in their functions, and personnel recruitment and status must be respected. The full coordination between all structures of the EEAS is ensured.

The central administration of the EEAS also include:

- a strategic policy planning department;

- a legal department, under the administrative authority of the Executive Secretary General, who works closely with Legal Services of the Council and the Commission;

- departments for interinstitutional relations, information and public diplomacy, internal audit and inspections and personal data protection.

The High Representative shall designate the chairpersons of Council preparatory bodies that are chaired by a representative of the High Representative, including the chair of the Political and Security Committee, in accordance with the detailed arrangements set out in Annex II to Council Decision 2009/908/EU of 1 December 2009 laying down measures for the implementation of the European Council Decision on the exercise of the Presidency of the Council, and on the chairmanship of preparatory bodies of the Council.

The High Representative and the EEAS shall be assisted where necessary by the General Secretariat of the Council and the relevant departments of the Commission. Service-level arrangements may be drawn up to that effect by the EEAS, the General Secretariat of the Council and the relevant Commission departments. [21]

6.2. The European Union's delegations in third countries and at international organizations

The decision to open or close a delegation shall be adopted by the High Representative, in agreement with the Council and the Commission.

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[20] According to Article 9 (3) of Decision of the High Representative of the Union for Foreign Affairs and Security Policy of 15 June 2011 on the security rules for the European External Action Service (2011/C 304/05), the Executive Secretary-General shall ensure that appropriate physical and organisational measures are in place for the security and safety of staff and visitors, physical assets and information in all EEAS premises. The Executive Secretary-General shall be assisted in this task by the Chief Operating Officer and the EEAS Security Directorate - Official Journal of the European Union C 304/7 of 15.10.2011.

[21] Article 4 of Council Decision 2010/427/EU.

Each delegation of the European Union is placed under the authority of a head of delegation. All staff of the delegation, regardless of their status, and overall activity of the delegation is under the authority of the Head of Delegation. He responds to the High Representative for the overall management of the business delegation and ensures coordination of all actions of the European Union.

Personnel of the delegations include the EEAS staff and, when necessary for the implementation of the Union budget and Union policies other than those under the remit of the EEAS, the Commission staff.

Head of Delegation shall receive instructions from the High Representative and the EEAS, and is responsible for their execution.

In areas where the European Commission exercises the powers conferred by the Treaties, it may, in accordance with Article 221 (2) of TFEU to issue instructions to delegations, which are executed under the overall responsibility of the Head of Delegation.

Head of Delegation is running operational credit in connection with Union's projects in the third country concerned, where the Commission has that sub jurisdiction, in accordance with Financial Regulation.

The operation of each delegation is periodically evaluated by the Executive Secretary General of the EEAS, evaluation includes financial and administrative audits. To this end, Executive Secretary of the EEAS may request assistance in this regard from the relevant Commission departments. In addition to internal measures taken by the EEAS, OLAF shall exercise the powers, especially by adopting the anti-fraud measures in accordance with Regulation (EC) no. 1073/1999[22].

High Representative concluded the necessary agreements with the host country, the international organization or the third country. In particular, the High Representative takes appropriate steps to ensure that host countries grant Union delegations, their staff and their property, privileges and immunities equivalent to those specified in the Vienna Convention on Diplomatic Relations of 18 April 1961.

Union delegations have the capacity to respond to the needs of other institutions of the European Union, in particular the European Parliament, in their contacts with the international organizations or third countries to which the delegations are accredited.

The Head of Delegation have the power to represent the European Union in the country where the delegation is accredited, in particular for the conclusion of contracts, and as a party to legal proceedings.

The Union delegations work in close cooperation and share information with the diplomatic services of the Member States.

The Union delegations, acting in accordance with the third paragraph of Article 35 TEU, and upon request by Member States, support the Member States in their diplomatic relations and in their role of providing consular protection to citizens of the Union in third countries on a resource-neutral basis.[23]

6.3. The staff of the EEAS

The EEAS staff is composed by officials and other servants of the European Union, including personnel from the diplomatic services of the Member States appointed as temporary agents.

If necessary, the EEAS may, in special cases, have recourse to a limited number of specialised seconded national experts. In this case, the High Representative shall adopt rules, equivalent to those laid down in Council Decision 2003/479/EC of 16 June 2003 concerning the rules applicable to

[22] Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF).

[23] Article 5 of Council Decision 2010/427/EU.

national experts and military staff on secondment to the General Secretariat of the Council[24], under which the specialised seconded national experts are put at the disposal of the EEAS in order to provide specialised expertise[25].

EEAS staff perform their duties and conduct solely in view the interests of the Union. They neither seek nor accept instructions from any government, authority, organization or person outside the EEAS or any other body or person other than the High Representative. In accordance with Article 11, second paragraph of Staff Regulations, EEAS staff can not accept any payment from any source other than the EEAS.

The powers conferred on the appointing authority by the Staff Regulations and the authority empowered to conclude contracts by the CEOS (Conditions of Employment of Other Servants)[26] shall be exercised by the High Representative, who may delegate these powers inside the EEAS.

Recruitment to the EEAS takes place according on merit and ensuring adequate geographical and gender balance. The staff of the EEAS comprise a meaningful presence of nationals from all the Member States.

Officials of the European Union and temporary agents coming from the diplomatic services of the Member States have the same rights and obligations and are treated equally, in particular as concerns their eligibility to assume all positions under equivalent conditions. There is no distinction between temporary agents coming from national diplomatic services and officials of the European Union as regards the assignment of duties to perform in all areas of activities and policies implemented by the EEAS. In accordance with the provisions of the Financial Regulation, the Member States shall support the Union in the enforcement of financial liabilities of EEAS temporary agents coming from the Member States' diplomatic services which result from a liability under Article 66 of the Financial Regulation.

High Representative establish the selection procedures for EEAS staff which is carried out through a transparent procedure based on merit, with the aim to provide a personal service with the highest degree of skill, efficiency and integrity, while ensuring a geographical balance and appropriate for men and women and a significant presence of nationals of all Member States in the EEAS. Representatives of Member States, the General Secretariat of the Council and of the Commission are involved in recruitment procedure for vacant posts in the EEAS.

When the EEAS has reached its full capacity, staff from Member States should represent at least one third of all EEAS staff at AD level. Likewise, permanent officials of the European Union should represent at least 60 % of all EEAS staff at AD level, including staff coming from the diplomatic services of the Member States who have become permanent officials of the European Union in accordance with the provisions of the Staff Regulations. Each year, the High Representative shall present a report to the European Parliament and the Council on the occupation of posts in the EEAS. In principle, all EEAS staff shall periodically serve in Union delegations. The High Representative shall establish rules to that effect.

In accordance with the applicable provisions of its national law, each Member State shall provide its officials who have become temporary agents in the EEAS with a guarantee of immediate

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[24] Official Journal of the European Union L 160/72 of 28.6.2003.

[25] According to Article 2 (1) of Decision of the High Representative of the Union for Foreign Affairs and Security Policy of 23 March 2011 establishing the rules applicable to National Experts Seconded to the European External Action Service (2012/C 12/04), the period of secondment may not be less than six months nor exceed two years and may be renewed successively up to a total period not exceeding four years. Exceptionally, at the request of the relevant Managing Director or equivalent, and where the interests of the service warrant it, the Human Resources Department may authorise one or more extensions of the secondment for a maximum of two more years at the end of the four-year period – Official Journal of the European Union C 12/8 of 14.1.2012.

[26] Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community (OJ 45, 14.6.1962, p. 1387/62. English special edition: Series I Chapter 1959-1962 p. 135).

reinstatement at the end of their period of service to the EEAS. This period of service, in accordance with the provisions of Article 50b of the CEOS (Conditions of Employment of Other Servants), the period of service may not exceed eight years, unless, it is extended for a maximum period of two years in exceptional circumstances and in the interest of the service.

Officials of the European Union serving in the EEAS shall have the right to apply for posts in their institution of origin on the same terms as internal applicants.

Measures are taken in order to provide EEAS staff with adequate common training, building in particular on existing practices and structures at national and European Union level.[27]

From 1 January 2011, a number of relevant departments and functions within the General Secretariat of the Council and of the Commission were transferred to the EEAS. Officials and temporary staff positions in these departments who had these functions were transferred to the EEAS. This provision is applied *mutatis mutandis* to local staff and contract employees in such departments and holding such functions. Specialized national experts (SNE) who were operating in those departments or functions in question had also been transferred to the EEAS with the agreement of the authorities of the originating Member State.

6.4. Access to documents, archives and data protection of EEAS

The EEAS applies the rules laid down in Regulation (EC) no. 1049/2001 of the European Parliament and the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.[28]

The relevant archives of the departments transferred from the General Secretariat of the Council and the Commission were also transferred to the EEAS and, therefore, they are organized by the Executive Secretary General of the EEAS.

According to Article 11 (3) of Council Decision 2010/427/EU, the EEAS protect individuals with regard to the processing of their personal data in accordance with the rules laid down in Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data[29]. The High Representative shall decide on the implementing rules for the EEAS.[30]

7. Conclusions

Until recently, the EU's institutional system included numerous posts that prevented the Union to represent a single voice in external relations. Legend says that three decades ago, Henry Kissinger, U.S. Secretary of State at the time, would have asked the following question: *"Who should I call if I want to talk to Europe?"* Although the American diplomat denied the authenticity of the moment, it remained as a landmark in transatlantic relations, reason for which today we can formulate an answer to this question.

Thus, the reforms implemented by the Treaty of Lisbon created the position of President of the European Council, chairing its work towards facilitating consensus among Member States, ensuring dialogue with other European institutions and representing the Union externally, without prejudice to the powers of another newly created position, that of High Representative for Foreign and Security Policy.

High Representative for Foreign Affairs and Security Policy, who is at the same time one of the vice chairs of the Commission and presides the External Relations Council's work, represents the Union for matters relating to common foreign and security policy, carrying out, on behalf of political

[27] Article 6 of Council Decision 2010/427/EU.
[28] Official Journal of the European Union L 145/43 of 31.05.2001
[29] Official Journal of the European Union L 8/1 of 12.01.2001
[30] For details on the European External Action Service activities see http://eeas.europa.eu

dialogue with third parties and expressing the Union's position in international organizations and international conferences. However, the Lisbon Treaty provided that for optimal conditions in the exercise of its mandate, the High Representative shall be assisted by a European External Action Service, working in cooperation with the diplomatic services of Member States and shall comprise officials from relevant departments of the General Secretariat of the Council and Commission and staff seconded from national diplomatic services.

So the establishment of the post of High Representative for Foreign Affairs and Security Policy and the European External Action Service can translate into practice the EU answer to the question of Henry Kissinger.

It remains to be seen whether the High Representative for Foreign Affairs and Security Policy, supported by the European External Action Service will be able to bring more coherence in external action and outline the profile of the European Union on the international stage, creating a distinct identity of it.

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WAYS OF PEACEFUL SETTLEMENT OF DISPUTES WITHIN CERTAIN INTERNATIONAL ORGANIZATIONS

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Abstract

Peaceful settlement of international disputes is one of the fundamental principles of international law, mainly formed via custom, but enshrined in numerous international treaties.

For the dispute management and settlement, some specific procedures were created in the United Nations, the UN specialized agencies and the regional organizations.

These procedures are complementary, to those who work directly between states, but the organization authority gives the necessary juridical strength for solving arising disputes.

Research of this matter aims at knowing concrete ways of settling disputes arising in intergovernmental organizations, in order to correctly apply instruments governing them, and to refine specific system of measures and procedures.

Keywords: *disputes, intergovernmental organisations, regional organizations, Security Council of UNO, peaceful solving.*

Introduction

While international organisations function, many types of disputes may appear[1], such as:

- which concern *the relation between the member states* of the organisation, related to *the interpretation and application of a constitutive document;*

- *between a member state and the above-mentioned organisation;*

- *between the different bodies of an international* and which generally concern competence conflicts;

- *between the different international organisations* with a similar profile and which regularly regard the limitation of their competence;

- *between the organisations and private*, specific to the integration organisations;

- *between the organisation and the employees or its agents*.

The majority of disputes within one international organisation appear between two or more member states, relating to the interpretation and application of the constitutive document of the organisation or when a member state is in dispute with the respective organisation.

The peaceful researches that allow the management and solving of disputes[2], and the specific procedures created within the framework of the United Nations Organisation, in the specialized institutions of UNO, as well as within regional organisations contribute to making the best measures for preventing conflicts among the state members of the international organisations.

These procedures have a complementary character, compared to those that act directly among states, however the authority of the organisation provides increased strength[3].

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[1] Adrian Năstase, Bogdan Aurescu, Cristian Jura, *Drept internațional public. Sinteze pentru examen*, Third Edition reviewed and completed (Bucharest: All Beck, 2002), p. 253.

[2] Aurel Preda-Mătăsaru, *Tratat de drept internațional public*, Third Edition reviewed and completed, (Bucharest, Lumina Lex, 2008), p.245, that shows that the peaceful solving of international disputes constitute one of the fundamental principles of public international law.

[3] Dumitra Popescu, *Drept internațional public* (Bucharest, University Titu Maiorescu Press, 2005), p.267.

The competence of the United Nations Organisation in solving disputes

The U.N.O can regulate the disputes within the organisation by peaceful ways or methods of constraint.

Regarding the peaceful methods, UNO, within the General Assembly, can *approach* any issues referring to the maintenance of peace and international security, can *invite* the parties to join the dispute, through the Security Council, as to solve them using peaceful methods, can *investigate* (also by means of the Security Council) any dispute or situation which could give rise to a dispute, or may *recommend* the parties joining the dispute different procedures or methods more appropriate to solving the issues.

Thus, UNO does not directly solve the disputes among state members (excepting those of a juridical nature, which depend on the competence of the International Court of Justice), but contributes to their solving or non-aggravation, to the extend that the parties involved accept the solutions proposed or are convinced to proceed directly to solving them.

The United Unions Organization is competent, by means of its bodies, to settle or solve *disputes*, as well as international *situations* which might lead to the infringement of peace or which might endanger the peace and international security.

In conformity to art.2 par.6 and art.35 par.2 from the UNO Charter, this organization may regulate not only litigations which may occur between its members, but also litigations in which other states are involved, provided that the latter have priorly approved to the solving of disputes by means of the peaceful methods stipulated in the Charter.

• *The UNO Security Council* has, in conformity with art. 24 from the UNO Charter, a main responsibility in maintaining the peace and international security.

In order to exercise this function, the Security Council is entitled to act in conformity with the dispositions of the chapters VI-VII of the UNO Charter, which enables it to take preventive or coercive measures as to peacefully solve disputes „in case of threats against peace and acts of aggression". Likewise, chapter VIII of the Charter, with the title „Regional agreements" establishes the competence concerning the agreements or regional organisms to take certain measures referring to the maintaining of peace and security, as well as their relation with the Security Council.

The Security Council may intervene, in conformity with the Charter, as to solve disputes in the following situations:

- when the parties present to a dispute requests the intervention by a common initiative or separate demands;
- if a third state, member of the UNO, states that prolonging the dispute in which it is not personally involved, would endanger the peace and international security;
- when an UNO member state, refers to a dispute in which it is involved, accepting the solving conditions stipulated in the Charter;
- at the initiative of the General Assembly or General Secretary of UNO;
- at personal initiative.

After the statement, the actions of the Security Council mainly depend of the nature of the dispute which it has to stabilize.

Thus, it may initiate an investigation to establish whether the present situation is susceptible to threaten the maintenance of peace and international security[4].

In order to perform the investigation, the Security Council may assign a subsidiary body or a commission formed of representatives of the states in litigation, or from independent personalities.

[4] Art. 34 from the UNO Charter stipulates: „The Security Council may investigate any dispute or situation which might lead to international conflicts or could give rise to a dispute, as to establish whether prolonging the dispute or the situation would endanger the maintenance of peace and international security".

In conformity with art.36 par.1 from the Charter, the Security Council may *recommend* procedures or methods of settling conflicts by means of peaceful methods to the states in litigation, taking into consideration the conclusions of the investigation (when it has been proposed).

The recommendations may be *general*, inviting the parties to appeal to peaceful solutions in order to solve the dispute, or *concrete* (precise), indicating the use of mediation, of the good offices etc., depending on the nature of the dispute and the present situation. Moreover, the Council may recommend that a dispute may be sent to a *regional organisation* to be regulated, without losing its right to supervise the solving of the dispute.

In the situation in which a dispute is extremely serious as to constitute a threat to the peace, an infringement of the peace or an act of aggression, the Security Council may adopt decisions which embody a mandatory power. Decisions may refer to measures that *do not comply using armed force* or measures that imply the use of an *armed force* [5].

From the first category of measures, we can mention: *partial or total interruption of economic relations and rail, sea, air, postal, telegraphic, radio communications and other means of communication, as well as interrupting diplomatic relations*.

The measures from the second category are decided by the Security Council when it considers that those which do not imply the use of armed force failed to prove adequate. In this situation, in order to maintain and re-establish peace and international security, *demonstrations, measures of blockade and other operations executed by air, naval and land forces of the Members of the United Nations* may be used.

• *The General Assembly of the United Nations Organisation* has, in conformity with the UNO Charter, the following competence regarding the peaceful regulating of international disputes[6]:

- *examines* the general cooperation principles for the maintenance of peace and international security, making *recommendations* regarding the later both to the UNO members and to the Security Council (art.11 par.1);

- *debates* any issue with which it is consulted and make recommendations regarding it (art.11 par.2);

- *draws the attention* of the Security Council on situations which would endanger the peace and international security (art.11 par.3);

- *recommends* measures for settling any situation in a peaceful manner that is suspected to cause damage to the relations among states (art.14).

In conformity with art.12 par.1 from the UNO Charter, the General Assembly can not intervene with recommendations regarding the disputes or situations which are subjected to the examination of the Security Council, if the later exercises, regarding these disputes or situations, the functions which are attributed by the Charter. In these cases, the General Assembly may pronounce itself only when the Council expressly demands to state its position regarding a dispute

Moreover, in conformity with art.11 par. 2 from the Charter, when an international issue requires coercive measures, it will be remitted by the General Assembly to the Security Council, who holds a monopoly situation in coercive matters[7].

• *The General Secretary of the United Nations Organisation* may draw the attention of the Security Council regarding any issue which might endanger the peace and international security (art.99 of the UNO Charter). This may fulfill missions of good offices, mediation or invite the parties in a dispute, as to solve it by negotiations[8].

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[5] Art. 41 and respectively art. 42 from the United Nations Organizations Charter.

[6] Năstase, Aurescu and Jura, *Drept internațional public. Sinteze pentru examen*, p.255; Raluca Miga-Beşteliu, *Drept internațional. Introducere în dreptul internațional public*, Third Edition (Bucharest, All Beck, 2003), p.372-373

[7] Quốc Dinh Nguyễn, Alain Pellet şi Patrick Daillier, *Droit international public* (Paris, Librairie générale de droit et de jurisprudence, 1987), p.739.

[8] Dumitra Popescu, *Drept internațional public,* p.269

These functions are exercised, in conformity with art.98 of the UNO Charter, based on a mandate granted by the General Assembly or the Security Council.

In conformity with art.99 from the Charter, the General Secretary is authorized to trigger the intervention of the Security Council, if this is not performed by the state or a group of states involved in an international dispute.

The regional organizations to which UNO Charter offered the role of peacefully regulating disputes

In art. 52, paragraph 2 from the United Nations Organisation Charter it is stipulated that the UNO member states which conclude agreements and the regional organisations must make every effort in other to solve these local disputes peacefully, with the aid of the regional organisation, before these disputes are submitted to the Security Council.

The Charted does not stipulate a hierarchy or a distribution of competences as to solve disputes, between the UNO and the local structures[9].

However, by corroborating the dispositions of art.52 par.3, with those of art.34 and art.35 from the Charter, in conformity to which the Security Council has the competence to involve itself in any dispute which threatens the peace and international security, it results that this organism may decide in each concrete case, if the case requires it to be directly involved in the peaceful solving of the dispute or the issue can be transferred to local structures.

In the situation in which measures of coercion are imposed, these will not be undertaken based on the local agreements or by the regional bodies, without the authorisation of the Security Council.

The most representative regional organisations which aim at maintaining the peace and security, by anticipating the solving of disputes by peaceful measures are: The Organisation of African Unity (O.A.U.), the American States Organization (A.S.O.), The League of Arab States and Organisation for Security and Cooperation in Europe (O.S.C.E.).

• *The Organisation of African Unity* was created in the year 1963, and one of its role being the peaceful regulating of disputes between state members, by negotiations, mediation, conciliation or arbitration.

In the framework of this organisation the Commission of Mediation, Conciliation and Arbitration was founded, by a Protocol enclosed to the OAU Charter, signed in Cairo in the year 1964, the month of July.

The African states which present disputed may appeal to the Commission, if this is commonly agreed upon or at the initiative of a party involved in the litigation. Moreover, the Commission may be referred by the Council of Ministers or the Conference of Heads of State and Government of the OAU, as to solve the disputes that embody an international character.

If one or more state-parties involved in a dispute do not accept to solve it by the Commission, the solving competence passes to the Council of Ministers or even the Conference of the African Unity Organisation.

Regularly, the African states have not appealed to legal procedures, but have resorted to *mediation* by means of special committees or *ad-hoc* committees, or have resorted to the *good offices* of certain personalities in the African states..

• *The American States Organization* was created in the year 1948, the Charter from Bogota containing many regulations concerning the peaceful solving of disputes among state members, by means of investigation, good offices or conciliation.

The bodies which have the competence of solving international disputes among state members, if these issues were impossible to solve in usual diplomatic ways, are the *OSA Council* and

[9] Nguyễn, Pellet and Daillier, *Droit international public,* p.743.

the *Committee for dispute regulation* (which in the year 1967 replaced the Inter-American peace committee).

• *The League of Arab States,* which was created in the year 1945, did not found a specialized organ for the peaceful solving of international litigations, but accomplishes this activity by means of the League Council. It is formed from the representatives of the member states and, in conformity to art. 5 from the Covenant of the League of Arab States, it can solve disputes, at the request of the parties in litigation, provided that they do not refer to independence, sovereignty or the territorial integration of states.

The Council uses, as to solve disputes, procedures of mediation, conciliation and good offices.

The parties in litigation do not participate to the debates of the Council, and its decisions, as an arbitrary body, are mandatory for the states in dispute.

• *The Organisation for Security and Cooperation in Europe*

In conformity with Principle V, stipulated in the Declaration of Principles from the Final Document of the Conference in Helsinki (1975) concerning security and cooperation in Europe, the Organisation for Security and Cooperation in Europe grants a particular importance to the peaceful solving of international disputes.

In conformity with the dispositions from the Final Document and the Charter from Paris for a new Europe (1990), the member states militate for peaceful, fast and efficient solving of the disputes among them, based on the international law, resorting in this purpose to means such as: negotiating, investigating, mediating, conciliating, arbitrating, legal regulating etc. (at the choice of the parties) or using any other procedure of regulating which has been agreed upon[10].

The systems of peaceful regulating within the Organisation for Security and Cooperation in Europe are based on the following main principles[11]:

- litigations non-regulated by means of direct contracts between the parties (negotiations or consultations) are applied;

- regulatory systems of the Organisation for Security and Cooperation in Europe to which they resort have a subsidiary nature, having the role of completing the pre-existent ones and not replace them.

From the practice of negotiations, performed especially in the years 1991 and 1992, four systems of peaceful regulatory systems for the disputes within the Organisation for Security and Cooperation in Europe were defined.

a) *The Procedure from La Valetta* stands for a document adopted in the year 1991, following an expert reunion, held in Malta, which establishes a pan-European mechanism, based on the intervention of third parties, to which member states of the C.S.C.E. may result to, as to solve the disputes among them.

At the request of a party involved in the litigation, a *C.S.C.E. body is created*, formed from one or more members selected by common agreement from a list of qualified candidates, held at the Center of the Organisation for Security and Cooperation in Europe for conflict prevention, in Viena. This body first attempts to *establish a contact with the parties in dispute*, as to choose the method of approach: investigation, conciliation, mediation, good offices, arbitration or the legal method.

If the parties do not reach an agreement regarding the means to solve the dispute, any of the parties, in term of 3 month from the notification concerning the disagreement, may request the *Body* to formulate *notifications* or *observations upon the background of the dispute*, the parties being free to accept these notifications or refuse them.

b) *The Convention regarding the conciliation and arbitration within the Organisation for Security and Cooperation in Europe,* adopted in December 1992 and that entered in force on the 5th

[10] Miga-Beşteliu, *Drept internaţional. Introducere în dreptul internaţional public*, p.377.

[11] These elements result from the final document of the reunion from Viena (1989) and from the Charter in Paris for a new Europe (1990).

of December 1994, decided the founding of the *European Court of Conciliation and Arbitration,* headquartered in Geneva.

If a dispute occurs among the member states, any party may request the establishment of a *Conciliation Committee*, which must support the parties in order to solve the litigation, in conformity with the international law and commitments to which the parties subscribed within the *Organisation for Security and Cooperation in Europe*, the Commission accomplishes a final report which is sent to the *Organisation for Security and Cooperation in Europe* for it to utilize the coercive measures at its disposal, if in term of 30 days from the notification of the parties, they refuse the proposals for solving the litigation.

The Convention also includes the possibility of arbitration, as an optional means to solve disputes among state members. The Arbitral Court may be formed by a common agreement of the parties or by the unilateral demand of a state in litigation, this being formed of 5 members. The sentence of the Court is definite and mandatory, being pronounce in conformity with the international law or „*ex aequo et bono*", when the parties agree

c) In the year 1992, at the proposal of Great Britain within the *Organisation for Security and Cooperation in Europe*, a document entitled „Dispositions regarding a Conciliation Commission" was adopted, which completes the „*La Valetta*" procedure.

The use of this conciliation procedure must be based on the agreement of the states involved in the disputes, except the situations in which the parties accepted the procedure by reciprocal unilateral declarations, prior to litigations. The conciliation procedure is applied only to disputes between two states (not more than two).

The conciliation commission is founded ad-hoc for every dispute, and its works are finalized in a report in which propositions for the solving of the dispute are made.

In case it is rejected by both state parties, the report will be sent to the Committee of Senior Officials of the Organisation for Security and Cooperation in Europe to provide the measures which are imposed.

d) In the year 1992, at the initiative of the United Nations of America, the *Organisation for Security and Cooperation in Europe* adopted another document regarding the peaceful regulation of disputes, entitled „*Dispositions regarding conducted conciliation*". This document does not establish a new procedure to solve disputes, however, it conducts the parties to follow the *British conciliation procedure or the procedure stipulated in the Convention regarding the conciliation and arbitration* within the Organisation for Security and Cooperation in Europe.

The Committee of Senior Officials of the Organisation for Security and Cooperation in Europe or the Committee of Ministers of Foreign Affairs may conduct the parties in dispute to resort to conciliation, without them having the right to oppose (except litigations regarding territorial integrity, national defence, sovereignty upon the national territory or competing claims upon the jurisdiction of other areas). This procedure does not apply when the parties involved in the litigation agreed to resort to a means of regulation except for Security and Cooperation in Europe [12].

Conclusions

The procedure for solving international disputes by peaceful means reflects one of the fundamental principles of international public law, as it allows a faster restoration of the law order and prevents the alteration of relationships among states, in contradiction with the option of applying sanctions of international public law. Moreover, one may say that the application of sanctions constitutes the exception, the basic rule being the peaceful solving of disputes.

Reflecting upon the entire subject of discussion, we conclude that no matter how well the system of international public law may be adjusted, and how much would be achieved on acception the principles which are at the basis of applying it within the international organisations, it would still

[12] Năstase, Aurescu and Jura, *Drept internațional public. Sinteze pentru examen,* p.268-269.

be more important that the contentious issues be solved by means of preventive diplomacy, by means of dialogue from positions of equality and by respecting to sovereignty of every state, thus avoiding tensed relations within the international entities and the alteration of state relations.

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THE SIGNIFICANCE OF THE INSTITUTION OF THE EUROPEAN CITIZENSHIP IN THE INTERNATIONAL LAW

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Abstract
Romania's adhesion to the European Union has given a stronger impulse for the examination and better understanding of the European Community regulations which become a part of our own legislation.
In this context, the interpretation and execution of legal provisions regarding citizenship, the status of foreigners and that of people who are not citizens of any other state, present multiple significations and implications regarding social, political and even economical life of our country. The European citizenship is a flexible institution which serves the inhabitants of the member states. It is to be mentioned that the purpose of this institution is not to substitute national citizenship, but to complement it. On the other hand, the internal legislation of the member states – which is rather diverse and controversial in most cases – has the role to regulate the access of the citizens to the European citizenship. Citizenship is a complex process, which implies maintaining a negotiated social integration, which refers to all those living the today's Europe and who, starting today, have a support point for the future.

Keywords: *European Union, European Council, citizenship, European Citizenship, statelessness.*

Introduction

Therefore, the first impact of EU integration is changing the status of the Romanian citizen. Even if the majority of rights covered by European citizenship coincide with those covered by the current Romanian Constitution, change of status still remains essential, by changing the entity to which it belongs.

In our society are discussed at length the issue of citizenship. The central issue is the question of whether one and the same person may simultaneously hold two or more nationalities and also considering the advantages of being a citizen of one EU Member. This latter statute is wished by more and more people because it gives you some rights, such as freedom of establishment, the right to move freely in the EU countries, the right to participate in a stable and continuous economic life of a Member State other than the State of origin, to obtain a non-wage income from an activity, enables the visa-free travel within Europe or around the world, to engage in gainful employment where it is better.

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The ruling principle in this regard is the prohibition of discriminatory measures based on nationality against the nationals of the Member States, and assimilation to nationals of persons established in another EU Member State than the State of origin.

Timeliness of national citizenship is due to the practical importance that the notion "citizenship" has in terms of a democratic society and the fact that the benefits accruing from citizenship depends on the knowledge offered by the holder of the rights and obligations it involves the quality of being a citizen of a State.

Consequently, the paper is to highlight the specific nature of European citizenship which is still in training at European level, to determine the nature of European integration as well as its effects.

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Starting with the signing of the Treaty of Lisbon[1], in the European political, legal, philosophical and sociological debate, reference to the notion of "European citizenship" is made. The notion of "nationality" is indeed related to fundamental questions such as identity, nation, political rights, sovereignty, membership, equality, democracy, migration, etc.

European citizenship was defined through the Treaty of Lisbon, entered into force on 1 December 2009, which includes rights, obligations and a more profound implication of the citizen in the process of European integration.

Article 20 of the Treaty of Lisbon provides that "any person having the nationality of one of the Member States is a citizen of the European Union, in accordance with the valid laws in the respective state". The European Union citizenship does not replace national citizenship, but completes it, offering the possibility of exercising some of the Union citizenship rights on the territory of the Member States it lives on (and not only in the country he belongs to, as it happened in the past). The following practical conclusions emerge from here:

1. it is more necessary that a person has the citizenship of a member state in order to benefit from the Union citizenship;

2. European citizenship will complete and add to the rights offered by state citizenship.

A declaration attached to the Treaty reinforces the fact that „if a person detains the citizenship of a member state, this will be determined only by reference to the national laws of the respective state". Thus, it's for each state to indicate which persons are its citizens. This way, the Union citizenship gives a more profound and real meaning to belonging to the European Union. Additionally, the Europeans citizenship is based on the common principles of the member states: freedom, democracy, the principle of respecting the human rights and the rule of law. These principles are included in the Treaty of Lisbon and they emerge from the human fundamental rights and the special rights granted to the European citizen (free movement and civil rights), described in the Treaty.

The Treaty of Lisbon[2] that entered into force on the 1st of May 1999 consolidated the protection of fundamental rights, condemning any form of discrimination and it recognized the right to information and consumer protection. The citizenship of European Union offers rights to the citizens of the member states and consolidates the protection of their interests. The above-mentioned include: the right to free movement, the right of visit, the right to settlement, the right to work and study in the other member states of the Union. The Union law establishes many conditions for exercising these rights. For a visit longer than 3 months one needs a visitor pass. The entrance on the territory of another Member State can be forbidden only for reasons of security and public health, and the interdiction must be justified (as well as for expulsion).

Apart from the rights and obligations written in the Treaty for the foundation of the European Community[3], the Union citizenship offers the following special rights:

- *the right to vote* and to be elected in the European Parliament and in the local elections in the resident state, in the same conditions as for the citizens of the respective state;

- *the right to benefit* on the territory of a third party state (which is not member of the European Union) of consular protection from diplomatic authorities of another Member State, if the state of provenience has no diplomatic representation in the respective third party state;

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[1] The Treaty of Lisbon entered into force on 1 December 2009

[2] The Treaty of Lisbon is the most recent of all the treaties which, in the past, have modified the treaties based on which the European Community and European Union have been formed, as well as the Single European Act (1986), the Treaty regarding the European Union (Maastricht) (1992), the Treaty of Amsterdam (1997) and the Treaty of Nice (2001).

[3] The Treaty establishing the European Community was signed on March 25th, 1957 and came into force on January 1st, 1958. After signing, the treaty was amended by the Single European Act (17-28 February 1992) Treaty of European Union (Treaty of Maastricht – February 7th, 1992) Treaty of Amsterdam (October 2nd, 1997) and by numerous special regulations, becoming now the of European Community Treaty (ECT).

- *the right to petition* in front of the European Parliament and the right to appeal to the European Ombudsman for the examination of deficient administration of cases by communitarian institutions and bodies.

The Treaty of Lisbon, which entered into force on 1 December 2009, regulated the "European citizen" status which, in addition, includes the following rights:

- *the right to address* the European institutions in an Union official language and to receive an answer written in the same language;

- *the right to access* the documents of the European Parliament, Council and the European Committee, given certain conditions;

- *the right to non-discrimination*, based on nationality, sex, race, religion, disability, age or sexual orientation, between the Union citizens;

- *the right to equal access* to a public communitarian position.

In what concerns the right to information, the Charter of Fundamental Rights of the European Union, art. 42 specifies that any European citizen and any physical and juridical person, having its headquarters in a member state has the right to access the documents of the European Parliament, of the European Council, limited on public and private interest reasons. Information of citizen is considered to be a priority by the European institutions.

The European Committee, with the role of supervising the abidance to the Treaty, supervises the application of the provisions related to the European citizenship and elaborates periodic reports referring to the progress realized and on the difficulties encountered.

The fundamental rights and the democratic values are respected in the European Union member states, as signatories of the Charter of Fundamental Rights of the European Union. Observance of human rights has been confirmed by the Charter of Fundamental Rights of the European Union[4] and was incorporated in the Treaty of Lisbon. The guarantee of respecting the fundamental rights was reinforced by including the abidance of rights that derives from article 6, in what concerns the activities of the European institutions. In the same time, the *suspension clause* was introduced, through which measures can be taken in case of severe and repeated violation by a Member State of the principles that stand at the base of the Union. The engagement of the Union was reaffirmed, officially, in December 2000, when the Bill of Fundamental Rights of the European Union was proclaimed.

The Member States, with a great number of citizens from other Member States can reserve the rights to vote for the communitarian voters resident on their territory, for a minimum period that cannot exceed five years (and the right to candidate in elections can be reserved for communitarian voters resident on their territory for a minimum period that cannot exceed ten years). This derogation is applicable when the proportion of European citizens resident in a Member State without detaining its nationality exceeds 20% of the total number of Union citizens that are resident there. In the last three European elections, Luxembourg was the only Member State which invoked this derogation. In the case of municipal elections, the minimum necessary period of residence cannot exceed the period for which the municipal authority is elected, in what concerns the rights to vote, neither the double of this period, in what concerns the right to candidate. Two Member States (Luxembourg and Belgium) benefit from such derogation. Anyways, Belgium can impose a minimum period of residence only in a limited number of electoral districts and must announce its intention on doing so a year before the elections.

An analysis of the nature and content of European citizenship allows a better assessment of the society, which is in training at European level, but also tailors the way to a series of fundamental questions, such as: What rights are attached to the status of "European citizen"? Who can access European citizenship? Is there a link between territory, nationality and citizenship?

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[4] The C*harter* of *Fundamental Rights* of *the European Union, dated* 7 December 2000, has been solemnly proclaimed by the European Parliament, the European Council and the European Commission

It is significant that, creating a concept of "European citizenship" has led many states to modify their constitutional right. This has fuelled significant debate about the meaning and consequences of establishing one citizenship at European level and how will it affect each Member State's nationality and sovereignty

In the same time is desired an analysis of how the notion of "European citizenship" is regulated and the extent to which it can make an effective contribution to European integration. Although since 1948 was stated, by the Universal Declaration of Human Rights, a set of principles concerning the right to a nationality of every person and the right not to be arbitrarily deprived of his nationality, in many countries, even in Europe, these rights are not respected. And those affected by these violations are generic called "stateless". A stateless person is a person who is not considered as a national by any State in accordance with its domestic law. Some of them are refugees or migrants who have left their country of origin; others live in their country of origin but are not recognized as citizens. Many of them face a brutal discrimination relative to employment, provision of housing, access to education and health care. Hence the need to regulate the status of stateless persons in the European Union and the importance of further improving the legal system to protect this category of persons.

Up to this date, the Council of Europe adopted the Treaty of Lisbon and the Charter of Fundamental Rights of the European Union in order to guide a rights-based approach on the avoidance of statelessness in relation to State succession. Both treaties contain general principles, rules and procedures of the greatest importance for the effective exercise of human rights to citizenship in Europe.

Conversely, due to lack of uniformity between the laws of various states regarding the criteria for citizenship award, by the combined game of national rules, an individual can be found in a position to have more citizenships or to be denied the right any nationality, although no law was broken. We are facing a conflict of citizenship that creates the multi-citizenship, dual citizenship is the most common. In general, dual citizenship results from the acquisition of a new citizenship without losing the state of origin one.

Dual citizenship is, in principle, a favourable legal situation for the person holding it, but in some cases it can lead to complications in his legal status, rather in the exercise of rights and obligations of the person concerned, and to some conflicts of interest between the states of whose citizen member is. Internationally, it tried the conclusion of multilateral conventions in order to avoid any dual citizenship situations, but gave no significant results. Still, there were concluded numerous bilateral agreements for avoidance of dual citizenship, which establish criteria of choice for the person with dual citizenship. At the same time the international practice is increasingly emerging the trend to favour the real and effective citizenship from the two.

As a result, European citizenship is a complex process that involves maintaining a negotiated social integration, which can adequately surround everyone living in today Europe, with direct implications on our state too. Also, it needs to be granted a high priority to the issue regarding stateless persons living in Europe by adopting a proactive policy by the Council of Europe, by developing measures to reduce and eliminate statelessness with the effect of current conflict resolution.

Conclusions

Regarding the legal status of dual-citizenship, although apparently it is favourable to the citizen, due to the adverse implications that may produce to its legal status, however, based on European regulations in force, it is necessary to deepen the concept and to adopt viable solutions applicable in all EU Member States.

Although European citizenship confers a new status to nationals of Member States, involving a series of rights that may be exercised throughout the European Union, however, implementation of

this concept may create tensions with some legitimate interest of Member States, as would be the desire to preserve national policies or sovereignty. Education for citizenship is considered, on European level, as a priority of educational reforms. It is seen as an instrument for social cohesion, based on the citizens' rights and responsibilities. Also, it represents a major dimension of educational policies in all European countries. Thus, it can be said that education for citizenship is an educational purpose, leading the educational system to a set of common values, such as: diversity, pluralism, human rights, social justice, wellbeing, solidarity. If a member state severely and systematically violates the fundamental rights and the democratic values, the Union can impose on it political or economical sanctions. One of the conditions that must be fulfilled for the adhesion to the European Union is the abidance of these fundamental rights.

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EU CLIMATE POLICY FROM KYOTO TO DURBAN

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Abstract
The risks posed by climate change are real and its impacts are already taking place. The biggest challenge about climate change is that there is no one single answer, no one single solution. This characteristic, together with the long history of political frictions and disputes worsened by environmental stresses suggests that global climatic changes have the potential to exacerbate existing international tensions. On December 31, 2012, the Kyoto Protocol's first commitment period will expire. Unless states agree to a second commitment period, requiring a further round of emissions cuts, the Protocol will no longer impose any quantitative limits on states' greenhouse gas emissions. Although, as a legal matter, the Protocol will continue in force, it will be a largely empty shell, doing little if anything to curb global warming.
Unlike the Kyoto Protocol negotiations, which focused exclusively on developed country emissions, the ongoing negotiations on a post-2012 climate change regime have also addressed developing country mitigation actions, without which a solution to the climate change problem is impossible. This has made the current negotiations as much between developed and developing countries as between the U.S. and the European Union. Key issues include: Legal Form; Regulatory approach; and Differentiation. By the Durban conference in December 2011 the EU needs to decide whether - and how - it will sign-up to a second commitment period for the Kyoto Protocol. This article focuses on the European Union needs to decide whether – and – how it will sign- up a second commitment period for the Kyoto Protocol. Because asking, whether others will act is the wrong question. The real question is whether signing- up to some form of second Kyoto commitment period will support Europe's fundamental interests.

Keywords: *Clime change, legal regime, International demands, EU's climate policy, Post-2012 climate change regime.*

Introduction

"Climate" and "policy" – less than fifty years ago, these two words were never heard in combination. But at least since June 1992, when about a hundred heads of state and government leaders from all over the world came together at the "Earth Summit" in Rio de Janeiro, the climate has featured on the developed nations' political agenda. And over the last 20 years, international efforts to fight climate change have intensified in view of the global challenges being faced in the areas of food, migration and security. At the "Earth Summit", more than 150 countries signed up to a Framework Convention on Climate Change (UNFCCC).[1] First a framework convention is adopted, establishing the basic system of governance for a given issue area. Then, regulatory requirements are negotiated in a protocol to the convention.[2] The UNFCCC, followed five years later by the Kyoto Protocol,[3] which elaborates specific regulatory requirements to limit greenhouse gas emissions.

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[1] Cf. UN Framework Convention on Climate Change, Item 2 (New York, 1992). Text available at: http://unfccc.int/essential_background/convention/background/items/ 2853.php (accessed February 2, 2011). This officially recognizes the global character of climate change and the need for international cooperation in this area.

[2] Daniel Bodansky, The Art and Craft of International Environmental Law, chapter 8 (Harvard Univ. Press 2009). The ozone regime followed this pattern, starting with the adoption of the Vienna Convention for the Protection of the Ozone Layer in 1985, and continuing with the adoption of the Montreal Protocol on Substances that Deplete the Ozone Layer in 1987. Similarly, the climate change regime began with the negotiation of the 1992 U.N.

[3] The Kyoto Protocol was adopted in Kyoto, Japan, on 11 December 1997 and entered into force on 16 February 2005. The detailed rules for the implementation of the Protocol were adopted at COP 7 in Marrakesh in 2001, and are called the "Marrakesh Accords.

Paper content

1.Three features of the Kyoto Protocol are noteworthy

First, the Protocol sharply differentiates between Annex I and non–Annex I parties (roughly translatable as "developed" and "developing" countries respectively).[4] The UNFCCC established the principle of "common but differentiated responsibilities and respective capabilities" (CBDR),[5] but did not draw an absolute separation between developed and developing countries. It elaborated general obligations common to all parties, additional commitments relating to reporting and financial assistance for Annex I and Annex II[6] parties respectively, a "degree of flexibility" for countries with economies in transition (i.e., the former Soviet bloc), special consideration for least developed countries, and a procedure by which the classification of countries could be reconsidered as circumstances change.[7] In contrast, the negotiating mandate for the Kyoto Protocol categorically excluded any new commitments for non–Annex I countries, operationalizing a comparatively flexible principle in an extremely rigid way.[8] Second, because the Kyoto Protocol negotiations focused exclusively on developed country emissions reductions, the primary axis in the negotiations was between the two main developed country powers, the United States and the European Union, in the case of the United States with support from Japan, Australia, and other members of the so-called "Umbrella Group." Third, the Kyoto Protocol's regulatory approach was modeled on the Montreal Protocol on Substances that Deplete the Ozone Layer, adopted ten years earlier. Like the Montreal Protocol, the Kyoto Protocol establishes legally-binding commitments, consisting of quantitative national performance standards, defined through a process of "top-down" international negotiations.[9] In contrast, the UNFCCC had elaborated a bottom-up process requiring countries to develop and report on nationally-defined policies and measures to mitigate climate change.[10]

The active role of the EU in the international climate change negotiations is vital and must continue. The new EU member states which have joined since 2004 have set their own targets within the framework of the Kyoto Protocol. In order to meet the targets set by the Kyoto Protocol, in June

[4] The UNFCCC refers in article 4.2 to "the developed country Parties and other Parties included in Annex I," leaving open the possibility that not all Annex I parties qualify as "developed." Conversely, the term "developing country" is never defined in the UNFCCC or the Kyoto Protocol. It is usually equated with non–Annex I status, although it is debatable whether all of the non–Annex I countries should be considered "developing," particularly since they include South Korea, Mexico, and Chile, which are now members of the Organization of Economic Cooperation and Development (OECD).

[5] UNFCCC art. 3. 1.

[6] Annex II is a subset of Annex I composed of members of the OECD as of 1992 when the UNFCCC was adopted.

[7] Iid. Art. 4.

[8] Berlin Mandate, UNFCCC Doc. 1/CP, April 7, 1995, UN Doc. FCCC/CP/1995/7/Add.1.

[9] The Kyoto Protocol's performance standards consist of quantitative limits on national greenhouse gas emissions. In contrast, the quantitative targets specified in the Montreal Protocol limit production and consumption (rather than emissions) of ozone-depleting substances. Kyoto's quantitative emissions targets are defined as percentage reductions from a base year emissions level (generally 1990 emissions), and apply to a basket of six greenhouse gases. For the Protocol's first commitment period, which runs for a five year period from 2008 to 2012, European Union member states are required to reduce their emissions by 8% relative to 1990 levels, Japan by 6%, and Russia by 0%. In addition to these emissions targets, the Protocol establishes detailed requirements for the monitoring, reporting and review of national emissions inventories. It also establishes several market mechanisms that parties can use to achieve their emissions targets, including emissions trading and the Clean Development Mechanism (CDM).

[10] See Daniel Bodansky, "The UN Framework Convention on Climate Change: A Commentary," 18 *Yale J. Int'l L.* 451, 508 (1993)

2000 the European Commission launched the European Climate Change Programme (ECCP).[11] This programme has the aim of supplementing the domestic efforts of EU countries with European strategies.[12] It is already clear that the EU will meet its Kyoto Protocol targets. The 15 EU countries have in fact managed to reduce their emissions by 14% compared to 1990. The ten new EU members have also either hit or exceeded their targets, so the EU-27 should have no problem in meeting their obligations. Only Austria and Italy are having problems meeting their targets, but this will have little impact on the overall EU result.[13]

The 15th United Nations Climate Change Conference and the 5th Meeting of the Parties to the Kyoto Protocol took place on December 7 and 8, 2009 in Copenhagen, one year on from Poznan. In line with the "Bali Action Plan",[14] negotiations on international climate protection plans for the period after 2012 should have been concluded in Copenhagen. However, after some difficult negotiating, the conference ended with nothing more than a political agreement, the "Copenhagen Accord", which covered certain core elements of future climate policy.[15] The Copenhagen Accord is not a legally-binding agreement but just a political declaration which is "acknowledged" by the party states.[16] Even though the climate summit ended without any binding agreement, it should be stressed that the Accord contains major core elements of climate policy. It was also agreed in Copenhagen that talks on future climate policy under the Framework Climate Convention and the Kyoto Protocol should be continued until the next climate conference in Cancun.[17]

The United Nations Climate Change Conference took place in Cancun, Mexico from November 29 to December 10, 2010, and encompassed the 6th Meeting of the Parties to the Kyoto Protocol. In the run-up to the conference, the EU Council formulated its goals for Cancun. The EU

[11] Communication from the Commission of 8 March 2000 on EU policies and measures to reduce greenhouse gas emissions: towards a European Climate Change Programme (ECCP) [COM(2000) 88.

[12] The main outcome of this programme is the EU Emissions Trading System which was introduced in January 2005 for carbon dioxide emissions (CO2). This is the fi rst multinational emissions trading system in the world.

[13] Cf. "EU schafft Kyoto-Ziel: Österreich am weitesten weg", *Kleine Zeitung*, October 12, 2010, http://kleinezeitung.at/

nachrichten/chronik/2 514576 (accessed February 2, 2011). See Celine-Agathe Caro and Christiane Ruth, "From Kyoto to Durban – The European Union's Clime Policy", Political Thought, no. 36 (2011): 23-33.

[14] The 2007 Bali Climate Change Conference culminated in the adoption of the Bali Road Map, which consists of a number of forward-looking decisions that represent the various tracks that are essential to reaching a secure climate future. The Bali Road Map includes the Bali Action Plan, which charts the course for a new negotiating process designed to tackle climate change, with the aim of completing this by 2009, along with a number of other decisions and resolutions.

[15] In this Accord, the vast majority of countries confirmed that average global temperatures should not be allowed to increase by more than two degrees Celsius. But the conference failed to provide any binding international agreements or any kind of instrument to allow this two-degree target to be met.

[16] Cf. Federal Ministry for the Environment, Nature Conservation and Nuclear Safety, "UN-Klimakonferenz in Kopenhagen – 7.

bis 18. Dezember 2009," http://www.bmu.de/15_ klimakonferenz/doc/44133 (accessed February 3, 2011). During the talks, China, India and the USA in particular were not keen to commit to binding agreements. The President of the European Council, Herman Van Rompuy, said at the end of February 2010 that Europe had been left sitting in the corridor while the USA and China struck their own deal. "We were excluded from the crucial deal between the USA and the four major developing countries." Cf. address by Hermann Van Rompuy, President of the European Council to the Collège d'Europe, Bruges, February 25, 2010, http://consilium.europa.eu/uedocs/cms_data/ docs/pressdata/en/ec/113067.pdf (accessed February 3, 2011).

[17] In 2010 the EU continued their efforts in the sphere of European energy and climate policy. As the Lisbon Strategy expired in 2010, the European Council adopted a successor strategy, "Europe 2020": a new European strategy for employment and growth. See European Commission (2009). Working Document. Consultation on the Future "EU2020" Strategy.

wanted specific actions on emission reduction, adaptation to climate change and deforestation.[18] After some tough negotiations the international community reached an agreement which – unlike the Kyoto Protocol – also included the USA, China and other emerging and developing countries. The two-degree target was officially recognised by more than 190 participating countries, providing a basis for a successor to the Kyoto Protocol.[19]

The challenge is now to make the right preparations for the Climate Conference in South Africa in 2011. This means that countries have to decide how much they can reduce their emissions and how much they are prepared to pay for this. The EU already held an energy summit on February 4, 2011.[20]

2. How should the Europe Play the Kyoto question at the Durban 2011 Climate Summit?

On December 31, 2012, the Kyoto Protocol's first commitment period will expire. Unless states agree to a second commitment period, requiring a further round of emissions cuts, the Protocol will no longer impose any quantitative limits on states' greenhouse gas emissions. Although, as a legal matter, the Protocol will continue in force, it will be a largely empty shell, doing little if anything to curb global warming. Ever since the Kyoto Protocol's entry into force in 2005, the question of what to do after 2012, when Kyoto's first commitment runs out, has been a central focus of the U.N. climate change negotiations. Developing countries such as China and India want the Protocol to continue in its present form, imposing quantitative limits on developed country emissions but not their own.

The European Union might be amenable to a new commitment period under the Protocol, but only as part of "a global and comprehensive framework engaging all major economies,"[21] including the United States and China. Meanwhile, some Kyoto parties, such as Japan, Canada, and Russia, want to replace the Kyoto Protocol with a comprehensive new agreement with commitments by both developed and developing countries. In 2007, at the Bali conference, the parties to the U.N. Framework Convention on Climate Change established a parallel negotiating process, involving the other big emitters such as the United States and China, to consider long-term cooperative action under the Convention, with the goal of reaching a comprehensive outcome addressing mitigation, adaptation, finance, and technology.[22]

Unlike the Kyoto Protocol negotiations, which focused exclusively on developed country emissions, the ongoing negotiations on a post-2012 climate change regime have also addressed developing country mitigation actions, without which a solution to the climate change problem is

[18] This groundwork strengthened the EU's negotiating position because it allowed it to push for concrete and realistic actions during the talks.

[19] NGOs considered the acceptance of the twodegree target to be a step in the right direction towards a new climate change treaty. Between 2013 and 2015 there will even be an appraisal of how the targets can be adapted to limit global warming to 1.5 degrees Celsius.

[20] In November 2010 Energy Commissioner Günther Oettinger presented a 10-year plan for the EU's energy policy. In it he

warned that the EU would not be able to hit its energy-saving targets without using nuclear energy. See: "EU: Energiegipfel

über das neue Zeitalter – Teil 2", Greenmag, January 12, 2011, http://greenmag.de/magazin/meldung/datum/2011/01/12/

alles-fuer-sonne-wind-wasser-und-atom-1.html (accessed February 5, 2011).

[21] Statement of the European Union to the 16th Session of the At Hoc Working Group on Further Commitments under the Kyoto Protocol, Apr. 5, 2011.

[22] Bali Action Plan, UNFCCC Dec. 1/CP.13, Dec. 15, 2007, U.N. Doc. FCCC/CP/2007/6/Add.1 (establishing the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention, or AWG-LCA).

impossible.[23] This has made the current negotiations as much between developed and developing countries as between the U.S. and the European Union. Key issues include: Legal form;[24] Regulatory approach;[25] and Differentiation.[26]

Positions vary widely on these issues. The European Union is open to considering a new round of legally-binding Kyoto targets, but only as part of a global and comprehensive framework that includes the United States and China. The United States would be willing to negotiate a legally-binding agreement, but only if the mandate provided that the agreement would apply with equal legal force to all of the major emitters (including China and India). Although it accepts that developing country commitments should be differentiated from those of developed countries as to content, it insists on symmetry of legal form, meaning that the provisions for major-emitting developing and developed countries should have the same legal character. Meanwhile, the big developing countries such as China and India would like developed countries to continue Kyoto's top-down, legally-binding approach, but are unwilling to accept this approach themselves. They insist on maintaining the Kyoto "firewall" between developed countries (which have emissions limitation commitments), and developing countries (which don't).

The negotiations on a post-2012 climate change regime were initially supposed to wrap up at the 2009 Copenhagen Conference. But the Copenhagen Accord — a political agreement establishing a bottom-up process based on national pledges — was not formally adopted by the conference.[27][16] And although the following year, the Cancun conference adopted decisions that elaborate the Copenhagen framework and anchor the Copenhagen pledges in the Convention, it extended the negotiating process and left open the final legal form of the regime, including the possibility of a second commitment period under the Kyoto Protocol.[17] So the battle over policy architectures will continue at this year's conference of the parties in Durban, South Africa, and most likely at the 2012 climate conference scheduled in Qatar.[28]

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[23] According to some estimates, developing country emissions will grow so rapidly over the next 20 years that, even if developed countries were to phase out their greenhouse gas emissions completely, global emissions would still be higher in 2030 than today. Project Catalyst, "Limiting Atmospheric CO2e to 450 ppm — The Mitigation Challenge," at 13 (Feb. 2009).

[24] Will the post-2012 regime be established through a legally-binding agreement (or agreements), such as an amendment to the Kyoto Protocol, a new legal agreement defining mitigation commitments for states that do not have Kyoto targets (such as the United States and China), or a comprehensive agreement that embraces all states and replaces the Kyoto Protocol? Or will the post-2012 regime be defined through a political agreement or decisions of the parties? See Jacob Werksman," Law and Disorder: Will the Issue of Legal Character Make or Break a Global Deal on Climate"? German Marshall Fund of the United States Policy Brief (July 2010).

[25] Will the post-2012 regime continue the top-down approach of the Kyoto Protocol, in which internationally-defined commitments are adopted in order to drive national action? Or will the regime switch to a more bottom-up approach, in which countries unilaterally define their own national climate change approach, or adopt some kind of hybrid approach?

[26] Will the post-2012 climate change regime continue to draw an absolute wall between developed and developing countries, as the Kyoto Protocol does? Or will it provide for greater parallelism or symmetry between developed and developing countries — for example, by imposing legally-binding commitments on both, or by adopting common rules on accounting, mechanisms, reporting, review and/or compliance? See Jacob Werksman, "Legal Symmetry and Legal Differentiation under a Future Deal on Climate Change," 10 *Climate Policy* 627 (2010).

[27] Rather than defining emissions targets from the top down through international negotiations, the Copenhagen Accord establishes a bottom-up process that allows each country to define its own commitments and actions unilaterally. The Accord specifies that developed countries will put forward national emissions targets in the 2020 timeframe, but allows each party to determine its own target level, base year, and accounting rules. Other key elements of the Copenhagen Accord include: (1) a long-term aspirational goal of limiting climate change to no more than 2° C; (2) significant new financial assistance for developing country mitigation and adaptation; and (3) a process for international analysis and review of national actions. See Daniel Bodansky, "The Copenhagen Climate Change Conference: A Postmortem," 104 *Am. J. Int'l L.* 230 (2010).

[28]Harvard University, "W[h]ither the Kyoto Protocol? Durban and Beyond," Harvard University, http://belfercenter.ksg.harvard.edu/publication/21314/whither_the_kyoto_protocol_durban_and_beyond.html (accessed August 2011).

The next UN climate summit will take place in Durban, South Africa from 28th November to 9th December. This follows the unsuccessful 2009 Copenhagen summit and the partially-successful one in Cancun in 2010. The EU has the opportunity to lead the world in climate negotiations by strengthening its climate and energy policies, and by offering bilateral financial deals to developing countries which accept obligations under the UN climate framework.

There is no doubt that the Durban summit will not lead to final agreement on new international legally-binding commitments. Differences between negotiating parties, on how deep emissions reductions should be and who should foot the bill, remain too great. At best the summit can lay the groundwork for a new legal agreement. But progress will only be possible with greater leadership, and only the EU can provide such leadership. US politics make leadership by the Obama administration impossible. China, India and other emerging global powers regard international climate negotiations with deep suspicion – part of attempts by 'the West' to keep them in their place.

The EU should provide leadership in Durban by stressing that climate policies can strengthen, not hinder, economic recovery. It should outline how its own climate policies will be made more effective. And it should offer countries resisting UN targets on climate change strong economic and financial incentives to accept such targets. The EU line at Durban should be based on four main points: Continuing to promote the Kyoto Protocol framework; Continuing to offer an increase in its 2020 emissions reduction target from 20 per cent to 30 per cent,[29] if other countries commit to ambitious targets; On energy efficiency and renewables, outlining how the existing 20 per cent targets will be met, notably by stressing that the draft energy efficiency directive will be top of the EU's agenda in 2012; and A statement that the EU's ETS will be strengthened with a Europe-wide floor price, with border tax adjustments to protect energy-intensive European decarbonisation policies should be introduced and implemented whatever the state of international climate negotiations.

However, the top down approach is needed too.[30] EU institutions can themselves implement top down policies to require unenthusiastic or ineffective member-states to take action. But global agreement gives arguments for Europe-wide action greater traction.[31]

3. Was Durban a significant step forward?

The United Nations Climate Change Conference in Durban, South Africa, was held from 28 November - 11 December 2011. The conference involved a series of events, including the seventeenth session of the Conference of the Parties (COP 17) to the UN Framework Convention on Climate Change (UNFCCC) and the seventh meeting of the Conference of the Parties serving as the Meeting of Parties to the Kyoto Protocol (CMP 7).[32]

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[29] Commission of the European Union, Doc. COM(2009) 647/3.

[30] Not all governments are committed to protecting the climate, and many of those that are committed rhetorically have made little progress on delivery. For example, UK governments under Prime Ministers Tony Blair, Gordon Brown and David

Cameron have repeatedly emphasized their commitment to reducing emissions and moving to clean energy, but the UK gets a lower proportion of its energy from renewables than all other European countries except Malta and Luxembourg.

[31] Centre for European Reform, "EU climate policies without an international framework," Centre for European Reform, http://www.cer.org.uk/sites/default/files/publications/attachments/pdf/2011/pb_climate_21oct11-3892.pdf (accessed October, 2011).

[32] In support of these two main bodies, four other bodies convened: the resumed 14th session of the *Ad hoc* Working Group on Long-term Cooperative Action under the Convention (AWG-LCA); the resumed 16th session of the *Ad hoc* Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol (AWG-KP); and the 35th sessions of the Subsidiary Body for Implementation (SBI) and the Subsidiary Body for Scientific and Technological Advice (SBSTA). The Conference drew over 12,480 participants, including over 5400 government officials, 5800 representatives of UN bodies and agencies, intergovernmental organizations and civil society organizations, and more than 1200 members of the media.

The meetings resulted in the adoption of 19 COP decisions and 17 CMP decisions and the approval of a number of conclusions by the subsidiary bodies.[33] These outcomes cover a wide range of topics, notably the establishment of a second commitment period under the Kyoto Protocol, a decision on long-term cooperative action under the Convention, the launch of a new process towards an agreed outcome with legal force applicable to all parties to the Convention, and the operationalization of the Green Climate Fund. After the frustrations at the Copenhagen conference and the struggle to rescue the multilateral climate regime in Cancun, negotiators in Durban turned a corner and not only resuscitated the Kyoto Protocol but, in doing so, adopted a decision that will lead to negotiations on a more inclusive 21st century climate regime. There was a strong sense that elements of the Durban package, guided by a need to fulfill long overdue commitments that go back to the Bali Roadmap, restored sufficient momentum for a new negotiation process, one that will continue to witness a anthropogenic interference" with the climate system.[34]

The talks resulted in the adoption of the 'Durban Platform' – a roadmap to a global legal agreement applicable to all parties. Negotiations for the new agreement, to begin early in 2012, are to conclude, as early as possible, and not later than 2015. The commitments in the new agreement will take effect from 2020.

This was accompanied by an agreement to a second commitment period of the Kyoto Protocol from 2013, [35] and the launch of the Green Climate Fund to distribute the US$100 million in assistance pledged by developed nations to assist developing nations with mitigation efforts.[36]

The agreed second commitment period to the Kyoto Protocol will begin in 2013 and will avoid a gap in reduction commitments that could have arisen when the current phase of the Kyoto Protocol expires at the end of 2012. The parties that signed up to the Kyoto extension must commit to firm emission reduction targets by next year. They must also decide by next year whether the second commitment period will last until 2017 or 2020 and whether surplus emission rights from the first commitment period will be eligible for carry-over into the second period.[37]

Actually, the key points of the Durban Platform are as follows:

- Agreement to negotiate a new international climate treaty as an "outcome with legal force" by 2015.
- Provides for a second commitment period for the Kyoto Protocol.
- Effectively secures the future of the Clean Development Mechanism.
- Little short-term impact on the EU's Emissions Trading Scheme.

Finally, one of the positive aspects at Durban was that the EU regained a central position, having been sidelined in Copenhagen. The EU was calling for a 'roadmap' for future negotiations.[38] This was agreed – eventually. China, India and the US all signed up to negotiating an agreement with binding targets by 2015, with the targets coming into force in 2020. Getting China and India to agree that they could at some stage have targets was progress.[39] However, the rich and powerful fossil fuel

[33] U.N. Doc. FCCC/CP/2011/L.1, Dec. 7, 2011.

[34] The Convention, which entered into force on 21 March 1994, now has 195 parties. See International Institute for Sustainable Development (IISD), "*Earth Negotiations Bulletin*", Vol. 12 No. 534 (2011): 1-2.

[35] Thus preserving the 'Kyoto architecture' – the rules and legal framework for managing emissions.

[36] Whilst EU representatives applauded the Durban Platform as an historic breakthrough in the fight against climate change, the agreement has received mixed reactions from politicians, green groups and climate change experts.

[37]Energy & Climate Change, "The UNFCCC'S Durban Platform Explained", Energy & Climate Change, http://www.hfw.com/__data/assets/pdf_file/0016/17422/Client-Brief-UNFCCCs-Durban-A4-4pp-January-2012.pdf http://www.hfw.com/__data/assets/pdf_file/0016/17422/Client-Brief-UNFCCCs-Durban-A4-4pp-January-2012.pdf (accessed January, 2012).

[38] Roadmap being the current jargon term of choice for anything the EU does on climate and energy.

[39] Back in 1997, the US senate voted 96-0 against any international agreement that didn't impose binding targets on China and India. Therefore, a US President would theoretically have a chance of getting a future treaty based on the Durban agreement ratified by Congress.

lobby in the US would then inevitably find other reasons to oppose a new climate treaty. And China and India still have the option of refusing binding commitments in 2015. All they've agreed so far is that they will talk about them.

Having a top-down international agreement would be valuable. Governments and negotiators should certainly keep talking, but a top-down framework is not essential. Bottom-up progress can be made without one. So politicians and policy makers should not allow the UNFCCC process to take their attention away from national or regional policies.

The EU should give priority to adopting the draft energy efficiency directive and rescuing the Emissions Trading System from irrelevance.[40]

Conclusion

The international political response to climate change began with the adoption of the UNFCCC in 1992. The UNFCCC sets out a framework for action aimed at stabilizing atmospheric concentrations of greenhouse gases to avoid "dangerous anthropogenic interference" with the climate system. In December 1997, delegates to the third session of the Conference of the Parties (COP) in Kyoto, Japan, agreed to a Protocol to the UNFCCC that commits industrialized countries and countries in transition to a market economy to achieve emission reduction targets.[41] COP 13 and COP/MOP 3 took place in December 2007 in Bali, Indonesia. Negotiations resulted in the adoption of the Bali Action Plan. Parties established the AWG-LCA with a mandate to focus on key elements of long term cooperation identified during the Convention Dialogue: mitigation, adaptation, finance, technology and a shared vision for long-term cooperative action.[42] The UN Climate Change Conference in Copenhagen, Denmark, took place in December 2009. The event was marked by disputes over transparency and process, as well as with political agreement "Copenhagen Accord."[43] Following four preparatory meetings in 2010, the UN Climate Change Conference in Cancun, Mexico, took place from 29 November to 11 December 2010. By the end of the conference, parties had finalized the Cancun Agreements, which include decisions under both negotiating tracks.[44] In 2011, three official UNFCCC negotiating sessions were held in the lead up to Durban. In April, the two AWGs convened in Bangkok, Thailand. The AWG-LCA engaged in procedural discussions on its agenda, finally agreeing on an agenda for its subsequent work. Two months later, negotiators gathered in Bonn, Germany, for sessions of the SBI, SBSTA, AWG-LCA and AWG-KP. SBSTA

[40] Proposal for Directives 2004/8/EC and 2006/32/EC [COM (2011) 370, 22/06/201]. The Danish government, which holds the EU presidency in the first half on 2012, has said that it will try to do both of these things.

[41] These countries, known as Annex I parties under the UNFCCC, agreed to reduce their overall emissions of six greenhouse gases by an average of 5.2% below 1990 levels between 2008-2012 (the first commitment period), with specific targets varying from country to country. At the end of 2005, the first steps were taken to consider long-term issues. Convening in Montreal, Canada, the first session of the COP/MOP 1 decided to establish the AWG-KP on the basis of Protocol Article 3.9, which mandates consideration of Annex I parties' further commitments at least seven years before the end of the first commitment period. COP 11 agreed to consider long-term cooperation under the Convention through a series of four workshops known as "the Convention Dialogue," which continued until COP 13.

[42] The Bali conference also resulted in agreement on the Bali Roadmap. Based on two negotiating tracks under the Convention and the Protocol, the Roadmap set a deadline for concluding the negotiations in Copenhagen in December 2009.

[43] It established a process for parties to indicate their support for the Accord and, during 2010, over 140 countries did so. More than 80 countries also provided information on their national emission reduction targets and other mitigation actions. On the last day of the Copenhagen Climate Change Conference, parties also agreed to extend the mandates of the AWG-LCA and AWG-KP, requesting them to present their respective outcomes to COP 16 and COP/MOP 6.

[44] See Doc. /SB/2011/INF.1/Rev.1 and FCCC/ AWGLCA/2011/INF.1, both issued after Cancun), and Decision 1/CP.16, created the Green Climate Fund (GCF), which was designated to be the new operating entity of the Convention's financial mechanism and is to be governed by a board of 24 members. They also recognized the commitment by developed countries to provide US$30 billion of fast-start finance in 2010-2012, and to jointly mobilize US$100 billion per year by 2020.

agreed to a new agenda item on impacts of climate change on water and integrated water resources management under the Nairobi Work Programme. This item will be taken up in Durban.[45] The AWG-LCA and AWG-KP reconvened from 1-7 October 2011 in Panama City, Panama.[46] The outcome for most of the informal group discussions was some "form of text" forwarded to Durban as a basis for further discussions. Since the negotiations in Panama, a number of meetings have been held that are relevant to Durban.[47]

Another climate change conference has come to an end at which the hope of binding global action to combat climate change has not been fulfilled.[48] Instead, this has once again been adjourned. With the document agreed (the Durban Platform for Enhanced Action), a road map has been drawn up that foresees a global treaty by 2020. This will mean almost ten more years of the negotiation marathon with an uncertain outcome and no fixed global measures.[49] The EU and some of the world's poorest countries vulnerable to climate change impacts have launched a joint bid for a strong outcome for binding targets by 2015. With the EU pact gaining support from over 120 countries, the world's largest polluters, China and India, could come under pressure to come on board.[50]

The alliance between the EU, the Alliance of Small Island States (AOSIS) and the Least Developed Countries (LDCs), facilitated by Denmark and Gambia, includes over half the world's governments. Other countries in Africa and Latin America also back its goals. This show of unity between developed and developing countries is possibly the first in the history of the UN climate convention, and marks a new dynamic in the often fractured process. The US and a number of big developing countries including Brazil, China and India want any negotiations to start in 2015 at the earliest, and not come into effect until after 2020.[51]

As part of a transition to the wider international climate regime that is needed, the EU is open to a second Kyoto period on condition that agreement is reached on:

- The roadmap and deadline for a comprehensive and legally binding global climate framework that should enter into force no later than 2020;
- Strengthening Kyoto's environmental integrity through a robust accounting framework for forest management and through a solution to the issue of the surplus of emission budgets ("AAUs")

[45] No agreement was reached on other proposed new items, such as blue carbon and rights of nature and the integrity of ecosystems, and a work programme on agriculture.

[46] The AWG-KP concentrated on outstanding issues and further clarifying options concerning mitigation targets, the possible nature and content of rules for a second commitment period, and the role of a possible second commitment period within a balanced outcome in Durban.

[47] For more information on many of these events, visit IISD Reporting Services' *Climate Change Policy and Practice* knowledgebase: http://climate-l.iisd.org.

[48] At the Durban Conference the EU has clearly stated that any new agreement would need to be binding according to international law. General expectations as regards the legal form consist of a clear wording, with clearly defined commitments and monitored implementation. It is very important that all commitments, no matter whether they are high or low, have a similar form, i.e. are of the same legally binding status.

[49] Scientists have been warning of the ever smaller time window for effective measures to limit global warming to 2°C for years now. Extension of the Kyoto Protocol with binding aims is considered too weak. Leading polluters such as Canada, Russia and Japan have already declared their unwillingness to support an extension of the Kyoto Protocol – Canada even wishes to withdraw from the Kyoto Protocol before it has even expired. However, the remaining states produce just 15 percent of greenhouse gas emissions. The reduction commitments for a further commitment period are only to be agreed next year, and it remains unclear when exactly this period should begin and end.

[50] China has however shown promising signals, although skepticism remains over its position. India has insisted it is unfair to expect them to slash emissions when it could hamper economic development and poverty reduction. Brazil, an emerging economy that plays a significant role in climate negotiations, also said there was convergence on a deal in Durban.

[51] AOSIS and the LDCs say that is too late as such a plan will most likely result in mean global temperatures increasing by more than 1.5C, wreaking havoc with climate change disasters such as drought and sea-level rises.

from the first commitment period. This solution must be non discriminatory and preserves incentives for overachievement of emission targets;

- Establishing one or more new market-based mechanisms in order to boost the development of a robust international carbon market.

As is always the case at international conferences where diplomacy and the different interests of individual states play an important role, one must take a closer look at the details. It then becomes clear that with its refusal policy, the USA is losing influence – primarily to China. The EU has entered into a strategic alliance with the small states affected the most by climate change, such as the island states that fear that their territories could already be submerged in just a few years time. For them the international process is one of the few opportunities to bring their interests to the attention of more influential governments.

The setting up of a Green Climate Fund, which is to primarily make funding available to the poorer states for climate protection and adjustment to the consequences of climate change, was celebrated as a key success (100 billion US dollars each year until 2020). The interim committee established at last year's conference in Cancun was officially confirmed, and the fund designated an operating entity of the financing mechanism of the Convention. However, it remains unclear where funding for this should actually come from. Several states have applied to host the fund, including Germany.

As trailblazer in climate policy, the EU has to continue to pursue ambitious goals, [52] but must also be aware that climate change is not afforded the same importance in other countries. In order to encourage countries like the USA to get on board, the EU will have to be willing to make compromises. On an international level, Europe needs to be seen as a role model, not as a teacher. If it manages this, then more important progress may be made after the Durban's 2011 Conference in the fight against climate change. But, it remains to be seen whether this will be sufficient to succeed in limiting global warming to two degrees Celsius in the long-term.

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[52] The EU needs to adapt its emissions reduction targets to reflect these changes and set itself the goal of reducing emissions by 30% by 2020. This would cost very little more than the previous 20% target, but would boost the EU's credibility in international climate talks and put the European economy in a good position for the future. Estimates suggest that an increase to 30% would only cost an extra 11 billion Euro compared to the original 20% figure. This represents less than 0.1% of the EU's economic output. And the cost of delaying is high: the International Energy Agency (IEA) estimates that delays in investing in low-carbon energy sources worldwide incurs annual costs of 300 to 400 billion Euro. See: "30 Prozent weniger Emissionen bis 2020", *Frankfurter Allgemeine Zeitung*, July 15, 2010, http://faz.net/- 01d9g0 (accessed February 8, 2011).

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THE IMPORTANCE OF PRINCIPLES IN THE PRESENT CONTEXT OF LAW RECODIFYING

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Abstract

In its grand historical-spatial diversity, in spite of the natural differences between civilizations, law presents a permanent and universal nature, represented by a bunch of constants. These constants of law are, doubtlessly, the juridical principles, those indispensable tools meant to facilitate harmonization, on international level, of the legal systems. Along with the global trend of unifying space and time and escalation of a new stage of civilization, a more diversified society, we are witnessing today a reconfiguration of the Romanian legal system, reflected in the adoption of new legal codes. In this historical context in which Romania is placed, researching the importance of law principles becomes a necessity.

Law principles have a privileged place within the positive juridical order, representing the foundation of any juridical construction: they certify the continuity of law during the centuries and that is why here we have to dig in order to find out the foundation of law, its permanent nature, its substance; they precede and give birth to positive law, which lies ahead of legal rules; principles build and guide the entire system of law, conferring to the legal order its necessary stability; being the underlayer of positive law, the principles of law represent a factor of stability and, also, a source of unity, coherence, consistency and efficiency for that legal system.

Keywords*: principle, new legal codes, continuity, stability, unity.*

Introduction

Being a facet of society, law does not reduce to the ensemble of applicable legal norms. At the basis of positive law we can find a handful of principles that have been an adjunct to society from the beginning of its existence and before the founding of state. These principles are the ones that confirm law's continuity in time and this is where the fundament of law, its permanent nature or its substance, need to be looked for. Therefore, regardless of the changes involved in the process of legal systems' evolution and of the number of qualitative and quantitative modifications recorded by the legal phenomenon, the essence remains unaltered.

In the present historical context, in which humanity is ascending a new level of civilization while embracing "the unity in diversity", the role of general principles of law, as a legal expression of the fundamental relations in society, is amplifying. We consider that in order for "the unity in diversity" to actually become possible, it is absolutely necessary for the European Union to specialize in principles and values situated in the area of the eternal legal for the individual's rationality as well as for the states' national identity.

On the other hand, we must not neglect the fact that great social-economic changes also determine modifications in the legislation's content along with changes in the construction of law systems, and the law principles are those that assure the legal system's opening and trace the directions that need to be followed. By placing the principles at the foundation of law evolution in the periods marked by legislative changes, we are highlighting the necessity of reconsidering the importance of law principles in the present context in which new legislative codes are being adopted in Romania.

The necessity of reconsidering the role of law principles is more obvious in the contemporary period, in which society's progress implies the continuous gradual decline of traditional forms and contents. The permanent struggle of emancipating from the traditions' arduousness, the lack of

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fondness towards the moral values and principles and the multiplication of principles into arbitrary, impart relativity, instability and incertitude to law. We are visibly drifting away from Portalis' belief, according to which "what is essential is to impart to the new institutions that character of permanence and stability that can guarantee them the right to grow old."

The symptoms of the crisis crossed by law are legislative explosion, a frantic tendency to reform everything that has proved to be sufficiently stable, obscure laws borrowed from other law systems and sometimes translated without sense, dispositions with imprecise, inconsistent and incoherent character. In this entire normative "chaos", also amplified by the continuous diversity of social relations and, in consequence, of those with legal character, the law principles striving to bring light and orientate the legislator during the process of creating law, as well as the practitioner during the difficult task of applying it.

Given that, such as Hayek sustained, "we must resort to the abstract where we cannot master the concrete", we believe that the need to return to principles is proven to be nowadays impetuously more necessary than in the past.

1. The importance of general principles in the process of elaborating law

The general principles represent a factor of stability in law, whilst being a counter-weight of the legislature's disorders. It is easily observed that the law regulations experience an alert rhythm of changes, whereas the principles maintain society in equilibrium, are long-lived and, thus, assure continuity for the legal order. Bergel observed that while the disappearance or modification of a simple law regulation has only an "episodic character", the elimination of a principle "risks causing a high prejudice to legal order because the faith of numerous legal regulations is at stake"[1].

The principles are genuine constants of law. However, this aspect should not lead to the conclusion that eternal and immutable law principles exist. Mircea Djuvara brought into notice the danger of considering the principles in a purely metaphysical way: "We are very easily inclined to committing the error of believing that a law or judiciary principle is the product of a pure speculation and that it would appear in our minds before an experience…This is why immutable law principles, that are valuable for any time and place, cannot exist".

Sofia Popescu emphasizes that the principles "do not block the law dynamics", but guarantee the law order's cohesion through their "migration" from a law branch to another[2]. At the same time they assure the evolution of the legal system and law renewal while constituting "the vectors of legal development, meaning that while progressing, they impel the progress of the legal system". For these reasons they are named development principles[3].

Nicolae Popa mentioned that the general principles of law are crossed by a double dialectic: external and internal[4]. The external dialecticism "concerns the principles' dependence to the social conditions assembly", while at some point they are reflected in the legal conscience of a nation; the evolution of this conscience imposes "the rethinking of some principles in accordance to the social-economic mutations that require a corresponding adequacy for the legal regulations and institutions"[5].

The internal dialecticism concerns "the assembly of internal connections characteristic to the legal system, the interferences of its component parts". Under this aspect, law principles are those that assure the coherency of the entire legal system. The subordination of the normative assemble to a

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[1] Jean – Louis Bergel, *Théorie générale du droit,* 4th edition, (Dalloz Publishing House), p. 108

[2] Sofia Popescu, *General Law Principles – again under our attention,* in Romanian Law Studies, 12th year *(*45), no. 1-2/2000, p. 13

[3] Dan Claudiu Dănişor, Ion Dogaru, Gheorghe Dănişor, *General Law Theory, (*C. H. Beck Publishing House, Bucharest, 2006), p. 156

[4] Nicolae Popa, *General Law Theory*, 3rd edition, (C. H. Beck Publishing House, Bucharest, 2008), p. 95

[5] Nicolae Popa, *Regarding the Concept and Role of General Principles in Law,* in the Public Law Magazine no. 1-2/1996

minimum of guiding assumptions contributes to affirming the legality's principle, as a fundament of the positive legal order and to assuring a logical unity as part of it.

The law system does not constitute the constant, static, arithmetic, mechanical, sum of the effectual legal norms, but the unity and assembly of legal norms that are systematically structured and organized on the base of certain principles[6]. The cohesion of law system is assured through the interdependency of its composing elements. Buche mentioned that structure and system's development are subordinated to the principles. Therefore they are structure principles. General principles of law "tend to change the legal order into a coherent system. They have the role to assure the systematic unity of law, in the middle of positive regulations' disorder, by forming check points that allow the placement and arrangement of law regulations in accordance to certain conducting ideas"[7].

On the other hand, as a facet of society, law does not reduce to the assemble of applicable legal norms. At the basis of positive law we can find a handful of principles that have been an adjunct to society from the beginning of its existence. Guided by ideals, law is for an individual a mean of social control: the person conforms to the legal norms because these offer him cultural–normative models, of which he is aware they are necessary and thus follows them. Law is valorized and integrates the behavior standards resulting from society's value conscience. Therefore, the elaboration of law is based on principles and values: the principles of law are to the extent of positive law, specify it and stand at its base[8].

The general principles of law occupy a privileged spot in the positive legal order and constitute the foundation of any legal construction. Hayek observes that law principles "determine in a real method the legal system, its general spirit, as well as every particular norm contained by it and the method in which it is applied"[9]. In a similar way,

Adhémar underlined that "in order to be viable and at least durable, the various institutions of a nation need to be founded on principles between which a general adequate harmony exists: this method of thinking, superior to the others, is simultaneously accessible to any real legal advisor"[10]

For Bergel the principles fulfill a fundamental function and a technical one. The fundamental function resides in the fact that while being the base of legal thinking, the principles impose themselves to the actual legal advisor[11]. Thus, the entire legislative assemble is governed and conforms to the principles' authority. The legal norms cannot be proclaimed outside the directives contained by the law principles. The technical function intercepts the interaction of various general law principles: some principles are directors because the legal order itself depends of them; therefore, the principle of law equality and of fundamental liberties constitutes "foundations of the legal structure". Other principles are rectifiers, since they aim only at the disposal of certain mistakes or of the eventual unjust solutions; for instance, the principle of good faith.

In the process of law creation, we are interested in the directing principles that orient the legislator's activity from a methodological point of view. "The entire law creating process involves the skillful combination of tradition and innovation, so that the most adequate legislative solutions are imposed"[12]. The legislator must permanently capture the requirements of social life and offer them an actual expression by establishing legal norms. However the effectiveness of these norms

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[6] Sofia Popescu, *General theory of law*, (Lumina Lex Publishing House, Bucharest, 2000), p. 210

[7] Dan Claudiu Dănişor, Ion Dogaru, Gheorghe Dănişor, *the quoted paper,* p. 156

[8] Gheorghe Mihai, *The Foundations of Law. The Theory on the Beginning of Objective Law*, volume III, (All Beck Publishing House, Bucharest, 2004), p. 36

[9] F.A. von Hayek, *Droit, législation et liberté*, volume I, page 78, *Apud* Philippe Malaurie, *the quoted paper*, p. 356

[10] Esmein Adhémar, *Apud* Philippe Malaurie, *The Anthology of Legal Thinking,* (Humanitas Publishing House, Bucharest, 1996), p.287

[11] Jean – Louis Bergel, *quoted paper,* p. 106

[12] Dumitru Mazilu, *General Theory of Law,* 2nd edition, (All Beck Publishing House, Bucharest, 2000), p.127

depends on their conformity with the ensemble of principles that govern the normative system so that the "law's principles trace the directing line for the legal system; without them the law could not be conceived"[13]. The positive law must organize, develop and apply these principles that guide society towards reaching ideals.

Law must itself contain the equilibrium between the letter and spirit of rules. The entire official legislation, instituted or approved by the state, otherwise said "the law's letter", must be crossed by the "spirit" of law principles. The principles constitute guiding marks for the legislator and assume the function of conforming the positive law's system. The law's spirit orients the legislator's will: "the normative act's text acknowledges that certain will of the legislator that is in accordance to the law spirit, itself configured in the values principle of justice and, on a larger scale, in the century's spirit"[14].

Franck Moderne attributes a functional legitimacy to the general principles of law: these assure the exigency of legal order coherency, by contributing to the consolidation of certainty in legality[15]. The author refers to Max Weber's belief in the fact that "that which answers to the coherency's imperative is rational".

The coherency of legal order signifies the lack of antinomies in law. In C. M. Stamatis' opinion, the law order has never been an absolutely coherent integral normative system, without internal flaws and in perfect conformity with the social, political, cultural domain, instead the antinomies are resident in its interior. However, it has been shown that they must not be seen necessarily as "mistakes" of legislative policy, caused by the legislator's negligence. The existence of antinomies in law is explained by the fact that, on hand, the legal norms serve not just for different purposes but to opposed ones as well, and, on the other hand, by the fact that certain legal regulations are inefficient since they cannot keep up with the tendencies of society's development.[16]

The principles represent the arching key of the entire legal structure. As the base for positive law, they are reservoir of unity, coherency, uniformity and efficiency for the particular law system. The entire law science consists in reality of "generating from the multiplicity of law dispositions their essential, namely these exact last justice principles, from which all the other dispositions derive. Hereby, the entire legislation becomes of a great clarity and is caught in the so-called legal spirit"[17].

2. The importance of general principles in the process of law establishment

The continental legal system rigorously distributes the tasks dictated by the fulfillment of society's ideals: the legislator is entitled to create the law and the judge must apply it, in its letter and spirit. The law, however, cannot be mechanically applied to some actual cases because it is general in its nature; it cannot cover all legal situations that rise from social reality, being insufficient; the law also cannot live forever since it is naturally temporary. The generality, insufficiency and perishable aspect of law make the judge's assignment extremely difficult.

Applying the law, as the judge's primordial assignment, demands a unitary and harmonious interpretation of the legal dispositions, along with the permanent adaptation of law to actual cases, but also to the continuous evolution of social facts. Also the necessity of solving causes under the

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[13] Nicolae Popa, Mihail C. Eremia, Simona Cristea, *General theory of law,* 2nd edition, (All Beck Publishing House, Bucharest, 2005), p 105

[14] Ioan Humă, *Controversial problems regarding historical tehnique in interpreting law,* in Romanian Magazine of Law Philosophy and Social Philosophy no. 2/2005, pp. 68-72

[15] Franck Moderne, *Légitimité des principes généraux et théorie du droit,* in Revue Française de Droit Administratif no. 15(4)/1999, pp. 722-742

[16] Sofia Popescu, *Research of legal methodology for the support of law's elaboration activiy*, in Romanian Law Studies, year 11 (44), no. 1-2/1999, p. 19

[17] Mircea Djuvara, *General Law Theory (Legal Encyclopedia),* All Publishing House, Bucharest, 1995, p.214

sanction of justice refusal, dictated by the civil Code, imposes to the judge the obligation to establish the justice act, indifferent to the silence, obscurity or insufficiency of law.

Interpreting the law is art, an act of creation, because it necessarily implies the issuing of some value judgments, leading to an "alteration" of the text's content. Every case is unique and reclaims innovative solutions, and the judge cannot apply in a mechanical way, instead he must particularize the law, shaping it according to the necessities of the actual cause. "The legislation's entire complexity thus reflects as an intense light, concentrated by a mirror in a single point, in that given text. Afterwards, this light must be aimed as a shred of convergent rays at the actual case that needs to be judged; all of the law's complexity must find its solutions in every test case"[18].

When the texts are no longer equivalent to the necessities of time, the judge will elude the law and apply solutions according to the new conditions of social life, divulging the law's spirit. If the law is silent, the judge will resort to general law principles, interpreting their significance. Therefore, the law principles constitute a guidance to which the judge can appeal to whenever the difficult task of applying the law places him in a deadlock. In this section we refer to the judge as being a representative figure for applying the law. We emphasize, however, that during the process of law establishment, the law principles constitute the key factor on which all actors implied in the justice act's achievement rely on, *lato sensu*.

First, while interpreting, the judge must determine the authentic sense of normative texts. For the achievement of this objective it is required that the judge guides himself not only according to the sense of words and the legislator's intention, instead he must take in consideration the law's spirit itself. "It is contrary to the law to discard its spirit and take in consideration only the words used by the legislator", was the warning int Justinian's *Code*[19]. The judge's activity is not exhausted in the passive lecture of law texts, the identification of concepts and while applying them to the test case. It has constantly been highlighted that "it is not the text containing the norm that adjusts the actual case, but the attorney, as a subject of the objectifying process of the abstract normative significations used for decisively solving a practical problem"[20]. The legal norm has an abstract existence, being incapable to satisfy on its own the exigencies of practice. It constitutes a model that the attorney bears on to the actual case through a creating interpretation. The interpretation thus resides in finding the perfect equation between the form's generality and the content's particularity, between the letter and spirit of law. Or, the law's spirit is situated above the attorney's will and the positive law; it is found in the principles that establish the law.

Other times, the existence of a "unique" sense for the words and any easily recognized attorney's intention are thought to be non-existing. The significance of normative texts is "a variable that depends on interpretation and therefore the interpretation itself must be considered as a constitutive discourse instead of a descriptive one of significations: thus, to interpret does not mean to describe, but to decide what is the significance of the normative text that will be expressed in a text with a value of norm, norm that is not characterized through the value of true or false, but through its validity in the legal system"[21].

Gh. Mihai specifies that, in interpretation, we resort to the law's principles either being intermediate or direct[22]: intermediate, because the law principles especially dedicated or deducted

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[18] Mircea Djuvara, *quoted paper,* p. 112

[19] *Nec dubium est, in legem committere eum, qui verba legis amplexus, contra legis nititur voluntatem* (L. 5, Codex, ab initio, De legibus, 1, 14), *Apud* Dimitrie Alexandresco, Romanian civil law principles, volume I, (Graphic Workshops SOCEC, Bucharest, 1926), p. 40

[20] Gheorghe Mihai, *Law foundations,* volumes I – II, (All Beck Publishing House, Bucharest, 2003), p. 395

[21] A. Aamio, *On the Truth and Validity of Interpretative Statements in Legal Dogmatics*, p.. 423, *Apud,* Lelioara Pena, *Ratio et voluntas. Argument of rationality and argument of authority in law,* in Romanian Law Studies, year 16 (49), no. 3-4/2004, p. 344

[22] Gheorghe Mihai, *Law foundations,* volumes I – II, (All Beck Publishing House, Bucharest, 2003), p.516

from normative texts, are engaged in any interpretative procedure; direct, they are invoiced as natural law principles or as an accepted common law.

Our attention is aimed at the fact that the interpretation should not be absolutely autonomous. If we refuse the interpretive intercession's any element outside the legal aspect, we obtain "perfectibility that tends to close under the limits of strictly legal principles", but we thus build an unprincipled and apolitical law, correct from a logical-formal point of view, but inefficient from a practical point of view. The law is constructed in a practical way and concerning values, so that even in interpretation an axiological base exists, resulting exactly from legal, moral, political values' compound[23].

The law's principles constitute guiding marks that the judge uses especially when the law's text has an ambiguous, vague character or can have multiple interpretations. It has sometimes been emphasized that it is preferred the rule's absence or a slighter perfect rule, instead of an uncertain rule. In this case, the judge is bound to appeal to the law's principles in order to clarify the meaning and to establish the adequate sense. Hart showed that the language involves an area of "half-shade", uncertain from the significance point of view, in which the renderer's discretionary power develops.

For D. C. Dănişor, I. Dogaru şi Gh. Dănişor, the law is "full of inconsistent areas and is often lost in an ocean of vague". The law's inconsistency results from its linguistic nature, but also from reality's complexity to which the law must answer to. On the other hand, the law sometimes resorts to concepts that are intentionally imprecise (for example, that of "exceptional situations"), since "this vague aspect can play a vector role of progress of law and of text's adaptability to situations impossible to be taken in consideration by the legislator in the regulation moment, through the constructive interpretations"[24].

In the context of law regulations' imprecise character, Franck Moderne attributes an explanatory function to the general principles of law: whenever doubts exist regarding the significance of a legal norm in a given context, an appeal is made to these principles that allow the establishment of the text's sense and understanding of the rationality for which this must be applied. At the same time, it is shown that principles also fulfil a function of justification: being recognized as having value on their own, any norm based on a law principle bears a presumption of legitimacy[25].

The author analyses the general principles of law also under the aspect of their contribution to assuring the legal order's completeness, element of the formal rationality of law. Because any legislative system involves, virtually, certain gaps, the law itself authorizes the judge to supply the existing gaps, deciding from the general principles at the base of law. Moreover, rationality through analogy is considered to be "one of the methods of elaborating general law principles, as long as they justify the application, through the association of some actual hypotheses, of a solution regarding a similar case". Formulating general principles with normative character, through analogy, the judge contributes to the law's "completion" and to assuring an accomplished legal order. Another method is that of "increasing induction", that allows the disengagement of new general principles of law for supplying the gaps, through the generalization of some particular dispositions applicable to some cases determined to other unexpected hypotheses.

Since a long time ago, the Romans have admitted the existence of law gaps, so that they surpassed the rigidity of literally approaching the law text and admitted the completion of law through analogy and fiction. To the Romans the law spirit was found in justice, the law being the art of good and the equitable. The Roman legal advisors considered that an appeal could be made to something similar (*ad simila procedere*), if identity rationality exists. The Roman judges had,

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[23] Dan Claudiu Dănişor, Ion Dogaru, Gheorghe Dănişor, *quoted paper,* p. 36

[24] Franck Moderne, *Légitimité des principes généraux et théorie du droit*, in Revue Française de Droit Administratif, no 15(4)/1999, p. 730 and the following

[25] Lucian Săuleanu, Sebastian Rădulețu, *Latin legal expressions dictionary*, (C. H. Beck Publishing House, Bucharest, 2007), p. 240

however, the possibility to declare at the end of debates that matters are unclear and to refuse to bring the verdict in.

Such a possibility is not recognized today, the judge being obligated, instead, to solve the cause under the sanction of justice refusal, regardless of the silence or insufficiency of law, presuming that only the legislative system can be defective. The law, in its ensemble, does not admit gaps, thus the judge has the possibility and obligation to solve the cause in the base of general principles of law. Therefore, if the law emitted a statute and its sense is clear, the judge must limit to applying it, according to the Roman principle *optima lex, quae minimum judici, optimus judex qui minimum sibi* – the best law is that which leaves as little as possible to the judge's judgment, and the best judge is the one who relies more on the law than on himself[26]. However if the law emitted a statute and its sense is ambiguous or if the law gave no such statute, the judge must solve the cause by resorting to either a norm that regulates similar situations (laws analogy), or to general principles of law (law analogy).

Analogy is a logical, inductive procedure, based on the idea that rapports presenting the same essential character must, actually, be subjected to the same law rule: *ubi eadem ratio, ibi idem jus.* Professor Vălimărescu highlights the fact that analogy most not be confused with the extensive interpretation of law, through which the "legal formula is expanded by being applied to some cases unexpected by the legislator, but which enters the spirit and purpose of the law". In the case of analogy, "it surpasses the law's spirit and applies to a rapport not taken in consideration by the legislator, not even implicitly"[27]. Therefore, if the analogy has an inductive character, the extensive interpretation of law is purely deductive.

Sofia Popescu mentions that applying law through analogy, represents, at the same time, a logical and creation activity. Analogously, the inexistence of a direct legal regulation of the case can be observed and the procedure of filling the gaps takes place[28].

The judge must find solutions for eliminating law obscurity. In the case of law analogy, he will attempt to apply a legal disposition to another rapport than the one predicted by law. For example, the jurisprudence appealed to law's analogy on the matter of guardianship, taking over the causes that exclude a person from the quality of guardian of a minor or forbid it, and applying them to the trustee, the purpose of establishing the two procedures being the same: the protection of an incapable person[29]. In case the judge does not find a legal norm proclaimed for a similar situation, he will resort to law's analogy, attempting to establish the real content of legal norms in the light of general principles of law. Through law analogy, the jurisprudence extracted from the dispositions that readjust the guarantee against the eviction with regard to sale, a general institution of guarantee, applying it to all contracts with onerous title that transfer property. Law's analogy surpasses the legislator's will and is established on law's general principles with the role of filling the gaps that exist on a legislative level, assuring at the same time the versatility of law. Law analogy must not, however, disestablish the legislator's will or the legislation's spirit.

The Calimach Code disposed that whenever a business cannot be decided after the literal text, nor after the sense of law, similar cases determined by law must be taken in consideration, as well as the motives of law that refer to similar matters. Furthermore, "if even then doubts exist, the fault should be researched with measure and attention through all circumstances and should also be decided according to the natural law's principles"[30].

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[26] Alexandru Vălimărescu, Treaty of Law Encyclopedia, (Lumina Lex Publising House, Bucharest, 1999), pp. 372 to 373

[27] Sofia Popescu, *General theory of law*, (Lumina Lex Publishing House, Bucharest, 2000), p.264

[28] Alexandru Vălimărescu, *quoted paper,* p. 374

[29] *Apud* Dimitrie Alexandresco, *quoted paper*, p. 22

[30] Alexandru Vălimărescu, *quoted paper*, p.389

The existence of some gaps in positive law is also explained by the fact that legal regulations are unable to promptly answer the spectacular dynamics of society's evolution. Beyond the law's necessity of permanently adapting to social needs, the law authorizes the judge to find solutions by the aid of a creating interpretation of law's principles. This solution is implicitly consecrated in the French and Romanian civil Code that allows the law completion in case it is silent, obscure or insufficient, but finds its absolute expression in the Swiss civil Code, that provides in article 1 that "The law determines all materials to which the letter or spirit of its dispositions refers to. In the absence of an applicable legal disposition, the judge shall act according to the unwritten law and, in the lack of a common law, after the rules he would establish in case he would act as a legislator. He inspires from the solutions consecrated through doctrine and jurisprudence". Recognizing the imperfection of legislative actions, the Swiss Code thus proclaims deliberately the judge's role of creator.

Vălimărescu mentions that for us "the jurisprudence constitutes a source of law subordinated to laws, when it has decided, but a creator of new rules as far as the law cannot face all necessities. If we abandon the fiction of the written law's amplitude, we no longer need to appeal to fictions, like that of historical theory. The jurisprudence, the same as the legislator, will search solutions in the real sources of law, in which the rational and experimental elements will constitute the required directives"[31].

Situated in the rational law, from where they are transmitted in positive law, the general principles of law prove to the judge to be "resources" of the existing legal order. The law's principles allow the accomplishment of exigencies concerning the completion of the legal system, a necessary requirement, since in spite of the attempts to perfect the legislative system, the complete character of the legal system remains an ideal of perfection, not being capable of "defining the statute of any specific fact with the aid of its elements ensemble"[32].

Besides assuring a soft interpretation of legal texts and filling the gaps in the legislative system, law's principles also fulfill another role in the legal order: as soon as they are established by jurisprudence, "the general principles and established solutions serve as support for other legal constructions and contribute to creating new law rules, therefore contributing to the evolution of the legal system"[33]

The general principles constitute the access key for the interpreter in the law domain. Synthesizing J.P. Gridel's considerations regarding the principles contribution in the process of law establishment, we show that these serve to: circumscribing the sphere of application of particular legal texts, highlighting the necessity of an extensive interpretation or, on the contrary, a restrictive one; establishing some exceptions that were previously not expected or admitted by law; determining the mandatory forces of legal norms; creating some new law principles by generalizing some special and analog legal dispositions (for this purpose we are offered as an example the principle of contractual responsibility for another's action, consecrated as a result of abstracting some wasted legal texts that refer to the entrepreneur's, transporter's or hotel-keeper's action); removing some inequitable solutions that result from a purely formal logic[34]

Law's principles are indispensible to the moderated functioning of legal order. They assure the adaptation of the written law, which is static, slow and often surpassed by the evolution of social actions, by clarifying it, completing it and assuring its uniformity, continuity and progress. In

[31] Alexandru Vălimărescu, *quoted paper,* p. 389

[32] Sofia Popescu, *General theory of law,* (Lumina Lex Publishing House, Bucharest, 2000), p. 263.

[33] Jean - Louis Bergel, *quoted pape.*, p. 107

[34] Jean - Pierre Gridel, *Le rôle de la Cour de Cassation Française dans l'élaboration et la consécration des principes généraux du droit privé*, in *Les principes généraux du droit, Droit français, Droits de pays arabes, droit musulman,* (Bruylant Bruxelles, 2005), p. 142 to 155.

addition, they "give those guarantees required by individuals since the norms of law are applicable in accordance to the fundamental exigencies of society"[35].

Conclusions

Since it is connected to the social environment, the law must permanently respond to the requirements of the actual social life, which are continuously transformation. In a reality marked by the gathering of legal civilizations, the jurists can no longer approach the phenomenon only from the perspective of national legal traditions, but also from the perspective of interdependencies on a regional or global scale. Such as the English teacher Twining mentions, in a globalized and cosmopolitan world, the general studies regarding law science, as well as those on the matter of law comparison, must become cosmopolitan, as a pre-condition for the revival of a general law theory and for the reconsideration of the law comparison.

While offering the conclusions for the legitimacy of law's general principles, Franck Moderne illustrates that they express "the most deeply rooted assumptions that accompany the ideal of a rational and modern law". These depended on assuring the coherency's and completion's exigencies of the law's systems, the insertion itself of the principles in a normative hierarchy constituted a guarantee of the ensemble's functioning; creating some interdependencies between the elements of the system, that are situated on the same level or on different ones; protecting some implicitly or explicitly admitted values; consecrating a judge enabled to speak the law. In essence, the author considers that in the context of contemporary liberal democracies the law's general principles "contribute to consolidating the legitimacy of law itself".

All these grounds explain the overwhelming importance of law principles in an era marked by profound legislative transformations, such as the one we are experiencing.

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CONSIDERATIONS REGARDING THE GUARANTEEING OF HUMAN RIGHTS IN ROMANIA

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Abstract

In our country existed and exists still a constant concern to respect and guarantee human rights and fundamental freedoms, especially after 1989, when Romania became a member or acceding to international or regional treaties and conventions enshrining such rights.

Taking into consideration the importance of respecting human rights, we consider that is necessary to research how they are secured in Romania, because only when these guarantees are known by their beneficiaries and those involved in their protection, actions which affect these values of humanity can be avoided.

In human rights, rules of international law have priority over those entered in the domestic law if they contain provisions which may be interpreted differently on the same matter, unless the Constitution or national laws contain more favourable provisions.

Keywords: *ensuring human rights, fundamental liberties, constitutional dispositions, freedom of thought, rights of foreigners.*

Introduction

Ideas concerning human rights have existed from the dawn of Romanian civilization, in all the areas of the planet, reason for which it may be affirmed that human rights are not the exclusive attribute of none of the time periods, or of any corner of the world, or of any culture[1].

Knowing the stage of progress achieved in ensuring human rights by the Romanian country, permits the establishment of future objectives for correlating the regulations and means of protection of rights with the aid of international instruments from the domain.

Over the years, Romania has been actively involved in promoting the principles upheld by the UN, including through the dissemination of the ideals and universally accepted principles and norms enshrined in the United Nations Charter, The Universal Declaration of Human Rights and relevant international human rights instruments.

Romania has assumed the highest international standards in the area of human rights, becoming party to all major regional and international treaties and protocol in the field of human rights, international humanitarian law and refugee law.

Up to present our country has ratified the most important universal treaties, such as: the International Covenant on Civil and Political Rights and its Optional Protocols, the International Covenant of Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of Child and its Optional Protocol, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Prevention and Punishment of the Crime of Genocide, the four Geneva Conventions and two Additional Protocols, the Rome Statute of the International Criminal Court etc. The provisions of these treaties and of the Universal Declaration of Human Rights are directly applicable within Romanian legal framework.

Similar to other states of the Council of Europe, Romania is interested in achieving the standards stipulated in the European Convention of Human Rights[2]. Moreover, the dispositions of the

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[1] Jean Bernard Marie, *La Commission des droits de l'homme de l'ONU* (Paris, A. Pedoné, 1975), p.5.

Universal Declaration of Human Rights were transformed into legal obligations, as well as in other member states of the United Nations Organization, as to create a legal system for protection, guarantee and implementation of human rights[3].

The Romanian Constitution adopted in the year 1991, amended and completed[4], regulates in Chapter II the rights and fundamental liberties of the citizen, thus correlating them with the dispositions of international treaties from this domain.

Regarding the relation between international law and internal law in human rights area, art. 20 of the Romanian constitution regulates the primacy in enforcement of international rules over the national ones as regarding human rights, establishing two special rules: interpretation and enforcement of constitutional norms regarding human rights and primacy in enforcement of international acts over internal laws. Through this provision is given effect to the principle of supremacy of international law over the national law, the supra-constitutional character of international law in a multilevel state being outlined.

As regarding the first rule, constitutional provisions concerning the human rights and freedoms shall be interpreted and enforced in conformity to the Universal Declaration of Human Rights, with the covenants[5] and other treaties Romania is a party to. This rule starts from the idea that, according to art. 11, all the treaties, including those regarding human rights are incorporated into the national law only if they are in conformity to the constitution. In other words, the inconsistencies between the two types of norms are inappropriate and if so, their interpretation and enforcement should assure the mutual conciliation and should remove any conflicts of norms. The second rule endorses the primacy of enforcement of international provisions over the internal laws. In this case also the interpretation of internal laws should assure the conciliation with international rules in human rights area. If there are inconsistencies between the two types of norms, the conflict is solved following the principle of primacy of enforcement of international rules over the internal ones. But the derivative constituent power added the principle *mitior lex* according to which the primacy of enforcement of international rules is valid only if internal laws and Constitution of Romania comprise more favorable provisions[6].

Two major consequences can be inferred from these provisions: the legislator should mandatory check if the bills adopted are in correlation with the international treaties Romania is a party to; the public authorities with competencies in negotiating, concluding and ratification of the international treaties should be aware of the correlation between an international act and Romanian laws and in difficult situation it should make reserves and declarations to the treaties.

Rights guaranteed in the Romanian Constitution and other regulations

In the Romanian Constitutions there are regulations regarding the nine categories of guaranteed international rights, which are discussed throughout the content of this paper.

a) Concerning the right to *non-discrimination*, in art. 16 from the Constitution, the principle of citizen equality before the law and public authorities is proclaimed, without privileges and discriminations, as nobody is above the law.

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[2] Bianca Selejan-Guțan, *Protecția europeană a drepturilor omului*, 4-th edition, (Bucharest,CH Beck, 2011), p. 79 and foll.

[3] Doina Micu, *Garantarea drepturilor omului în practica Curții Europene a Drepturilor Omului și în Constituția României*, (Bucharest, All Beck, 1998), p.79 and foll.

[4] By the Law of reviewing the Romanian Constitution, no. 429/2003, published in the Official Gazette of Romania, Part I, no. 758 from 29 Oct. 2003, republished by the Legislative Council, in conformity with the art.152 from the Constitution, with upgrading the denominations and renumbering the texts.

[5] Covenant regarding civil and political rights and Covenant regarding social, economic and cultural rights

[6] SiminaTănăsescu, *Despre autoritatea constituțională a unui tratat european*, Revista Sfera politicii, http://www.sferapoliticii.ro/sfera/120-121-122/art4-siminatanasescu.html.

Moreover, in art. 4 par. 2, it is stated that „Romania is the common and indivisible homeland of all its citizens, without discrimination in race, nationality, ethnic origin, language, religion, sex, opinion, political affiliation, fortune or social origins".

The equality in rights constitutes a guarantee referring to the exercising of fundamental rights stipulated in the content of the Constitution, but also whose rights and subjective liabilities are regulated in the content of other normative documents.

As a guarantee of observing this right, in the art. 247 from the Penal Code, the offense of abuse in service by limiting certain rights, which sanctions the limitation by an agent of using or exercising of these rights by a citizen, or creating situations of inferiority for the later based on nationality, race, sex or religion is considered a crime.

b) Regarding the right concerning *the integrity of every person*, guaranteed by international instruments, in art. 22 of the Romanian Constitution it is stated that the right to life and to physical and mental integrity of a person are ensured. Nobody may be submitted to torture, any type of punishment, inhuman or degrading treatment, the death punishment being also prohibited.

In the Romanian Penal Code the offenses against life, as well as against physical integrity or health are considered punishable (art. 174 – art. 184), which constitutes an important guarantee for protecting these rights by sanctioning of those which breach them.

Moreover, in conformity with art. 266-268 from the Penal Code, the illegal arrest and abusive investigating, submitting the persons under arrest or detained or in execution of a safety or educational measure to ill-treatments and unjust repression against persons that are legally searched are punishable

In these cases, the Romanian authorities apply domestic legal dispositions in conformity with the regulation of the European Convention regarding Human Rights, of other international instruments and the practice of the European Court of Human Rights.

c) Concerning the right regarding *liberty of every natural person*, guaranteed by international documents, guarantees are stipulated in the Romanian Constitution, as well as in other laws, in view of the fact that our country grants a particular importance to the defence of this right.

Thus, in art. 23 of the Constitution it is stipulated that the liberty of each individual and the safety of each person are inviolable, and the search, detention or arrest of a person is permitted only in cases and with the procedure stipulated by the law.

The withhold, which can be ordered by the public prosecutor or the legal police, can not surpass 24 hours, and the arrest may be ordered for a maximum of 30 days by the judge, who has the right to prolong its duration in the conditions admitted by the law. The person in case will be informed of the reasons of retain or arrest as soon as possible, and the accusation will be transmitted before an elected or appointed lawyer.

The release of the person retained or arrested is mandatory, if the motives on which these measures are based have disappeared.

No punishment can be established or applied except in the conditions and based on the law.

These constitutional principles, which defend the liberty of each person, are detailed in the Penal Code in which the case and procedures for ordering the measures that deprive a person's liberty are stated.

The guaranteeing of the right referring to the liberty of the person is also achieved by incriminating illegal arrests (art. 266 par. 1 penal Code), illegal retain or detention or submitting a person to execute a punishment, safety or educational measures, in another manner than the one stipulated by legal disposition that are punished with jail. Moreover, the liberty of a person is guaranteed by incriminating unjust repression (art. 268 Penal Code) which criminally sanctions the act of disposing arrest or condemning a person, knowing that she is innocent.

Referring to the right of free circulation (consecrated by art. 39 of the Treaty establishing the European Community), in art. 25 from the Romanian Constitution it is stated that „the right to free circulation in the country and abroad is guaranteed", the ordinary law establishing the conditions of

its exercising. Moreover, each citizen is guaranteed the right to establish its domicile or residence in any locality in the country, to emigrate, as well as to return in the country.

The regulations from the Romanian Constitution complies with the subject of international dispositions[7], as it contains a general form which does not state the legal exceptions regarding the exercising of the right of free circulation, which will be established by ordinary laws.

As a guarantee of these rights being defended stands the incrimination of the act of limiting the liberty of every person, in an illegal manner (art. 189 Penal Code).

d) Regarding the *procedural rights*, as in the international domain, in the domestic law these do not refer to a material liberty, but the guarantees a person disposes of in a state of law as to value its rights and liberties.

Thus, the right to a fair trial is proclaimed in the art.21 of the Romanian Constitution, in which it is shown that every person may address the law for the defence of its rights, liberties and legitimate interests, as no law may restrict the exercising of this right.

The parties have the right to a fair trial and to solve the causes in a reasonable term, as the administrative special jurisdictions are optional and free of charge.

The right to petitioning is proclaimed in art. 51 from the Constitution, where it is stated that the citizens and organizations that are legally founded have the right to address the public authorities with petitions, being exempted of stamp duty. The public authorities are compelled to respond to the petitions in the terms and conditions established by the law.

In conformity with art. 52 in the Constitution, a person who is harmed in its right or legitimate interest, by a public authority, by an administrative act or by not solving the request in a legal term, is entitled to obtain the acknowledgement of the right claimed or of its legitimate interest, as well as the annulment of the act and compensation for the damage.

The State shall bear patrimony liability for the damage caused by the legal errors and the magistrates who exercised their function in ill will and gross negligence will not be exempted from their liability.

In art. 124 from the Constitution it is stipulated that the justice is rendered in the name of the law, this being unique, impartial and equal for every one.

Art. 126 states that justice is achieved by legal instances, their competence and procedure being stipulated by the law; moreover, the founding of courts of exception is prohibited.

Still as a guarantee of the capitalization of legal rights, the hearings are public, except the cases stipulated by law (art. 127).

In art. 128 from the Constitution certain rights for minorities referring to the possibility of using interpreters before the courts of justice are guaranteed, and in art. 129 the right to use legal appeals against the decisions of the courts is stated.

The right to a fair trial, the right to an appeal, the legality principle of criminal offenses and penalties, as well as other procedural rights are also guaranteed by regulations stipulated in ordinary laws such as: the Criminal Code and Criminal Procedure Code, as our country is facing a process of permanent correlation of the dispositions in the domestic law with communitary and international regulations.

e) *The right to compliance with private and family life*

The protection of the private and family life occupies an important role in the preoccupations of the Romanian legislator, as Romania is adhering or is taking part in the international instruments that have this object[8].

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[7] Jean-François Renucci, *Tratat de drept european al drepturilor omului,* (Bucharest, Hamangiu, 2009), p. 636 and foll.

[8] Loredana-Bianca Macrea, *Dreptul privat la viaţă privată* in *Justiţie, stat de drept şi cultură juridică. Sesiunea ştiinţifică* (Bucharest, Universul Juridic, 2011), p. 164 and foll.

In conformity with art.26 in the Constitution, the public authorities respect and protect the intimate, private and family life. The natural person has the right to dispose of itself, if it does not breach the rights and liberties of other persons, the public order or the good morals.

Thus, the Romanian state guarantees the liberty of the private life and the right to engage in marriage. Moreover, it respects ad protects the private life of every person, depending on the preferences, provided that it does not harm the rights of other persons, the public order or the good morals.

The intimacy of the private life[9] and the right to make connections and relations with other persons is also guaranteed.

The right to respect private life also embodies the person's right to a healthy environment, this principle being guaranteed by the art. 35 in the Romanian Constitution, in which it is stipulated that „The state acknowledges the right of any person to a healthy and ecologically balanced environment". It is also stated that „the state ensures the legislative framework for exercising this right, and the natural and legal persons have the duty of protecting and improving the environment".

Except for the principles contained in the Constitution, these rights are also guaranteed by the dispositions stipulated in the ordinary laws, such as: the Family Code in which the conditions for concluding a marriage are established, as well as the relations between the parents and children, the rights and obligations of family members, etc. It is the case for the Penal Code, where incriminations by which the influences brought to the rights analysed are stipulated, such as the offense for abandoning the family (art. 305), according to which the breach of the obligations stipulated by the law in favour of the family members etc. and that are related to maintenance and mutual assistance are punished.

f) *The freedom of thought,* respectively the liberty to think freely, the liberty of consciousness and religion are also stipulated in our country's legislation, thus ensuring all means of manifestation and other guarantees to ensure that they are respected.

Thus, in art. 29 of the Constitution it is stipulated that the freedom of thought and opinions, as well as the freedom of religious beliefs can not be restricted under any circumstance. Nobody is to be constraint to adopt an opinion or to adhere to a religious faith, which is contrary to its beliefs.

Moreover, the freedom of consciousness is guaranteed; it just expresses itself in the spirit of tolerance and mutual respect.

Religious cults are free and are organized according to personal statute, in the conditions permitted by the law, as in the relations between cults any form, means, acts or actions of religious enmity are prohibited.

Religious cults are autonomous towards the state and enjoy its support, including by the facilitation of religious assistance in the army, hospitals, penitentiaries, shelters and orphanages.

The parents and tutors have the right to ensure, according to personal convictions, the education of minor children in their care.

These dispositions stipulated in the Constitution are in accordance with the dispositions of the European Convention of Human Rights and with the practice of the European Court of Human Rights, as well as with other international instruments regarding the freedom of thought, of religious beliefs or the spirit of tolerance and mutual respect between the persons that have different beliefs or who practice other religious cults, thus imposing one single limit, namely of religious enmity.

In conformity with the Constitution, the Romanian citizens are guaranteed not only the right to these liberties, but also the possibility to manifest their convictions in the social and political life of the country.

The liberties presented are also guaranteed by ordinary laws, thus existing even regulations according to which those who negatively influence these rights, such as incrimination for preventing

[9] Ioana Vasiu and Lucian Vasiu, *Criminalitatea în cyberspațiu*, (Bucharest, Universul Juridic, 2011), p. 272 and foll.

the liberty of cults are sanctioned. Thus, in conformity with art.318 in the penal Code, the acts of preventing or disturbing the liberty of performing religious cult, that is organized and functions in accordance with the law, or to compel a person, by forcing her, to participate to the religious services of a cult or to fulfill a religious act related to the performance of a cult are sanctioned.

g) *The freedom of social and political actions*

The right to freedom of assembly and association are also guaranteed by the regulations in our country, similarly to those stipulated in the international instruments.

Thus, the freedom of assembly is consecrated by the dispositions contained in art. 39 from the Romanian Constitution, in which it is stated that: „ The meetings and demonstrations are free and can be organized and performed only in a peaceful manner, without the use of weapons".

The freedom of peaceful assemblies can also refer to private, as well as public meetings.

Some of them are submitted to authorization, however this measure does not influence the freedom of assemblies, but aims at ensuring their peaceful nature by the state authorities; public manifestations can be prohibited if there are serious signs that the public order and security are being threatened.

The regulations in our country referring to the peaceful nature and absence of weapons related to assemblies are in conformity with the practice promoted by the European Court of Human Rights.

The right to association is proclaimed in art. 40 par. 1 and 2 in the Romanian constitution, in which it is stated that citizens may freely associate in political parties, syndicates, patronates and in other forms of association, however the organizations that militate against the political pluralism, of the principles regarding the state of law, of sovereignty, integrity or independence of Romania are unconstitutional.

Associations are groups with a durable character, a permanent target and that function based of a structure that is accepted by its members[10].

In conformity with par. 3 of art.40 in the Constitution, the Judges of the Constitutional Courts, the lawyers of people, the active members of the army, the police and other categories of public workers established by the organic law, may not be part of the political parties. They may however, participate in professional and scientifical associations, etc.

The Constitution limits the right to association for the organizations that embody a secret nature, which are forbidden. (art. 4 par. 4).

h) *The right to a property*

In art.44 from the Romanian Constitution the right to property is stipulated and guaranteed, also stating the circumstances in which this right may be limited.

Thus, it is stated that the property right and the debts of the state are guaranteed, the contents and limits of these rights being stipulated by the law. Moreover, it is stated that public property is guaranteed and protected equally by the law, regardless of the owner. In the same text from contained in the Constitution it is stated that nobody may be expropriated except for a cause of public utility, established in conformity with the law, with the just and prior compensation.

The nationalization or any other measures of forced passage in the public property of goods based on social, ethical, religious, political affiliation or any other discriminating nation of owners is prohibited.

As a limitation of the use concerning property right, the Constitution establishes that referring to the works of general interest, the public authority may dispose of the basement of any real estate, with the obligation of compensating the owner for the damages brought to the soil, plantations or constructions, as well as for other damages imputable to the authorities. The compensations are established, similar to the expropriation, as a mutual agreement with the owner, or, in case of dispute, by appealing to court.

[10] Nicolae Purdă and Nicoleta Diaconu, *Protecția juridică a drepturilor omului*, 2-nd edition, revised and added (Bucharest, Universul Juridic, 2011), p.339 and foll.

Another limitation of exercising prerogatives concerning the property right is that the owner will guarantee the observance of tasks regarding environment protection. Moreover, the later must ensure the Neighbourhood policy and other tasks that, according to the law or custom, are in the care of the owner.

As a guarantee of observing the right to property, the Constitution also stipulates that the fortune gained in an illicit manner will not be confiscated, as the legal nature of acquiring it is presumed. Moreover, the goods destined, used or resulted from offenses or contravention may be confiscated only in the conditions of the law.

As it can be observed, the principles from the Romanian Constitution, regarding property or the right to property, correspond in their majority, to the dispositions and the spirit of the European Court of Human rights and other international instruments in the domain.

Moreover, the ordinary laws that refer to property are adopted in the spirit of the principles stipulated in the Constitution and are meant to ensure the appropriate exercising and guaranteeing of the right to property.

An extra guarantee of observing the right to property is the fact that in the Penal Code many acts are incriminated by which this right is influenced negatively, such as: theft (art. 208 şi 209), destruction of property (art. 217), fraudulent management (art. 214) etc.

i) *The rights of foreigners*

Foreign and stateless citizens living in Romania enjoy the general protection of persons and fortunes, guaranteed by the Constitution and other laws (art. 1 in the Constitution).

Generally, foreigners and stateless persons have the same rights as Romanian citizens, but with certain limitations imposed by the social-political realities, such as the one resulting from the art. 16 par. 3 in the constitution, according to which the public, civil or military functions and dignities may only be occupied by persons which have the Romanian citizenship and are domiciled in the country.

In the Constitution there are also other applicable dispositions referring to the rights of foreigners or stateless persons, such as in art. 18 par. 2, according to which the right to an asylum is granted and refused in conformity with the law, with the observance of international treaties and conventions to which Romania took place. Moreover, in conformity with art. 19 par. 3 in the Constitution, foreign citizens and stateless persons may be extradited only based on an international convention or in conditions of reciprocity.

Conclusions

For all the nine categories of analysed right, their regulation in the Constitution constitutes a guarantee of achieving a special protection, a reality which enlists Romania among the countries capable of ensuring the persons the necessary conditions for accomplishing the fundamental rights and liberties.

The control over the constitutionality of laws and organizing the legal system in such a manner that it may take measures for the restoration of rights breached by the state bodies or other individuals, also constitutes strong guarantees for observing the human rights and liberties in our country.

The most important guarantee in the sense of observing the rights and liberties of persons, in accordance with the international regulations, is the principle subscribed in art. 20 from the constitution, according to which the *constitutional dispositions concerning the rights and liberties of the citizens* will be interpreted and applied in conformity with the Universal Declaration of Human Rights, with the pacts and other treaties in which Romania has taken part.

Romanian government pays constant attention to matters related to the implementation of human rights norms. Over the last sixteen years, a thorough process of reform has been carried out in order to bring the national legislation and institutional mechanism in full compliance with the

relevant international requirements. However, Romanian law and practice in some areas (for example the housing legislation) falls far behind international human rights standards.

As there are still numerous infringements of the human rights, it is necessary to act in the direction of improving the legislation, as the bodies of the state will have been clearly informed of their attributions in this domain, as well as the liabilities for breaching the respective norms. Moreover, it has been imposed that more serious acts, by which the human right have been negatively influenced, to be incriminated by the penal law, which would prevent the majority of actions that affect these social values.

Since the events of December 1989 until nowadays, Romania crossed a sinuous road during which it registered both notable events and many failures trying to edify a real democratic society. Therefore, even if in post-Decembrist Romania we cannot speak about a large range disrespect of the basic rights and liberties consecrated both in the constitutions stipulations and in the international and regional documents our country participates to, we cannot ignore the fact that, on December, 31st 2008, our country was the third, after the Russian Federation and Turkey, as a defendant in different causes placed in the examination of a judicial formation of the European Court of the Human Rights in Strasbourg[11].

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[11] The European Court for Human Rights pronounced on October, 12 th 2010 its first pilot decision against Romania in the cause of Maria Atanasiu and others against Romania that practically suspended the similar causes of CEDO role and forced thus the Romanian state to take measures, in a 18 months term in order to improve the retrocession problem. The pilot decision is extremely important whereas it determines the Romanian state to solve the restitution problem, in the direction of respecting the basic rights and of instituting a functional mechanism of retrocession and compensation. (http://www.echr.coe.int; http://www.romania-actualitati.ro/rrapages/view/20249).

LIABILITY AND RESPONSIBILITY

ELENA EMILIA ŞTEFAN*

Abstract
The violation of a social norm establishing a rule of conduct engages the violator's liability.
Responsibility is a social phenomenon and it expresses, in its shortest definition, an act of commitment of the individual in the process of social interaction.
This study aims to analyze the concepts of liability and responsibility, but also the relationship between them, starting from their common fundamentals and ending with the main differences between the two notions.

Keywords*: liability, responsibility, social relationships, violation of the rule of law, social order.*

1. Introduction

Man is essentially a social being. He ripens in the society and is a creator of social relationships.[1] The social history of mankind is nothing else but the history of their individual development, regardless of whether they are conscious of it or not.[2]

Several surveys[3] on legal sociology warn about the fact that the failure to meet the society's expectations regarding the law is particularly connected to *liability*, that the law cannot exercise its influence in the society, unless it succeeds to identify the *person responsible* and to establish *the liability* (…).

In the doctrine of specialty[4] an interesting question has been raised with regard to the specificity of justice, namely that of the relationship between law and justice, which is essential, and of the relationship between justice and social order. As regards the second relationship, the social order, different from justice and unmistakable for it, is the foundation of a stable social organization, but also the most important. "The established social order is the one that separates us from the catastrophe; most people in the civilized countries prefer to tolerate some injustice than suffer the risk of the catastrophe".[5]

Historically speaking, states have been concerned with inserting the subject matter of *responsibility of human action* under various terminologies, both in Constitutions and in the common acts[6].

Two distinct texts in the Declaration of the Rights of Man and of the Citizen of 1798 underlies the natural right of the citizen to control the governor.[7]

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[1] Ion Deleanu, *Instituţii şi proceduri constituţionale (Constitutional Institutions and Procedures)*, (C.H. Beck Publishing House, Bucharest, 2006), p.28.

[2] Marx- Engels, *Opere alese în două volume,* vol II, ("Politică" Publishing House, Bucharest, 1967), p.416, quoted by Nicolae Popa in *Prelegeri de sociologie juridică (Lectures on Legal Sociology),* (Bucharest, 1983, Faculty of Law - Bucharest University), p.7

[3] Sofia Popescu, *Teoria generală a dreptului (General Theory of Law)*, (Lumina Lex Publishing House, Bucharest, 2000) p. 300.

[4] Gheorghe Iancu, *Proceduri constituţionale, Drept procesual constituţional (Constitutional Procedures, Constitutional Procedural Law),* (Bucharest, Publishing House of the Official Gazette, 2010), p. 109.

[5] Maurice Hauriou, quoted by Gheorghe Iancu, op cit, p.109.

[6] such as Declarations.

[7] Cristian Ionescu, *Analiza fundamentelor teoretice şi politice ale controlului parlamentar. Studiu de drept comparat (Analysis of the Theoretical and Political Fundamentals of Parliamentary Control. A Survey of Comparative Law)*, in *Liber Amicorum Ioan Muraru*, (Hamangiu Publishing House, Bucharest, 2006), p.139 et seq.

Thus, the *French Declaration of the Right of Man and of the Citizen* of 1789 sets forth the following in its article 15: "Society *has the right to call any public servant to account for the way they perform their function"*.

The *Universal Declaration*[8] *of Human Rights* in its *article 8* sets forth that: "Everyone *has the right to an effective remedy* by the competent national tribunals for acts violating the fundamental rights granted to him by the constitution or by law", and according to article 29 paragraph 1 "*Everyone has duties to the community* in which alone the free and full development of his personality is possible".

As a witted remark emphasized in the Romanian administrative doctrine, the political liability of the Government is engaged on the background of the committed harm, therefore it triggers a special procedure and finally materializes into a constitutional sanction.[9]

2. **Literature review**

The subject matter we are dealing with herein will be approached from several perspectives: of the philosophy, of the legal sociology, of the general theory of law, but also of the administrative law, bringing into attention, as a synthesis, the opinions of foreign doctrinaires such as: Paul Fauconnet, *La responsabilité*, (Éd. II. F Alcou, Paris, 1928), Hans Jonas, *Le principe de responsabilité,* (Paris, Cerf 1990), etc. but also of Romanian doctrinaires: Mihai Florea, *Responsabilitatea actiunii sociale (Responsibility of Social Action),* (Ştiinţifică şi Enciclopedică Publishing House, Bucharest, 1976), Lidia Barac, *Răspunderea and sancţiunea juridică (Liability and Legal Sanction)*, (Lumina Lex Publishing House, Bucharest, 1997), Mihai Bădescu, *Sacţiunea juridică în teoria, filosofia dreptului and în dreptul românesc (Legal Sanction in the Theory and Philosophy of Law and in the Romanian Law)*, (Lumina Lex Publishing House 2002), Nicolae Popa, *Prelegeri de sociologie juridică (Lectures on Legal Sociology),* (Bucharest, 1983, Bucharest), A. Iorgovan, *Tratat de drept administrativ (Treatise of Administrative Law),* vol. II, (All Beck Publishing House, Bucharest, 2001), Mircea N Costin, *Răspunderea juridică în dreptul RSR (Legal Liability in the Law of the Socialist Republic of Romania),* (Dacia Publishing House, Cluj, 1974), Gheorghe Iancu, *Proceduri constituţionale, Drept procesual constituţional (Constitutional Procedures, Constitutional Procedural Law),* (Bucharest, Publishing House of the Official Gazette, 2010), etc[10].

3. Paper content

3.1. Short considerations on "responsibility"

Almost all authors who dealt in their studies with the subject matter of liability started their research by conceptualizing the terms of *liability* and *responsibility*.[11]

The issue of man's responsibility has been a meditation subject for a long time.[12] Currently we use, at least in the Romanian language, the two terms of "liability" and "responsibility" with the same meaning or with very close meanings, but never accurate enough.

Usually, the meaning of the terms of *liability* and *responsibility* is that of a formally imposed obligation to do or not no a particular thing, in relationships imposed to the social agent (to the individual) from the outside[13].

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[8] dated 10 December 1948.

[9] A. Iorgovan, *Tratat de drept administrativ (Treatise of Administrative Law)*, vol. II, (All Beck Publishing House, Bucharest, 2001), p. 413, quoted by Cristian Ionescu, op. cit, p.141.

[10] This itemization is merely given by way of example and does not exhaust the vast range of doctrinaires who approached this subject.

[11] Lidia Barac, *Răspunderea şi sancţiunea juridică (Legal Liability and Sanction)*, (Lumina Lex Publishing House, Bucharest, 1997), p.3.

[12] Mihai Florea, *Responsabilitatea acţiunii sociale (Responsibility of Social Action)*, (Ştiinţifică şi Enciclopedică Publishing House, Bucharest, 1976), p.5.

A possible starting point[14] for setting up a *theory of responsibility* may have been the French sociology, represented by Emile Durkheim, but it was altered afterwards particularly by A. Bayet[15] for whom the human behaviour is dictated by a series of inner needs, specific both to society and to the individual, the felon being the victim of the social agents who inoculated the crime to him: "…how come we are able to consider a criminal *responsible* for his actions, as if his committing the crime or not depends on his own will?" This way, the abolition of *responsibility* is suggested.

At the beginning of our century, the French sociologist Paul Fauconnet[16] attempted to rehabilitate the idea of *responsibility*, analyzing the issue of *responsibility* in his treatise *"La responsabilité"* as seen from the perspective of the individual who commits a felony, the responsibility being of legal nature, being in fact a legal (criminal) liability, with moral dimensions.

In Fauconnet's opinion, the concept of responsibility is part of the system of collective representations. It is the abstract summary of all the collective ways of thinking and feeling thoroughly experienced in the rules and judgments of responsibility.[17]

In his mind, the criminal is a "falsely accused"[18] who bears the liability that society rests upon him, to purify himself from the deeds that even its rules contain virtually and which it inspires individually, as he is unable to avoid them.

In Fauconnet's opinion, responsibility is a social fact: "all beings are virtually capable of becoming responsible. The responsibility of a subject does not derive from features that would be inherent to him, but from the situation he is engaged in."[19]

Paul Fauconnet asserts in his work *"La responsabilité*, *Étude de sociologie"*[20] that responsibility in general corresponds to the sanction in general. However, since there are various kinds of sanctions, they correspond to the various kinds of responsibility. *Among these count:* legal sanctions and moral sanctions, criminal sanctions and civil sanctions, sanctions with the meaning of compensation or punishment, restitutive or retributive sanctions.

Also, Fauconnet specifies that this parallel classification of responsibility with the sanction revealed difficulties regarding the nomenclature. Thus, there is a distinction between legal responsibility and juridical responsibility (we refer to juridical responsibility through organized sanctions), moral responsibility (through diffuse sanctions - and refers to the responsibility of the moral agent towards its own conscience), criminal and civil responsibility and mixed responsibility, restitutory and retributory responsibility, responsibility corresponding to repressive sanctions, and remunerative (premium) responsibility.

In his same work "*La responsabilité*, *Étude de sociologie"*[21] in Part I called *"Description of responsibility",* Paul Fauconnet makes a presentation of the subject matters of responsibility. Thus, he asserts that man is responsible because he is able to play the role of: *"patient de la peine"*. Legally speaking, responsibility is a particular case of capacity; the adult and normal man is fit for being punished. However, Fauconnet mentions, the adult and normal man is not the only possible subject

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[13] Mihai Bădescu, *Sacţiunea juridică în teoria, filosofia dreptului şi în dreptul românesc (Legal Sanction in the Theory and Philosophy of Law and in the Romanian Law)*, (Lumina Lex Publishing House 2002, Bucharest), p.54.

[14] Lidia Barac, *quoted paper,* p.7.

[15] Stelian Stoica, *Etica durkheimeistă (Durkheim's Ethics)*, (Ştiinţifică Publishing House, Bucharest, 1979), p.131 et seq.; Nicolae Popa, *Prelegeri de sociologie juridică (Lectures on Legal Sociology),* (Bucharest, 1983, Faculty of Law-Bucharest University), p.201-202; Mihai Florea, *Responsabilitatea acţiunii sociale (Responsibility of Social Action)*, (Ştiinţifică şi Enciclopedică Publishing House, Bucharest, 1970, p.10-11, quoted by Lidia Barac in *op cit*, (Lumina Lex Publishing House, 1970), p.7.

[16] Lidia Barac, op cit., p.7-8.

[17] Paul Fauconnet, *La responsabilité*, *Étude de sociologie,* (Paris, Librairie Felix Alcau, 1929), p.4, www.gallica.bnf.fr, (Accessed on 27 December 2011).

[18] Mihai Florea, op. cit., p.12.

[19] Paul Fauconnet, *La responsabilité*, (Éd. II. F Alcou, Paris, 1928), p.396 şi Nicolae Popa op cit, p.202.

[20] Paul Fauconnet, *La responsabilité*, *Étude de sociologie,* p.12-16.

[21] Paul Fauconnet, *op cit,* p.26-83.

of a judgment of responsibility. The child, the insane, the corpse, the animal, collective objects and beings may become responsible, but in the chapter regarding the *subject matters*[22] of responsibility Fauconnet states that the following are entirely irresponsible: children (providing historic examples of cases where children were judged starting from the age of 3, 7 and up to 14 years in various archaic societies), alienated persons, dead persons, animals and legal persons.

It seen from another perspective, responsibility is magisterially approached in a monograph dedicated to the study of law and morale by the author Irineu Popa[23] in the section called *"Libertatea ca fundament ontologic al răspunderii (Freedom as the ontological foundation of responsibility)"*, from the researcher's point of view who sees the world through the prism of religion.

Thus, the author[24] considers that man is a rational and volitional being. Though will, his thought is transposed into practice and thus he becomes a subject, i.e. a person who wants to undertake and undertakes responsibilities. His freedom, even if related to actions exterior to him, is still related to man.

Responsibility, in general, is conditional[25] on:

a) Man's knowing what there is and what there will be, and on the control powers on the development of events that the subject assesses through deductive and inductive proofs;

b) Man's capacity to project achievable conducts;

c) Man's weighing, depending on the purpose, among the possibilities he has in order to choose "the best, the most efficient, the most suitable for him, the most cost-effective, etc."

The author Irineu Popa also states in the work mentioned above that, regardless of the perspective from which we look at responsibility, it should be freed from compulsion.[26]

The author Lidia Barac[27] provides a definition of social responsibility in her work called: "*Răspunderea şi sancţiunea juridică (Legal Liability and Sanction)"*. Thus, the author specifies that "as an institution, *social responsibility* could be defined as the social institution which includes man's complex of attitudes in relation to the system of values, institutionalized by the society he lives in, for the preservation and promotion of those values, for the perfection of the human being and the preservation of life in community, with a view to maintaining and promoting social order and the public good".

3.2. Short considerations on "liability"

In general, in the usual terminology, the notion of *"liability"* means that a person or an authority has the obligation to justify and explain its own actions.

Transposed in the administrative law applicable in the European Union, we think fit to interpret this meaning of liability by the fact that any regulatory body must be liable for its actions before another authority.

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[22] Paul Fauconnet conducts an exceptional research work as regards the subject matters of responsibility, providing examples for each separate case, at least one example for each subject matter, specifying even the sources of inspiration for them: the vendetta against the crocodiles happens in Madagascar, trials against children, insane people, and animals are described. On the same occasion, the horrors committed during the Inquisition are described among others (when besides the bodily punishments there were also spiritual or temporal punishments like excommunications, burning of houses, seizure of the heretic's assets, etc.), with a highlight on the taboos and rituals of the ancient period.

[23] Irineu Popa, *Substanţa morală a dreptului (The Moral Substance of Law)*, (Bucharest, Universul Juridic Publishing House, 2009). Please note that the High Reverend Irineu Popa is an Archbishop of Craiova and a Metropolitan Bishop of Oltenia.

[24] Irineu Popa, op cit., p.353-364.

[25] Gheorghe C. Mihai, Radu I Motica, *Fundamentele dreptului, Optima Justitia (Fundamentals of Law, Optima Justitia)*, (All Beck Publishing House, Bucharest,1999), p.111.

[26] Irineu Popa, *Substanţa morală a dreptului (The Moral Substance of Law)*, op. cit., p. 358.

[27] Lidia Barac, *quoted paper,* p.15.

Liability as an essential component of any form of social organization existed even in the primitive society. In the primitive society (...) there was no state, no law, and implicitly at that time the institution of legal liability did not exist.[28] In this society, the victim instinctively responded with an immediate physical reaction, as strong as possible. The idea of *revenge* contains the entire idea of law, as it was developed afterwards.[29]

As early as the Ancient Times, Plato, in his works, determined, among others, the meaning of legal liability, establishing that nobody must remain unpunished for violating the law, regardless of the damage they cause through such violation.

The legal sociology operates with notions such as the statute and role of the individual.[30] According to Lidia Barac[31], the word "liability" is connected to everything that is organized. According to professor A. Laubadere[32], the French administrative law envisaged the public servant's personal responsibility and the responsibility of the administration.

In Valentin Prisăcaru's mind, the legal liability, considered in its broad meaning, consists both of a sanctionative liability and of a reparatory liability. If the sanctionative liability is the manifestation of the attitude that the state has towards the person who violates a legal rule, then the reparatory liability is the method through which the prejudiced person is entitled to a repair of the prejudice caused by a guilty action – by violation of a legal rule or of a convention[33].

Mircea Djuvara believed that the legal rule will have a "social efficiency" if there is a conviction that the government body who created the legal rule was competent to do it: *"a state that is recognized as being legitimate issues commandments through its bodies which, more often than not, are recognized by it as legitimate. Also, even a factual authority which, because of a higher necessity, issues regulations can be sometimes recognized as legitimate.*[34]

If we consider the two large parts of law – as a whole of the legal rules – the public law and the private law, we will notice that even the legal liability[35] is divided in two parts:

a) legal liability in the public law
b) legal liability in the private law

Besides this division, the legal liability is also divided depending on the branches of law that the rules regulating the legal liability belong to, specifically for each branch of law:

a) civil liability
b) criminal liability
c) administrative liability

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[28] Mihail Eliescu, *Răspunderea civilă delictuală (Offensive Civil Liability)*, (Academiei RSR Publishing House, Bucharest, 1972), p.6, quoted by Iulia Boghirnea in *Teoria Generală a Dreptului (General Theory of Law)*, (Sitech Publishing House, Craiova, 2010), p.197.

[29] Ioan Ceterchi, Ioan Craiovan, *Introducere în teoria generală a dreptului (Introduction to the General Theory of Law)*, (All Publishing House, Bucharest, 1993), p. 107, quoted by Iulia Boghirnea în *op cit*, p.197.

[30] Nicolae Popa, *Prelegeri de sociologie juridică (Lectures on Legal Sociology)*, (Publishing House of the Universităţii Bucharest, 1983), p.32-37.

[31] Lidia Barac, *Elemente de teoria dreptului (Elements of Theory of Law)*, (All Beck Publishing House, Bucharest, 2001), p.153.

[32] A. de Laubadere, J-C.Venezia et Y. Gaudement*, Droit administratif,* 16e éd., (Paris, L.G.D.J), p. 145.

[33] V. I. Prisăcaru, *Răspunderea administrativă, mijloc de întărire a legislaţiei economice (Administrative Liability – A Method to Consolidate the Economic Legislation)*, ("Arbitrajul de Stat" Magazine no. 2/1972), p.4.

[34] Mircea Djuvara, *Teoria generală a dreptului. Drept raţional, izvoare şi drept pozitiv (General Theory of Law. Rational Law, Sources and Positive Law)* (All Beck Publishing House, Bucharest, 1999), p.529 quoted by Iulia Boghirnea in *Teoria Generală a Dreptului (General Theory of Law)*, (Sitech Publishing House, Craiova, 2010), p.136.

[35] Valentin Prisăcaru, *Tratat de drept administrativ român, partea generală (Treatise of Romanian Administrative Law, General Part)*, 3rd Edition revised and supplemented by the author, (Lumina Lex Publishing House, Bucharest, 2002), p.684.

The reason of being, i.e. of the concrete forms of legal liability, can only be the same as that of liability[36] itself. The existence the categories of liability is based on the fact that the legal rules of management and organization are grouped into subsystems depending on the nature of the social relationships they regulate.

The evolutions[37] of law, as compared to the requirements of social life, generate new forms of legal liability, which are different from the traditional legal form due to their specific nature. Thus, the legal liability in the environmental law tends to form its own institution of legal liability in the event of a trial in which it the court holds, in a certain stage, in the environmental protection and development field, "the civil, misdemeanour, or criminal liability, as the case may be".

The entry into force of the new Civil Code[38] determined a reconsideration of the institutions of law, including the legal liability. Here are some examples of novelties, among others:

- He who occupies a real estate, even without any title deed, is liable for the prejudice caused by the fall of or throwing an object into the real estate,
- Another amendment refers to the codification of the doctrine and of the case-law regarding the misuse of law. The misuse of law is expressly sanctioned in article 15 "no right can be exercised so as to damage or prejudice another person or in an excessive and unreasonable way, contrary to good faith", and in article 1353 "he who causes a prejudice while exercising their rights shall not be obliged to repair it, unless such rights were abusively exercised".

At European level, there is an institution called the European Ombudsman[39]. The role of the European Ombudsman is to defend the rights and interests of citizens, receiving their complaints regarding faulty administrative acts in the activity of community institutions or bodies, except for jurisdictional institutions.

3.3. Foundations of "liability and responsibility"; differences

We find particularly interesting Lidia Barac's inclination towards the subject matter of liability, who in her work *"Răspunderea şi sancţiunea juridică (Legal Liability and Sanction)"* dedicated a section called *"The biological levers of responsibility"* to research. Thus, in Lidia Barac's opinion[40], as responsibility involves values, it must be sought in the individual's existence, as it depends on feelings, attitudes, being expressed by what we call human behaviour.

Understanding that responsibility is a dimension of the individual, connected to his spiritual life, in discovering the premises of responsibility the author Lidia Barac is of the opinion that it is not enough to point out only its social levels, but it is also necessary to move the problem beyond these levers, by researching and studying thoroughly the spiritual life of man. In this framework we will acknowledge that the foundation of man's spiritual life is the experience, as it is the result of the complexity of organization at psychological level.[41]

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[36] Antonie Iorgovan, *Răspunderea contravenţională (Misdemeanour Liability)*, (Bucharest University, Doctoral dissertation, 1979), p.88.

[37] Ion Craiovan, *Tratat de teoria generală a dreptului (Treatise of the General Theory of Law),* (Bucharest, Universul Juridic Publishing House, 2007), p 437- 438.

[38] Law no. 71/2011 for the implementation of Law no. 287/2009 on the Civil Code, published in the Official Gazette no. 409/10 June 2011.

[39] Elena Emilia Ştefan, *"Ombudsmanul European şi dreptul la o bună administrare (The European Ombudsman and the Right to Good Administration)"*, Challenges of the Knowledge Society, 4th Edition, Nicolae Titulescu University**,** Bucharest, 23-24 April 2010, (article published in Volume I of the Conference, Prouniversitaria Publishing House) p.756- 788.

[40] Lidia Barac, *Răspunderea şi sancţiunea juridică (Legal Liability and Sanction)*, op.cit., p.10.

[41] I.B. Lamarck, *Discours, d'ouverture (1804)* in *Philosophie zoologique*, (Paris, 1907), p.31 quoted by Lidia Barac, op cit. p.10-11.

In the understanding of Mihai Florea, the factors[42] that liability and responsibility are based on are multiple and dissimilar and refer basically to the totality of objective and subjective elements that condition the existence and functionality of liability and of responsibility.

The most general and common factor of the foundation of liability and responsibility is the *need of social cohabitation of human individuals.* As a determining historical and social phenomenon, responsibility is based on three fundamental factors, as Mihai Florea believes, namely the objective needs of social life, the freedom of agent, and its wilful self-commitment, based on an option in the achievement of a social objective.[43]

The social-objective needs to which certain values were associated or which are manifested as values, Mihai Florea continues with his argumentation, witness a complex differentiation process, depending on how the society or a given collectivity relates them to its concrete historical requirements, on the way it interprets them and, consequently, on the choice it makes among the various possible directions of evolution of this society or collectivity.

Starting from this aspect, by analyzing the three categories of actions: obligations, interdictions and permissions, Mihai Florea asserts that they originate in the same objective social needs, in the same directions and trends of evolution of the given social life, which differentiate one from another particularly by the way the relate to the agent.

Another particularly interesting approach is the conception of professor Nicolae Popa on the subject matter of liability and responsibility.

At the same time, we also notice that sometimes the way the forms of legal liability are defined reveals an identity of the sanction (punishment) with the liability, professor Nicolae Popa asserts. The author criticizes such a point of view because the sanction refers to only one aspect of responsibility and entitles[44] the assertions of some sociologists claiming that the law does not envisage responsibility as such, only its limits; responsibility is reduced to liability[45].

The legal responsibility, as Nicolae Popa asserts, must be defined as "a conscious and deliberate attitude of assuming concerns for how legal rules are achieved, for the integrity of the legal order, and for the actions that the individual carries out in order to ensure a climate of legality".

Opposite to this meaning of legal responsibility, the legal liability "is not as much a relationship between the individual and the collectivity as it is a relationship between the authority of a collectivity and the individual".

As seen from this perspective, professor Nicolae Popa continues, "the legal responsibility does not exclude liability, but it is not reduced to it either, and the legal liability does not exclude responsibility, but it does not necessarily require it". Among the various forms of social liability - political, moral, etc., legal liability "is an aggravated form of liability that never loses its social features and which enjoys a special treatment as compared to the other forms".[46]

As for the *differences between liability and responsibility*, we are going to continue presenting Mihai Florea's opinion, as expressed in the aforementioned work, *Responsabilitatea acţiunii sociale (Responsibility of Social Action)*.

Thus, the author identifies a number of 6 dissimilarities[47], namely:

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[42] M Florea, op cit, p. 58.

[43] Mihai Florea, op. cit., p.205.

[44] Nicolae Popa, op cit., p.207.

[45] A. Hlaveck, *Problema responsabilităţii (The Issue of Responsibility),* Revista de filozofie (Philosophy Magazine) no. 2/1975, quoted by Nicolae Popa, op cit, p.207.

[46] Nicolae Popa, op cit, p.211.

[47] Mihai Florea, op., cit.73-76, and also Mihai Bădescu, *Sacţiunea juridică în teoria, filosofia dreptului şi în dreptul românesc (Legal Sanction in the Theory and Philosophy of Law and in the Romanian Law)*, (Lumina Lex Publishing House 2002).

1. They are not only *based on different external factors, but their manifestation itself requires a series of different subjective factors from the agent*. Whereas liability only requires the agent's obedience, responsibility requires much more elements from the agent.

2. If liability and responsibility do not coincide in terms of the content or of the factors they are based on, *they are sometimes dissimilar to a certain extent in terms of the collectivities and social structures and in terms of the objectives they relate to.*

3. Liability and responsibility do not coincide in terms of *their nature* either. If liability is more of a normative nature and particularly or preponderantly of a legal nature, responsibility preponderantly and directly involves values.

4. Liability and responsibility are different from each other also *through the main direction in which the relationships between the agent and the society are taking place*. In the current social action, liability is manifested particularly as the active presence of society, as an expression of certain requirements that society imposes to the agent, who finds himself as a potential patient of the system of social rules. In exchange, responsibility is manifested as a free human presence.

5. Also, liability and responsibility *do not entirely coincide as regards the consequences of their functioning, their social functions*. (...) While liability more particularly and directly refers to the conservation of the given social system, responsibility results in a greater improvement of the social system and in its development.

6. Liability and responsibility are also dissimilar in terms of the *ways and methods by which society stimulates and ensures their normal functioning;* on the one hand they depend on the deontological foundations of liability and of responsibility, on the other hand they depend on their role towards society.

Conclusions

In this study we have sketched the notions of liability and responsibility, trying to present to the reader, in our own fashion, the most interesting opinions of the legal literature.

According to our analysis, liability and responsibility concern equally the citizen and the state, they are concepts that evolved together with the society, were transformed and adapted to the modern times, entering the age of computerized society.

The fact that things are as described above, namely that there is responsibility including from the public authorities, is proven by the multitude of cases in which the state was condemned. Thus, in 2010[48], after the Court issued the decisions acknowledging the violation of the provisions of the Convention or of its additional Protocols, the Romanian State was condemned to pay EUR 3,874,287. During the period of 01 January 2010 - 31 December 2010, the legislative power is responsible in 79.26% of the cases where condemnation decisions were issued (107 out of 135), the executive power is responsible for 65.92% of the cases (98 out of 135), the judiciary power is responsible for 54.812% of the cases (74 out of 135), the Public Ministry for 15.55% of the cases (21 out of 135), and the Constitutional Court is responsible for 0.74% of the condemnations (1 out of 135 cases).

The widest area for the assessment of legal responsibility[49], as an attitude of the individual in relationship with the legal regulatory system in general, remains the area governed by the constitutional law. The constitutional rules were the object of the individual's reflection, a measure for his social responsibility.

[48] Dragoş Călin, Mihaela Vasiescu, Paula Andrada-Coţovanu, Florin Mihăiţă, Ionuţ Militaru, Lucia Zaharia, Elena Blidaru, Roxana Lăcătuşu, Lavinia Cîrciumaru, Cristina Radu, *Decisions of the ECHR in cases against Romania, volume VI, 2010, Analysis. Consequences. Potentially Responsible Authorities*, Universitară Publishing House, Bucharest, 2011), p.2586 et seq.

[49] Lidia Barac, *Răspunderea şi sancţiunea juridică (Legal Liability and Sanction)*, op.cit, p. 36.

The integration of the legal rules and liability in the wide sphere of the social rules and liability takes place as part of a correlation process between the various forms of social liability which manifest in a permanent interdependence and mutual influence.[50]

There are legal sociology surveys warning that the disappointment of the society's expectations towards the law is particularly connected to liability, that the law cannot exercise its influence in society unless it succeeds to identify the person responsible and to establish the liability[51].

In conclusion, we have the pleasure to mention the opinion of professor Antonie Iorgovan[52] who said that "*liability must be regarded as the phenomenon that manifests itself on the background of the committed harm"*. This is a conception rather classical and at the same time dominant suggestively expressed by an author[53] by this wording: "the illicit deed is the objective ground of liability and the application of the legal sanction its main consequence".

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[50] Vasile Pătulea, Stelu Şerban, Gabriel Ioan Marconescu, *Răspunderea şi responsabilitatea socială şi juridică (Social and Legal Liability and Responsibility),* (Ştiinţifică şi Enciclopedică Publishing House, Bucharest., 1988), p.31.

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THE CONCEPT OF LEGAL LIABILITY

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Abstract
The failure to abide by the social rules could determine the application of sanctions of various types that could restore the social balance. The legal liability, unlike other forms of social liability, refers to the obligation of being held responsible for violating a legal rule. Starting from the hypothesis that the social rules and values may be violated or omitted in the individuals' actions, one can assert that the social liability may take several forms, depending on the affected social relationships, namely: moral liability, political liability, legal liability, etc.
This study aims at dealing with only several aspects related to the concept of legal liability.

Keywords*: the fundamental legal category, the social rules, legal liability, values, the legal sanction.*

1. Introduction

The legal liability is a form of social liability. The social liability can be encountered in everyday life under several and various forms. Although the legal liability is a series of specific particularities that configure its personality, in relation with the other forms of the social liability it is in a permanent interdependence and mutual influence.[1] Therefore, one can assert that the legal liability is accessory to any other form of social liability.

Nicolae Popa[2] conceives *responsibility* as an assumption of liability for the results of man's social action. Sociologically speaking[3], *"responsibility"* as part of the social life evolved together with society. The social[4] *responsibility* appears when the individual deliberately opts for a variant of social behaviour. *The legal responsibility is a form of social responsibility,* a legal phenomenon with an independent object of research.

The *notion of liability* is specific to law[5] and is seen as a legal obligation according to a legal regulatory act.

In this study, we have tried to select, out the multitude of works dealing with the subject matter of the legal liability or responsibility, those we considered relevant for defining the concept of legal liability.

The first section of this survey will make a historical approach of the evolution of liability, will be followed by a section regarding the etymology of the words *liability* and *responsibility*, and in its last part the concept of legal liability will be defined under three aspects. Finally, we aim at making a synthesis of the conclusions deriving from our analysis.

Literature review

The subject of legal liability is not a new one in the legal science debates. The concern for the sanction of those who break the laws, the established order has existed since the oldest times, however the subject is far from being fully discussed.

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[1] Gheorghe Boboş, *General Theory of the State and Law*, (Didactică şi Pedagogică Publishing House, Bucharest, 1983), p.262.

[2] Mihai Bădescu, *Theory of Legal Liability and Sanction*, (Lumina Lex Publishing House, Bucharest, 2001), p.119.

[3] Irineu Ion Popa, *The Moral Substance of Law*, (Bucharest, Universul Juridic Publishing House, 2009), p.356 et seq.

[4] Nicolae Popa, *Lectures on Legal Sociology*, (Bucharest, Printing House of the Bucharest University, 1989), p. 198.

[5] Mihai Bădescu, *op.cit.,* p.114.

In this respect, we mention from older times the works of Plato, Thomas Aquinas, Montesquieu, Rousseau, Locke, Spinoza, Leibnitz, Paul Fauconnet who dealt in their works with the subject matter of responsibility; from the more recent period we mention Romanian authors such as: Dimitrie Gusti, Mircea Djuvara, M. Costin, Mihai Florea, Ion Craiovan, Gheorghe Boboş, Nicolae Popa, I. Humă, etc. and from the field of administrative law or constitutional law we mention Paul Negulescu, Anibal Teodorescu, Tudor Drăganu, Valentin Prisăcaru, Antonie Iorgovan, Ion Deleanu, Ion Muraru etc.

2. Paper content

In dealing with the subject matter of the legal liability, we start our theoretical demarche with a rhetoric question raised by Ion Craiovan[6] in his work, *General Theory of Law*, namely: *"What could we understand for example from the complex institution the legal liability without resorting to social responsibility and to a conception on society and man?"*

Deservedly, we agree with the question raised as there is no possibility to deal with legal liability, which we consider a part of the social liability, without dealing with its relationship with the legal responsibility, and last but not least with the social responsibility. As responsibility involves values, it must be sought in the individual's existence, as it depends on feelings, attitudes, being expressed by what we call human behaviour.

Any society and any form of social power is characterized by a certain regulatory system, a set of rules of conduct.[7]

Any holder of a right – regardless of whether it is a particular person before its equals or the state, or the state before its subjects, or the state before other states – must be liable for its actions, assuming the consequences of the commitments its makes or of the disregard of a legal debt.[8] Thus, liability is very similar to responsibility as a general principle of law, although it allows for a certain touch of constraint, without being mistaken for the sanction, but rather being a general framework where the law is implemented.[9]

Although distinct in terms of their content, but directly relying on different factors, liability and responsibility are rightly connected to each other.[10] On the one hand, they represent the manifestation of the multiple and various relationships between the individual and the collectivity, and on the other hand, liability and responsibility are forms or rather successive steps of the same general phenomenon of integration of individuals in the collectivity.[11]

In the regulatory systems determined exclusively and objectively by the necessity of the social cohabitation of the members of society in their accession to their Common Good, in the systems where man is sympathetic to them because the protected values and the ordering criteria for these values are his own values and criteria, the observance of behavioural rules is a conscious and deliberate undertaking of the necessity, originating in conviction, therefore it is seen as responsibility.[12]

The social responsibility does not exclude the liability – including the legal one, as one of the segments of responsibility – nor is it reduced to it. The social responsibility[13], which is an interiorized

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[6] Ion Craiovan, *General Theory of Law,* (Craiova, Sylvy Publishing House, 1999), 303 p.

[7] Ion Deleanu, *Constitutional Institutions and Procedures in the Romanian Law and the Comparative Law*, (C.H. Beck Publishing House, Bucharest, 2006), p.35.

[8] Dan Claudiu Dănişor, Ion Dogaru, Gheorghe Dănişor, *General Theory of Law*, (Bucharest, C.H. Beck Publishing House, 2008), p. 537.

[9] Idem, p.537.

[10] Mihai Florea, *Responsibility of Social Action*, (Ştiinţifică şi Enciclopedică Publishing House, Bucharest, 1976), p. 88.

[11] Idem, p.88.

[12] Ion Deleanu, op. cit, p.39.

[13] Idem, p.39.

dimension of the social agent, refers to the activity carried out on one's own initiative, sometimes through an original contributive action, depending on its strictly regulatory-legal basis.

Dumitru Maziu[14] makes a historical incursion into various ages to highlight the manifestation forms of liability in time.

Thus, the author divides the evolution of the various forms of liability into three large periods: Ancient Time, Middle Ages, the period after the French Revolution (year 1789).

a.) In the Ancient Times, revenge seemed like a natural solution to an aggression. Dumitru Mazilu quoted some authors on this subject, namely: Seneca who, in his work *"On anger"*, compared the sanctioning measure to the medical act, aiming to maintain the health of the cohabitation relationships within the citadel; and the Greek philosopher Socrates drew attention to the dangers in social relationships if the laws are violated and destroyed by each private person. If in Athens and Rome the sale of insolvent debtors was allowed, Solon suppressed this custom, saying that nobody should suffer any bodily violence for debts between private persons.

b.) In the Middle Ages, the sanctions were particularly severe, characterized by cruelty to intimidate and discourage the infringement of the existing rules. Also, the author mentioned that during that period the ecclesiastic law had an overwhelming influence. People guilty of having committed reprehensible deeds had to account for their deeds before the great feudal seigneurs who often applied sanctions arbitrarily in the cases they judged. To understand the meanings given to liability during that time, the works of Thomas More and Tommaso Campanella (...) should be researched, says the author Dumitru Mazilu.

c.) After the French Revolution of 1789, a true doctrine is developed regarding liability for breaking the law. The criticism against the feudal system expressed by the arbitrariness of the great seigneurs and by the cruel sanctions, often unjust, defined little by little the parameters of legal liability, at the foundation of which is the guilt stipulated in a legal norm. Dumitru Mazilu believes that the most prestigious things in this field are "Lettres persanes" and „L'esprit des lois" of Charles Montesquieu[15] and "Dei delitti e della pene" of Cezare Becaria.[16]

Also, the author Lidia Barac[17] enounces an interesting point of view, from the same perspective of the analysis of the concept of *legal liability*. Thus, understanding that responsibility is a dimension of the individual, connected to his spiritual life, in discovering the premises of responsibility she is of the opinion that it is not enough to point out only its social levels, but it is also necessary to move the problem beyond these levers, by researching and studying thoroughly the spiritual life of man. In this framework we will acknowledge that the foundation of man's spiritual life is the experience, as it is the result of the complexity of organization at psychological level.[18]

Antonie Iorgovan[19] asserted that, as regards the institution of liability, either seen from the perspective of the general theory of law, or from the perspective of the legal sciences of the branch, the Romanian authors have been broadly concerned about the clarification of three essential issues:

a.) Identification of the fundamental legal category through which the notion of legal liability may be defined.

b.) Determination of the delimitation criteria (classification of the forms of legal liability).

c.) Determination of the conditions and grounds of legal liability (and implicitly of each of its forms).

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[14] Dumitru Mazilu, *Teoria generală a dreptului (General Theory of Law)*, (All Beck Publishing House, Bucharest, 1999), p.306-307.

[15] Charles Louis de Secondat Montesquieu, *De l'esprit des lois,* 1748.

[16] Cezare Becaria, *Dei delitti e della pene,* Livorno, 1764.

[17] Lidia Barac, *Răspunderea şi sancţiunea juridică (Legal Liability and Sanction)*, (Lumina Lex Publishing House, Bucharest, 1997), p.10.

[18] I.B. Lamarck, *Discours d'ouverture (1804)* in *Philosophie zoologique*, Paris, 1907, p.31 quoted by Lidia Barac, op cit. p.10-11.

[19] Antonie Iorgovan, *Drept administrativ, Tratat elementar, vol III (Administrative Law, Elementary Treatise, volume III), (*Bucharest, Proarcadia Publishing House, 1993), p.175 şi urm.

Liability[20] is the natural consequence of any commitment. In a state of law nobody can go beyond liability as regards the way they fulfill their duties or the commission they accepted. When somebody accepts a public function, they accept rights, obligations, liability in the universality of their dimensions.

2.1. Etymology of the words: "liability" and "responsibility"

To present the etymology of the words *"liability"* and *"responsibility"*, we are going to mention the opinions of some foreign doctrinaires.

The author Henri Lalou[21] asserts in his work *"La responsabilité civile. Principes élémentaires et applications pratiques"*, in chapter *"Generalities on civil responsibility"*, that etymologically speaking the word liability derives from the Latin word *spondeo*, which in the verbal contract (*verbis*) of the Roman law means the solemn *obligation* of the debtor towards his creditor to fulfill his obligations undertaken in the contract. In the same work, Henri Lalou asserts that the issue of responsibility was raised in all fields having to do with human activities: in morale, in international relations, in public law, in private law. In morale, responsibility refers to a double issue: human freedom and existence of a moral law.

As regards the international liability[22], we are well aware of the controversies born from the responsibility for war or from the responsibility of the states for crimes or offenses committed on their territory at the expense of foreigners (...).

In the public law, the constitutional laws regulate the responsibility of the head of state, the ministerial responsibility, the responsibility of public servants.

The criminal responsibility that conditions the application of punishments requires a social unrest caused by a felony for which the responsible individual should be held accountable.

Whereas civil responsibility[23] requires essentially, on the one hand, a victim who suffered a prejudice and, on the other hand, another person who should repair the prejudice.

Henri Capitant[24] specified that the term *liability* derives from the Latin verb *respondere* which means both to respond and to pay in one's turn.

Another French author who dealt with the subject matter of responsibility, around year 1977, was Michel Villey.

According to the assertions of the French author Michel Villey[25], the word responsibility appeared in the French language rather late (1783) and it seems it was used for the first time by Wecker: "the trust in this paper is born from the responsibility of the Government".

Another author, the English professor A. Hart[26], analyzes legal liability bringing into the light the multiple meanings that can be ascribed to the notion of liability.

The same well-known representative of the analytical philosophy of law, A. Hart[27], drew the attention on the fact that the following distinct meanings can be ascribed to "liability":

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[20] Ioan Muraru, Nasty Vladoiu, Silviu Barbu, Andrei Muraru**,** *Contencios Constituțional (Constitutional Disputes)*, **(**Bucharest, Hamangiu Publishing House, 2009), p.45-46, quoted by Elena Emilia Ștefan *"Considerations on liability in administrative law"*, published in CKS – eBook 2011 p. 24-32.

[21] Lalou Henri, *La responsabilité civile. Principes élémentaires et applications pratiques,* (Paris, Dalloz, 1932,), p.1-3.

[22] Lalou Henri. Op. cit, pag 2, http://gallica.bnf.fr/ark:/12148/bpt6k61426111/f11.image, accessed on 27 December 2011.

[23] Idem, p.2.

[24] Henri Capitant, *Vocabulaire juridique*, (Paris, Les Presses Universitaires de France, 1936), p.429, quoted by Sofia Popescu, *Teoria generală a dreptului (General Theory of Law)*, (Lumina Lex Publishing House, Bucharest, 2000), p.303.

[25] Villey M. *Esquisse historique sur le mot responsable. Archives de Philosophie du Droit*, dossier « La responsabilité », (Sirey, Tome 22, 1977). p 45-58.

[26] Hart H.L. *Ascription of responsibility and Rights. Freedom and Responsibility. Readings in Philosophy and Law*, (edited under the supervision of Herbert Moris, Stanford University Press, California, 1961), 147 p.

a.) The liability deriving from a certain role – the person is liable for fulfilling the duties deriving from the role they have, from the position they fill in a certain organization (e.g. the parents are responsible for raising their children);

b.) The causal liability – it can be ascribed not only to human beings but also to natural events, to dangerous things and to animals (the frost is liable for the road accident it caused, meaning that the accident happened because of the frost);

c.) Liability – when a person infringes the legal norm that obliges them to do a certain action or when the person is obliged by the law to bear a punishment or to repair the damage caused (either by their deed or by somebody else's deed);

d.) The capacity to be held liable – the person meets the requirements for being able to be held liable.

A whole range of theoreticians set out to defining the concepts of liability and responsibility, using the dictionaries of that time.

We notice that in the French language the term *"responsibility"* (responsabilitate) of the Romanian language has no equivalent, the only known term being that of liability, i.e. "responsabilité".

Thus, the *dictionary of the modern Romanian language*[28] defines liability as the "fact of being liable, responsibility", whereas responsibility is defined as the "obligation of doing something, of being liable, of accounting for something, liability".

Similarly, the dictionary *Larousse* defines responsibility as being the "obligation of repairing damages caused to somebody else by themselves, by a person depending on them or by an animal or thing guarded by them; the obligation of bearing the punishment established for the committed felony; the capacity to make a decision without first referring to a higher authority; the need of a minister to abandon his functions when the Parliament refuses to trust in him…", whereas "collective responsibility", "the fact of considering all the members of a group as jointly responsible for the deed committed by one of the members of the group".

2.2. Possible definitions of legal liability

In presenting the possible definitions that have been given in time to the legal liability, we start from the acknowledgement that we cannot find in the legislation any definition of the legal liability, regardless of the field.

On the other hand, the various pieces of legislation present the principles of holding someone liable, the conditions in which a person, regardless of their statute, can be held liable[29].

We should also mention that the selection of the definitions we are going to present followed the three directions that have underlain the attempts to define the concept of legal liability, namely:

a.) the obligation category

b.) the legal relationship category

c.) the legal situation category

Definition of legal liability as seen from the perspective of the category *"obligation"*

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[27] H.L.A. Hart, op. cit, p.145 et seq., quoted by Sofia Popescu, (op cit), p.304; Radu I Motica, Gheorghe Mihai, *Teoria generală a dreptului (General Theory of Law)*, (All Beck Publishing House, Bucharest, 2001), p.223.

[28] On this subject please see Mihai Bădescu, *Teoria răspunderii şi sancţiunii juridice (Theory of Legal Liability and Sanction)*, (Lumina Lex Publishing House, Bucharest, 2001), Nicolae Popa, *Prelegeri de sociologie juridică (Lectures on Legal Sociology)*, (Bucharest, Printing House of the Bucharest University, 1989), Mihai Florea, *Responsabilitatea acţiunii sociale (Responsibility of Social Action)*, (Ştiinţifică şi Enciclopedică Publishing House, Bucharest, 1976), Lidia Barac, *Răspunderea şi sancţiunea juridică (Legal Liability and Sanction)*, (Lumina Lex Publishing House, Bucharest, 1997).

[29] Hence, we refer not only to natural or legal persons, but also to dignitaries, public servants, etc.

Ilie Iovănaş[30] envisages legal liability as "an expression of the condemnation by the state of an illicit conduct, which consists in an *obligation* to bear a privation".

M. Costin[31] envisages liability as an obligation to bear the consequence of having failed to abide by some rules of conduct, an obligation falling upon the author of the deed which comes in conflict with these rules and which always carries the mark of social disapproval of such conduct.

Gheorghe Boboş[32] agrees with M. Costin's point of view, according to which legal liability is a complex of rights and accessory obligations which, according to the law, is born as a result of committing illicit deeds and which constitutes the framework for imposing governmental constraints by applying the legal sanction in order to ensure the stability of social relationships and guidance to the members of society in the spirit of observing the rule of law.

Among the French authors of civil law who connect the idea of liability to the idea of obligation we mention Henri Lalou[33]. Also, we mention Rene Savatier[34] who gives the following definition to civil liability: "civil responsibility is the obligation falling upon a person to repair the damage caused to another by their deed or by the deed of the persons or things depending on that person".

Definition of legal liability as seen from the perspective of the category *"legal relationship"*

The author Dumitru Mazilu[35] defined legal liability as a constraining legal relationship whose content consists of the state's right to hold liable the one who violated the legal rule, applying the sanction established by the violated rule, and of the obligation of the defaulting party to be held liable for its deed and to be subject to the applicable sanction based on the violated rule.

A similar point of view is that of the author Gheorghe Boboş[36] who defines legal liability as a constraining legal relationship whose aim is the legal sanction.

According to the statements of Dan Ciobanu[37], legal liability is the situation deriving from a previous legal relationship, it is the legal relationship that finds its source in an illicit deed.

In the mind of Lidia Barac[38], *legal liability* could be defined as the *institution* containing the set of legal norms referring to relationships that are born from the activity conducted by the public authorities, in observance of the law, against all those who infringe or ignore the rule of law, in order to ensure the respect and promotion of the legal order and of the public good.

Also, we would like to mention the authors C. Stătescu and C. Bârsan[39] who claim that legal liability has an essential feature, i.e. "the possibility to apply the governmental constraint, if necessary".

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[30] Iovănaş I. *Consideraţii teoretice cu privire la răspunderea administrativa (Theoretical Considerations on Administrative Liability),* Doctoral Thesis, (Cluj. 1968. p.4), quoted by Lidia Barac, Elements of Theory of Law, op.cit, p.154.

[31] Mircea N Costin, *Răspunderea juridică în dreptul RSR. (Legal Liability in the Law of the Socialist Republic of Romania),* (Dacia Publishing House, Cluj, 1974), p.19.

[32] Gheorghe Boboş, *Teoria generală a statului şi dreptului (General Theory of the State and Law)*, (Didactică şi Pedagogică Publishing House, Bucharest, 1983), p. 31-32, quoting M. Costin, *O încercare de definire a noţiunii de răspundere juridică (An Attempt to Define the Notion of Legal Liability),* in RRD (Revista Română de Drept) 1970, nr. 5.

[33] For details, please see Lalou Henri, *op.cit,* p.1-3, quoted by Mircea N Costin in op cit, p.20.

[34] R Savatier, *Traité de la responsabilite civile en droit francais*, Tome I, (Paris, 1939, p.1), quoted by Mircea N Costin in op cit, p.20.

[35] Dumitru Mazilu, *Teoria generală a dreptului (General Theory of Law)*,op cit., p.310.

[36] Boboş Gh. *Teoria generală a statului şi dreptului (General Theory of the State and Law)*, (Cluj-Napoca, Ed. Dacia, 1994). 280 p.

[37] Ciobanu D., *Introducere în studiul dreptului (Introduction to the Study of Law),* (Course, Bucharest: Ecologică University, Faculty of Law, 1990), 133 p.

[38] Lidia Barac, *Elemente de teoria dreptului dreptului (Elements of Theory of Law)*, (All Beck Publishing House, Bucharest, 2001), p.155.

[39] Stătescu C., Bârsan C, *Drept Civil*, *Teoria Generală a Obligaţiilor (Civil Law, General Theory of Obligations)*, (Bucharest, Ed. All Beck, 1997), 340 p.

Definition of legal liability as seen from the perspective of the category *"legal situation*"

Thus, as regards the third category, i.e. that of the legal situation, we mention the conception of Antonie Iorgovan.

Antonie Iorgovan[40] believes that legal liability can be defined as "the legal situation consisting of the complex of rights and accessory obligations, the content of legal relationships determined by the legal norms that fulfil, at the level of the system of law, a self-regulatory & sanctionative function of the global social system".

Through liability one aims both at re-establishing the regulatory order, by ceasing any actions that are contrary to this order using certain constraints, and at materializing a negative reaction of the social authorities (considered at the micro-, meso- or macro-social level) on the author of such deed, by placing the latter in an unpleasant, unwanted situation so that he may become conscious of the negative meaning of his deed and of the need to adopt in the future a conduct complying with the social rules.[41]

Consequently, Mihai Florea[42] asserts, liability does not necessarily involve any option or conviction or initiative or interest from the agent in relation to the aims that are offered to him and for whose achievement he is committed, not even the understanding of their content. It simply contemplates the compliance with or infringement of certain prescriptions (obligations or interdictions), while the agent has rather a passive role rather than an active one.

Conclusions

In our study we have tried to make an inventory of the most interesting definitions of the concept of legal liability. We took into account both the opinions of sociologists and the opinions of Romanian and foreign jurists.

Considering the opinions of the reputed authors in this field presented above, we conclude that the subject matter of legal liability still remains unelucidated.

The legal liability is currently in the middle of a transformation process, together with the evolution of society actually, it has new dimensions, new correlations.

In this context of the redefinition of the concept of legal liability, we acknowledge how actual the famous expression of Juvenal[43] is: *"quis custodient custodes?"* Deservedly, this question[44] summarizes one of the most difficult problems standing in the way of accomplishing the rule of law: find the most efficient procedural ways to make the state's bodies, which directly or indirectly have constraining force in view of making the citizens be compliant with the laws and, in their turn, be forced to comply with them.

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[40] Antonie Iorgovan, *Răspunderea contravenţională (Misdemeanour Liability)*, (Bucharest, Bucharest University, Doctoral Thesis, 1979), p.98.

[41] Antonie Iorgovan, *Drept administrativ, Tratat elementar, vol III (Administrative Law, Elementary Treatise, volume III),* (Actami Publishing House, Proarcadia, 1993), p.182.

[42] Mihai Florea, *Responsabilitatea acţiunii sociale (Responsibility of Social Action)*, (Ştiinţifică şi Enciclopedică Publishing House, Bucharest, 1976), p. 63.

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BREACHING AN INTERNATIONAL OBLIGATION-THE OBJECTIVE ELEMENT OF THE INTERNATIONAL RESPONSIBILITY OF THE STATE FOR INTERNATIONALLY WRONGFUL ACTS

FELICIA MAXIM[*]

Abstract

The responsibility of states for internationally wrongful acts can be triggered in case two essential elements are cumulatively met, namely: the subjective element, the chargeability of the wrongful act and the objective element, the violation of the obligation assumed internationally. The violation of an international obligation is the objective element of the international responsibility of the state for internationally wrongful acts. The subject of international law is the holder of various rights and the subject of various obligations. Such rights or obligations arise from concrete legal cases, that is they have been determined by the agreement of will of the subjects of international law. The subject of law acts or does not act for the purposes of exerting the subjective act, its faculty or power lead to a violation of international obligations.

The obligation has been created and imposed to the subject of international law based on a legal document, be it an international treaty, a decision of a arbitral or jurisdictional court, a decision of an international organization, etc. The violation of this obligation, by omission or action, constitutes the element of responsibility. There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character. An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.

Keywords*: international responsibility, state, internationally wrongful acts, breach of an international obligations, the objective element.*

1. Introductory aspects

The responsibility of the state for internationally wrongful acts can be triggered if two essential elements are cumulatively met, that is: the subjective element, the chargeability of the wrongful act, and the objective element, the breaching of the obligation assumed internationally.[1] The delimitation between the conduct required by the international norm law and the wrongful conduct by the respective state constitute the essence of the wrongful act and the existing situation can be expressed in various ways. For instance, International Court of Justice (I.C.J.) uses phrases such as "incompatible with the state's obligations"[2], "contrary fact" or a fact "improper" to an existent rule and "the failure to meet and obligation assumed conventionally". It is recognized the breaching of an obligation, even in case where the act of the state is only partly contrary to an obligation assumed internationally. In some cases, the conduct required by the international law norm is clearly established, in other cases it is shaped by indicating a minimum standard according to which the state is free to act. The conduct may consist in an action or failure, as it may be constituted in a combined way of an action and failure. The wrongful character of the act is invoked independently of the existence of the guilt, negligence; the doctrine, practice and case law being in favour of instating the objective responsibility.[3] In each case, the comparison between the conduct

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[1] R.Miga-Beşteliu, *Drept internaţional public-Curs universitar (Public International Law – University Course)*,vol.II, (Editura C.H.Beck, 2008), p.30, art.2

[2] Please refer to the *United States Diplomatic and Consular Staff in Teheran case, (*I.C.J. Reports 1980), p.3, p.29.

[3] M. Shaw, *International Law,* 4th Edition, (Cambridge, University Press, 1999), p. 29.

adopted by the state and the required conduct can determine whether a breach of an international obligation has occurred. In order for an wrongful act to exist, there needs to exist a conduct contrary to the international law norms in force, irrespective of the source and nature of the international obligation breached. As a result, the obligation needs to exist, therefore to be present, irrespective of its source and content. Breaching an obligation also leads to the creation of a new rapport of international law, being considered a new source of obligation for the state guilty of committing the wrongful act.

Although the aspects presented have been subject to the works of the UNO International Law Commission (ILC), the identification of the characteristic features of the international obligations is necessary so that this way we would be able to appreciate whether we have the second element of the wrongful act.[4] The absence of the international obligation triggers the inexistence of the wrongful act and state's responsibility under international law.

On another hand, the study of each category of obligations is not important in codifying the responsibility of the states, but we deem it important from the point of view of the responsibility of the states and international case law. It would be very easy to assert that it is not relevant the delimitation of the obligations according to content, but it is very difficult to identify in each particular case whether an international obligation has been breached and if yes, what the obligation is and what the breaching consists in.[5]

In conclusion, we consider that it is welcome the attention paid to the objective element of responsibility, as this way the rules applied internationally can be better understood.

2. Origin of the obligation

Establishing the origin of the international obligation is determined by the existence of various sources of international law and by the possibility of triggering specific consequences according to the source of the obligation. Thus, there can be identified obligations assumed based on customary law, obligations the arise from treaties, obligations determined by the application of a general principle of international law, obligations imposed under decisions adopted by a relevant body of an international organization, obligations arisen from the I.C.J. decisions or arbitral decisions assumed based on a unilateral act of the state.[6]

The practice of the states and the decisions of international courts confirm the existence of the principle stating that the responsibility of the states is triggered by breaching an international obligation irrespective of the origin of such obligation.

This principle is applied in the *Armstrong Cork Company* Case by the Conciliation Commission of the United States and Italy, set up based on art. 83 of the Peace Treaty dated 10 February 1947. The Commission says that the responsibility of the state triggers the obligation to repair the prejudices caused, if such are the result of a failure to meet international obligations. In this regard, the Commission refers to any obligation instated by the public international law rules.[7]

Such a decision also results from the works of the Committee preparing the Hague Conference of 1930 which requested that the states' governments should decide on the relevance or irrelevance of the origin of the breached obligations. All the states' governments agreed with the

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[4] Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001,*Yearbook of the International Law Commission, 2001*, vol. II, Part Two.

[5] James Crawford, *The international Law Commission's Articles on States Responsibility, Introduction, text and Commentaries,* (Cambridge University Press 2002), p.124-141. **Felicia Maxim,** *Dreptul răspunderii statelor pentru fapte internațional ilicite (Responsibility of the States for Intrnationally Wrongful Acts)*, Editura Renaissance, 2011, p.128-161.

[6] Yearbook of the International Law Commission, 1976, vol. II, Part One, p. 6; **I. Anghel,V. Anghel**, *Răspunderea în dreptul internațional (Responsibility in International Law)*, (Editura Lumina Lex, Bucureşti, 1998), p.46.

[7] United Nations, Reports of International Arbitral Awards, vol. XIV, 1953,p.163.

principle already instated in international practice, according to which it was of no importance the origin of the obligations assumed, the responsibility of the states being triggered in all cases in which a wrongful act was committed, the arguments formulated were, however, different.

In the decision ruled by the I.C.J. in the *Barcelona Traction, Light and Power, Limited* Case, it is said that the Belgian government could be entitled to formulate a request if it proved that one of the violated rights and facts reported by it had been determined by breaching an obligation arisen from the treaty or from breaching a general rule of law.[8]

The analysis of each source of international law as a source of obligations can lead to disclosing certain particularities. Thus, in case of customary law it is easy to say that it can constitute a source of obligations, but it is more difficult to prove. Being defined as "a relatively long, repeated and uniform general practice considered by the state as expressing a rule of conduct with mandatory legal force in the rapports between them"[9], it needs to prove the subjective element and the objective element. There are cases where states have not accepted a certain customary law, in cases of this type responsibility cannot be established as the obligation pertaining to it does not exist. The inexistence of the obligation is proven by considering various acts and opinions by means of which the state has manifested its objections.

In case of treaties, specialized literature claims the existence of special cases.[10] There can be identified cases where a state can breach a norm regarding the conclusion of the treaties, in order to determine another state to conclude a treaty, which constitutes a case of responsibility for the wrongful act; if it breaches a norm established under the treaty, it is a responsibility according to the respective treaty. In treaties law, the Vienna Convention states that the provisions of the Convention do not prejudice any of the issues that might be raised in relation to a treaty from the point of view of international responsibility of a state.[11] Nevertheless, the Convention states that a material breach of a treaty by a party state authorizes the other party to a bilateral treaty to invoke the breaching as a reason for terminating the validity of the treaty or for suspending the application of the treaty in full or in part.[12]The articles regarding the treaties declared terminated, out dated or whose application has been suspended, the Convention assumes the related authority.

Referring to the relationship between the treaties law and the law of the international responsibility of the states, the Court mentions that these two branches of international law have obviously distinct scopes. According to the treaties law, there needs to be established whether a convention is in force or whether it has been suspended or denounced. However, according to the law of the responsibility of the states, there needs to be appreciated to what extent the suspension or denouncing of a convention, which would be incompatible with the treaties law, engage the responsibility of the state that has taken such action.[13]

As a result, we support the assertion, formulated in specialized literature, which underscores the interference between the two categories of norms, appreciating that the law of the responsibility of the states contributes to the consolidation of the treaties law.[14]

The use of the concept of "principle" makes use invoke the distinction between the fundamental principles of international law and the general principles of law. The fundamental principles constitute the core of international law, they determine the contents of the other principles, norms and institutions of the entire system of international law. The fundamental principles are

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[8] I.C.J.Reports, 1970,p.3-p.46.

[9] **D**.Popescu,Drept internațional public(*Public International Law)*,Editura Universității Titu Maiorescu, 2005, p.32.

[10] I.Diaconu, *Tratat de drept internațional public (Treatise of Public International Law)*, vol. III, (Editura Lumina Lex, Bucureşti, 2005), p.357.

[11] art. 73 of the Vienna Convention regarding the treaties law of 1969.

[12] art. 60 of the Vienna Convention regarding the treaties law of 1969.

[13] C.I.J. Recueil, 1997, para.47.

[14] I.Diaconu,op.cit., vol.III, 2005,p.358.

instated based on customary law and multilateral treaties that are universal, their normative contents giving them a mandatory legal character.[15] As a result, disregarding the provisions of the conventions and customary law having the value of *jus cogens,* which instate the fundamental principles of international law, triggers the responsibility of the states.

The general principles of law refer to the complex of general rules that form the basis of operation of each system of law, national and international. The recognition of the general principles of law as source of international law generally covers certain gaps of this type of law. Such principles, however, do not have a mere complementary role as against the treaty and customary law, but are independent legal norms, not being included in the category of ancillary means, and being placed on the same standing as the treaty and customary law. Invoking the rich doctrine and practice of the states that attest the value of the general principles of law, but especially the fact that the text of 38 of the C.I.J. Bylaws has not been abrogated, the authors of international law consider that the states are obligated to observe them.[16] Thus, disregarding the general principle of law equals a breach of international obligations.

Part of the ancillary means, art. 38 of the I.C.J. By laws refers to the court decisions and doctrine of the best qualified experts of various states. The doctrine of the best qualified experts cannot be brought into discussion, as it consists in the contribution of various specialists and works of international scientific forums of utmost importance to the codification and progressive development of international law, but without mandatory legal value. However, court decisions have mandatory legal force only for the litigating parties and only for the case settled. As a result, disregarding the contents of a decision may trigger the responsibility of the state that has disregarded the contents of the ruling pronounced. The category of the international courts whose decisions are taken into consideration also includes international arbitration tribunals.[17] The decisions of international courts being appreciated for their high scientific level can be invoked in similar cases.

Although not regulated by art. 38 of the I.C.J. Bylaws, still the unilateral acts are recognized as part of the category of sources of rights and obligations in international law. In order to determine the responsibility of the states for breaching the obligations instated by unilateral acts, it is necessary to invoke the distinction between the unilateral acts of international organizations and the unilateral acts of states. Within the acts of the international organizations we distinguish between: the acts that form the internal law of the organization, which, even if mandatory are not relevant to the issue of sources and the acts referring to reaching the objectives of the organization, which may be subdivided into acts with mandatory legal force and acts having the character of recommendation.[18]

Part of the category of acts with mandatory legal force, we can mention the resolutions that regard peacekeeping and international security and especially the ones adopted based on chapter VII of the UNO Charter. In this respect, art. 25 of the UNO Charter states that: "The members of the United Nations agree to accept and execute the decisions of the Security Council in accordance with this Charter." The resolutions with mandatory legal force adopted by the Security Council regard the reaching of precise objectives or establishing international standards in special fields.[19] Thus, if a state adopts a behaviour contrary to the conduct established under the resolution, it is triggered the responsibility of the state and as a result the sanctioning of the respective state.[20]

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[15] D.Popescu, op.cit., 2005, p.39.

[16] R.Miga-Beşteliu, *Drept internaţional public, Curs universitar (Public International Law, University Course)* ,vol.I, (Editura All Beck, Bucureşti, 2005), p.75.

[17] These can be set up by two or more states to settle certain disputes. The essential difference between arbitral courts and the C.I.J. is the ad-hoc al arbitration as different from the permanent character of the Court.

[18] D.Popescu, op. cit., 2005,p.37; Gerhard von Glahn, James Larry Taulbee, Law among Nations, 8th Edition, (New York, San Francisco, Boston, 2007), p.75-76.

[19] D.Popescu, *Sancţiunile în dreptul internaţional (Sanctions in International Law),* în „ Dreptul românesc şi integrarea europeană*",* vol.IV,2006, p.176-177.

[20] D.Popescu, *Natura bivalentă a actelor Consiliului de Securitate al O.N.U.(The Bivalent Nature of the acts of the UNO Security Council)*, în „ Dreptul românesc şi integrarea europeană", vol. I, 2003, p.91-93.

In principle, the resolutions of the UNO General Assembly have the value of *soft law,* that is they are recommendations, the states being free to choose whether to observe the provisions of the resolutions. A distinct category is represented by the resolutions adopted under the form of declarations that refer to fields of special importance to international law, such as: human rights, outer space, decolonization, principles of international law, etc. The declarations of the UNO General Assembly can acquire a conventional character, when, subsequently to adoption, they are formally accepted by the states (under the form of treaties or conventions).

At first sight, the unilateral acts of the states cannot be considered sources of international law, as they represent a unilateral manifestation of will, not being the result of the joint agreement of the states. Still, certain unilateral acts of the states are susceptible to have effects, that is to engage the state which has issued them or even to create rights and obligations.[21]

3. Existence of the obligation

In order to be able to talk about the international responsibility of the states, we need to refer to a conduct contrary to the conduct established under an obligation in effect as at the time of occurrence of the wrongful act. The problem that leads to unclear aspects is establishing the time when the obligation arises and the time when the obligation ceases to have effects. The controversy has been determined by the succession of the rules of international law and of the obligations assumed under the rules instated. If the obligations did not suffer changes in time, then this aspect could not be invoked and it would be very easy to prove that the state has engaged a conduct contrary to an obligation in effect, which has led to triggering its responsibility. Actually, this issue is far more complex, as international law is not a static system, the norms are issued when this is deemed necessary and they cease to exist when they become obsolete.[22]

The existence of the international obligation triggers three general cases which should be considered. *The first case* regards the situation where the obligation requiring a certain conduct has ceased to exist before the state has adopted a contrary conduct. It is obvious that we do not deal with a conduct contrary to international law, this not being a wrongful act. However, there needs to be clearly delimited the time when the obligation has ceased to exist. *The second case* regards the adoption by the state of a conduct contrary to the conduct prescribed by an existing obligation in force. Although the resolution could be considered to be a simple one, in the sense that it is obvious that the existence of the obligation determines the state to adopt a proper behaviour, still, in the practice and case law of international law, there have been controversies regarding the delimitation of the time of occurrence of the event from the time of settling the dispute.

Thus, if the obligation exists between the time of occurrence of the wrongful act and the time of settling the dispute, the decisions is easy to make. Disputes occur when the obligation assumed ceases to exist in the time span between the time of occurrence of the wrongful act and the time of settling the dispute. The analysis of the decisions pronounced internationally has confirmed the application of the principle that establishes the responsibility of the state, if the state has adopted a conduct contrary to the conduct required under the obligation assumed as at the time when the wrongful act has taken place. Moreover, it has been confirmed that it is of no importance the fact that the existence of the obligation assumed has ceased as at the time of settling the case. *In respect of the third case,* identified in the practise of the states and specialized literature, which might refer to a case where the state might adopt a conduct which at the time of occurrence was not contrary to the norms of international law, subsequently, however, a rule might come up setting a conduct that against the conduct of the state makes the latter wrongful. Is it possible to determine the responsibility of the state for a conduct contrary to a conduct imposed under a new rule, which did

[21] **R.**Miga-Beşteliu, op.cit.,2005,p.79.

[22] Yearbook of the International Commission, 1976, vol. II, Part One, p.14; Gerhard von Glahn, James Larry Taulbee, op.cit., 2007, p.67-68.

not exist at the time of the action of the state? In domestic law, a person cannot be criminally liable for an act that was not prohibited at the time when it was committed. The principle has been instated by the constitutional provisions of various states or of criminal codes, as well as of various international documents or conventions, such as for instance: The Universal Declaration of Human Rights of 1948[23], European Convention of Human Rights of 1950[24] etc. In the field of the civil responsibility of the states, this principle is often not states expressly, but it is no doubt that in this field also it represents a general rule. Being a general principle of law, accepted by all the law systems, it can be said that it is a valid principle also to the international society, which can be applied in the field of the international responsibility of the states.[25] As a result, we can conclude that the responsibility of the states for adopting a conduct contrary to the one prescribed by the obligation assumed is triggered if the obligations exist at the time of occurrence of the wrongful act.

In international case law, the aspects presented above are generally resolved implicitly, rather than explicitly. The best known thesis is the one formulated in 1928 by arbiter Max Huber in the *Island of Palmas* Case*,* the aspect that needed to be clarified regarded the problem whether it could be established the exertion of Spain's sovereignty over an island, as this state had discovered the island in XVI century. The arbiter decided that: "Both parties agree that an act should be appreciated in light of the law contemporary with it and not with the rules in force as at the time of occurrence of the dispute or the rules existing as at the time of resolving the case. "Therefore, we need to admit that the rule stated represents a general principle that can be applied also in other cases.

An example may be the decision ruled in the J. Bates Case as arbiter in the Joint Commission regarding Great Britain and the United States set up based on the Convention of 8 February 1853. The case brought forth to the Commission regards the conduct of the British authorities in respect of the American vessels engaged at the time in the slaves trading. The United States requested compensations from Great Britain, as the British authorities had freed a number of slaves aboard the American vessels which belonged to American nationals. The specificity of the case was, however, determined by the fact that the incidents occurred at different times, the arbiter having to establish for each incident whether slavery was allowed. The incidents occurred in the period when slaves trading was allowed, including in the British dominions, triggered the responsibility of the British authorities. As different from these, the incidents occurred in the period when slavery had been forbidden by the "civilized nations", including by the United States, could not be considered wrongful. In conclusion, the arbiter ruled that there was a breach of an international obligation if the conduct of the state bodies was contrary to an obligation in force as at the time when the conduct took place.[26]

The European Commission of Human Rights has often had the opportunity to apply the rule mentioned above. The most mediatized application is the one regarding decision 1151/61. A Belgian citizen invoking the provisions of art. 5 paragraph 5 of the European Convention of Human Rights claimed damages from the German Government for the prejudices caused to him by the detention and death of his brother in a concentration camp in 1945. The Commission overruled the request saying that although art.5 paragraph 5 of the Convention stated that any person who was the victim of an arrest or detention under conditions contrary to the provisions of this article was entitled to reparations, the case invoked did not fall under the scope of this provision, as it took place in a period of time when the Convention was not in effect.[27]

[23] UNO General Assembly Resolution, 217 A (III),Art.11, paragraph 2.
[24] Art.7-(1) European Convention of Human Rights.
[25] Yearbook of the International Law Commission, 1976, vol.II, Part One, p.19.
[26] Yearbook of the International Law Commission, vol. II,Part Two, 2001,p.134.
[27] Report of the International Law Commission, vol.II, Part One, 1976,p.17; European Court of Human Rights, Grand Chamber, Blecic v. Croatia, 2006, para.48

The practise of the states and the authors of international law have recognized the application of the principle according to which an act of the state is considered to be wrongful, if the breached norm was in force as at the time of occurrence of the act.

The instated principle is not only necessary, but is also sufficient to trigger the responsibility of the state. Once the responsibility has been triggered as a result of breaching the obligation, it cannot be affected by the subsequent cessation of the obligation as a result of the cessation of the treaty that has been breached or of another change to international law. Thus, the Court in the *Northern Cameroons* Case mentioned that if during the existence of the custodianship the custodian was responsible for the acts of violating the Custodianship Agreement as a result of which damage was effected to another member of the United Nations or to other citizens, the claim for damages cannot be eliminated by the cessation of the custodianship[28]. Similarly, in the *Rainbow Warrior Case,* it was stated that although the conventional obligations had expired with the passage of time, France's responsibility for breaching its obligations has effects as the breaching had occurred when the obligation was in force.[29]

From the above, it results that, according to international practice, doctrine and case law of international courts an act of a state cannot constitute a breach of its international obligation, unless the respective state was bound by the respective obligation at the time of the breaching.[30]

4.Contents of the obligation assumed

The specific contents of the obligation assumed or the particular type of conduct required to the state will not have effects on responsibility.

In the *Gabcikovo-Nagymaros Project Case,* C.I.J., referring to the provisions of the draft articles adopted by ILC in 1976 in supporting the solution ruled, underscored that it is a well-known fact that when the state commits a wrongful act, international responsibility is established irrespective of the nature of the obligation breached by it.[31]

In a similar context, it has been argued that the obligation regarding certain aspects can be considered as breached when a wrongful act is committed corresponding to the contents of the obligation. The rule formed the basis of the objection formulated in the *Oil Plaforms Case* in front of CIJ. It has been said that a treaty of friendship, trade and sailing cannot, in principle, be breached by a conduct that has involved the use of armed force. The Court has very prudently formulated an answer pointing out that the 1955 Treaty required to each party various obligations regarding various aspects. Any action from any of the parties that was incompatible with those obligations was considered wrongful, irrespective of the means by which it was taken. A breach of the rights of one of the parties according to the treaty, by means that involve the use of force, was considered as wrongful as a breach by means of an administrative decision or by any other means. The matters referring to the use of force were not, as a result, excluded *per se* from the scope of the Treaty, thus the breaching of an international obligations was an international wrongful act, irrespective of the subject and contents of the obligations breached and irrespective of the type of the noncompliant conduct.[32]

The breaching of an international obligation can sometimes be determined by the contents of the provisions of the domestic law, which may happen in case where the provisions of the domestic law conflict with the international obligations assumed. Thus, all the states are obligated to observe the international obligations assumed, in this respect the legislative bodies will take all the necessary

[28] Northern Cameroons, Preliminary Objections, I.C.J.Reports, 1963, p.15-35.
[29] Yearbook of the International Law Commission, vol.II, Part Two, 2001, p.136.
[30] Also see in this respect art. 13 of the Draft articles of ILC
[31] Also see in this respect art. 12 of the Draft articles of ILC.
[32] Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objections, I.C.J.Reports, 1956, p.811-812, para.21.

measures to put domestic legislation in agreement with international legislation, and the judicial bodies will apply the law adopted by the legislative bodies. In case where disregarding the international obligations is determined by the conflict between the domestic legislation and the international provisions, guilty are considered those domestic bodies that are in charge of adapting the domestic legislation to the internationally accepted norms of law. However, as pointed out above, the state is responsible for the internally wrongful acts of the state bodies.

The contents of the obligations assumed determines the necessity of making various distinctions between obligations according to the importance of the interest pursued. Thus, it can be identified the category of crimes and delicts, the category of the obligations of result and the obligations of means, as well as the category of the obligations that establish the adoption of a behaviour in an imperative manner or forbid a certain behaviour. The distinctions made have led to contradictory discussions on the cases where it is triggered the international responsibility of the states for wrongful acts or on whether such a distinction is necessary as part of the responsibility of the states for wrongful acts. The controversies have been brought to an end by reaching a unanimous agreement between practitioners, theoreticians and states, an agreement that points out to the principle according to which any breach of an international obligation triggers the responsibility of the state, irrespective of the object of the obligations assumed.

4.1 The triad: wrongful act, crimes and delicts

In classic international law the wrongful acts of the states which breached an international obligation were considered "international delicts", as it was not recognized the distinction between crimes and delicts as in domestic law. Together with the manifestation of the tendencies to outlaw war, war has started to be considered by doctrine an international crime. A valuable contribution in this respect was made by Romanian lawyer V.V.Pella, who supported the necessity of instating international responsibility for the war of aggression, qualified as being the most serious international crime.[33] The necessity of the distinguishing, within the general category of wrongful acts, a separate category that regards violations of norms of top importance to international society became obvious after the end of World War II. The terrible consequences of World War II consisting in the disappearance of a big number of people, destruction of property, massacres executed on human beings led to the necessity of adopting at international level a category of norms to ensure the observance of human rights and human being.

As a result, from the point of view of the responsibility of the states, in its initial works, ILC made a net distinction between international crime and international delict. According to art. 19 of the draft articles of 1996 a wrongful act consisting in a violation by a state of an international obligation so essential to the protection of fundamental interests of international community, that its breaching is recognized as a crime by this community overall, is an international crime.[34]

Para. 4 of art. 19 of the draft shaped the concept of international delict stating that any internationally wrongful act that is not a crime according to the above provisions is an international delict. The provisions mainly aimed at delimiting the category of international crimes from the residual category of international delicts.[35]

However, the delimiting was no longer kept in the final form of the Draft articles (2001), considering that no criminal consequences can be developed for states in case of violation of the fundamental norms. The distinction made between crimes and delicts is important as it underlines the

[33] **G**.Geamănu, *Drept internațional public (Public International Law)*, vol.I, (Editura Didactică şi Pedagogică, București, 1981), p.337.

[34] I.Diaconu, op. cit., vol. III, 2005, p.347.

[35] S. Villalpando, *L'emergence de la communaute internationale dans la responsabilite des Etats, (*Presses Universitaires de France, 2005), p.164.

protection of the values essential to international society, but also it was not well placed in the draft articles, as it presented a criminal approach rather than an international one.

In the reports presented, J.Crawford tried to reach a consensus between the members of the Commission replacing the notion of crime with the concept of "serious violation by a state of an obligation to the international community overall, essential to the protection of its fundamental interests"[36]. ILC has regulated the serious violations of the obligations established based on the imperative norms of general international law in Chapter III of Part II of the Draft regarding the contents of the responsibility of the states.

4.1.1. Serious violations of the *jus cogens* norms

The identification of the serious violation of an international obligation is done by using two criteria: the first criterion regards the violation of an obligation established according to an imperative norm of general international law, and the second criterion regards the effects considered under the aspect of their extent and nature.

In order to determine the contents of the obligations violated we need to consider the concept of imperative norms of the international law.[37] Based on the Convention regarding the treaties law of 1969, a norm of general international law is a norm accepted and recognized by the international community of states overall, as a norm from which no derogation is allowed and which cannot be amended unless by a norm of the general international law having the same character (art.53). Still, the Convention presents the concept of *jus cogens*, but does not identify, *exempli gratia*, categories of norms that do not fall under the scope of the concept.

Within the works of ILC, it cannot be reached a consensus with regard to listing various categories of this type of norms, and most authors of international law have referred to criteria related to the importance of the values protected by norms. Thus, it has been noticed that one of the prohibitions regards aggression, the norms that forbid such actions being considered imperative norms. In the comments made by ILC on the treaties law, as well as in the debates that took place in the Vienna Conference, the governments of the states agreed that not resorting to force or to the threat of force was an imperative norm. The states also agreed with other examples supported by the Commission in respect of the norms that forbid slavery and slaves trading, genocide, racial discrimination and apartheid. These aspects have been subject to international regulations, the states ratifying the conventions and treaties with no exception. In respect of slavery and slaves trading, it can be said that they are no longer important, as such cases are rather isolated occurrences. However, the importance given to human rights and the fact that slavery and slaves trading would be a denial of the human rights have determined international community to establish norms which forbid such acts having the value of *jus cogens*. Supporting the position of imperative norms of the norms that forbid genocide has also been identified by the international case law. The position of imperative norm was also applied in case of the provisions regarding the banning of torture in art. 1 of the December 1984 Convention against torture and other cruel, inhuman and degrading treatment and the punishment of such acts.

Eventually, we mention the international existence of the imperative norms that regard the right to self-determination. C.I.J. stated in the *East Timor* Case that the principle of self-determination was one of the most important principles of the contemporary international law, which led to an imperative obligation which ensured the exertion and observance of the principle as a fundamental principle of international fundamental law.[38]

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[36] Third report on state responsibility by Mr. J.Crawford, 2000, p.3.

[37] **S. Villalpando**, op.cit., p.164.

[38] East Timor (Portugal v.Australia), I.C.J.Reports, 1995, p.90, p.120, para.29; In this respect, please refer to the Declaration on the principles of international law regarding the friendship and cooperation between states, according to the UNO Charter, Resolution of the UNO General Assembly no.2625(XXV), 1970.

The obligations imposed by the imperative norms aim at defending the most important values and interests for international community, which regard the existence of the states and their citizens, protecting the basic human values.

The concept of imperative norms of the general international law has been recognized by the practice of the states, international case law, as well as the courts and tribunals of the states. The position of C.I.J. was expressed, for instance in the *Barcelona Traction* case as follows: "An essential difference needs to be established between the obligations of the states to the international community overall and those that arise as against another state part of diplomatic protection. Given their very nature, the first regard only the states. Given the importance of the rights involved all the states can be considered as having a common legal interest in protecting them, and the correlative obligations are *erga omnes* obligations"[39]The Court was interested to present a position contrary to the one presented by the victim state against the background of the diplomatic protection, underscoring the position adopted by all the states with regard to the violation of an obligation recognized by the international community overall. Although the case presented dealt with no such case, the Court clearly underscored that the responsibility of the states would be triggered in case of a violation of various obligations that are characteristic to the whole international community, and given the importance of the protected law, all the states have a legal interest in protecting those rights.[40]

The shaping of the position of the states, but also the international case law regarding the category of imperative norms, as well as the theories prepared in the literature of international law have led to the identification of the respective fields, thus they will be grouped in: norms that regarding the banning of the use of force and the threat of force; norms the regard the principle *pacta sunt servanda*; other fundamental principles of international law stated in the UNO Charter; the elementary rights to life and human dignity, the norms that refer to rights generally recognized to all members of the international community, such as the freedom of seas and outer space.

The qualification of the violations of international obligations as serious has been introduced by the provisions of art.40 of the ILC Draft, considering that the violation of such an obligation is serious if it shows an obvious or systematic disregard of the respective obligation on the behalf of the relevant state.

We believe that the provision mentioned above is not correctly formulated, even if in the comments made, ILC points out that the word "serious" regards the representation of the intensity of the violation of the obligation and not that a violation of such obligation is not serious. In order to be serious, two alternative criteria are established in order to appreciate seriousness: the violation of the obligation should be obvious or systematic.[41] In order to be systematic, it needs to take place in a deliberate and organized manner and in order to be obvious the intensity of the violation is taken into account, established according to the values protected by the violated norms and by the effects resulted.[42]

Specialized literature[43] says that art. 40 of the Draft sets two distinct regimes of responsibility:

- "ordinary" international responsibility, that which is established based on meeting the conditions stated by art.2 of the Draft,[44] whose general consequences consist in the obligations to halt the wrongful behaviour, to meet, under the conditions required, the obligation initially violated and to repair the prejudice effected by the wrongful conduct;

[39] I.C.J.Reports 1970, p.3-33.

[40] Yearbook of the International Law Commission,vol.II, Part Two, 2001,p.278.

[41] R.Miga –Beşteliu, *Dreptul răspunderii internaţionale a statelor.Codificarea şi dezvoltarea progresivă în viziunea Comisiei de Drept Internaţional a O.N.U.*, în Revista Română de Drept Internaţional, nr.2, 2006,p.10.

[42] Yearbook of the International Law Commission, 2001, p.285.

[43] S. Villalpando, op.cit., p.254.

[44] These conditions regard the violation of an international obligation and, respectively, the attribution of the wrongful behaviour to the state.

➢ aggravated international responsibility, involving two conditions (nature of the violated obligation and the intensity of the violation), which need to be met in order to trigger various specific consequences.[45] In the literature of international law, it has been asserted that among the factors that have contributed to determining the degree of seriousness there are: the intention to breach the norm, the extent and number of the violation and the seriousness of the consequences.[46]

4.1.2.Consequences specific to serious violation of the jus cogens norms

First of all it is very clear that a serious violation of the obligations assumed determines the legal consequences stipulated for breaching an obligation of "common law"[47], thus the guilty state has the obligation of ceasing the wrongful act, the obligation of giving assurance and guarantees that the act will not be repeated, as well as the obligation of repairing the prejudice caused. The occurrence of the obligations listed will not be affected by the seriousness of violating the obligation, however supplementary consequences might appear in case of serious violations, consequences determined by the special circumstances of such violations.

As noted, the first condition regards the obligation of the state to cease the wrongful act, but it is obvious the possibility of cases where the guilty state should not comply. In this respect, the states need to cooperate to put an end to the violation occurred. The interventions shall be made firstly by means of the international organizations, these being the main forms of international cooperation. Generally, the focus is on the intervention of the United Nations which is a well organised framework, whose members of most states of the world. Cooperation, however, cannot be reduced only to a framework organized by the scope of the United Nations, it can also be achieved by a reduced number of states or may take the shape of non-institutionalized cooperation. The obligation to cooperate in order to repress wrongful acts exists for the victim states, but also for the states that have not suffered and which need unite their efforts to counteract the effects of the violations occurred. Cooperation has been manifested internationally pre-emptively, but also for the purpose of doing away with the effects, however in this case cooperation has been rather low and without a significant efficiency.

No state should encourage the commissioning of serious violations of the imperative norms of general internal law, but on the contrary should make efforts to remedy the situation, without giving aid, assistance or supporting the situation created. A state that helps guilty states, supports them or gives them assistance shall be considered guilty and shall be responsible. In a related development, collective manifestation of non-recognition is an efficient way of repressing the serious violation occurred internationally, but also a form of implicit cooperation, aiming at isolating the guilted state and forcing it to remedy the situation the has been condemned.

Although it was normal that specific consequences of a serious violation of the obligations should include the consequences of a violation of a common obligation, it was also necessary to add new ones. As a result, it is established that the states should cooperate in order to end, by licit means, any serious violation; no state should recognize a licit a situation created by a serious violation and support the maintaining of this situation; there are not excluded the legal consequences stated for breaching an obligation or the supplementary consequences, which may appear on the basis of international law further to a serious violation.[48]

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[45] R. Miga-Beşteliu, op.cit., 2006, p.9.

[46] See in this respect also art. 1 of the Convention for banning the use for military purposes or for any other hostile purposes techniques of changing the environment (1976), which states that each party state assumes the obligation of not engaging in using for military purposes or for any other hostile purposes techniques of changing the environment having wide scope, long lasting or serious effects, as means that effect destruction, damage or prejudices to another party state.

[47] R Miga Beşteliu**,** op.cit., 2006,p.11.

[48] art.41 of the Draft artciles of ILC regarding the responsibility of the states for internationally wrongful acts.

Authors of international law claim that the Draft does not require overwhelming obligations to the guilty state, but that are certain measures to be taken by all in order to achieve an "isolation" of the guilty state and paralysation of the consequences of its conduct.[49]

4.2.Obligations of means and obligations of result

Based on the claims in the specialized literature, it can be asserted that the delimitation between the two categories is based on the fact that in case of the obligation of means the purpose of the obligation needs to be achieved by means, behaviours, precisely determined actions, whereas in case of the obligations of result it is of no interest how this result is to be obtained.[50] The category of obligations of means, there can be introduced the states' obligation of adopting certain laws or legislative measures, such as the ones in the field of human rights; the obligation of submarines to sail on surface in the territorial sea of another state or the obligation of police forces not to enter the premises of the diplomatic missions without the acceptance of the head of the diplomatic mission.[51] An obligation of means is breached when the state adopts a behaviour that is not conformant in accordance with the conduct determined specifically under the respective obligation.

The distinction becomes important when the existence of a violation is established, but it is not relevant from the point of view of the responsibility of the states for wrongful acts. In the *Colozza* case, the European Court of Human Rights was requested to rule in a case where the trial had been conducted in the absence of a person, the latter not being informed of the trial; the person had been convicted to a 6-year term in prison and could not subsequently challenge the sentence. The person claimed that they did not have the possibility to defend themselves as per art.6 of the European Convention of Human Rights.[52] The Court pointed out the following: "The contracting states enjoy a great liberty of appreciation in choosing the means to ensure the surety that their legal systems comply with the requirements of art.6 para. 1 in this field. The task of the Court is not to indicate to the states what these means are, but to establish whether the result required under the Convention have been obtained. To this end, the resources offered by the domestic legislation need to prove efficient, and the accused, who was in a similar situation to the one in which Mr. Colozza found himself, needs not to be obligated to prove that they had not tried to elapse from justice or that his absence was due to a case of force majeure.[53]

As a result, the Court rules that art. 6 requires an obligation of result. In order to settle the cases invoked in such circumstances it is not sufficient to analyse what measures have been adopted in order to realize an effective application of art. 6. The distinction between the obligations of result and the obligations or means is not conclusive to prove a breach of art.6.

It is important for the determination of the responsibility of the states for wrongful acts to determine the conduct that needs to be adopted, that is the indication of the result pursued or the adoption of concrete actions presented by the international legal provision. Thus, if the state fails to obtain the result pursued, it is guilty of committing a wrongful act, and in case of the obligations of means it is guilt as it has not adopted the behaviour described in the norms of international law. Irrespective of the case, the state will be responsible for the wrongful acts committed, of essence being the wrongful character, that is why in the field of responsibility the distinction is not important, the specialized literature saying that it is more a distinction of interest to civil law.[54]

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[49] D.Popescu, op.cit., 2006, p.183; R.Miga-Beşteliu, op.cit., 2006,p.11-12.

[50] G.Geamănu, op.cit., 1981 , p.338.

[51] D.Popescu, A.Năstase, *Drept internațional public (Public International Law)*, Ediție revăzută și adăugită, (Casa de editură și presă „Șansa" S.R.L., 1997), p.343.

[52] Article 6 of the European Convention of Human Rights.

[53] Decizii ale Curții Europene a Drepturilor Omului, Culegere Selectivă (Decisions of the Euroepean Court of HUman Rights, Selection fo choice), Editura Polirom, 2000, p.148

[54] **I**. R.Urs,S. Angheni, *Drept civil (Civil Law),* ediția a-III-a, (Editura Oscar Print,București, 2000), p.179.

4.3. Actions or omissions

The conduct attributed to the state may consist in an action or omission. The cases where the international responsibility of the states is triggered by an omission are at least as numerous as the ones where the international responsibility of the states is triggered by an action, in principle, there being no difference between the two. Furthermore, as also specified in the ILC, there cannot be isolated an omission from other relevant circumstances to determined responsibility[55]. Specialized literature claims that the violation may take place as a result of a positive action -*delicta commissiva*- (when the obligation was of not doing) or of an omission, of refraining - *delicta omissiva*-(when the obligation was of giving or doing).[56]

In conclusion, the international responsibility of the states may be triggered by committing a wrongful act that may consist in an action or omission originated by both causes. For instance, the international dispute regarding the Corfu Strait, between Great Britain and Albania, settled by the I.C.J. in 1949 gives a classical example of establishing the responsibility of the states both for action and for omission. As at October 22, British ships passing through the Albanian territorial waters hit a mine field placed in the strait, incurring of deaths and material damage[57]. I.C.J. held Albania responsible for not having notified the existence of the mine field placed in its territorial waters, as well as the fact that it allowed its territory to be used contrary to the right of other states, according to the theory that the sovereign of that territory knew all the actions or inactions taking place on its territory. I.C.J. also held responsible Great Britain for undertaking demining operations in the Albanian territorial waters without any consent.[58] In the case of the diplomatic staff in Teheran, triggering responsibility took place due to the Iranian authorities' omission to take all the measures necessary to protect the US diplomatic and consular staff.[59]

4.4.Hypothesis of the complex delict

4.4.1 Continuous wrongful act

According to the established principles, a breach of a specific obligation of international law takes place when the respective obligation was in force for the state at the time when it adopted the conduct contrary to the behaviour required by the obligation. The mentioned rule is very clear for instantaneous conducts, but difficulties are encountered when the conduct is extended for a certain period of time. In this case, three situations can be identified*: the first situation* regards an obligation that was not in effect at the time when the state adopted a certain conduct, and as a result, the state acted legally, however, subsequently, the obligation came into effect and the acts of the state have become wrongful*; the second situation* regards the case where the conduct of the state was contrary to the norms of international law in the beginning, however, subsequently the obligation became no longer effective and the conduct has become licit; *the third situation* regards the possibility where the state acted wrongfully in a continuous manner, the obligation being permanently into effect.

The application of the principle is not difficult on condition that the acts committed be continuous and the time span during which the acts took place should coincide with the period in which the obligation was in force. If at the time when it acted, the acts of the state were perfectly legal and the obligation of the state came into effect subsequently, the state will be responsible only for the violations occurred as of the time when the obligation came into effect. On the other hand, when the conduct of the state was wrongful at the time when it started to act, but subsequently it became licit as the obligation ceased to have effects, the state will be responsible for the wrongful act committed correspondingly to the time when the obligation was in effect.

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[55] Yearbook of the International Law Commission,vol.II,Part Two,2001,p.70.

[56] I. Anghel, V.Anghel , op.cit., p.43; M.Eliescu, *Răspunderea civilă delictuală (Delictual Civil Responsibility)*, (Editura Academiei, Bucureşti, 1972),p.141-142.

[57] Corfu Channel,Merits,I.C.J.Reports, 1949, p.4, 22-23.

[58] I.Chung-Legal Problems involved in Corfu Channel incident, 1959, p.2.

[59] Yearbook of the International Law Commission, vol.II,Part Two,2001, p.70.

The notion of continuous act is common to all the great system of law, being also recognized in international law. International courts have encountered many cases where the continuous wrongful act has been invoked. For instance, in the *Diplomatic and Consular Staff* Case, the Court took into account the fact that Iran had successively and continuously breached its obligations to the United States of America as stated in the Vienna Conventions of 1961 and 1963.[60] The consequence of the continuous wrongful act depend on the circumstances in which it has occurred and during the violation effected. For instance, in the *Rainbow Warrior* Case[61] the arbitration invoked the France's omission of withholding two of its agents on Hao Island for a period of three years, a request formulated in the agreement between France and New Zeeland. The arbitral tribunal made a distinction between continuous acts and instantaneous acts pointing out that by making this classification in this case it was obvious that the continuous violation consisted in the omission to go back to the Hao Island, the two agents having committed a continuous act. The classification mentioned is not a pure theoretical one, but on the contrary it has effects in practice, determining serious violations, playing an important role also in determining the prejudice effected.[62]

ILC noting the implications of the continuous wrongful acts has deemed it necessary to include a special provision in the Draft articles which have provided for the three cases regarding the length in time of the act.[63]

Thus, the Draft establishes, to a certain extent, that the distinction between the violation that is instantaneous and the continuous wrongful act by underscoring the importance of the identification of the starting moment and the moment when it ended, mentioning that the subsequent effects are not considered an extension of the wrongful act committed.

We consider that the introduction in the category of continuous wrongful acts of the obligations of vigilance, of the obligations that are required in order to prevent the occurrence of wrongful acts, as being important and conclusive in the field. The violation of an obligation of vigilance can be considered a continuous act, if the state fails to adopt any measure during the period in which the event continues to occur and to constitute an act contrary to the conduct required by the obligations assumed. For instance, the obligation to prevent across border air pollution in the *Trail Smelter* Case was violated by acts of continuous pollution.[64] Indeed, in such cases, the violation can be progressively aggravated by the length of time during which the acts continue to have effects. We mention that the violation of the obligation to prevent can be effected by an instantaneous wrongful act, whereas if the conduct remains contrary to the norms assumed during a period of time, it changes into a continuous wrongful act.

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[60] United States Diplomatic and Consular Staff in Teheran, I.C.J.Reports 1980,p3-37.

[61] Marc Perrin de Brichambaut, Jean-Francois Dobelle avec la collaboration de Marie-Reine d'Haussy, *Lecons de droit international public*, (Presses de Sciences Po et Dalloz, 2002),p.208. In 1985 two French agents sank a ship belonging to Greenpeace called Rainbow Warrior, while in the territrial waters of New Zeeland. The dispute was brought in front of the UNO Secretary General and his decision was accepted by the two states taking the shape of an agreement. This treaty established that the two French agents are to be transferred under French military escort to Hao Island for a three-year period. Before the three-year period had elapsed, the two agents left the island without requesting the approval of New Zeeland. The Court ruled that France violated its obligations assumed.

[62] Rainbow Warrior,UNRIAA, vol. XX,1990,p.217-264.

[63] Article 14 -Extension in time of the breach of an international obligation -1. The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue; 2. The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.; 3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.

[64] A similar situation occurred in the case of Romania vs. Hungary and to a certain extent Serbia, with regard to the incident in Baia Mare, in the year 2000, when River Tisa and other rivers were polluted with cyanides and when the polluted waters reached Danube, the situation mentioned occurred.

4.4.2 Complex wrongful act

As different from the acts analysed above, the wrongful acts to which we will refer are neither instantaneous nor continuous. Doctrine says that the complex wrongful act consists in a series of separate acts that regard different situations, which creating a unitary whole can constitute a violation of an international obligation or the complex wrongful act may consist in a succession of acts that regard the same situation, a circumstance that determines eventually a violation of an international obligation.[65]

In the first case, the complex wrongful act consisting in a series of acts that regard different situations, which overall form together a violation, there can be considered the case where each act is a violation of the obligations assumed, or each of them is a violation, other than the one constituted by the whole of them.

We consider that the notion of complex act is limited to violations of the obligations that regard a sum of conducts and not acts considered individually.[66] Examples may be the obligations regarding genocide, apartheid or the crimes against humanity, systematic acts of racial discrimination etc. Some of the most serious wrongful acts are defined in international law by presenting their complex character. The importance of the obligations mentioned in international law also determines the necessity of instating responsibility of the states for such acts.

The crime of genocide may be an illustration of a complex wrongful act. It is regulated as crime distinctly by the Convention of 1948 regarding the prevention and punishment of the crime of genocide, in the By-laws of International Criminal Court, as well as in the by-laws of the ad-hoc tribunals. All the legal instruments present the content of the crime of genocide by listing the acts that can be committed. Thus, based on the Convention in 1948, genocide is defined as being any of the acts committed with the intention of extermination, in whole or in part, a national, ethnic, racial or religious group, consisting in: the physical extermination of the members of the group; serious harming the physical or mental integrity of the members of the group; intentionally subjecting the group to living conditions that would lead to its physical destruction, partial or total; measures that aim at preventing births within the group, forced transfer of children from one group to another.[67]

Of essence is the identification of the period when this complex delict took place. It is asserted that the occurrence takes place at the time of the latest action or inaction, which cumulated with other actions or inactions, is sufficient to determine a wrongful act, not being necessary to be the past in a series. Determining the time when it is identified the violation of the international obligation is made by reference to the primary rules of international law. The number of actions or omissions that need to constitute wrongful acts is also determined by the phrasing and purposes contained in the primary rules. The legal provisions do not clearly establish the number of actions or inactions that need to be part of a series in order to constitute a complex wrongful act, requiring only a sufficient number, which sometimes might determine uncertainty on the moment of committing a complex wrongful act.[68]

It is recognized the existence of complex acts that are constituted from a series of actions or inactions regarded as a whole, which determines a wrongful act, but it is not excluded the possibility that each act should be wrongful by reference to another international obligation.

In the ILC. Such cases are regulated as follows: 1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act; 2. In such a case, the breach extends over the entire period starting with the first of

[65] Yearbook of the International Law Commission, vol.II, Part One, 1976,p.21.

[66] As established by C.D.I. in the comment made in 2001,p.149.

[67] art.2 of the Convention regarding the prevention and repression of the crime of genocide,9 December 1948; **I.Diaconu**, op.cit., vol. III, 2005, p.375.

[68] Yearbook of the International Law Commission, (Part Two, 2001), p.149.

the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation. [69]

Conclusions

The analysis of the objective element of the internationally wrongful act has involved approaching the specific issues related to it, namely: the origin of the obligation violated, the existence of the obligation violated, as well as the analysis of the content of the obligation assumed. Establishing the obligation violated is determined by the existence of a number of sources of international law and by the possibility of occurrence of specific consequences according to the source of the obligation. As a result, there can be identified obligations assumed based on customary laws, obligations arising from treaties, obligations determined by the application of a general principle of international law, obligations imposed by decisions adopted by a relevant body of an international organization, obligations arisen from the decision of I.C.J. or arbitral decisions and obligations assumed under a unilateral act.

Part of the existence of the obligation violated, the problem on which the research has focused was that of the time when the obligation arises and the time when the obligation ceased to have legal effects, the controversies being determined by the succession of the rules of international law. The conclusion reached, according to international practice, doctrine and case law, in case where the state was bound by the respective obligation at the time of the occurrence of the violation.

The content of the obligations assumed has led to making a series of distinctions between obligations according to the importance of the obligations pursued. Thus, it has been analysed the triad wrongful act, crimes and delicts; the category of the obligations of result and obligations of means; as well as the category of the obligations that establish the adoption of a behaviour in an imperative manner or that forbid a certain behaviour.

In respect of the triad wrongful act, crimes and delicts, the attention has been focused on the concept of "serious violation of the *jus cogens* norms" and on their consequences, a concept that has replaced the notion of international crime presented in the ILC Draft of 1996.

The hypothesis of complex delict has brought into discussion the concepts of continuous wrong act and complex wrongful act. With regard to the continuous wrongful act it has been underscored the importance of identifying the moment when the act ceased to be, mentioning that the subsequent effects are not considered an extension of the wrongful act effected. In a different development, the research of the complex wrongful act has been conducted by reference to violations of the obligations that regard a sum of conducts and not facts considered individually.

The identification of the feature characteristics of the international obligations is necessary in order to prove the existence of the objective element of the wrongful act, this aspect having a major importance to international case law.

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NATIONAL AND INTERNATIONAL CONTEXT OF TRAINING FOR ROMANIAN MAGISTRATES

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Abstract

In the context in which human resources management has an international dimension, the paper briefly analyzes the process of training for magistrates, both from the perspective of general international principles, as well as from the perspective of national legislation. The importance of permanent development of training programs for magistrates is reflected in the professionalism of magistrates and assumes a certain adequacy to the specific needs of the judicial system. From this perspective, the training for magistrates has a compulsory feature not only in relation with the national or European legislation, but also is a practical need for adjustment to continuous changes that occur in the judicial relations, by legislative reforms, some radical, as a consequence of the dynamic social life.

***Keywords**: judiciary organization, human resources management, training, magistrates, international principles.*

Introduction

In the present socio-technological evolution, it is natural that every category of organization to be concerned that its employees have a serious professional background, with a large cultural horizon, able to use modern techniques and technology. In this context, training and professional development are premises and essential conditions which determine the efficiency of all social work.

Training is a complex and lengthy process, preparing each person for the chosen job or occupation, using all existing methods and forms for acquiring basic scientific, technical, general and specialized knowledge and for acquiring the required job skills. In other words, training must embed learning process and work, acting in two directions, namely:

- Insuring each employee a high volume of general and specialized knowledge
- Training professional skills[1].

By training each organization aims the practical development of the strategic ability, encouragement and eases of efforts to perfect and develop the intellectual capital. The encouragement of the development of an organization can only be achieved by conception and implementation of knowledge management, using personal development plans, as a component of the performance management[2].

In the legal system, the quality of the staff is essential for the achievement of organizational objectives. It is expressed by the fact that the ensemble of requirements necessary for the fulfillment of attributions, jobs stated by the law set a true status of the staff working in justice, but in the same time the exercise of professional attributions shapes the idea of mission in the system[3].

In this context, the present study aims the research of the means of professional training for magistrates, referring to the principles and the national and international framework.

Being an area of research provided for by the legislator, the references to the literature are minimal, prevail the analysis of the normative texts. My own contribution to this study, besides the synthetic analysis of the legislative framework, consists of the indication of the vulnerabilities of the

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[1] Cornescu Viorel, Mihăilescu I., Stanciu S, *Managementul organizației*, (Bucharest: All Beck, 2009), p. 206.

[2] Armstrong Michael, *Managementul resurselor umane. Manual de practică*, (Bucharest: Codecs, 2003), p. 40.

[3] Barac Lidia, *Management judiciar*, (Bucharest: Hamangiu, 2009), p. 134.

presented means of in-service training for magistrates, but also of suggested means to improve the system.

1. Principles and international normative framework settling the training for magistrates

According to international documents, training for magistrates is important because each judicial system is the supreme guarantor of democratic function of national, European or international institutions.

According to ***Opinion No 4 (2003) of the Consultative Council of European Judges (CCJE) on appropriate initial and in-service training for judges at national and European levels***[4] it is essential that judges, selected after having done full legal studies, receive detailed, in-depth, diversified training so that they are able to perform their duties satisfactorily. Such training is also a guarantee of their independence and impartiality, in accordance with the requirements of the Convention for the Protection of Human Rights and Fundamental Freedoms. Lastly, training is a prerequisite if the judiciary is to be respected and worthy of respect. The trust citizens place in the judicial system will be strengthened if judges have a depth and diversity of knowledge which extend beyond the technical field of law to areas of important social concern, as well as courtroom and personal skills and understanding enabling them to manage cases and deal with all persons involved appropriately and sensitively.

Principles grounding the development of training for magistrates are found in the ***European Charter on the statute for judges***[5], according to which "certain precautions must be taken in preparing judges for the giving of independent and impartial decisions, whereby competence, impartiality and the requisite open-mindedness are guaranteed in both the content of the training programs and the functioning of the bodies implementing them. This is why the Charter provides that the authority/court must ensure the appropriateness of training programs and of the organization which implements them, in the light of the requirements of open-mindedness, competence and impartiality which are bound up with the exercise of judicial duties. The said authority must have the resources so to ensure. Accordingly, the rules set out in the statute must specify the procedure for supervision by this body in relation to the requirements in question concerning the programs and their implementation by the training bodies".

The importance of training was also stated by Art 6 Point 3 of the ***Bangalore Principles of judicial conduct***[6] according to which "a judge shall take reasonable steps to maintain and enhance the judge's knowledge, skills and personal qualities necessary for the proper performance of judicial duties, taking advantage for this purpose of the training and other facilities which should be made available, under judicial control, to judges".

The ***Resolution of the Council and of the Representatives of the Governments of the Member States meeting within the Council on the training of judges, prosecutors and judicial staff in the European Union***[7] adopted in the reunion of the Justice and Home Affairs Council on 24 October 2008 in Luxembourg, established the following:

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[4] Opinion No 4 (2003) of the Consultative Council of European Judges (CCJE) on appropriate initial and in-service training for judges at national and European levels available on-line at:
http://www.coe.int/t/dghl/cooperation/capacitybuilding/Source/CCJE(2003)OP4_en.pdf

[5] European Charter on the statute for judges available on-line at: http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/European-Charter-on-Statute-of-Judges_EN.pdf

[6] Bangalore Principles of judicial conduct Bangalore Principles of judicial conduct available on-line at: http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf

[7] Resolution of the Council and of the Representatives of the Governments of the Member States meeting within the Council on the training of judges, prosecutors and judicial staff in the European Union available on-line at:
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:299:0001:0004:EN:PDF

1. To contribute to the development of a genuine European judicial culture, based on diversity of the legal and judicial systems of the Member States and unity through European law;

2. To improve the knowledge of the European Union's primary and secondary law among judges, prosecutor and judicial staff, including fostering the knowledge of the procedures before the European Court of Justice;

3. To promote, through appropriate training, the application of European law by judges, prosecutors and judicial staff, in a way which is in keeping with the fundamental rights and principles recognized in Art 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union;

4. To foster the knowledge of the legal systems and law of the other Member States, notably by promoting relevant courses of comparative law.

2. Training for judges in the Romanian judicial system

In the light of the international principles, the training for Romanian judges was settled by Law 303/2004 modified and amended on the statute of judges and prosecutors[8], the methodological norms being established by the Regulation on in-service training for judges and prosecutors and certification of results, approved by the Superior Council of Magistracy Decision No 322/2005 modified and amended.

There are two ways of training stated by the Romanian legislation, namely:

- Initial training for future judges and prosecutors
- In-service training for judges and prosecutors[9]

Initial training for future judges and prosecutors is settled by Art 16 of the law, stating that it is performed "by the National Institute of Magistracy and consists of theoretical and practical training of future judges and prosecutors". The duration of training for future judges and prosecutors is 2 years.

Also, during courses, the future judges and prosecutors perform an internship in the courts and prosecutor's offices, assist in courtrooms and in criminal prosecutions to directly familiarize with the activities of judges, prosecutors and judicial staff.

Training for future judges and prosecutors is approved by the Superior Council of Magistracy, at the proposal of the National Institute for Magistracy.

In-service training must consider the dynamics of the legislative process and consists mainly in the knowledge of national legislation, of European and international documents to which Romania is part, of the jurisprudence of courts and Constitutional Court, European Court of Human Rights and of the Court of Justice of the European Union, of compared law, of deontological norms, in the multi-disciplinary approach of novelty institutions, as well as in the knowledge of foreign languages and computer skills (Art 35).

The National Institute for Magistracy is responsible for in-service training for judges, prosecutors, presidents of courts or prosecutor's offices where the first perform their duties, namely for judicial managers and for each judge or prosecutor by individual training.

Regarding the in-service training of judges and prosecutors, it is performed by two ways:

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[8] Law 303/2004 modified and amended on the statute of judges and prosecutors published in the Official Gazette, Part 1, No 576/29 June 2004, amended by Government Emergency Ordinance no.124 of 24/11/2004, published in the Official Gazette, Part 1, No 300/1168/9 December 2004, approved by Law No 71/2005, published in the Official Gazette, Part 1, No300/11 April 2005. It was republished based on Art 12 of Title XVII of the Law No 247/2005 on reform in fields like property and justice, as well as on some adjacent measures, published in the Official Gazette, Part 1, No 653/22 July 2005, renumbering the texts,

[9] Regulation on in-service training for judges and prosecutors and certification of results, approved by the Superior Council of Magistracy Decision No 322/2005, published in the Official Gazette No 816/8 September 2005 and amended by Decision No 2223/17 December 2009 of the Superior Council of Magistracy, published in the Official Gazette No 12/8 January 2010.

I. Organizing regular activities within each court of appeal and prosecutor's office attached to a court of appeal consisting of consultations, debates, seminars, sessions or round tables, with the participation of the National Institute of Magistracy, their agenda being approved by the Superior Council of Magistracy. Within this form of training a special role belongs to judicial managers of the courts of appeal or, of prosecutor's offices attached to a court of appeal, who have the obligation to name judges or prosecutors responsible with in-service training. The responsible for decentralized in-service training in courts and prosecutor's offices have the possibility to use as staff for training university teachers from the superior legal education system, judges and prosecutors, specialized judicial staff or other national or international specialists. Using the staff for training who is not qualified as trainer of the National Institute of Magistracy it is necessary the approval of the leading board of the court or prosecutor's office.

II. Participating, at least every 3 years, on in-service training organized by the National Institute for Magistracy, by national or foreign superior education institutions or on other forms of professional training.

In 2009, proposed by the National Institute of Magistracy, the plenum of the Superior Council of Magistracy has approved three new strategies of NIM on initial and in-service training for magistrates, as well as on the recruitment, training and evaluation of NIM's trainers for 2009-2012. Also, the Strategy of the Superior Council of Magistracy in the area of human resources, adopted in the plenum of SCM by Decision No 1320/27 November 2008, included objectives on the initial and in-service training for judges and prosecutors.

In establishing the strategic objectives were considered: the analysis of trainings organized/coordinated by the National Institute for Magistracy in previous years, the necessities for training in the judicial system resulted from the structure of judicial staff, the obligation to provide training stated by national laws and strategic documents containing Romania's commitments assumed in the adhesion document, mainly the obligations resulted from the Action plan for the fulfillment of the terms within the cooperation and verification mechanism of the progress registered by Romania in the area of the reform of the judiciary and of the fight against corruption, adopted by the Romanian Government according to the Decision no. 1346 of October 31, 2007, especially the priorities in the area of training resulted from the European Commission's monitoring reports; the obligations for training for judges and prosecutors resulted from the analysis of international documents, studies or reports on the judicial system or on the statute of judges and prosecutors.

3. Vulnerabilities of the training process for Romanian magistrates

Nevertheless, despite the fact that the process of training for magistrates has a solid legal basis, in practice was noticed that it presents a series of vulnerabilities, such as:

- The absence of evaluation of the socio-professional profile of the future magistrate;
- The centralized emphasized feature of training, found both in the curricula of seminars, as well as in the way they are carried out;
- The lack of practical feature of the initial training within NIM;
- The lack of the formative feature which aims the development of abilities and skills specific to magistracy, the appropriation of deontological norms, awareness on the professional role and membership in the judicial system.
- Regarding in-service training, the number of places for training offered for magistrates varies from a year to another, depending on the budget received by NIM, access to European funds subsequent to pre-adhesion period being an insignificant moment. In addition, the normative framework regarding budget, old and inflexible, significantly heavies the development of decentralized in-service training process.
- The presence of a large number of theoreticians among trainers, inexperienced in legal practice, limits the development of practical skills of future magistrates.

- The lack of balance among NIM teachers between the number of judges-trainers and the number of prosecutors-trainers.
- The participation of Romanian magistrates to stages, trainings or study visits in courts, prosecutor's offices or other judicial institutions in EU Member States, though it has increased from year to year, it is still insufficient in relation to the needs of the legal system. The main obstacles are the budgetary and organizational limitations, as well as the level of linguistic competences of judges.

4. Implementing measures to improve the training process for magistrates

In order to overcome the above-mentioned issues, we propose the following solutions for the improvement of the initial and in-service training process:

- Creation of an uniform and homogenous program for initial training, which will alternate modules of training in the Institute with internships in courts and prosecutor's offices attached to them, and internships in other institutions, from the first stage of the training program, common for judges and prosecutors, as well as in the stage of specialized training for the role of judge or prosecutor;
- Congestion of the initial training program;
- Modularization of the training program based on specific competences, by regrouping disciplines adjacent to civil and criminal law, so that interdisciplinary transfer becomes possible, useful in the assimilation and connection of different law institutions;
- A higher responsibility of internship judges, by their participation in courts, as well as the obligation to draft court decisions/procedural documents for prosecutors etc;
- Emphasis on the extracurricular component of training;
- On-line seminars held either by national authorities, or by international organisms, represent efficient methods for training, both from the perspective of results, as well as from the perspective of costs;
- Attracting specialists from other judicial areas to participate on in-service training;
- Expanding the capacity of NIM to organize in-service seminars, which will allow the participation in seminars of a large number of magistrates;
- Regularly access European funds for training for magistrates, in order to complete the budgetary resources and to annually provide a sufficient number of seats in trainings, including the contribution of Romanian magistrates to build an European area of freedom, security and justice;
- Insuring a coherent management of NIM, as well as regarding the budget for training for magistrates;
- Strengthening the capacity of NIM to access and manage European funds assigned to training for magistrates, assumes some measures such as: training for the NIM's Department of Public Policies staff in the management of European funds, adjusting the budget as to insure co-financing from the national budget, including by an increased budgetary autonomy of NIM in relation with the Superior Council of Magistracy etc.

Also, budgets of the Superior Court of Magistracy, Ministry of Justice and National Institute of Magistracy should insure the necessary funds:

- For the participation of Romanian judges and prosecutors in European training sessions (internships, conferences, exchanges between judicial organisms based on European exchange programs, such as the European Judicial Training Network - EJTN);
- For the adoption of modern solutions for training and professional motivation (for instance, supporting the change in specialization for magistrates by granting scholarships for 6-12 months);
- In order to unfold projects proposed to by the professional associations of judges.

To achieve these objectives it is necessary the promotion of some legislative changes in order to:

- Adjust the management of funds for training
- Insure an appropriate level of the initial training, regardless the recruitment methods;
- Insure the coherence of management of NIM.

Conclusions

Training magistrates as professionals of law has acquired new meanings and values, national training institutions, along with their supra-national structures, being called to identify proper answers, but also to share expertise, resources and training actions to achieve the objective, represented by the training, in the next few years, for judges and prosecutors in order to fulfill the act of justice, the desiderate of every civil society.

A common European jurisdiction ideally assumes at least a relative uniformity in judicial training; this is why Romania must permanently adjust not only its legislation, but also its jurisprudence in training for magistrates, by permanently staying connected to the changes that occur in the large area of human resources management.

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EXPORTING LAW OR THE USE OF LEGAL TRANSPLANTS

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Abstract
From the general theory of law, we are aware of the migration of legal concepts, practices and institutions. We believe that there are no legal system anywhere in the developed world that has not used legal transplants, that has not borrowed from another country's laws. This paper intends to explore the concept of "legal transplants". Why are they used? Where do they come from? Is their assimilation uncomplicated? Why are they rejected in some cases? A transplanted law should be comported with the host state in order to be accepted? Should be discussed the relationship between law and culture when contemplating a study of legal transplants? What forces propel those borrowings? However, this paper does not claim to offer definite answers to the above mentioned questions. Its goal is more modest. In understanding the phenomenon of legal transplants, we underline the fast growing importance of using the comparative research.

***Keywords**: legal transplants, legal transfers, globalization, culture, borrowing.*

Introduction

It is interesting that "as far as we can look, the law, it seems, is an experienced and eager traveller. As far as we can look, *the migration of legal concepts*, practices, and institutions has been a commonplace occurrence all around the world: from the "reception" of Roman law in many countries; from America's constitutional exports to the defeated countries after World War II to the large-scale transfer of Western legal knowhow to the post-socialist countries of Eastern Europe. We will not find a legal system anywhere in the developed world that has not borrowed from another country's laws. That much is undisputed."[1]

In the present, the process of *globalization* (economic, political, legal) engages a redimension of the law sciences functions'. The debates on the evolution of law concern the harmonization of the legislation in the 27 states that compose the European Union, the creation of effective instruments at EU level able to cope with the "globalization" of organized crime and, in general, with the crime phenomenon, the increase of the cooperation in combating international terrorism, the improvement of traditional legal instruments (e.g., the entire contractual arsenal). As professor Nicolae Popa underlines[2], there is a real legal process of ideological and institutional contamination. In this context it is familiarized the concept of "legal transplant" or "legal transfer". In a reality marked by the encounter of the legal civilizations, lawyers can not only address the phenomenon only from the perspective of national legal traditions, but from the perspective of interdependencies that competition of legal values from different areas of law imposes.

Alan Watson, the legal historian and comparativist, created the notion of *legal transplant* and in a monograph described its effect as „the moving of a rule or a system of law from one country to another, or from one people to another"[3].

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[1] Inga Markovits, *Exporting Law Reform – But Will It Travel?*, 37 Cornell Int'l L. J. 95, (2004);

[2] Nicolae Popa, *Teoria generală a dreptului (i.e. General Theory of Law)*, third edition, (C. H. Beck, 2008), p. 10;

[3] See Allan Watson, *Legal transplants. An approach in Comparative Law*, 1st ed. (1974), 2nd ed. (1993), 21 *et seq apud* Holger Fleischer, *Legal Transplants in European Company Law – The Case of Fiduciary Duties*, 2 ECFR 378 2005, p. 378;

From a theoretical perspective, his choice of terms has been criticed[4]; for instance, *Rodolfo Sacco,* head of the Italian Guild of Comparative Law, prefers the expression *legal formants*[5], *Gunther Teubner*, a leading German legal sociologist, suggests *legal irritants*[6], *Pierre Legrand*, a Franco-Canadian comparativist, denies the possibility of legal transplants[7]. But, beyond the terminological dispute, what is legal transplant and why do we need it? Where do they come from? When are they used? And how does it work as a balance between the globalization of law and the indigenization of it?

My own work has been to critically examine the doctrine on this topic and to try to answer the above mentioned questions. However, this analyse should go deeper, because more interesting findings could be revealed.

Paper content

It is interesting that in the doctrine there is disagreement about what forces determine those borrowings and what happens to the borrowed laws and institutions as they are "planted" into foreign soil. Doctrinaires like Alan Watson see no problems with exporting law from one country to another, from one historical period to another. Watson believes that law is not "the natural outgrowth of a particular society, but the intellectual creation of clever lawyers, easily adaptable to local use by other clever lawyers elsewhere on the globe"[8].

What is globalization? Globalization is not a new phenomenon; it has existed for a long time in different forms: from the military expansion of the Roman Empire through Genghis Khan, to the so-called capitalism of today, these are all different types of globalization in different times. Therefore, all through history, globalization has always existed in military, religious and economic form. The word "globalization" we use refers to an economic, technological and cultural transnational process since World War II, and particularly refers to how this transnational process surmounts national boundaries and becomes a new challenge to national sovereignty.

However, the *globalization* of law and the *indigenization* of it are two inalienable elements in contemporary legal development. They do have certain contradictions and conflicts, which are inevitable. But how should we co-ordinate these conflicts? *Legal transplant* is introduced by most countries to the homogenization of international rules. In other words, legal transplant has become a method used to balance the conflicts between the globalization of law and the indigenization of it.

Doctrinaires sustain that a positive legal transplant is an effective way for indigenization to resist the globalization of law.

And it does make legal traditions continue even under the explosion of globalization. Even more, it does, to some extent, prevent legal colonialism.

Although globalization does exert such a huge influence, indigenization also appears similarly strong. Every nation is seeking to gain maximum benefits from the impacts of globalization. In that case, legal transplantation is of course the first and best choice.

It was discovered that ancient Phoenicia and countries around the Mediterranean had systematically transplanted the Commercial Code from Babylonia, which has been proved by

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[4] Holger Fleischer, *Legal Transplants in European Company Law – The Case of Fiduciary Duties*, 2 ECFR 378 2005, p. 379;

[5] See Sacco, 39 Am J. Comp. L. 1 (1991) under the heading „Legal Formants: A Dinamic Approach to Comparative Law"; Rodolfo Sacco preffered the expression *legal formants* because it captures the social, economic, political and doctrinal elements of a particular legal system;

[6] See Teubner, 61 Mod. L. Rev. 11, 12 (1998); Teubner suggested *legal irritants*, which cannot be transferred from something alien into something familiar, but rather will unleash an evolutionary dynamic in which the external rule's meaning will be reconstructed and the internal context will undergo fundamental change;

[7] See Legrand, 4 Maastricht Journal of European and Comparative Law 111 (1997) under the title *The Impossibility of Legal Transplants*;

[8] See Alan Watson, *Legal Transplants and Law Reform*, 92 Law Q. Rev. 79, 79 (1976);

massive unearthed legal literature[9]. Afterwards, the Phoenician Commercial Code was absorbed by its colony Rhodian, and it became the famous Rhodian Law[10]. Then, the Rhodian Law was copied to a great extent by Greek Law and Roman Law[11]. Moreover, most western countries' private law was more or less directly from either Roman Civil Law or English Common Law in Middle Ages. Also, most Asian and African countries' laws were transplanted from Mohammedan law. It is obviously that the phenomenon of transplantation is not restricted to the modem world, it happens all the time whenever law exists[12].

In modern times, this kind of phenomenon occurs on a large-scale, and legal transplantation becomes more common. For example, France transplanted law from Ancient Rome, Germany transplanted law from France, the United States from the United Kingdom, Japan from France and Germany, Asian countries from Japan and western Europe, Japan from the United States after World War, and most developing countries in Africa, Asia and Latin America transplanted their laws from either Common Law or Civil Law country, and so on. There are so many that we cannot point all of them out.

The literature on transplants showed that legal systems can accommodate a plurality of models. Though only some legal systems are currently classified as "mixed", many more exhibit features revealing that borrowing or transplantation are regular occurrences, even across boundaries that would not have seemed to be so permeable. This finding casts serious doubts on the utility of the established approach to comparative law with its heavy reliance on the classification of legal systems into legal families[13].

Please note that the legal transplant is possible and it is a quite complex process. Concerning the institutions and the content we choose, there are some important points to be considered prior to transplanting the institutions. Firstly, do we want to transplant the entire legal system or only the specific legal rules, legal concepts or legal principles? Secondly, is the law we want to transplant closely linked to politics, the economic system, ideology or value sense or is there no relationship between them? Thirdly, does the rule in question have different political purposes or social functions? Fourthly, do we want to transplant international law or specific national and traditional law? It is obvious that what we discussed above is much more closely linked to the possibility of legal transplant and the methods we use.

But what are the causes of legal transplant? Two types of law reform can be discerned: one is qualitative law reform and the other one is quantitative law reform. Moreover, of all the legal changes that occur, perhaps one in a thousand is an original innovation.

We consider that nowadays most legal changes are imitation, in other words, they adopt or transplant institutions from other nations and it is rare that one sees an original innovation.

But must the rules or institutions transplanted fulfil the same aims and achieve the same results in their society of adoption as in their society of origin? Thus, it is important to notice that the question of success can arise at more than one stage of the transfer of legal rules and institutions. We may be concerned about how a legal transplantation emerges or the way it exerts its influence.

Why is a legal transplant necessary? *First*, it needs low experimental costs and can achieve results in a short time. Comparing to original innovation, it is fair to say that legal transplantation require low costs in investigation of problems, research and testing of systems, and drafting bills. *Second*, it can help to adjust the new social relations evoked by reform and also avoid legal

[9] See Feng Zhuohui, Falv Yizhi Wenti Tantao, in He Qinhua (Ed.), *Fa de yizhi yu fa de bentuhua* 20-21 (2001);

[10] We can also find some relevant resources about it in the Rome Digest;

[11] Feng Zhuohui, supra note 9, at 21;

[12] Shaohong Zhuang, *Legal Transplantation in the People's Republic of China: A Response to Alan Watson*, 7 Eur. J.L. Reform 215 2005;

[13] Michele Graziadei, *Legal Transplants and the Frontiers of Legal Knowledge*, 10 Theoretical Inq. L. 723 2009;

backwardness during the reform. *Third*, in learning international conventions and universal procedures in various countries, it can ultimately decrease unnecessary transaction costs due to differences between different countries.[14]

Therefore, legal transplantation is exactly what legal modernization needs. The differences between legal systems are not only caused by differences in legal methods and legal techniques, but also in legal values and legal mentalities. It is actually the differences in legal spirits and legal values that distinguishes traditional and modern, developed and underdeveloped legal systems. In those legal systems which are still traditional and backward, it is better to transplant some laws and institutions from developed countries, especially those laws or institutions which are well developed and tested, in order to accelerate their legal innovations. Without doing that, they will face an enlarging distance between developed countries and themselves and the delay of their legal modernization. Moreover, they will lose opportunities to modernize their legal systems.

But when should we solve the problems arising from transplanting the law? Should we start to solve it when it arises after every single law is transplanted? This would be a inefficient. Why not solve the issues properly before the transplant? In this way, a lot of problems can be avoided or solved before legal transplantation takes place.

The experience of "moving a rule or a system of law from one country to another" has indicated that the transplanted laws usually cannot achieve the same results and fulfil the same aims in their society of adoption as in their society of origin. This is because the result caused by the law usually is limited to the specific time and place.

Moreover, transplanting laws which deal with citizens, marriage, family, property, assignment etc., will be extremely difficult, because those laws are based on a country's social values which vary from one country to another. Transplanting these laws would involve putting different social values together. In most cases conflicts exist between these different values, which make the implementation difficult.

However, transplanting laws which are dealing with nature relations, social management, maintenance of public security etc., might be easier and more successful. These laws usually come from national rules, and are an accumulation of social experience, for example, environmental protection law and technology law. Moreover, international conventions and international treaties can be transplanted easily, especially those that deal with international trade, because these international conventions and treaties are usually negotiated among many countries and meet their interests.

When transplanting laws, one country should not only make some choices according to its actual situation, but also create some corresponding systems to make sure that the transplanted laws can be implemented successfully. It will take some time to be able to assess the result of legal transplantation. The goals of legal transplantation set by the country of adoption should be reasonable, because there would be the same laws or institutions, implemented in the same way, but they could not possibly have the same domestic resources as the donor country. The transplanted laws usually cannot achieve the same results in the country of adoption as in the country of origin.

Therefore, legal transplantation is a massive systems engineering project; it is not simply transplanting a single law or institution, but also creating the circumstances and the legal framework to make sure that the transplanted law can perform successfully.

Moreover, a successful legal transplantation also sets certain requirements on an acceptor's social circumstance. Legal transplantation usually happens on a large-scale as social reform happens. Thus, if one country's social, economic and political situation has seen remarkable changes, and it is changed to have more enlightened social values, then it will inevitably accept legal transplantation more easily.99 In that case, those countries which have a market economy and democratic political systems will find it easier to transplant laws then those who do not.

[14] See He Qinhua, *Fa de yizhi yu fa de bentuhua*, China Legal Science. Vol. 3. at 90 (2002);

Legal culture, in other words how to deal with the relations between different legal cultures, is another factor. As an important part of national culture, legal culture is usually based on social values, local customs and national feelings.' When transplanting laws, we should not only have a comprehensive understanding of the legal culture of the country of origin, but also have a scientific appraisal of the compatibility between transplanted laws and local legal culture, after making a rational choice." 2 It is again those laws which deal with citizens, families and marriages that have close relations with domestic culture and are more difficult to be transplanted; those laws which have more technical elements and are commonly used in international trade, such as securities law, patent law and contract law are easier to be transplanted for these laws are less influenced by domestic culture.

Defining the word "culture" is the subject of debate in every language. However, culture:

„includes speech, knowledge, beliefs, customs, arts and technologies, ideals and rules. That, in short, is what we learn from other [persons], from our elders or the past, plus what we may add to it. ... Culture might be defined as all the activities and non-physiological products of human personalities that are not automatically reflex or instinctive"[15].

Cultural identity plays a significant role in individual identity and in personality formation. Although culture is inseparable from the existential and experiential state of persons, it is not uniform from one region of the world to another. In the doctrine, there is underlined the idea that „there is tremendous amounts of cultural variation around the world. This fact is important before analyzing the concept of „legal transplants" because it raises the possibility that the culture into which a law is transplanted will differ from the culture in which that law was created. Thus, the relationship between law and culture must be discussed when contemplating a study of legal transplants"[16]. Between law and culture there is a very close relationship, because the law must comport with the cultural context in which it is located in order to that law to be effective.

Thus, legal indigenization is a key point in a successful legal transplantation. It is believed that the law is a mirror of society and it reflects specific national histories, cultures and social values. The legal systems of any two countries cannot be possibly the same. Without legal indigenization, it is difficult to transplant a legal culture to another successfully. And in order to harmonize different legal cultures, it is necessary to pay attention to both external and internal legal cultures, particularly the internal legal culture. By harmonizing the internal legal culture, the external culture will be harmonized as well.

After more than twenty years from the first edition of his influential monograph on legal transplants, Alan Watson underlined in a law review article that "The act of borrowing is usually simple. To build up a theory of borrowing on the other hand, seems to be an extremely complex matter"[17].

Watson used the concept of "legal transplant" in the very narrow sense of the transfer of a legal rule from one jurisdiction to another, and did not seem to consider it necessary to acknowledge the strong determining role of culture of the "sending" or "receiving" society when assessing the fate of any such rule.

A Japanese jurist, Masaji Chiba, defines it in the wider sense of a "law transplanted by a people from a foreign culture". Very pertinently, Chiba includes the transfer of law through the migration of people from one place to another in his concept, specifically mentioning the

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[15] A. L. Kroeber, *Anthropology: race, language, culture, psiychology, prehistory, 253* (rev. Ed. 1948); see also Clyde Kluckhohn, *Culture and behavior,* 73, (Richard Kluckhohn ed., 1962) *apud* Philip M. Nichols, *The viability of transplanted law: Kazakhstani reception of a transplanted foreign investment code*, U. Pa. J. Int'l Econ. L., vol. 18:4, 1997, p. 1237;

[16] Philip M. Nichols, *The viability of transplanted law: Kazakhstani reception of a transplanted foreign investment code*, U. Pa. J. Int'l Econ. L., vol. 18:4, 1997, p. 1238;

[17] Alan Watson, 44 Am. J. Comp. L. 335 (1996);

immigration of people from the Korean peninsula in the 3rd century AD as having involved "probably the first transplantation of foreign law to Japan"[18].

But there is also negative opinions regarding the use of *legal transplants.* For example, Sir Otto Kahn-Freund considers that the use of foreign law as a model for domestic law "becomes an abuse only if it is informed by a legalistic spirit which ignores this context of the law"[19]. This idea is based on the observations of Montesquieu who stated that it is „un grand hazard" (a great coincidence) if the laws of one nation fit into the legal system of another one[20]. He concludes that "Montesquieu's pessimism has remained valid in all matters". Allan Watson, responding to Kahn-Freund argued that "Montesquieu badly – very badly – underestimated the amount of successful borrowing which had been going on, and was going on, in his day"[21]. The best argument is, according to Watson, the reception of Roman law in Western Europe.

It seems that Alan Watson may, at times, be right about the ease of legal transfers[22]. Some legal innovations work indeed like clever mechanical contraptions that the law reformer can pack into a suitcase and unpack where needed. For instance, the abolition of the death penalty. This proposition does not take its strength from the cleverness of experts but from a society's basic moral principles. One would assume that legal culture plays an important role in its acceptance or rejection. But while you need legislative approval to repeal the death penalty, you do not need public compliance. The hurdles to abolition lie in parliament, not among the people. Since renouncing the death penalty is a prerequisite for joining the European Union[23], Eastern European parliaments have been eager to comply with a reform requirement that at very little cost can signal their political maturity. Like their Western European role models, they have done so in the face of a strong public preference for retaining capital punishment[24]. But as in the case of electoral reform, the public, in this case, cannot avoid, bypass, or undercut by daily acts of disassociation and defiance a liberalization of which it does not approve. No administrator needs to worry about the hangman going it alone. With luck, the public may eventually come around to share the abolitionists' convictions, as it did in Germany. But it will not matter if that does not happen. In the case of self-executing law reforms, transplanting legal rules seems indeed, as Watson claims, "socially easy".

That means that transplants such as antitrust, bankruptcy, or money laundering laws do not arrive like bare-root plants in their new surroundings but come with at least a little bit of soil clinging to their roots that may help them grow. Take bankruptcy, for instance. Bankruptcy statutes do not deal only with the consequences of economic failure. They address many other questions (often implicitly relying on answers that a legal culture has provided elsewhere): questions about securing credit, concepts of property or contract, social fairness, and moral rights and wrongs. Like a tent fastened by the stakes that surround it on all sides, a bankruptcy scheme might begin to wobble if

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[18] Masaji Chiba, *Legal Cultures in Human Society* (Tokyo: Shinzansha International, 2002) at 20-21 [Legal Cultures] *apud* Prakash Shah,*Globalisation and the Challenge of Asian Legal Transplants in Europe,* 3 Annals Fac. L. Belgrade Int'l Ed. 180 2008. Subsequent streams of migrants from the Korean peninsula continued to have a crucial bearing on legal developments, notably with the introduction of Buddhism in the 6th century AD, and also agricultural and artisan techniques over many years.

[19] O. Kahn-Freund, *On uses and Misuses of Comparative Law*, 37 Mod. L. Rev. 1, 27 (1974);

[20] Montesquieu, *De l'esprit des lois*, Livre I, chapitre 3 (J. P. Mayer & A. P. Kerr eds., Gallimard 1970) (1749)) ("Les lois politiques et civiles de chaque nation … doivent etre tellement propres au people pour lequel elles sont faites, que c'est un grand hazard si celles d'une nation peuvent convenir a une autre.") *apud* Philip M. Nichols, *The viability of transplanted law: Kazakhstani reception of a transplanted foreign investment code*, U. Pa. J. Int'l Econ. L., vol. 18:4, 1997, p. 1241;

[21] Alan Watson, *Legal Transplants and Law Reform*, 92 Law Q. Rev. 79, 80 (1976);

[22] Inga Markovits, *Exporting Law Reform – But Will It Travel?*, 37 Cornell Int'l L. J. 95, 2004;

[23] See Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol No. 6, Apr. 28, 1983, 212 U.N.T.S. 262;

[24] See, e.g., Alexander S. Mikhlin, *The Death Penalty in Russia* 171 (1999) (reporting that in Russia, only 6.6% of the population favors the complete abolition of the death penalty);

some of the stakes that uphold it break or are left ungrounded. That means that bankruptcy reforms cannot be designed in splendid isolation.

They are much more susceptible to being undermined by cultural dissonances than my "potted plants". Despite their "newness" to Eastern European citizens, bankruptcy or antitrust reforms still must mesh with the instincts and convictions that former Socialists carry over from their pasts.

That makes the choice of the model from which these law reforms are copied crucial to their success. Again, take bankruptcy. In times of fundamental economic change, the law might want to encourage new beginnings and reward entrepreneurial risk-taking that for so long had to lay dormant under Socialism. Thus, Eastern European countries might favour laws modelled after the American Bankruptcy Code of 1978, which is debtor-friendly and with its provisions on reorganization, consumer bankruptcy, and debt forgiveness, gives even ordinary citizens the chance to start anew after economic failure. The liberating aspects of America's bankruptcy model also appeal to Western Europeans: the new German Insolvency Law of 1994, which after much debate entered force in 1999, introduced reorganization and, for natural persons, a court-managed procedure for debt release, in the Federal Republic.

But the German example also shows how tricky it can be to establish reforms that clash with deeply held cultural convictions. Because, to Germans, debt forgiveness looks very much like moral capitulation, German creditors have been reluctant to contractually agree to cancel unpaid debts.

Moreover, the path to court-managed debt forgiveness for natural persons under the new German law is littered with substantive and procedural obstacles. Already in the first year of the new law's application, commentators were calling for "a reform of the reform".

Conclusions

So where does all this leave us? With some fairly banal and unreliable rules of thumb about the likely viability of legal transplants. Legal rules requiring no individual compliance are easily incorporated into foreign legal systems.

Reforms that carry with them their own surroundings ("potted plants") will do better, the more institutional support and personnel they have and the less dependent they are on local cooperation and approval. Law reforms that are inconsistent with deeply held moral and political beliefs may work if they only slightly affect convictions at the periphery of the local value system. But their success is doubtful if they contradict fundamental cultural gut reactions. The more complex and multilayered a particular environment, the greater the danger that legal imports will irritate local sensibilities. For this reason, procedural changes might be riskier than substantive reform because procedure is based on repetition, role-playing, and tradition ("we've always done it like this") and is saturated with unspoken assumptions and conditioned reflexes. Finally, law reform that corresponds to common habits and beliefs or that can connect with institutions and procedures that have performed reasonably well in the past-grounded change-seems much more promising than change that had to start from scratch.

It is actually very difficult to decide whether a legal transplant is a success or not.

In conclusion, the topic of legal transplantation will never be out of date. And we should always bear in mind that, as different countries exist with different levels of legal development, legal transplantation will always be unavoidable.

I have merely sketched some outlines of current legal debates concerning legal transplants. It remains vital for more research to be conducted. The study of legal transplants provides a vital critical supplement to mainstream theories about legal change.

However the doctrine considers that it is worthwhile continuing this intellectual and interdisciplinary endeavour[25].

[25] Holger Fleischer, *Legal Transplants in European Company Law – The Case of Fiduciary Duties*, 2 ECFR 378 2005, p. 378.

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CASES OF INDIRECT EXPROPRIATION IN INTERNATIONAL ECONOMIC LAW

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Abstract
Unforeseen difficulties arise along with the government measures whose object is not to expropriate or to nationalize the foreign investment, but to deprive the foreign investors of the rights attached to their investments. These measures are generally known as measures of indirect expropriation or nationalization. When asked about what falls into the concept of indirect expropriation, a simple answer can not be given easily, but the circumstances in which these measures may occur can be described and discussed. These measures could be grouped as follows: forced sale of property; forced sales of shares of an investment through a corporate vehicle; indigenization measures; taking control of investment management; determination of others to take physical property; failure to provide protection when there is interference with the foreign ownership; administrative decisions that cancel licenses and permits required for foreign businesses to operate in the host state; exorbitant taxation; the expulsion of the foreign investor contrary to the international law; harassment (e.g. freezing of the bank accounts).
This paper therefore argues that in practice there are many situations which may be analysed as measures of indirect expropriation.

***Keywords**: indirect expropriation, host state, taking, dispossession, foreign investor.*

Introduction

This paper argues that in practice there are many situations which may be analysed as measures of indirect expropriation; however, the law can provide a basis to answer the above mentioned question, but the circumstances leading to the question can scarcely be determined.

As a general principle, a state may do whatever it wants on its territory. Modern assertion of sovereignty in the economic sphere is also carried by the principles of economic self-determination and permanent sovereignty over natural resources. The right to control the economic affairs of the state is one of the rights that European countries have supported and exercised regularly. This is an inherent aspect of state sovereignty: to control all people, incidents and objects found on its territory. Due to the principle of states equality, there is no reason why the same right should be exercised by all States[1].

It is interesting that in the international economical law the minimum standard of international existence is being used. The content of this standard is difficult to identify in a concrete manner. In addition to the rule on compensation for expropriation and settlement of disputes through a court which is outside the state host, it appears that there are no further guidance on the content of this standard. It is said that the assessment of compensation by a foreign court, and the requirements that expropriation is discriminatory and for a public purpose under all the international minimum

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[1] Sornarajah M., *The International Law on Foreign Investment, Third edition, Cambridge University Press, New York, 2010*, pag. 119, *apud* Shaw Compare M., *Title to Territory in Africa* (1986), p. 16;

standard. Besides the rules regarding to compensation for expropriation advanced by developed countries, it seems that there are no other rules associated with the international minimum standard[2].

The right to property is a human right and this right must be respected also for foreigners, so, if his property is taken, he must be compensated. Major conventional sources of human rights such as the International Covenant on Civil and Political Rights and the European Convention on Human Rights do not contain references to the right to property. Instead, the Protocol. no. 1 to the European Convention of Human Rights proclaims this right. However, the case law generated under the provisions on property rights does not recognize a right to property without reservation. Other human rights conventions recognize this right, but also the right of the state to interfere with the right to property when there is a public interest.

The *treatment of foreign investment* is defined as the set of principles and rules of international and national law governing the international investment, since its creation until its liquidation. Principles and rules of international law can be derived either from non-conventional sources and, in particular, from the general principles of international law or conventional sources, treaties and agreements, both multilateral and bilateral.

The national principles and rules are developed not by the investor's home state, but by the host state. These laws and regulations translate the host state policy choices regarding the international investors. These political choices vary from state to state depending on a number of considerations, in this case there are three types of legislations or regulations - legislation and regulations aiming a policy of *incitement*, *control* or *deterrence*, as underlines the famous professor Carreau[3].

Paper content

The transfers from the private sector to the public sector are becoming rare. The priority became the transfer from public sector to the private sector. In the 1960s and 1970s, the states from the South used expropriation and nationalization very often for the investments made by the Northern states and in the 1980s and 1990s privatizations were imposed, in the Northern and in the Southern states, as well as in the Western and in the Eastern states[4]. These transfers do not rise the same problems in international economic law.

Thus, there are transfers *negotiated* between the private transferor and the public transferee (*there is no interest for them in the international economic law, because they are made through contractual operations, revealing at the same time microeconomics and micro-legal*[5]) and *forced* transfers from the private sector to the public sector, towards which we turn our attention.

The generic term is *taking*[6], which we encounter frequently in the protection clauses of bilateral instruments. This term is not great because it implies that the private investor not to be deprived only of the right of possession. The measure of taking is depriving the investor of the investment essential rights *for the benefit of the public authority*, irrespective of how the taking was made and whether or not it would be consistent with the international law.

But within the category of measures of taking, there are some specific differences. First, *expropriation* and *nationalization* are the most important forms of dispossession. Expropriation and nationalization are acts of public power which cause the transfer of ownership from the private sector to the public sector, with some differences between the two notions. Expropriation results from an

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[2] Ibidem, p. 128;

[3] Carreau Dominique, Juillard Patrick, *Droit international économique, 3e édition, (Dalloz, Paris, 2007)*, p. 461;

[4] Ibidem, p. 529;

[5] Ibidem, p. 531;

[6] In French, „*dépossession*";

administrative measure, while nationalization arises from a legislative measure. Expropriation is made under judicial control, while nationalization is beyond any control. Asymmetry of these procedures is translated into economic and legal realities. Expropriation concerns individual property while nationalization concerns a collection of goods which are not necessarily individualized. Expropriation is to satisfy a need of general interest, but for a local scope, nationalization is to satisfy a need of general interest, but for a national scope.

Expropriation and nationalization should respect the principle of compensation. If this principle is respected, they are considered legitimate under international law, if not respected, they are considered illegal under international law. In other words, expropriation or nationalization which does not respect the principle of compensation would be distorted in relation to the qualification attached to it by its author. Thus, the respective measure of expropriation or nationalization would obtain the character of a *spoliation*[7].

Thirdly, *seizure*, within the meaning of many Western countries, has a special place in the category of generic measures of takings. Expropriation and nationalization are two different forms of public transfers, while the seizure is a *penalty*, it punishes individual behavior, considered reprehensible by the law. Thus, it can be stated that seizure punishes economic crimes. By definition, it excludes granting of any compensation.

Unforeseen difficulties arise with the *governmental measures whose purpose is not to expropriate or to nationalize the foreign investment, but to deprive investors of rights attached to their investments*. Some international instruments mention in different terms these measures (sometimes these differences are significant) in order to subjugate them to the same principles and rules of expropriation or nationalization measures.

These measures generally known as *indirect measures of expropriation or nationalization* are not new. The Permanent Court of International Justice (PCJI) and the International Court of Justice (ICJ) have ruled on the government interference threshold that would have been taken as indirect expropriation or nationalization - PCJI: the case concerning the *Factory at Chorzów* (1926), the case of *Oscar Chinnor* (1934) and ICJ: *the Barcelona Traction* case (1970). The same guidelines are found in Starrett[8] and Tippetts[9] cases of the famous Iran-U.S. Claims Tribunal.

Therefore, we can state that the concept of *indirect measures* is not new. But what is new is the context in which these indirect measures are taken. If in the past, it was about individual actions, in the present it is about non discriminatory general measures taken for a public interest, such as environmental protection.

Defining *indirect takings* becomes difficult because there are diverse ways of affecting property interests. These types of taking have been identified as "disguised expropriation", to indicate that they are not visibly recognisable as expropriations or as "creeping expropriations"[10], to indicate that they bring about the slow and insidious strangulation of the interests of the foreign investor. In Middle East Cement Shipping and Handling Co. v. Egypt[11], indirect expropriation was described as "measures taken by a state the effect of which is to deprive the investor of the use and benefit of his investment even though he may retain nominal ownership of the respective rights".

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[7] Carreau Dominique, Juillard Patrick, *op. cit.*, p. 532;

[8] Starrett Housing Corp vs. Iran, Iran-U.S. Claims Tribunal Report no. 4, 1983, p. 122;

[9] Tippetts vs. TANS – AFFA Consulting Engineers of Iran, Iran-U.S. Claims Tribunal Report no., 1984, p. 219;

[10] Dolzer R., *Indirect Expropriation of Alien Property* (1986) 1 ICSID Rev 41; B. Weston, *Constructive Takings under International Law* (1975) 16 Virginia JIL 103. Creeping expropriation may be more appropriate to denote the slow and progressive measures adopted to initiate attrition of ownership and control rights. See Tecmed v. Mexico (2006) 10 ICSID Reports 54, para. 114, which emphasises that such expropriation takes place "gradually and stealthily";

[11] ICSID Case No. ARB/99/6 (2002), para. 107. The sentence goes on to equate creeping expropriation with the phrase "tantamount to a taking", in investment treaties;

Moreover, the awards of the Iran–US Claims Tribunal have been a fruitful source for identifying such types of taking. The Tribunal dealt with types of taking that took place in the context of a revolutionary upheaval following the overthrow of the Shah of Iran, and the propositions the Tribunal formulated may not have relevance outside the context of the events that attended that upheaval.

The assimilation of indirect expropriation to direct expropriation is seen as crucial, as it builds a platform for an analysis of the remedies that are to be provided[12].

As mentioned above, the types of indirect taking that could amount to expropriation (involving also conduct by the state) have been identified in the doctrine[13] and in arbitral awards. Unless the conduct of those committing the acts is directly attributable to the state, the taking cannot involve state responsibility.

Professor Sornarajah has done an impresive work by grouping these different types of taking as follows:

1) forced sales of property;
2) forced sales of shares in an investment through a corporate vehicle;
3) indigenisation measures;
4) taking over management control of the investment;
5) inducing others to take over the property physically;
6) failure to provide protection when there is interference with the property of the foreign investor;
7) administrative decisions which cancel licences and permits necessary for the foreign business to function within the state;
8) exorbitant taxation;
9) expulsion of the foreign investor contrary to international law; and
10) acts of harassment such as the freezing of bank accounts.

Using the information obtained from professor Sornarajah, we will discuss point by point the above mentioned types of indirect takings.

1) Forced sales of property

From the beginning, we should cross a line between forced sales of the foreign investment which are brought about by civil unrest or economic downturns and those brought about by a state policy such as the indigenisation of the economy. A state cannot be held responsible for such conduct on the part of the foreign investor, unless it has taken measures that affect the investment. But, if the unrest is engineered by the host state and the violence is directed at the foreign investors for the specific purpose of ensuring that they leave the host state, clearly there is a situation that involves a taking. Where the foreign investor abandons the property or makes a quick sale of the property in these circumstances, there is no voluntary conduct on his part. The conduct is induced by the state. State responsibility could therefore arise in such a situation[14].

Moreover, where there is racial discrimination that motivates conduct, this gives rise to a separate head of liability.

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[12] In Biloune v. Ghana Investment Board (1993) 95 ILR 184, para. 75, the tribunal held that no distinction should be drawn between direct and creeping expropriation. The decision was followed in Metalclad v. Mexico (2000) 5 ICSID Reports 209; (2001) 40;

[13] Sornarajah M., *The International Law on Foreign Investment*, Third edition, Cambridge University Press, New York, 2010, pag. 375;

[14] There could also be an argument that the duty to give full protection and security to the investment is violated;

Also, some modern investment treaties protect the foreign investor against abuse of the process of liquidation[15]. The protection usually appears in the treatment provision of the treaty. There must be a demonstration that the ordinary process of justice attended the liquidation process and that there was nothing that could be seen as a denial of justice. The mere fact that there is a court-ordered liquidation may not provide legitimacy to the taking. The court may be used as an instrument to effect the taking, in which case, clearly, the liquidation could amount to a taking depending on the circumstances[16].

2) Forced sales of shares in an investment through a corporate vehicle

The question whether there could be diplomatic protection and state responsibility where wholly foreign-owned companies incorporated in the host state are taken over has been debated in international law. Such companies, incorporated in the host state, have personality only under the law of the host state and are corporate nationals of the host state. Many bilateral treaties now contain provisions which contemplate the protection of shareholders. Shareholder protection becomes important because of the requirement found in host state laws that entry by the foreign investor be made through an incorporated joint venture company formed in association with a local entrepreneur or state company. The foreign partner will usually be only a shareholder of such a company, and the protection of his investment in the company would be on the basis that he is a shareholder. The foreign investor or his home state will ordinarily have no standing to protect the company or its assets. The only way in which the investment could be protected through international law mechanisms is to confer treaty protection upon the shareholding of the foreign investor. The effect of this would be that, even where the management of the company is taken over as a result of state interference but shareholdings are kept intact, there will be no taking in respect of which the foreign shareholder can invoke protection. This will not be an acceptable result from the point of view of the foreign investor for the profits of the company may diminish considerably in the absence of a vigorous management. It is quite possible that the treaty is widely worded so as to include the right to management and control within the definition of an investment, provided the shareholdings were such as to create management rights in the foreign investor. In any event, investment treaties usually cover contractual rights. This would be so where the foreign investor had made entry through a corporate joint venture. The joint venture contract should have provided for such management and control rights, in which case they will become protected. Another factor to note is that the shareholder protection that has evolved through treaties should not be taken to include portfolio investments. However, there are treaties which provide for the protection of portfolio investments.

On the other hand, since many privatisation measures do not restrict shareholdings by foreigners, there are likely to be many foreign investors who have bought shares in foreign privatised public companies. Thus, *renationalisations* can be expected to be effected through forced sales on the local stock markets on which the real value of the shares cannot be raised for the obvious reason that the sales will be confined to the local investors and there will be a flood of the shares on the stock exchange. The question will arise as to whether such forced sales amount to takings or whether the situation is akin to one of interference with portfolio investments, in which case the shareholders will have to bear the risk of loss or seek remedies provided by the local law. The buying of shares during privatisation is more akin to the making of a portfolio investment and the answer, resulting

[15] Thus, the ASEAN Investment Treaty (1987) states that: „Each contracting party shall, within its territory, ensure full protection of the investments made in accordance with its legislation by investors of the other Contracting Parties and shall not impair by unjustified or discriminatory measures the management, maintenance, use, enjoyment, extension, disposition or liquidation of such investments" (Article IV(1));

[16] In Yaung Chi Oo Ltd v. Myanmar (2003) 42 ILM 540; (2003) 8 ICSID Reports 463, the claimant argued that the liquidation proceedings before the Myanmar courts were themselves an act of taking. But, the tribunal did not find on this;

from the analogy, may be that there would be no taking by the state in these circumstances. But, the Argentinian cases suggest that, even if there may be expropriation involved, there could be liability for violation of treatment standards.

3) Indigenisation measures

What do indigenisation measures involve? Well, they involve a progressive transfer of ownership from foreign interests into the hands of local citizenry (*therefore, there is no vesting of any property in the hands of the state or a state organ, there is no direct or even indirect enrichment of the government as a result of such measures*). This kind of measures were undertaken in many Asian and African countries after independence in order to ensure that the termination of political control also meant the termination of economic control and the passing of such control into the hands of local entrepreneurs. Another possibility is that the foreign investor may remain in control of his venture and his control because the local entrepreneurs may lack the skill to run the business as efficiently at least in the initial stages. When, eventually, the local shareholders displace the foreign managers, the displacement will take place in accordance with the corporate laws of the host state and not through any government fiat. Yet, the transfer of the ownership is involuntary and the timing of the transfer of the shares in the venture owned by the foreigner is not left to him. As a result, he may not be able to secure the optimumprice for his shares. There is no doubt that there is a resemblance to forced sales in indigenisation measures. However, foreign investors were content to accept it rather than face a protracted dispute with the host state. They reckoned that they would come out losers in the dispute and prejudice their continued business prospects in the host state. The maintenance of links with the host state was a much prized asset which multinational corporations did not want to lose.

Ethnicity has a role to play in government measures which seek to restructure companies on the basis of their racial compositions so as to achieve a measure of economic equity. In Malaysia, the bumiputra policy was intended to ensure this, and companies had to restructure in accordance with specified ethnic quotas as to shareholdings by each of the races in Malaysia, and foreigners were restricted to a percentage of the shareholdings.

Divestment measures which do not benefit the state directly will not amount to an expropriation.

4) The exercise of management control over the investment

Interference by the state to take over management and control of the foreign investor's affairs is *prima facie* a taking by the state which should be compensated. The foreign shareholder is entitled to such control and management of his investment or property as he pleases, subject to the general laws of the host state. The extent of this exception that the regulatory laws of the host state have a role to play in the determination of the rights of the foreign investor generates considerable problems. The exception may be wide enough, if some views are accepted, to undermine the general rule altogether. The exception flows from the fact that the host state has interests to safeguard as far as the operation of the investment is concerned.

In the ELSI Case, when the foreign company contemplated the dismissal of a part of its workforce, there was widespread industrial action. The state had an obvious interest in ensuring that the dismissals did not lead to unemployment in an already economically depressed part of the country. Bankruptcy proceedings that were later instituted prevented the management from conducting an orderly liquidation of the company, which may have enabled the foreign company to realise a greater value for its assets. Interference in these circumstances in the management and control of the company by the host state was held to be justifiable. The state had a compelling interest in ensuring that the impact on its economy of the failure of the company was reduced or

eliminated. The steps it takes to achieve this objective cannot be considered to be such an interference with the foreign investor's management rights as to amount to a compensable taking. Again, a regulatory interference was involved, and the approach of the International Court of Justice was not to second-guess whether the interference was necessary.

5) Takings by agents and mobs

The rule is that, where there is destruction of property during civil strife or an insurgency, the state is liable for the destruction if it failed in its duty to protect the property of the foreign investor. It follows that, if there is active participation or instigation of the persons causing the damage by the state or its agents, then responsibility for the damage will arise. It is also clear that there must be a definite link between the perpetrators of the damage and the state or some attributability of the damage to the state through a theory of negligence. These rules have been established through many arbitral awards. They have also been stated in the Draft *Code of the International Law Commission on State Responsibility*. The Iran–US Claims Tribunal dealt on several occasions with the situation where property was taken or destroyed by mobs. In all these situations, the essential element was the establishment of the link between the revolutionary gangs and the new government which emerged. In the early stages of the revolution, there were several gangs with which the emerging government did not have any links whatever. The Tribunal refused to hold Iran liable for the activities of these gangs. But, when the revolution took hold, groups emerged with links to and authority from the state. Iran was held liable for the acts of these groups.

Where the *armed forces of a state are involved in a taking of property*, the attribution of the act to the state is clear. In Amco v. Indonesia, the taking was effected by the army, but the tribunal held that there was no attributability, as the army was acting in order to further the interests of its own pension fund. In AAPL v. Sri Lanka, there was destruction of property by the army during hostilities. Liability was based on the state's failure to protect the property. In Wena Hotels v. Egypt, there was interference by the army.

Therefore, where the army is involved, the attributability of the act of taking to the state is easier to establish.

6) Interference with property rights

There has been a general tendency in the international protection of alien property to transfer domestic norms of property protection into the international sphere. The view that only an outright takeover of physical assets amounts to expropriation by a state no longer holds.

Whereas stress on the physical nature of property was sufficient to protect ownership in times when there was a *laissez-faire* philosophy, the coming of the welfare state meant an increase in the nature and frequency of state interference with the ownership of property by individuals. Interference with the exercise of property or ownership rights by the host state could amount to takings which require compensation. Once the jurisprudential fact that ownership itself involves a bundle of intangible rights in relation to property is acknowledged, then it follows that it is not only the outright taking of the whole bundle of rights but also the restriction of the use of any part of the bundle that amounts to a taking under the law. It is necessary to understand the course of developments relating to the concept of property in the municipal systems, in particular of the United States, as the leading capital-exporting states will contend for the transference of the system of property protection in their domestic sphere into the international sphere. There is evidence of such transference in the past.

7) Cancellation of permits and licences

The cancellation of permits and licences involves a regulatory taking, and has been dealt with above in that context. But, where such cancellations are made *without due process*, are *discriminatory and violate commitments made regarding their issuance and validity*, their subsequent withdrawal could amount to a compensable taking. Where licences and permits are necessary to operate in certain sectors of the economy and these licences are withdrawn, the foreign investor's ability to conduct his business will be adversely affected. It could be argued that such measures involve a taking even if they do not affect the ability of the foreign investor to continue with the business or in any way affect the ownership of the property of the foreign investor. In modern investment treaties, such licences are protected, as they fall within the definition of investments.

Where the privilege is revoked, the state is not benefited in any sense. Hence, it would be difficult to say that there had been a taking by the state in situations where there is a revocation of a licence. However, the foreign investor may have to relinquish his business as a result of such a termination and the assets of the business may then vest in some state entity. This will be so where the state entity is a partner in the venture with the foreign investor. In the alternative, it may have to be sold for a lower price than would otherwise have been the case. In the administrative law systems in the common law world, there is generally no review permitted for the revocation of licences, as they are privileges the conferment of which is entirely at the discretion of the state. There are many awards of arbitral tribunals and claims commissions which have asserted that the withdrawal of licences or the imposition of controls do not amount to the taking of property.

But, the law stated in these older cases must be reviewed in light of new developments. The law is increasingly coming to accept that such a withdrawal must not be lightly done without warnings to the licensee to desist from the offending behaviour or to fulfil conditions attached to the licence. It must be preceded by an opportunity for the licensee to explain why the licence should not be withdrawn. The withdrawal of a licence may be considered a regulatory act, particularly where the conditions attached to the licence have not been satisfied. But, the substantive right is subject to procedural regularity. The proper exercise of the substantive right of revocation for non-satisfaction of the condition is not compensable, as it is a regulatory act. But, if it is done without procedural regularity, that irregularity gives rise to the duty to pay compensation. Cancellation of licences on environmental grounds will become more frequent with the increasing concern for the protection of the environment. Such cancellations will often put an end to the foreign investment. They will usually not amount to compensable takings.

In Murphyores Ltd v. The Commonwealth, a concession had been given to two US companies for sand-mining on Fraser Island, close to the Great Barrier Reef. The minerals did not have a local market. They had to be exported. An environmental study found that the sand-mining was harmful to the Great Barrier Reef. The Australian government refused to grant export licences for the export of the minerals. This effectively terminated the operations of the companies. The Australian High Court rejected the claims of the two companies for compensation on the basis that no compensable taking was involved. The Australian government also resisted efforts on the part of the home state of the foreign investor to ensure that compensation be paid to the foreign investor.

Recent awards have emphasised the *need for due process safeguards* prior to the cancellation of licences and have deemed cancellations without due process as violations of treatment standards as well as of the expropriation provisions[17].

[17] In addition to Biloune v. Ghana Investment Board (1993) 95 ILR 184; and Metalclad v. Mexico (2000) 5 ICSID Reports 209 (2001) 40 ILM 55, see Middle East Cement Shipping and Handling Co. v. Egypt, ICSID Case No. ARB/99/6 (12 April 2002), para. 143; Lauder v. Czech Republic, UNCITRAL Arbitration Proceedings (Final Award, 3 September 2001); CME v. Czech Republic, UNCITRAL Arbitration Proceedings (Award, 14 March 2003) (both decisions are available on the website of the Department of Finance of the Czech government); and Goetz v. Burundi (1999) 15 ICSID Rev 457; (2001) 26 YCA 24. The creeping of administrative law theory into the area is evidenced by these awards. From such awards, it is possible to launch into the whole array of administrative law notions such as legitimate expectations, which has been done in cases like ADF v. United;

8) Excessive taxation

As indicated earlier, taxation is within the sovereign power of a state. There is no rule in international law limiting the power of a state to impose taxes within its territory. But, "excessive and repetitive tax" measures have a confiscatory effect and could amount to indirect expropriation[18]. A uniform increase in taxation cannot by itself have such an effect. But, where a foreign investment is singled out and subjected to heavy taxation, a clear situation of expropriation can be made out. Such a result may not follow where sufficient justification for such taxation exists. The taxing of windfall profits (i.e. profits which arise without any act on the part of the investor) cannot amount to a taking. Thus, taxation of the oil industry for windfall profits due to price hikes cannot amount to a taking[19]. Where the situation of excessive taxation is dealt with in investment treaties, the mechanism used is *joint consultation* between the parties to determine whether the excessive tax should be imposed. Except in certain obvious circumstances, it is unlikely that a charge of unfair taxation would succeed. Many investment treaties deal with taxation separately, requiring that allegations of unfair taxation be dealt with through consultation between the two treaty partners. This removes the area from the scope of the taking provision in the treaty.

9) Expulsion of the foreign investor

The expulsion of the foreign investor *will amount to a taking if the purpose of the expulsion is the taking of his property*. But, where national security or other sufficient grounds exist for the expulsion, this will be different. Objectively reasonable factors for the expulsion must exist if it were to be justifiable on national security grounds. A tribunal which has jurisdiction over the taking on the basis that it is a violation of a foreign investment agreement does not have jurisdiction to pronounce on the human rights issues involved in the taking. This is a sensible idea, for a tribunal which deals with commercial matters is not justified in pronouncing upon disputes that are not commercial in nature.

10) Freezing of bank accounts

The freezing of the bank accounts of a foreign investor could amount to a taking of property in certain circumstances. Where bank accounts are frozen on the ground that it is necessary to do so in order to investigate a crime or a violation of banking regulations, the interference could be justified. But, where it is done in the process of an expropriation of the property of the foreign investor and as a part of a plan to deny him all his property rights, there is a strong case for the view that the freezing of the accounts amounts to a taking.

Having all that in mind, we underline that the taking of foreign property by a state is *prima facie* lawful. Such legality is, however, subject to conditions. The taking of foreign property *will be lawful only if such taking was for a public purpose and is not discriminatory* (a racially discriminatory taking is unlawful in international law). The principle against racial discrimination is an *ius cogens* principle of international law. It is odious to international law that nationalisation or any act of state should be based on considerations of race. But, please note that a *postcolonial nationalisation* which is designed to end the economic domination of the nationals of the former colonial power is exempted from this general rule. Here, nationalisation would be directed at the

[18] World Bank, *Report and Guidelines* (1992) 31 ILM 1375;

[19] See, for the US, Crude Oil Windfall Tax (United States Crude Oil ProfitWindfall Tax Act, 1980, PL 96–223), upheld in United States v. Ptasynki, 462 US 74 (1983);

citizens of a distinct state identifiable by race for the obvious reason that they alone are in control of the economic sectors of the nationalising state. A German court accepted the existence of this exception when considering the legality of the Indonesian nationalisations. It rejected the argument that the nationalisation measures were illegal as they were directed only against Dutch nationals. The court emphasised the fact that the Dutch were the colonial rulers of Indonesia and that they had control over the Indonesian economy.

We should bare in mind that there is a duty in international law to *pay compensation* for the taking of alien property. Non-payment affects legality. Moreover, where a taking is done in violation of a treaty, the taking will be considered illegal. The Chorzow Factory case concerned a taking in violation of a treaty. The view of the Permanent Court of International Justice was that, in circumstances of takings in violation of treaties, restitution was the proper remedy for the international wrong.

Conclusions

Though the law recognised that there could be takings of alien property other than through direct means, the indirect methods of taking have not been identified with any certainty either in arbitral decisions or in the literature. It is unlikely that this deficiency of the law will be cured. The law on alien takings, especially the law on state responsibility arising from such takings, was developed at a time when the state rarely interfered with the marketplace, and interference was effected for rather crude purposes such as the self-aggrandisement of ruling elites. It was easy to identify and stigmatise such takings as unlawful. Investment protection was facilitated by the uniform application of this rule to all types of taking. But, with increasing state intervention in the economy, the maintenance of this rule became unacceptable.

The increasing tendency among both developed and developing countries to control foreign investments, albeit through different types of regulatory structures, will keep this issue in the forefront of the law in this area. As indicated, this issue has replaced the theory of internationalisation of foreign investment contracts and the debate on compensation as the central issue in the area of expropriation of foreign investments. But, it is an issue that involves interests that are so inconsistent that the challenge of reconciling them would prove difficult.

So we must ask what the foreign investor who wishes to understand the law on protection against expropriation should do? How can a foreign investor know if the host's state conduct affecting the investment is compensated? How can a foreign investor know whether the host's state conduct affecting the investment is compensable? Since the law is indeed in a state of flux, the best answer to the question *when, how or at what point the valid regulation becomes, in fact and effectively an expropriation?* should be *we will recognize it when we will see it*. However, the law may provide a basis to answer the question, but the circumstances which determine the question remain crucial for the determination. It is obvious that some governmental actions, in some cases, almost always, will give rise to indirect expropriation finding cases, and therefore to compensation. Other measures, will not. Between the two categories will be the "very brief and hard" are about which the famous professor Dolzer was speaking, still full of gaps.

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DELIMITATION OF THE DISCRETIONARY POWER FROM THE POWER EXCESS IN THE ACTIVITY OF THE STATE'S AUTHORITIES

MARIUS ANDREESCU[*]

Abstract

A problem of essence of the lawful state is to delimitate the discretionary power and respectively, the abuse of right in the state's institutions activities. The legal behavior of the state institutions is being materialized by their right of appreciation, and the power excess yields in the violation of a subjective right or a legitimate interest of the citizen. The application and observance of the lawfulness principle in the activity of the state authorities is a complex problem because the exercise of the state's functions assumes the discretionary power with which the state's organs are invested with, or otherwise said the 'right of appreciation'' of the state's authorities regarding the moment of adopting and the contents of the disposed measures. The discretionary power cannot be opposed to the lawfulness principle, as a dimension of the lawful state.

In this study we propose ourselves to analyze the discretionary power concepts and respectively, the excess of power, having as landmark the legislation, jurisprudence and the doctrine in the matter. At the same time, we wish to identify the most important criterions that will allow the practitioner, no matter whether he / she is an administrator, a public clerk or a judge, to delimit the legal behavior of the state's institutions from the power excess. In this regard, we appreciate that the principle of proportionality represents such a criterion.

We consider that the law courts, by applying the principle of Constitution's supremacy, can censor some juridical acts contrary to the constitutional norms, if the Lawmaker does not foresee the competence of the Constitutional Court in this matter. In our opinion, all law courts, within the limits of the competence granted by law, can control and censor the juridical acts of some public authorities issued by power excess. In order to demonstrate these assertions some theoretical and juridical practice arguments are being brought.

Keywords: *The discretionary power excess, the abuse of right public authorities, principle of proportionality, fundamental rights and liabilities, general control for respecting the constitution supremacy.*

I. Introduction

The applying and observance of the principle of lawfulness in the activity of state's authorities is a complex problem because the exercise of the state's powers implies also the discretionary power with which the state's bodies are invested, or otherwise said the right of appreciation of the authorities regarding the adopting moment and the contents of the disposed measures. What it is important to underline is the fact that the discretionary power cannot be opposed to the principle of lawfulness, as a dimension of the rightful state.

In our opinion, the lawfulness represents a particular aspect of the legitimacy of the juridical acts of the public authorities. Thus, a legitimate juridical act is a legal juridical act, issued outside the appreciation margin recognized by the public authorities, that does not generate unjustified discriminations, privileges or restraints of the subjective rights and is adequate to the situation in fact, which is determined by the purpose of the law. The legitimacy makes distinction between the discretionary power recognized by the state's authorities, and on the other side, the power excess.

Not all the juridical acts that fulfill the conditions of lawfulness are also legitimate. A juridical act that respects the formal conditions of lawfulness, but which generates discriminations or privileges or unjustified restrained to the exercising of the subjective rights or is not adequate to the situation in fact or to the purpose aimed by the law, is an un-legitimate juridical act. The legitimacy,

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as a feature of the juridical acts of the public administration authorities should be understood and applied in relation to the principle of supremacy of Constitution.

II. Paper content

Antonie Iorgovan asserted that a problem of essence of the rightful state is that of answering to the question: "where ends the discretionary power and where begins the law abuse, where ends the legal behavior of the administration, materialized by its right of appreciation and where begins the subjective law or the legitimate interest of the citizen? "[1]

Approaching the same problem, Leon Duguit in 1900 makes an interesting distinction between the "normal powers and the exceptional powers" conferred to the administration by the constitution and the laws, and on the other side the situations in which the state's authorities act outside the normative framework. The last situations are split into three categories by the author: 1) the power excess (when the state authorities exceed the limits of the legal mandates; 2) the embezzlement of the power (when the state's authority fulfils an act that enters its competence aiming a different scope, other than the one the law stipulated), 3) the power abuse (when the state's authorities act outside their competence, but through acts that don't have a juridical character)[2].

In the administrative doctrine, that studies mainly the problematic of the discretionary power, it was underlined that the opportunity of the administrative acts cannot be opposed to their lawfulness, and the conditions of lawfulness can be split in general lawfulness conditions and respectively in lawfulness specific conditions on opportunity criterions[3]. As a consequence, the lawfulness is the corollary of the conditions of validity, and the opportunity is a requirement (a dimension) of the lawfulness.[4] Nevertheless, the right of appreciation is not recognized by the authorities of the state in the exercising of all duties they have. One must remember the difference between the *linked competence* of the state's authorities that exists when the law imposes them a certain strict decisional behavior, and on the other side the *discretionary competence*, situation in which the state authorities can choose between more decisions, within law limits and its competences. To remember the definition proposed in the literature in specialty to the discretionary power: "it is the margin of liberty that is let to the free appreciation of the authorities, so that in view of fulfilling the purpose indicated by the law maker, to use any means of action within its limits of competence."[5]

Yet the problematic of the discretionary power is studied mainly in the administrative law, the right for the appreciation in the exercise of some duties represents a reality met in the activity of all state's authorities.[6] The Parliament, as a supreme representative organ and with a unique law making authority, disposes of the largest limits in order to show its discretionary power, which is identified by the characterization of the legislative act. The discretionary power exists in the activity of the law courts. The judge is obliged to decide only when it is noticed for, within this notification limit. Beyond these it is manifested the sovereign *right of appreciating* the facts, the right to interpret the law, the right to fix a minimum punishment or a maximum one, to grant or not extenuating circumstances, to establish the quantum of the compensations etc. The exercising of such competences means nothing else but the discretionary power.

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[1] Antonie Iorgovan. *Forward to:* Dana Apostol Tofan, *Discretionary power and the power excess of the public authorities,* (All Beck Publishing House, Bucharest, 1999).

[2] Leon Duguit, *Manuel de Droit Constitutionnel*, (Paris, 1907), p.445-446.

[3] Antonie Iorgovan, *Treaty of administrative law, volI, (Nemira Publishing House, Bucharest 1996), p.301*

[4] Ibidem, p.292.

[5] Dana Apostol Tofan, *quoted works*. p. 22.

[6] In the doctrine, Jellinek and Fleiner sustained the thesis according to which the discretionary power is not specific only to the administrative function, but also it appears in the activity of the other functions of the state, under the form of a liberty of appreciation upon the content, on the opportunity and the extent of the juridical act. (see Dana Apostol Tofan, *quoted works*. p. 26)

Exceeding the limits of the discretionary power signifies the violation of the principle of lawfulness and of legitimacy or, of what in legislation, doctrine or jurisprudence is named to be the "excess of power".

The power excess in the activity of state's organs is equivalent with the law abuse because it signifies the exercising of the legal competences without the existence of a reasonable motivation or without the existence of an adequate relation between the disposed measures, the situation in fact and the legitimate purpose aimed at.

The law of the Romanian administrative prosecution[7] uses the concept of "power excess of the administrative authorities" which is defined to be the "exercising of the right of appreciation belonging to the public administration, by the violation of the fundamental rights and liberties of the citizens stipulated by the Constitution or by the law" (item 2, paragraph 1, letter m). For the first time the Romanian law maker uses and defines the concept of power excess and at the same time acknowledges the competence of the administrative prosecution instances to sanction the exceeding of the discretionary power limits throughout the administrative acts.

The exceptional situations represent a particular case in which the Romanian authorities, and mainly the administrative ones, can exercise the discretionary power, obviously existing the danger of the power excess.

Certainly, the power excess is not a phenomenon that manifests itself only in the practice of the executive organs it can be seen in the Parliament activity or in the activity of the law courts.

We appreciate that the discretionary power acknowledged by the state's authorities is exceeded, and the measures disposed represent a power excess, anytime it is ascertained the existence of the following situations:

1. The measures disposed do not aim to a legitimate purpose;
2. The decisions of the public authorities are not adequate to the situation in fact or to the legitimate purpose aimed, in the meaning that everything that is needed in order to reach the aimed purpose, is exceeded;
3. There is no rational justification of the measures disposed, included the situations in which it is established a juridical treatment that is different for identical situations, or a juridical treatment identical for different situations;
4. By the measures disposed the state's authorities limit the exercise of some fundamental rights and liberties, without the existence of a rational justification that would represent, mainly, the existence of an adequate relationship between those measures, the situation in fact and the legitimate purpose aimed at.

The essential problem remains that for the identification of criterions through which are to be established the limits of the discretionary power of state's authorities and to differentiate them from the power excess, that should be sanctioned. Of course there is the problem of using some criterions in the practice of the law courts or in the constitutional prosecution.

In connection to these aspects, in the literature in specialty it is expressed the opinion according to which the "purpose of the law will be then the legal limit of the right to appreciate (the opportunity). Therefore the discretionary power does not mean a liberty outside the law but one allowed by the law."[8]

Of course, "the purpose of the law" represents a condition of lawfulness or, as the case may be, of constitutionality of the juridical acts of the state bodies and that's why it can be considered as a criterion to delimit the discretionary power from the power excess.

Such as results from the jurisprudence of some national and international law courts, in relation to our search topic, the purpose of the law cannot be the only criterion to delimit the

[7] Law no.554/2004, published in the Official Gazette no..1154/2004.

[8] Rozalia Ana Lazăr, *The Lawfulness of the administrative act. Romanian law and the compared law, quoted works,* p. 165.

discretionary power (synonymous with the margin of appreciation, term used by C.E.D.O.), because a juridical act of the state can represent a power excess not only in the situation in which the measures adopted do not aim to a legitimate purpose, but also in the hypothesis in which the measures disposed are not adequate to the purpose of the law and are not necessary in relation to the situation in fact and with the legitimate purpose aimed at.

The suitability of the measures disposed by the state authorities to the aimed legitimate purposes represents a particular aspect of the principle of proportionality. Significant is the opinion expressed by Antonie Iorgovan which considers that the limits of the discretionary power are established by the: "written positive rules, the general law principles subscribed, the principle of equality, the principle of non retroactivity of the administrative acts, the right to defense and the principle of contradictoriality , *the principle of proportionality" (s.n.).*[9]

Therefore, the principle of proportionality is an essential criterion that allows the delimiting of the discretionary power from the power excess in the activity of state's authorities.

This principle is consecrated explicitly and implicitly in the international[10] juridical instruments or by the majority of the constitutions of the democratic[11] countries. Romania's Constitution regulates explicitly this principle in item 53, but there are other constitutional dispositions that imply it.

In the constitutional law, the principle of proportionality finds its use mainly in the field of protection of human fundamental rights and liberties. It is considered as an efficient criterion of appreciation of legitimacy of the interventions of the state authorities in a situation limiting the exercise of some rights.

Much more, even if the principle of proportionality is not consecrated expressly in the constitution of a state, the doctrine and jurisprudence considers it as being a part of the notion of a rightful state[12].

This principle is applied in many branches of the law. Thus, in the administrative law it is a limit of the discretionary[13] power of the public authorities and represents a criterion in the exercising the jurisdictional control of the discretionary administrative acts. Applications of the principle of proportionality exist in the criminal law[14] or in the civil law[15].

The principle of proportionality is found also in the community law, in the meaning that the lawfulness of the community rules is subject to the condition that the means used to be adequate to the aimed objective and not to exceed what it is necessary to reach this objective.

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[9] Antonie Iorgovan, *quoted works* vol. I, p.296.

[10] To remind on this topic item.29, paragraphs.2 and 3 of the Universal Declaration of Human Rights items 4 and 5 of the International Pact regarding the economical, social and cultural rights, item 5, paragraph 1, item 12 paragraph 3, item 18, item 19 paragraph 3 and item 12 paragraph 2 of the International pact regarding the protection of the national minorities; item G Part V of the European Social Chart – revised; items 8, 9, 10, 11 and 18 of the European Convention for the defense of human rights and the fundamental liberties or item B13 of the Treaty regarding the European Economical Community.

[11] For example, item 20, point.4; item 31 and item 55 of Spain Constitution; items 11,13.14,18,19 and 20 of the German Constitution or the provisions of items.13,14,15,44 and 53 of Italy Constitution.

[12] For the development see Petru Miculescu, *The Lawful State, (*Lumina Lex Publishing House, Bucharest, 1998), p.87-88 and Dana Apostol Tofan *quoted works.*, pg.49.

[13] On this meaning see Dana Apostol Tofan, *quoted works* pg.46-50; Iulian Teodoroiu, Simona Maya Teodoroiu, *Lawfulness of opportunities and the constitutional principle of proportionality, (* in: Law no. 7/1996), p.39-42.

[14] The provisions of item 72 of the Criminal Code refer to the proportionality as a general criterion of judicial individualization of the punishments or the provisions of item 44, paragraph 3 of the Criminal Code considers the proportionality as a condition of legitimate defense.

[15] The provisions of items 951 and 1157 of the Civil Code, allow the cancellation of a contract for the obvious disproportion of the service conscriptions (lesion).

The jurisprudence has an important role in the analysis of the principle of proportionality, applied in concrete cases. Thus, in the jurisprudence of the European Court of the Human Rights, the proportionality is conceived as a just, equitable ratio, between the situation in fact, the restraining means of the exercise of some rights and the aimed legitimate purpose, or as an equitable ratio between the individual interest and the public interest. The proportionality is a criterion that determines the legitimacy of state interference of the contracting states in the exercising of the rights protected by the Convention.

In the same meaning, the Constitutional Court of Romania, by several decisions established that the proportionality is a constitutional principle[16]. Our constitutional instance asserted the necessity to establish some objective criterions, by the law, for the principle of proportionality: "it is necessary that the legislative institutes objective criterions that should reflect the exigencies of the principle of proportionality" [17].

Therefore, the principle of proportionality is imposed more and more as a universal principle consecrated by the majority of the contemporary law systems, to be found explicitly or implicitly in constitutional norms and acknowledged by the national and international jurisdictions[18].

In the literature in specialty were identified three jurisdictional levels of the administrative acts: "a) the minimum control of the procedure rules (form); b) normal control of the juridical appreciation of the facts; c) the maximal control, when the judge asserts upon the necessity and proportionality of the administrative measures**".**[19]

The maximal control, to which the quoted author refers to, represents the correlation between the legality and the opportunity, otherwise said, between the exigencies of the principle of lawfulness and the right of appreciation of the public authorities, the proportionality couldn't be considered as a super legality criterion, but as a principle of law, whose main finality is to represent the delimiting between the discretionary power and the power excess in the activity of the public authorities.

There are situations in which the Constitutional Court used a "proportionality reasoning" as an instrument for the interpretation of the correlation between the legal contested dispositions and on the other side the constitutional dispositions, and in situations in which the proportionality, as a principle, is not explicitly expressed by the constitutional texts. Self evident in this meaning are two aspects: invoking in the Constitutional Court's jurisprudence of C.E.D.O. jurisprudence, which, in the matter of restraining the exercise of some rights, analyzes also the proportionality conditions, and the second aspect, the use of such a principle in situations in which it is raised the question of respecting the principle of equality.

Declaring as non constitutional a normative disposition on the ground of non observance of the principle of proportionality, applied in this matter, signifies in essence the sanctioning of the power excess, manifested in the activity of the Parliament or of the Government. Also excess of power, sanctioned by the Constitutional Court, using the criterion of proportionality, are the situations in which the principle of equality and non discrimination are violated, if by the law or by the Government ordinance it is applied a differentiated treatment to equal cases, without the existence of a reasonable justification or if exists a disproportion between the aimed purpose and the means used.

[16] The Decision no 139/1994, published in the Official Gazette no 353/1994, decision no.157/1998, published in the Official Gazette no 3 /1999; the decision no. 161 / 1988 published in the Official Gazette no 3 / 1999.

[17] The decision no. 71/1996, published in the Official Gazette no.13/1996

[18] For development see Marius Andreescu, *Principle of proportionality in the constitutional law*, (Publishing House C.H. Beck, Bucharest 2007).

[19] Antonie Iorgovan, *quoted works.* vol.I, p. 296.

III. Conclusions

There are two most important finalities of the constitutional principle of proportionality: the control and the limiting of the discretionary power of the public authorities and respectively the granting of the fundamental rights and liberties in situations in which their exercising could be conditioned or restricted.

The proportionality is a constitutional principle, but in several cases there is no explicit normative consecration, the principle being deducted by different methods of interpretation from the normative texts. This situation creates some difficulties in the application of the principle of proportionality.

In relation to these considerations we propose that in the perspective of a reviewing of Romania's Constitution, that at item 1 having as a side denomination "Romanian state" to be added a new paragraph that will stipulate that :"*the exercising of the state power must be proportional and non discriminatory"*.

In such a manner many of requirements have been answered:

a) The proportionality is consecrated expressly as a general constitutional principle and not only with a restrained application in case of restraining of the exercise of fundamental rights and liberties, such as it may be considered presently, when having into consideration the provisions of item 53 in the Constitution:

b) This new constitutional provision corresponds to some similar regulations contained in the "Treaty instituted by the European Community" or in the draft for the Treaty for the establishment of a Constitution for Europe, which is very important in the perspective of Romania's adhering to European Union.

c) This new regulation would represent a genuine constitutional obligation for all state authorities to exercise their duties in such a way that the measures adopted, to subscribe within the limits of the discretionary power limits acknowledged by the law and not to represent a power excess;

d) To create the possibility for the Constitutional Court to sanction, by the means of control of constitutionality of the laws and ordinances, the power excess in the activity of the Parliament and the Government, using as criterion the principle of proportionality;

e)To make a better correlation between the principle of proportionality and the principle of equality.

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NATIONAL PUBLIC LAW IS BACK, EUROPEAN LAW DISAPPEARS?

MARIUS VACARELU[*]

Abstract
Analyzing the last two years main titles in daily press, we discover not only great economic problems inside the EU, but also big concerns about the future of EU, when a lot of states are victims of their public debt. For this big deficit, only national budget was good to help, at European level money are missing.
In this idea, the concept: "EU with two speeds" really appears, and every government is forced today to have a position. But on this case, a good part of European laws are menaced by the national law coming back – it must be a legal system able to replace the holes, because every human situation must be regulated by a kind of law.
In fact, last years discovered why a lot of political constructions are made only of "perfect papers", not according with the reality. In this case, when integrationist plans are rejected by the reality, only the national states and the national public law are forced to intervene and to support the fury.
Our text try to analyze where is the limit of EU law appliance in this case and how much national law will come back.

Keywords: *national public law, economic transformation, European Union with two speeds, disappearance of European law, political transformation*

Introduction

Last year offers to public a common speech: economic crisis and its consequences, Greece and Italy prime ministers, national public debt and the Maastricht criteria of 60% debt, defeat of "multi-kulti", etc.

As we can see, the economy is the engine of every day television news journals and after few years, Occupy Wall Street time appeared – expressing a social wish. However, in this public speech, it was a problem: if we found a guilty element – the cause of everything bad, today is time to think to the future: because it must be someone who was not able to function correct and it will not function well too, despite big amount of Euro introduced by Central European Bank.

As always, every specialist and whole political class offered an answer for the next decade – a crisis has not only causes, but it has its victims. The globalization was one of them; human rights – in few states, young generation is a perpetual victim – today, the Spain unemployment rate for young people is almost 50%[1].

In this idea, the concept: "EU with two speeds" really appears, and every government is forced today to have a position. But on this case, a good part of European laws are menaced by the national law coming back – it must be a legal system able to replace the holes, because every human situation must be regulated by a kind of law.

The author try to analyze and describe where is the limit of EU law appliance in this case and how much national law will come back, because it is clear that last two years were not profitable for European unionist ideas.

The author intends to answer underlining few ideas who are still available in legal science, especially in their relation with new socio-political paradigm. In the same time, we must offer a perspective for the future: the dispute between national public law and the European law will have,

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[1] Just a single example.

on this lack of resources time, a long continuation: the pressure for both direction of human activity is too big now to can be avoided.

This "war" is now between image – EU law and reality – national public law. On this case, to not be schizophrenic, we believe that it can be a negotiated solution, but is not forever.

There is some literature for this subject: less in Romanian doctrine, more in Western Europe and other developed part of the world. But this idea is not too much studied, because it is a Pandora box for a fundamental change to some truths understood as "eternal", after 1989: the complete victory of image (EU supremacy in everything) was not possible, but too many people forget that is still possible to have an efficacy existence the national public law.

The author believes that is time to come back to normal logic in public law and politics, because the old ideas cannot be replaced by propaganda.

Paper Content

1. Last year was almost mad – according with normal political standard. In this time, almost everything was changed by few elements that join together, being able to defeat the official paradigm.

Nicolas Sarkozy is causing a big stir after calling on November 8th for a two-speed Europe: a "federal" core of the 17 members of the euro zone, with a looser "confederal" outer band of the ten non-euro members. He made the comments during a debate with students at the University of Strasbourg[2]:

"You cannot make a single currency without economic convergence and economic integration. It's impossible. But on the contrary, one cannot plead for federalism and at the same time for the enlargement of Europe. It's impossible. There's a contradiction. We are 27. We will obviously have to open up to the Balkans. We will be 32, 33 or 34. I imagine that nobody thinks that federalism—total integration—is possible at 33, 34, 35 countries.

So what one we do? To begin with, frankly, the single currency is a wonderful idea, but it was strange to create it without asking oneself the question of its governance, and without asking oneself about economic convergence. Honestly, it's nice to have a vision, but there are details that are missing: we made a currency, but we kept fiscal systems and economic systems that not only were not converging, but were diverging. And not only did we make a single currency without convergence, but we tried to undo the rules of the pact. It cannot work.

There will not be a single currency without greater economic integration and convergence. That is certain. And that is where we are going. Must one have the same rules for the 27? No. Absolutely not [...]. In the end, clearly, there will be two European gears: one gear towards more integration in the euro zone and a gear that is more confederal in the European Union."

These ideas was completed by another ones, presented on 1 December 2011, in Toulon, considered as the main speech for the presidential elections in France of April 2012[3]:

"The reform of Europe is not a march towards supra-nationality. The integration of Europe will go the inter-governmental way because Europe needs to make strategic political choices."

Sarkozy said he would meet German Chancellor Angela Merkel in Paris on Monday to push ahead with joint proposals for a new EU treaty to fix flaws in the Maastricht Treaty and create a true economic government for the bloc.

He said France and every other euro zone country needed to enshrine a budget-balancing "golden rule" in their constitutions, to force stricter fiscal discipline as the bloc strives to reform itself or get left behind.

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[2] http://www.economist.com/blogs/charlemagne/2011/11/future-eu, consulted on 16 January 2012.

[3] Selection available on http://www.reuters.com/article/2011/12/01/us-eurozone-france-idUSTRE7B014O20111201, consulted on 16 January 2012

He also said the European Central Bank must stay independent and decide for itself when to act against the risk of deflation.

"Europe is no longer a choice. It is a necessity. But the crisis has revealed its weaknesses and its contradictions. Europe must be rethought," Sarkozy said.

"Let us not hide it, Europe may be swept away by the crisis if it doesn't get a grip, if it doesn't change. A consensus has already emerged on budgetary and fiscal convergence as well as harmonization. There is also consensus about euro zone countries' commitments to deficit-reduction targets".

2. It may be asked: why such a log presentation of Sarkozy speech?

There are two reasons:

a) The importance of French economy. Despite all problems with rating agencies, in Europe Paris voice is still strong. The engines of European Union project are Germany and France and their economies: without them, in less than 6 months every EU institution collapse and

b) French legal system is very important for many countries, the basics of public law is settled by Law faculty of Sorbonne from 19th century and their disciples.

3. In this case, we must see that the possibility of a change in the triumphant road to totally integration in European continent can be fulfilled or is something inevitable?

In May 2010 it had appeared a special text: "PROJECT EUROPE 2030. Challenges and Opportunities. A report to the European Council by the Reflection Group on the Future of the EU 2030".

Form the first pages the destiny of European Union it was underlined that[4]:

"The choice for the EU is clear: reform or decline:

Many of these developments have been accelerated by the current financial and economic crisis, the worst crisis of its kind since the Great Depression, and one from which the EU will take some years to fully recover. The crisis has highlighted the structural weaknesses which underline most of the European economy: lower productivity, structural unemployment, inadequate labor market flexibility, outdated skills and poor growth. ….

If the EU does not adjust to the needs of the global economy, there is a real danger that Europe's relative decline may become absolute. ….

Embracing a global ambition should not result in scaling back domestic reforms, far from it; external influence cannot be achieved without solid growth and internal cohesion throughout the European Union**.** But our current era has decisively become a global one, a transformation which is creating new winners and losers. If we do not want to join the losing ranks, we have to take bold action now."

3. As we notice here, is only the economy who speaks. But the economy is commercial law (mainly) and public law for instrument used by the government: the tax regime, the different regulations adopted to create a profitable framework for economy, the demography politics.

The EU has often found itself at the center of global historical processes. There would have been no European integration at all without the Cold War, to cite but one example. The Cold War made it impossible for the actors most responsible for the international bloodbaths of the first half of the twentieth century to engage in the brutal *realpolitik* that had led to such disasters[5].

But European integration, once begun, was based on market and economic matters, making its course sensitive to major shifts in the international economy. After 1945, helped substantially by American aid via the Marshall Plan, each Western European country refined its specific strategies for governing the economy, growing its welfare state, steering and subsidizing national industrial

[4] M. Monti et al., *PROJECT EUROPE 2030. Challenges and Opportunities. A report to the European Council by the Reflection Group on the Future of the EU 2030*, p. 12

[5] George Rose, *The European Union and Its Crises Through the Eyes of the Brussels Elite*, (Palgrave Mcmillan, 2011, London), p. 12

development, regulating credit, priming the pump to stimulate demand, and sometimes outright planning[6].

The end of the Cold War created a puzzling new international situation for the EU. The rapid collapse of the Yugoslav Federation illustrated how treacherous this new world order could be, as key member states, faced with an explosion of warfare and ethnic cleansing, could do little but squabble, issue solemn pronouncements, and send a few unarmed emissaries to the Balkans.

Despite much talk about common EU foreign and defense policies, it took US intervention to begin recreating order.

4. The collapse of the Soviet bloc posed even greater challenges. The ex-communist central and eastern European countries aspired to become market democracies, implying that they would eventually want to join the EU.

Adding ten or more poor and mostly small members in the midst of other very complicated and uncertain transitions was daunting, especially because the EU 15 were still digesting very large economic changes that had begun in the middle of 1980s.

Moreover, a flock of new members with different histories and interests from Western Europeans would complicate EU decision-making and involve reforms to EU institutions initially designed for six Western European countries.

5. The 2005 political 'emergencies' made the EU's difficult situation much more visible. On May 29, the French held a referendum to ratify the European Constitutional Treaty. This document was the product of long public consultations and discussion by the European Convention, set up to remove matters of institutional reform from a seemingly bottomless mire of intergovernmental disagreement[7].

On referendum day, 70 percent of French voters turned out and 55 percent voted "no". The French debate had been thorough. Every citizen received the text – very expensive cost, and the first decade of 21st century introduce in public debate a new problem: the cost of EU institutions and the cost of propaganda for EU – and the issues had been discussed exhaustively by political leaders and the media. But unemployment was high, economic growth lagged, and there was widespread anxiety about the future of the French welfare state.

Sociologically, the middle classes, the better-educated, and the better-off voted "yes". Blue-collar workers, rural dwellers, the young, the poorer and less well-educated were more negative, many fearing for the future of France's social model and seeing the EU as a liberalizing threat to it. A majority of "no" voters also believed that by defeating the referendum they could thereby precipitate renegotiation of the ECT in a more "social" direction[8].

Thus, the propaganda was addressed to the people with a high level education. In fact, it is something from the psychology science: educated people believe more in ideas, and they try to analyze fact according with official doctrines; less educated people think and act more in reality.

What is as not underlined: it was a discussion about losing of national sovereignty in both countries that used referendum – but not very decided, because the world economy still had good profit.

When the Dutch held their own ECT referendum a few days later on 1 June, their verdict, harsher than the French, was 62 percent against. Like France, the Netherlands was a founding EU member and had traditionally been strongly pro-European. The results of the French vote played a role in Dutch negativity, but the opposition had its own roots.

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[6] Ibidem.

[7] Catherine Moury, Luís de Sousa, edit., *Institutional Challenges in Post-Constitutional Europe Governing change*, (Routledge, 2011, London), p. 5

[8] John Erik Fossum, Agustín José Menéndez, *The Constitution's gift: a constitutional theory for a democratic European Union*, (Rowman & Littlefield Publishers, 2009, Plymouth), p. 11

This was the first referendum in Dutch history and the government of the day was unpopular, partly because after long years of a supposed Dutch Miracle, the economy had turned sour. Politicians, confused by the new referendum procedure, did not campaign effectively and national debate was unclear. Perhaps more significant was the timing; Dutch society was in the throes of debate and upheaval about immigration and cultural diversity[9].

What is was surprising here: the first referendum in the history of Netherlands, despite important acts that creates a different political entity inside Eastern Europe. Where is the democracy?

6. Since 2007, when the EU enlargement had a break, it was time to think if the expansion was good and profitable. In that moment, it started the global economic crisis, which introduces all states on the same position: private economy is down; the only one change for escape was the public budget. And public budget means that public law is back (no mater if is national or supranational).

Once the Eurozone troubles exploded, however, the Union's responses confirmed the worst of their fears about deeper institutional dynamics. It was true that key Eurozone actors eventually reached some agreement on courses to follow, but whether it would be successful remained to be seen. What was clear was that it was much too slow in coming and dangerously costly in economic and political terms[10].

National public law was the only one able to help states during the private banks crisis (2008 – 2009). The national budget represents a reserve and politicians was forced for the first time after many years to think more to the capacities of their national states to pay.

In this case, the cost of banking operations was paid by all citizens, and a big problem appeared: the legitimacy of national politicians – who saved the big banks – almost disappeared. A lot on internet blogs and forums was suffocated with critics: why national state must pay for the mistakes of private enterprises?

But this saving time made only one thing: create stronger holes on national budgets. In these cases, politicians were forced to recognize that the price of citizen's bribe was the public debt. The citizen's bribe was the comfort and the social services created in late 50 years.

Here EU law and EU social principles appeared again and the anger increase: the European standards of living were accepted by any state and any national politician: the cost was, of course, public debt[11], because the big jumps made by EU member states were not according with their economic potential.

So, almost all profit made by governments before private banks economic crisis was lost in 2008 – 2009; from 2010, when the holes of public budgets was difficult to be covered, the politicians understand that the European Union must help from its central budget, unless, the prestige will collapse and all integrative measures adopted in last 50 years will represent only a piece of cake.

Of course, it was impossible, national budget of big states was claimed – and Berlin and Paris started to ask for special conditions. Without them, the European construction will disappear, and from the big Corpus Juridicus Europeanum will remain only its values – which are, in a real interpretation, the high level of humanity moral.

7. A sign of this coming back of national public law is represented by the Treaty on stability, coordination and governance in the economic and monetary union, adopted on 31 January 2012.

In this text, the first article underlines the correct interpretation of European Union level of politician's purposes:

"By this Treaty, the Contracting Parties agree, as Member States of the European Union, to strengthen the economic pillar of the Economic and Monetary Union by adopting a set of rules intended to foster budgetary discipline through a fiscal compact, to strengthen the coordination of economic policies and to improve the governance of the euro area, thereby supporting the

[9] Ibidem.
[10] George Rose, *The European Union and Its Crises …* , p. 160
[11] About public debt, watch Emil Balan, *Drept financiar/ Financial law*, (C.H. Beck, Bucharest, 2007), p 116

achievement of the European Union's objectives for sustainable growth, employment, competitiveness and social cohesion."

For sure, today sustainable growth has a different interpretation: before 2007 this means economic growth for every state, and preserving high position for Western Europe; today it means: if we don't grow again fast, the EU will collapse. This is the correct interpretation of the text: "strengthen". Today EU legal texts are more important to don't let the national states to run away!

For this we can watch more the preamble, which contain few dispositions impossible to fulfill today:

"… RECALLING the need to facilitate the adoption of measures under the excessive deficit procedure of the European Union for euro area Contracting Parties whose planned or actual government deficit to gross domestic product exceeds 3%, whilst strongly reinforcing the objective of that procedure, namely to encourage and, if necessary, compel the Member State concerned to reduce a deficit which might be identified,

RECALLING the obligation for those Contracting Parties whose government debt exceeds the 60 % reference value to reduce it at an average rate of one twentieth per year as a benchmark …".

Thus, the national public law must do everything to respect these dispositions, no matter the costs. We can consider that its role increase now (for sure, not for innocent purposes), but the law practitioner lost partially their skill of working with national law. In fact, this treaty is more an official invitation: "save who can", because … the main actor of EU had a public debt bigger than 60% (almost 100%, it seems).

So, today generation of politicians are confused: their "career plan" is menaced by the national public law (financial law, mainly) and citizens are now more informed like no other time. "Sto delat?"/What we can do? Lenin asked this – but the answer is, for sure, not communism, but a re-evaluation of national public law and its role, and, for sure, a different EU construction, only for big liberties and rights, but not more for public affairs.

Conclusions

Our text underlined few directions of research about the difficult problem of transforming European Union and its treaties – which change, as main consequences, the pillars of EU law – into a coherent organization, where the limits of national public law are not violated by the Brussels organizations.

The results of our research offer a small understanding for the big confusion which exists at the politic level, both directions: national and European. Now, the economy forces the politicians to recreate themselves, because the population starts to make pressure on streets and on internet.

It might be possible that our text to not be accepted for its ideas – the national public law is back; it is necessary to build now a new generation of politicians, etc. – but in "battle of ideas" the history proved many times that the ideas who are not on the same level with the official doctrines resists better then he "fashion on public debates", because it is more sincerity on it. It is necessary – for a real impact of this article – that the lawyers must think a little for the destiny of their states and not only to read articles to discover new techniques for a blind appliance of any law, no matter its purpose or its effect.

This kind of researches are made more with the ear connected to the social noise – new direction of study can appear only if people will want to think in a normal way: the states are to different – as history and economic power – for a coherent and functional political integration. Internet can create a different psychology, but no one can replace the national tax system and the politician ambitions, which are more pillar of any political system: no politician, no promises; no money from the tax law, no money to fulfill the politician promises.

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CONSIDERATIONS CONCERNING THE REVOCATION OF ADMINISTRATIVE ACTS WHICH ARE CONTRARY TO EUROPEAN UNION LAW

CONSTANȚA MĂTUŞESCU*

Abstract

In the process of adopting administrative acts, public authorities are obliged to respect both the national provisions legally superior and European Union law with superior legal force and also the general principles of law, including those imposed by the constant practice of the Court of Justice of the European Union.

Implementation and maintenance at the level of the Member States of inconsistent acts with EU law affect the obligation of community loyalty and ensure the full effectiveness of EU law which rests on their failure could result in an action of breaching community obligations.

Revocation is the legal transaction that the issuer has withdrawn its own body act on its own initiative or pursuant to the provisions of the superior authority. The disappearance of the illegal administrative act of domestic law doesn't necessarily involve restoring legality community as for this may be necessary the adoption of a new act.

While acknowledging the procedural autonomy of the member states, the European Union law requires that national administrative rules concerning the acts revoking to respect two of its general principles - the principle of legal certainty and legitimate expectations principle, which can cause a number of complications, constraints on public administrations. The present contribution aims at examining the various influences on which the Union right performs towards this matter.

Keywords*: administrative acts, EU law, revocation, principle of legal certainty, legitimate expectations principle.*

Introduction

The influence that the European Union law exerts on the public law of the European Union Member States is undeniable[1], and the rules and general principles of the administrative law were not excluded from any such influences, resulting a circulation of the principles established at communal level to the national administrative rights, with the consequence of achieving a certain harmonization of them. But the influence is mutual, as the European law is based on traditions and legal realities of the European Union Member States.

Instrumentalization of the administrative law, as a result of European integration, its transformation in the main mechanism of enforcement for the communal action (along with the traditional role of national instrument of exercising public power) led not only to expand its mission, but also to a considerable increase in its complexity, being forced to develop in respect with the development of the communal law in order to ensure its execution[2]. The europeanization of administrative law object necessarily entailed a profound transformation of its regime[3], and the influences of European Union law were extended to areas that are not about the communal law, being exclusively part of the national jurisdictions. It is about a "progressive influence using

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[1] See in this respect J. Schwarze, *Droit administratif européenne*, second edition, completed, (Bruylant, Bruxelles, 2009); S. Cassese, *Les transformations du droit administratif du XIX-e au XX-e siecle*, D.A., October 2002; J. Sirinelli, *Les transformations du droit administratif par le droit de l'Union Europeenne*, (L.G.D.J., Paris, 2011).

[2] J. B. Auby, *Ou il est question d'execution des actes communautaires*, (D.A., August-September 2004), p 3.

[3] J. Sirinelli, *op. cit*., p. 16.

persuasion and voluntary recognition by the national law of certain European legal features of the administrative law", as noted in the doctrine[4].

Developing the subjective dimension of administrative legal system by recognizing, by using the case law path, of certain existing legal principles and their realization, in order to strengthen the protective effect of the citizen, is the main feature of the recent development of the law in the European Union[5]. Identifying, in the Union law, of some certain solutions, of some waivers arising from the European requirements, which departs from traditional principles of the administrative law, threatens the coherence of the administrative regime systematization, leading to a dual legal system in which a differential treatment is applied to the administrated persons, as it lies or not within the scope of European Union law. Since such a situation can not be maintained on a long term, the predictable evolution seems to be that of extending its own rules of EU law to all administrative law. As such a situation can not be maintained on a long term, the predictable evolution seems to be that of extending to the European Union law own rules to all the administrative law[6]. From this point of view, the Court of Justice role is essential, and one of the most pressing problems faced by the Court in the recent years was that of establishing a set of standards to define clearly enough the legal consequences of inconsistent application of the national law with the European legislation, directing this way the action of the Member States as regards the elimination of inconsistencies between legal internal order and European Union law.

We will consider in present paper, to what extent the solutions identified in the European Court of Justice Jurisprudence on the principles governing administrative papers revocation[7] as a mean of restoring the communal legality find their applicability in the Romanian law system. The question being asked, as we consider, in Romania's case, is whether the current state of the domestic legal order allows to the authorities and to the jurisdictions to ensure the compatibility with European Union law.

1. The obligation of the national administrative authorities to restore the legality in relation to the European Union law

The conflict with European Union law is one of the cases that determine the illegality character of an administrative act, and the effective restoration of legality is an essential requirement arising from the commitments the Member States have assumed in relation to the European Union law.

European Union membership entails, among others, the need to give a full effect to the European norms. Legal European Union order is based on a complementarity between different levels of authority – the European and the national authorities[8]. Ensuring the implementation of European Union law is - in the absence of a specific empowerment of the European institutions - the

[4] J. Schwarze, *op. cit*., pp. 1508-1509.

[5] Idem, pp. 124-125.

[6] J. Sirinelli, *op. cit*., p. 442.

[7] Given its various meanings (see, in this respect O. Podaru, *Administrative Law*, Vol I. *The administrative act*, Hamangiu Publishing House, Bucharest, 2010, pp. 280-283), the term "revocation" is here used with its general sense, of operation by which the administration withdraw from the legal internal law an act that it previously issued. Throughout this paper the reference is limited to the individual acts, meaning to decisions taken by the administration in individual cases and not to the normative acts which impose general and abstract rules and on which revocation fewer doubts remain (see in this regard A. Iorgovan, *Tratat de drept adminstrativ*, vol. II, All (Beck Publishing House, Bucharest, 2005), p. 83-90; V. Vedinaş, *Drept administrativ*, fifth edition, (Universul Juridic Publishing House, Bucharest, 2009), p. 107-111; D. Apostol Tofan, *Drept administrativ*, Vol. II, (C.H. Beck Publishing House, Bucharest, 2009), p. 59-65; O. Podaru, *op. cit.,* pp. 280-331; E. E. Ştefan, *Revocation of administrative acts - theoretical and practical considerations*, LESIJ NO. XVIII, VOL. 1/2011, p. 121-128).

[8] P. Pescatore, *L'ordre juridique des Communautés européennes. Etude des sources du droit communautaire. (*Bruxelles, Bruylant, 2006), p. 199.

competence of the administrative and judicial authorities of the Member States[9], which thus have *principle competence*[10], the Union not being able to intervene unless if a uniform regulation proves to be necessary[11]. The Court of Justice made a number of statements that converge on the idea that this competence does not represent a simple need, but a genuine obligation[12].

The communal loyalty clause involves for the states the obligation to equip themselves with the necessary means to discharge their duties under the law of the Union. However, the Court of Justice recognizes to the Member States the institutional and the procedural autonomy, which means that in the absence of some specific dispositions of communal law, when implementing the European Union law, Member States shall act, in principle, accordingly to the materials and procedural norms provided by their national law[13]. Nevertheless, the need to ensure a full effect and a uniform application of the European Union law led to the formulation, in the Court's jurisprudence, of some of the requirements of the communal law regarding the national conditions.

The Court has consistently decreed that, when the Member States foreseen, in accordance with what is called procedural autonomy, the applicable procedural rules to judicial proceedings designed to protect the rights of the parties conferred by the communal law, they must ensure that these arrangements are not less favorable than those applicable to some similar actions based on dispositions of internal law (the equivalence principle) and that they are not organized to make virtually impossible the exercise of the rights conferred by the communal law (the effectiveness principle)[14]. The states are not compelled to create other legal ways than the existing ones so that the national law may be respected[15].

A general obligation regarding the application of the European Union law by the Member States arises directly - and "objectively", in other words, even independent of the context of "invoking some communal rights by the private community" – from the supremacy principle of the

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[9] See in this regard, for example, the Decision from 23rd of November 1995, *Nutral SpA/Commission* (C 476/93 P, Rec., p. I 4125, point 14).

[10] As reflected in article 4 paragraph 3 of the TEU (according to which: "Under the principle of sincere cooperation, the Union and the Member States shall respect themselves, assist each other in carrying out tasks which flow from the treaties. The Member States shall adopt any general or particular measure in order to ensure the fulfillment of the obligations which flow from the treaties or of those resulting from the acts of the Union institutions. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardize the objectives of the Union"), in conjunction with article 291 TFUE ("(1) Member States shall take all internal law measures necessary for putting into force the required acts of the Union from the judicial point of view. (2) If there are necessary unitary conditions for implementing the required acts of the Union from the judicial point of view, these acts confer to the Commission powers or, in duly justified cases and in cases provided by the articles 24 and 26 from the Treaty regarding the European Union, to the Council")

[11] A. Berramdane, J. Rossetto, *Droit de l'Union Européenne. Institutions et ordre juridique*, (Montchrestien Publishing House, Lextenso editions, 2010), p. 373.

[12] L. Guilloud, *La loi dans l'Union Européenne. Contribution a la définition des actes législatifs dans un ordre juridique d'intégration*, LGDJ, Paris, 2010, p. 119. See also for details C. Mătușescu, C. Gilia, *Aspects regarding the EU Member States competence in the enforcement of the European legislation*, CKS eBook 2011, (Pro Universitaria Publishing House, Bucureşti), p. 538-548.

[13] See in this regard: CJCE, 16th December 1976, *Rewe-Zentralfinanz and Rewe-Zentral*, Cauza 33/76, *Rec*. p. 1989, point. 5; CJCE, 14th of December 1995, *Peterbroeck*, Cause C-312/93, *Rec*. I-4599, point 12; CJCE, 13th of March 2007, *Unibet*, Cause C-432/05, *Rec*. p. I-2271, point 39 and CJCE, 12th of February 2008, *Kempter*, Cause C-2/06, *Rec*. p. I-411, point 57.

[14] See the Decision from 6th of October 2005, *MyTravel*, C‑291/03, Rec., p. I‑8477, point 17, the Decision from 15th of March 2007, *Reemtsma Cigarettenfabriken*, C‑35/05, Rep., p. I‑2425, point 37, the Decision from 19th of September 2006, *i-21 Germany and Arcor*, C-392/04 and C-422/04, Rec., p. I-8559, point 62 or the Decision from 20.10.2011, *Danfoss and Sauer-Danfoss,* C-94/10, not published.

[15] Making thus the implementation of the European law not to entail "the unsettlement of the national legal system", but just a series of adjustments - C. Blumann, L. Dubouis, *Droit institutionnel de l'Union Européenne*, Paris, Litec, 2ème éd., 2007, p. 578.

communal law and from the obligation to ensure its full application[16], the Court stating that the obligation is both of the national administrative institutes and of all courts to ensure the compliance of the communal norms in their respective fields and, if necessary, to refuse appliance of a national norm which precludes the full effectiveness of the communal law[17].

The incompatibility between an administrative act and the European Union law can take different forms. It may result either from failure or improper application of European standards benefiting from a direct effect, either from the conflict with European Union law of the norm of internal law on which the administrative act is based.

The task of restoring the legality belongs both to the government itself and to the courts. We will especially refer below to the case in which the restoration of legality is ensured by the administration through its traditional power to revoke the illegal administrative acts, which can also be exercised to remove a violation of the European legislation through an administrative act. In general, neither in legislation nor in case laws of the Member States no distinction is made regarding the illegal administrative acts, between acts contrary to the European legislation and acts contrary to another source of law, all administrative acts being treated the same way regarding their revocation.

2. Conditions of exercising the right to revoke administrative acts contrary to European Union law developed in the European Court of Justice jurisprudence

Essential institution of the general law, the revocation theory of the administrative acts enjoys a special characterization of the European Court of Justice Jurisprudence. Starting from its early case law, the Court has tried (having as the ultimate prohibition argument the interdiction, for a judge, of the justice disclaiming[18]) to fill the absence of this subject from treaties and even, with few certain exceptions, from the secondary law, and to develop, based on a comparative study of the Member States' judicial orders, a series of *principles concerning the revocation of the administrative acts*. Thus, using the traditional distinction of administrative law between legally adopted acts and illegal decisions, the Court determined as the main rule, recognized today as true general principles of the communal law[19], the irrevocability of the legal administrative acts that create rights[20], on one hand, and the revocability of the illegal administrative acts, on the other hand[21].

With regard to the legal acts, the Court considers that "the retroactive revocation of a legal act which gave subjective rights or similar benefits is contrary to the general principles of law[22]" and that a legal document giving subjective rights to the concerned person can not be, in principle, withdrawn, "in this case the subjective right being gained, the need to preserve the confidence in the

[16] The conclusions of the General Lawyer Ján Mazák presented at 24th of March 2009 in Cause C 2/08 *Amministrazione dell'Economia e delle Finanze şi Agenzia delle Entrate împotriva Fallimento Olimpiclub Srl*

[17] Regarding this aspect, emblematic are the Decision from 9th of March 1978, *Simmenthal* (106/77, Rec., p. 629, points 21-24), the Decision from 19th of June 1990, *Factortame and others* (C 213/89, Rec., p. I 2433, points 19-21), the *Larsy* Decision, (C 118/00, Rec., p. I 5063, points 51 and 52), *Kühne & Heitz*, (C-453/00, Rec., p. I-837, point 20) and *Lucchini*, (C-119/05, Rep., p. I-6199, point 61).

[18] J. Schwarze, *op. cit*., p. 1030-1031.

[19] Idem, p. 1038.

[20] CJCE, 22nd of March 1961, *SNUPAT/High Authority*, The Connected Causes 42/59 and 49/59, Rec. 1961. Other decisions have subsequently confirmed this principle: CJCE, 22nd of September 1983, *Verli-Wallace/ Commission*, Cause 159/82, Rec. P. 2711; TPI, 5th of March 2003, *Ineichen/ Commission*, Cause T 293/01, Rec. p. FP-I-A-83, II-441, point 91.

[21] CJCE, Decision on July 12, 1957, *Algera and others/Assembly*, 7/56, 3/57-7/57, Rec., p. 81, p 116

[22] The Court decision in the *SNUPAT/Commission* causes, prequoted. From the Court wording stands out that, theoretically, it would be possible a revocation with *ex nunc* effects of such an act, but from the Decision given in the *Algera* causes is stated that the *ex nunc* revocation is also inadmissible in these acts cases.

stability of the situation thus created has priority over the interest of administration that wants to reconsider its decision[23]".

In respect with the illegal administrative acts, they can be, in principle, abrogated, "the absence of a legal objective basis of the act affecting the subjective right of the interested person"[24]. However, the administration has no discretionary power to revoke the illegal administrative communal acts, but this possibility is conditioned on the fulfillment of two requirements: to interfere in *a reasonable time* (expression of the legal security principle) and the institution making the request takes into account sufficiently the measure in which the recipient of the act could possibly trust in its legality (to meet his legitimate expectations)[25].

Retaining the principle of legal security[26] under the form of the protection principle of concerned person's legitimate interests, the European Court of Justice did not give an abstract interpretation for the two requirements of revoking the illegal administrative acts, but was pleased to determine, from case to case, to what extent they are fulfilled. The Court's solutions reflects, in fact, the balance to be achieved under the specific circumstances of the cause, between the requirements of communal legality, which requires it to restore the legal position in relation to the European Union law, and the legal security. Thus, the Court considered that the principle of legal security is not absolute, since its application must be accompanied by the principle of legality, this principle and the concrete situation of the parties can sometimes prevail over the principle of legal security[27]. The balance between public interest, of restoring the communal legality and private interest (good faith of the beneficiary, his legitimate expectations) will be found in each case according to the actual circumstances of the cause[28].

A particular series of case law developed in the recent years by the European Court of Justice in conjunction with the principle of judicial security follows the problem *reexamining the administrative decisions that have become final and prove to be contrary to the communal law, as was after interpreted by the Court*[29]. In this series of causes, the judicial security is used as a interpretation tool regarding national administrative decisions within the scope of the communal law, an approach that reflects, as noted in doctrine, the ambivalent nature of this principle that encourages and restricts in the same time the effective application of the communal law[30] in so far as it seeks to ensure both the quality and the integrity of the norm and also the stability of legal situations[31].

In the Kühne & Heitz case[32], the problem that arose was, in essence, if the obligation of a national authority to apply a norm of communal law, as it was interpreted by the Court, even the

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[23] The court Decision in *Algera* causes, prequoted.

[24] Ibidem.

[25] CJCE, 13th of July iulie 1965, *Lemmerz Werke/ High Authority*, Cause 111/63, Rec. p. 853; CJCE, 3rd of March 1982, Alpha *Steel/Comisia,* Cauza 14/81, Rec. p. 749, point 10; CJCE, 26th of February 1987, *Consorzio cooperative d'Abruzo/ Commission*, Cause 15/85, Rec. p. 1005, point 12; CJCE, 20th of June 1991, *Cargill/ Commission*, Cause 248/89, Rec. p. I-2987, point 20; CJCE, 17th of April 1997, *De Compte/ European Parliament*, Cause C-90/95 P, Rec. p. I-1999, point 35.

[26] In the predictability and stability sense of the judicial reports. For a detailed analysis, see also I. Brad, *Revocarea actelor administrative*, Universul Juridic Publishing House, Bucharest, 2009.

[27] X. Groussot, T. Minssen, *Autoritatea de lucru judecat în jurisprudența Curții de justiție: ponderarea securității juridice cu legalitatea?,* in (RRDE no. 6/2010), p. 88

[28] *SNUPAT*, supra, p. 87; CJCE, 12th of July 1962, *Hoogovens/ High Authority,* Cause 14/61, Rec. 1962, point 5.

[29] The Decision from 13th of January 2004 in cause C-453/00, *Kühne & Heitz*, Rec. p. I-837; the Decision from 19th of September 2006, *i-21 și Arcor*, the connected causes C-392/04 and C-422/04, Rec., p. I-8859, pct. 50-52; the Decision from 12th of February 2008, *Kempter*, C-2/06, Rec., p. I-411

[30] X. Groussot, T. Minssen, *op. cit*., p. 97.

[31] R. Mehdi, *Variations sur le principe de sécurité juridique,* Liber Amicorum Jean Raux, Apogée, Rennes, 2006, pp. 177- 178.

[32] That was about the decision of a national administrative institution regarding the customs nomenclature, became final on appeal and which seemed inconsistent with a subsequent decision of the Court. The reopening request of the administrative procedure therefore resulted in a preliminary procedure reference.

legal relationships aroused and established before the notifying of the Court's decision on the request of interpretation, may be imposed, despite the final character of the administrative decision acquired before its requested review, in order to take into account this decision of the Court. Kühne & Heitz decision allowed the Court to show how it intended to reconcile the requirements that leave from the supremacy principle of the communal law, and also from the retroactive effect of preliminary decisions with requirements that leave from the legal security principle in conjunction with the authority principle of judged thing[33].

Kühne & Heitz decision allowed the Court to show how they intend to reconcile the requirements that ensue from the supremacy principle of the communal law, as well as from the retroactive effect of the preliminary decisions with the requirements that ensue from the legal security principle in conjunction with the judged issue principle[34]. Thus, in the consideration of the task that is for all of the Member States' authorities, that to ensure compliance communal law norms within their jurisdiction, and since the interpretation that the Court, in exercising the competence which is conferred the article 234 EC, gives to a communal law norm, it clarifies and defines, if necessary, the meaning and scope of this norm as it should or ought to be understood and applied from the moment of its entry into force, the Court considers that the communal law norm interpreted as such must be applied by an administrative institution within its powers, *even to legal relationships created and established before the Court gave its decision regarding the request for interpretation*[35]. Stating that legal certainty is between the general principles recognized by the communal law and the final character of an administrative decision, acquired at reasonable deadlines for lodging appeals, or by the exhaustion of those procedures, contribute to this conviction, the Court considers that *the communal law does not require that an administrative institution to be, in principle, obliged to reopen an administrative decision which has acquired such a final character*[36]. In respect with the context proper to the case, *as an exception, the administrative authorities are required to review their final decision*, as a consequence of a preliminary decision, if there are met four "circumstances" that characterizes the main proceeding and that, cumulatively, will have to be delivered, in terms of article 10 EC, an obligation of reviewing in the administrative institution's task that received a request for this review: 1) the national law has to recognize for the administrative institution the possibility to return to that final decision; 2) the decision has become final as a consequence of a court of last instance decision; 3) the respective judgment is, in light of subsequent case-law of the Court, based on a misinterpretation of the communal law, adopted without being brought before the Court with a preliminary title in the conditions foreseen by the article 234 paragraph (3) EC[37]; 4) the concerned person addressed to the administrative institution immediately after becoming aware of mentioned jurisprudence. In such circumstances, the Court concluded that it is the administrative institution obligation, in accordance with the principle of cooperation which follows from Article 10 EC[38], to *re-examine the decision* in order to take into consideration the interpretation of the relevant disposition of the communal law upheld in the meantime by the Court. In addition, "the administrative institution should set, according to the results of this review, whether it is obliged to reconsider the decision in question without affecting the third parties' interests"[39].

Although designed to solve a specific situation, this decision (issued by the Grand Chamber) has become of a paramount importance, acquiring the character of a principle decision, the solution

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[33] The conclusions of the General Lawyer Yves Bot presented at 24th of April 2007, Cause C 2/06 *Willy Kempter* KG against Hauptzollamt Hamburg Jonas

[34] Conclusions of Yves Bot General Lawyer, presented at 24th of April 2007, Cause C 2/06 *Willy Kempter* KG against Hauptzollamt Hamburg Jonas

[35] Points 20-22 from Kühne & Heitz Decision.

[36] Ibidem , point 24

[37] Article 267 paragraph (3) TFUE after the Treaty from Lisabona.

[38] Currently, article 4 paragraph 3 from TUE

[39] *Kühne & Heitz* Decision, point 27.

pronounced in this case being subsequently confirmed in similar cases (like *i-21 şi Arcor* and *Kempter*[40]). However, it suffers a certain lack of clarity because its not concise enough character of motivation[41], which gave rise to some questions. If it is mainly clear that the review obligation must be interpreted restrictively, as derogation from the legal security principle, a matter on which there were differences of opinion concerns the length of the obligation of the administrative institution. Following the the distinction made by the Court between *the review* and *the revocation* of the final administrative decision[42], the question arises whether the requirement established in the decision of the administrative institution regards only the obligation to review that specific decision (to reopen the proceedings) or also the obligation to revoke the decision, following this examination, that interpretation is contrary to the communal law interpretation further emphasized by the Court. The European Commission opinion[43] and that subsequently results from the case law of the Court[44] is that that this decision must be interpreted as the competent administrative institution, when the communal law allows it to revoke a final administrative decision and in the circumstances explicitly described in the mentioned decision, is also required, under article 10 EC, to revoke this decision, if from its review shows that it has become incompatible with the interpretation of the communal law given by the Court in the meantime.

Proving to be protective towards the procedural autonomy of the Member States, the national authorities following to appreciate each particular situation in light of their internal legislation, the Court's decision proves to be incomplete regarding the extent of the effects of any review of that decision, if they occur with retroactive character, or, in the future, following therefore that this thing to be considered in the light of all the provisions of the national law. As noted in the doctrine[45], both the disparate solutions that can be provided by the national legislation to this question, and also the fact that it is possible that the national law of some states can not provide for the administrative institutions to reopen a final decision make that the application of Kühne & Heitz jurisprudence in different European Union member states to determine discrepancies in the protection of the individuals' rights. The subsequent Court's case - law has allowed, in some degree, the clarification of some questions raised about Kühne & Heitz decision. Thus, in the first place, the four circumstances hold in this case are qualified as "conditions" by the Court[46], but they do not apply in the situation in which the one who request the revocation of a final administrative decision did not make use of the right to lodge an appeal against the mentioned decision (i-21 decision Germany and Arcor[47]). Principles in the light of which it is judged the i-21 Germany and Arcor cause are those of

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[40] According to Yves Bot General Lawyer decisions, "Kühne & Heitz Decision, previously quoted, has established under the existent conditions that exists, no matter of the situation, a reviewing obligation. However, the communal law does not oppose to another review in other circumstances when the national procedural dispositions allow" – point 83.

[41] The very argument based on the importance of the procedural autonomy of the Member States and not on the priority principle of the Union law being considered questionable - X. Groussot, T. Minssen, *op. cit*., p. 97.

[42] The widely used terms which leave a window for the procedural diversity of the Member States (revocation / review / recurrence/ etc.).

[43] Observations presented by the Commission in *Kempter case*, point 40.

[44] The conclusions of the Yves Bot General Lawyer in *Willy Kempter* Cause, point 53:" We believe that formulating in such way the point 27 from the decision, the Court sought to clarify that if, under the article 10 EC and in the mentioned circumstances the review becomes compulsory for the competent administrative institution, in turn the revocation of the final administrative decision has, however, an automatic character, since it depends on the re-examination result itself". … in such a situation, article 10 EC requires to the administrative institution the administrative decision's revocation to the extent necessary to take into account the outcome of the re-examination (point 55).

[45] X. Groussot, T. Minssen, *op. cit*., p. 98.

[46] *Kapferer* Decision, point 23 (regarding a courts) and *i-21 Germany şi Arcor* Decision, point 52.

[47] Cause having as object a preliminary question where the remittance court asked the Court to express its view on whether article 10 EC and article 11 paragraph (1) of Directive 97/13 of the European Parliament and of the Council from 10th of April 1997 regarding a common framework for general authorizations and individual licenses in the field

the effectiveness and equivalence used to the appreciation of the national procedural law, applied in regard with the obligation of revoking a decision that rests with the administration and with the right to appeal, that must exist both in relation with internal matters and with the communal law. According to the Court, "if the applicable national norms to the appeals require the obligation to revoke an unlawful administrative act in respect with the internal law, although this act has remained final, if the specification of this act would be <simply unacceptable>, the same obligation of revocation must exist in equivalent conditions, in the case of an administrative act which is not according with the communal law"[48]. The Court is asked to verify if the criteria derived from the German jurisprudence, which allow evaluating the concept of "purely and simply intolerable", are not applied differently, as it is considered or not the national or the communal law.

The decision of the Court in Willy Kempter Case offered the solution of clarifying the last two criteria retained in Kühne & Heitz decision. Regarding the third condition, the Court stated that, if appropriate, the revocation of a final administrative decision with the scope to consider the interpretation of a communal law disposition upheld in the meantime by the Court *do not require that the applicant to invoke the communal law in the appeal brought under internal law against such decisions*[49]. Regarding the last criterion concerning the interpretation of Kühne & Heitz, when asked by the national court whether there is a term to require the review and the revocation of a final administrative decision contrary to the communal law, the Court also made reference to the effectiveness and equivalence principles. Bearing in mind that in order to ensure legal compliance of the judicial security, the Member States may require that a request for review and revocation of an administrative decision remained final and contrary to the communal law, as it was subsequently interpreted by the Court, to be submitted to the competent administration in a *reasonable time* after finding out of the Court of Justice decision[50], the Court stated that it is for the national law to determine such terms.

As a conclusion of the two series of the Court jurisprudence, it may be noticed the effort that the Court of Justice has put in time to find a balance between the requirements of a full insurance applicability of the communal law, on one hand, and the establishment of the legal reports with the meaning of protecting the legitimate interests of individuals, on the other hand.

Between the public interest (communal) and the private one, the Court has chosen, in principle, for a conditioned remediation rather than for a restoration with any price of the prior position to the violation of the communal legal order through an administrative act. Through the last series of jurisprudence can be considered to occur, in a certain extent, an erosion of the legal security on national level (regarding the stability of the administrative decisions), which is sometimes sacrificed for achieving the compliance of the European Union legal order. The Casuistic character of the Court's rules and the reference to the procedural autonomy of the Member States moderate thou this effect. The principle of cooperation, often invoked by the Court in these cases, requires, among others, that the obligation to ensure the compliance of the communal law is incumbent for all the Member State's authorities within their jurisdiction[51]. In these conditions, although the organization

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of telecommunications services had as effect, in light of the Court's decision in Kühne & Heitz Cause, to limit the discretionary competence of the national authority responsible for regulation in the revocation of charging decisions, taking into consideration, especially, the Court's decision for Kühne & Heitz

[48] i-21 Germany şi Arcor Decision*,* previously quoted, point 63.

[49] *Kempter* Decision*,* points 40-46. According to the general lawyer (point 94 from his conclusions), what is important is the fact that considered court's decision is based on an incorrect interpretation of the communal law and confirms, as a consequence, its misapplication.

[50]Idem, point 12. Although it was suggested that the term "to be aware of the Court's jurisprudence" to refer to the time when the applicant was actually informed of this jurisprudence, and not at the date on which the Court pronounced its decision, this solution was not retained.

[51] See also the Decision from 12th of June 1990, *Germania/ Commission*, C-8/88, Rec., p. I-2321, point 13, and also *Kempter* şi *Kühne & Heitz* Decisions, previously quoted.

and the powers of the public administration represent a national prerogative, by using the European court rules upon this principle it is produced a growth of the revocation power of the administrative acts of which the public administration benefits, when this concerns an act contrary to the communal law. Article 10 EC requires, in this case, involving all instruments which may exist in national procedural law to achieve, if the latter enables it, a review and, where appropriate, a revocation of the final administrative decision contrary to communal law[52].

3. The relevance of the Court's solutions in national context

Without proposing a development of administrative revocation theory as it appears in the internal law [53] (action that might be, in fact, quite complicated given that this area is the subject of much controversy in Romanian doctrine [54]), closely related to the principles and rules identified above in the jurisprudence of the European Court of Justice, we can raise a few issues regarding the way in which the revocation of administrative acts (in this case the illegal ones) may represent, in the Romanian legal system, an effective tool for restoring the legality in compliance with European Union law. Thus, in terms of general principles of the revocation of illegal found administrative acts by the European instance, if the juridical security, in reasonably meaning is fully respected, the current law allowing the revocation of an administrative act only within the general term of exercising the action in administrative Court, not the same can be said about the principle to respect the legitimate expectations of the beneficiary of the act (in the sense that the institution that issued to take into account in a sufficient extent that the addressee could eventually to trust its). The legal regime of administrative acts revocation in Romanian law is an objective one, based mainly on the nature of the act and the establishment of an objective time at which it becomes irrevocable, and not on the subjective attitude of the addressee of the act. There are no, therefore, premises to customize the solutions to specific cases, specific solution to European law, which may put the administration in the situation that could not always meet European. However, this guidance does not benefit of using the revocation procedure as an effective means of restoring legality in relation to European Union law.

In the context of principles mentioned above, a provision of Romanian law of the administrative Court shows the disadvantage in which find the administration in relation to our courts, as regards to the possibility to withdraw their own acts. Under Article 1 (6) of Law 554/2004, "public authority issuing an unlawful administrative act may apply to the court its nullity, in case the act can not be revoked, as he entered the civil circuit and produced legal effects. In case of admission the action, the court will decide, on request, also on the legality of civil concluded acts under the unlawful administrative act and also on the occurred civil effects ". Administration, therefore, deprived of the opportunity to cancel its act, may still invest with such a task the Court, which undoubtedly is not justified in relation to the principles of juridical security and to the principles of legitimate trust of the beneficiary of the act, considering that the act would need to be "untouchable" in the sense that it can not be revoked by any government, or canceled by the Court[55].

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[52] The conclusions of Yves Bot General Lawyer in *Willy Kempter* Cause, point 79.

[53] In the absence of administrative procedure's code, still in draft phase, the administrative court's law (Law no. 554/2004), which represents the common law in the administrative procedure matter, establishes in article 7 paragraph (1) that "Before apply to the competent administrative court, the person who considers himself injured in one of his rights or in a legitimate interest through an individual administrative act *must* require to the emitting public authority or the higher authority, if it exists, within 30 days from the date of the document notification, its revocation, in whole or in part thereof.

[54] For a largely consideration of this matter, see also I. Brad, *op. cit.*

[55] For such a conclusion, see also O. Podaru, *op. cit.,* p. 294.

A special problem is posed by the obligation of administrative authorities, in accordance with jurisprudence Kühne & Heitz of the Court in Luxembourg, to reconsider a final decision and proves to be contrary to European Union law as interpreted by the Court later. In our opinion does not exist in internal law criteria for mandatory revocation of a decision by an administrative authority for the purposes noted in the first condition in Kühne & Heitz, that the national law to recognize the administrative bodies the possibility of revert to respective final decision. Law on Administrative Court, as amended in 2007[56], a new means of review final and irrevocable decisions: breach of the principle of precedence of Communal Law. This solution provided for the possibility of revision of a final court decision if the Communal Law was not considered during the administrative adoption of the decision or during proceedings before administrative courts. Reason for revision it is, as this provision, "pronunciation" the decision contrary to the principle of priority. Or, for our situation in the case provided by jurisprudence Kühne & Heitz, the third condition requires that the final decision is, in light of subsequent case-law of the ulterior Court, based on a misinterpretation of Communal law, adopted without noticing the Court with preliminary title[57].

Conclusions

To those presented above, it can be concluded that if in regard to the application of European law, national government has a role, not the same can be said about the role reserved for it in terms of removing the effects of possible infringements of Union. The principle of effectiveness, which requires that national law does not render virtually impossible or excessively difficult the exercise of rights conferred by Union law, justifies an extension of the power to revoke the administration when it concerns a national act contrary to European Union[58]. Although European Union law in principle does not require states to create legal means other than those for ensuring compliance with national law, with strict reference to the objective of ensuring the compatibility of national law with European law, can be taken into consideration an eventual entry into the Romanian legislation of some provisions to facilitate the revocation of the administrative organs of the acts that prove to be contrary to European Union law. For example, could be considered formal consecration on Administrative Court law and in the future administrative procedure code the possibility of review of administrative decisions if the three conditions Kühne & Heitz are met[59]. It would be also useful the introduction of the public interest criterion (of restoring of Communal legality) to allow revocation of a creative of rights act, that will allow the appreciation, from case to case, on the interest that has to be protected (obviously, with the right of the individual to compensation)[60]. Such a solution could be analyzed also in relation to the principle of State liability for breach of Communal obligations that would justify the imposition of the obligation even on the administration to revoke a final decision incompatible with European legislation and that is likely to engage state responsibility.

[56] Through Law no. 262 from 19th of July 2007, republished in the Official Gazette no. 510 from 30th of July 2007.

[24] This disposition was abrogated through Law no. 299/2011, published in the Official Gazette of Romania, part I, no. 916 from 22nd of December 2011.

[57] Given the extremely recent character of this disposition repeal, the consequences of removing the possibility reviewing a final decision on the grounds of violating the principle of priority of the European Union law and possible identification in the national law of other legal grounds have not been studied yet and anyway, not covered by this study.

[58] J. Sirinelli, *op. cit*., p. 450.

[59] For such a conclusion, see also G. L. Goga, *The Obligation of the National Administrative Organs to Reexamine their own Decisions in the Context of the Recent Jurisprudence of the Court of Justice of the European Union*, (in Acta Universitatis Danubius No. 3/2010), p. 162-169.

[60] See also in this regard O. Podaru, *op. cit.,* p. 314.

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PARLIAMENTARY OVERSIGHT IN ROMANIA, A GUARANTEE OF ACHIEVING SEPARATION OF POWERS IN THE STATE

SILVIA MIHALCEA*

Abstract

This paper focuses on the dimension of the relationships between the Parliament and other state institutions in Romania (Government, chief of state, public administration authorities) from the point of view of the parliamentary oversight. The reason and the necessity of the parliamentary oversight comes naturally from the existence of the democratic principle of representation: using the mandate entrusted by the people in the electoral elections, the members of the Parliament are entitled and, in the first place, have the obligation to verify the public affairs related to the safeguarding of the national interest and achievement of the well being. This mechanism is a flexible one and involves collaboration, cooperation, balance and thus, it appears as the strongest form in accomplishing the separation of powers in the state.

The paper approaches the early developments and the evolution of the parliamentary oversight, the wide range of tools used by the Parliament to carry out this function (procedures and forms) according to the stipulations of the Constitution, laws and European Treaties and emphasizes the role of the parliamentary practice in this field. The study also puts forward a series of detailed recommendations aiming to improve the quality of this act. A new element is the parliamentary oversight in the field of European affairs, introduced by the implementation of the Lisbon Treaty, which consolidates the role of the national assemblies in order for them to become important actors in the European construction by their active involvement in the decision making.

***Keywords**: Parliament, parliamentary oversight, separation of powers, state, Constitution.*

Introduction

The people are the sole holders of the power, which is exercised by the state through its institutions. A *division*[1] of the powers occurs and we distinguish between the legislative power, the executive power and the judicial power. The importance of this segmentation brings a balance, each power has control instruments on the others, limiting and preventing the power seizure and thus, avoiding abuses.

The parliamentary institution has remote origins, being recorded in Island in 1930 for the first time, when it was founded and when the first national forum met under the name of *Althing*; in Romania, the parliamentary history started in 1831 along with the Organic Regulations, in 1831 in Wallachia and in 1832 in Moldavia.

The mission assigned to the parliament is very much connected to its functions, namely to provide the citizens' needs according to the mandate received from them. One of these functions is the parliamentary oversight (control), which represents a democratic mechanism for ensuring that necessary balance between the powers in the state in order to prevent the seizing of the . Using specific means, the legislative authority exercises influence on the Government and the public administration, but also on chief of state, pursuing the general interests of the society.

Even if there are very clear and precise provisions in the Romanian Constitution and other laws, in practice things are very often different and this study aims to underline these aspects taking into account the latest approaches and developments, identifying the slippages also targeting to put forward proposals for future amendments of the actual legislation.

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[1] Nicolae Popa, *General Law Theory*, (C.H.Beck Publishing House, Bucharest, 2008), p. 80

Paper content

1.Evolution of the parliamentary oversight concept

The Parliament, „the supreme representative body of the Romanian people and the sole legislative authority of the country"[2], is composed of the Chamber of Deputies and Senate, elected by universal, equal, direct, secret and freely expressed vote according to the electoral rules, each of them having different duties.

Professor Ioan Muraru identifies six tasks for the Parliament[3]:

a) adoption of laws;

b) establishment of the socio-economic, cultural, state and legal guidelines;

c) election, appointment or removal of some state authorities;

d) parliamentary oversight;

e) executive board in foreign politics;

f) own organization and operation.

The occurrence of the parliamentary control concept was born long time before the development of modern political parties. Etymologically, the word *control* comes from the old French, *contreroller*, undertaken from the mediaeval Latin word *contrarotulare* (to check by registering in a second register). In English, *scrutiny* is used for defining this concept, undertaken also from the French word *scrutin*, which comes from the Latin word *scrutinium* – exam and the verb *scrutari* – to search, to look over.

Adopted by the French National Assembly on the 26th of August 1798, the Bill of Human Rights and Citizens set at the art. 14 and 15[4] the principle of the governors' accountability to people, principle developed subsequently by the French Constitution from 1791, Title III About public powers: „ministers are liable for all the crimes perpetrated by them against national security and Constitution [5] meanwhile the regulatory power has the authority to prosecute ministers and main agents of the executive body before the High National Court.

In our country, as well as in the other European ones, the transparency of the scrutiny (parliamentary control concept) can't have its origins but in the constitutional provisions, proceeding from the competencies assigned to the state institutions and their inter-relations on the state power separation-based principle.

Once the state power separation principle has been established in the Constitution, we can analyze the existence, size and forms of the parliamentary control within that period of time.

One of the first constitutional moments was present in Romania in 1822, „the first attempt to give consistency to the Romanians' liberal trends and democratic ruling principles worldwide"[6], by the commissary's, Ionică Tăutu, constitutional project, known also under the name of "*Carvunarilor Constitution"*. Being inspired by the Bill of Human rights and citizens*,* the text broadly underlined the separation of power between the Lord and the Public Assembly. The executive power belonged to the Lord; the legislative power could be carried out by the Lord together with the Public Assembly, while the judicial power was subordinated to the executive one. The great historian, A. D. Xenopol named it as "the first Moldavian constitutional project", but the act couldn't be applied

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[2] Art. 61 of the Romanian Constitution

[3] Ioan Muraru, Simina Tănăsescu, *Constitutional Law and Political Institutions,* C.H.Beck Publishing House, Bucharest, 2009, p 154

[4] The citizens have the right to find out by themselves or by their representatives, the necessity of the public contribution and to willingly accept it, to follow its destination, to establish its quantum, bases, perception and time. The society has the right to take a public officer to task for the way he/she meet his/her duties.

[5] http://sourcebook.fsc.edu/history/constitutionof1791.html

[6] Cristian Ionescu, *Constitutional Law and Political Institutions*, vol. I, (Lumina Lex Publishing House, Bucharest, 1997), p. 19

because of the great boyars' opposition, supported by the Ottoman Porte. We do not consider that it has significant items which could have specified the idea of a control performed by the legislative power, but „it announced even from the first years of the earthling reigns the institutional searches which were to mark out the second half of the century"[7].

The first constitutional delimitation of the state power duties, although faulty and "confusedly described in a less clear style,"[8] can be found in the Organic Regulations, acts which instituted a modern state machine, ousting a series of feudal-like institutions.

The executive power was in hands of the Lord, vassal of the Turks and protected by Russia, who appointed and discharged ministers, he also granted clemency and could reduce punishments, he granted and withdrew noble titles, he concluded treaties with foreign powers, within certain limits, but he could also enjoy exclusively the right of legislative initiative, and he shared the legislative prerogatives with the unicameral parliament established under the name of Public Assembly. The Public Assembly was elected for a five-year mandate and although it had the right to vote legislative proposals with full majority, it had no legislative power as the modern parliaments, as the Lord held a veto right.

We have reached to the matter in question for the present research, being found within the text of article 49 of the Wallachia's Organic Regulations and in article 52 of the Moldavian Organic Regulations: „The ordinary deliberations of the Public Assembly shall only have legal power when approved by the Lord who is free not to approve them without giving an explanation on his reason of not doing it". As Marian Enache noticed, within the Lord's right to vote for the implementation of the adopted laws, we find "the origins of the Romanian parliamentary control, origins which were valued in the next constitutional acts of Romania"[9].

There are also similar provisions, but more consolidated, in the Developing Statute of the Paris Convention, adopted within Alexandru Ioan Cuza's reign, in 1864, according to which, due to the state power collaboration, the Assembly was supposed to listen the ministers within the legislative process, if those were asked for taking the floor; The Lord could reject law promulgation.

The provision of Alexandru Ioan Cuza's constitutional project is also deemed to be mentioned, being published in a French newspaper, *La Nation* in 1863 and unapproved by the great powers through which the MPs were granted the right to address questions to a minister without involving the government's political liability. Moreover, the questions were supposed to be notified to the president of the correspondent forum who decided in respect to their opportunity but under the conditions to be appointed for that position by the Lord's decree.

The 1866 Constitution, of Belgian inspiration, was the one which would really establish the state power separation and in consequence a more consolidated form of the parliamentary control; „by its essence it is a modern, democratic constitution"[10]. The legislative power was collectively granted to the monarch and to the National Representation, the executive one exclusively to the monarch and the judicial one to the Courts.

The control performed by the Parliament over the executives took concrete shape by establishing the institutions of parliamentary inquiry, questions and by the citizens' right to petition.

Article 47 stated that „Each and every Assembly had the right of inquiry", being performed by each chamber the way they thought suitable and provided in the parliamentary regulations as well. The right of MPs' to address questions to ministers was established for the first time in a promulgated constitutional text (although that was also provided in Cuza's constitutional project as

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[7] *Constitutional Reform in Romania. Theoretical and historical aspects related to constitutional evolution,* (ProDemocratia Association, Bucharest, 2008) p. 19

[8]. Gheorghe Gh Tănase, *Separation of Powers in the State*, (Editura Ştiinţifică, Bucharest, 1994), p. 218

[9] Marian Enache, *Parliamentary control*, (Polirom Publishing House, Iaşi, 1998), p. 125

[10] Emil Cernea, Emil Molcuţ, *The History of State and Romanian Law,* (Universul Juridic Publishing House, Bucharest, 2006), p. 275

we have shown above): art. 49 - „Each and every member of Assembly has the right to address questions to Ministers".

The parliamentary control was also performed by the motion (petition) right stipulated in art. 50: „Anyone has the right to address motions to Assemblies by means of office or any of its members. Each and every Assembly has the right to submit the addressed motions to Ministers. Ministers have to give explanations over their activity each time the Assemblies would ask for it". In this way, ministers are obliged to notify the Assemblies regarding the solutions to the corresponding requests. There is also important to underline the fact that the right of motion was recognized regardless age, sex, political affiliation, ethnical origin, etc.

Not last, article 99 established „as a pregnant necessity"[11], the collaboration that should exist between the state powers, by a minister's attendance to the parliamentary chambers' debates: „If the ministers aren't members of the Assemblies, they can participate in law debates, but without having right to vote. There is necessary the presence of at least one minister to the Assemblies' debates. Assemblies can ask for the ministers' attendance to their deliberations".

According to the new adopted Constitution, the Lord, exercising the executive power, was deemed to be „inviolable" and couldn't be made liable in the terms of the fundamental law. This situation had to be balanced somehow, and so the official papers issued by the monarch had to be countersigned by the ministers, being liable for that before the Lord and the Parliament, too.

The vote of non-confidence represented a component of the control performed by the Parliament and although in the previous parliamentary practice prior to 1866 there were cases related to the ministers' joint or individual political liability – the so-called reprimand passed in the Assembly of Deputies - (on the 18th of February 1863, Nicolae Crețulescu government -50 pro votes, 5 against votes, 50 abstention votes), the Constitution of 1866 did not comprise any explicit provision related to those situations, acknowledged in a customary manner[12]. After the adoption of the fundamental law, the Government was supposed to resign not only after a negative vote passed in the Assembly, but also in the Senate, but in practice, if an express motion of confidence was adopted in the Assembly, the vote given in the Senate didn't have much importance; moreover, that parliamentary chamber would have been dissolved by the Lord, as it happened in the case of Lascăr Catargiu Government in 1876.

The ministers' legal liability was stipulated in the fundamental act of 1866, in article 101: the Assembly of Deputies, the Senate or the Lord could send them before the High Court of Cassation and Justice, in joint sections.

If things were clear at the level of constitutional provisions, related to the parliamentary control and performance methods, in practice they were totally different. The executive power succeeded many times to assign a predominant role by majority mechanism, dependent on the government's influence, as it used many times the state machinery for the candidates' service in order to win the elections. There were many cases when ministers asked the MPs, who constituted the majority, to vote laws they did not agree with. As an example, we present the confession of Constantin Argetoianu, minister of internal affairs, regarding the situation occurred in 1921, when more MPs of the Peoples' Party didn't want to vote certain articles of agrarian law: „Within the 2-3 days prior to voting, we arranged the groups and on the voting day I assigned my people to demand a vote with nominal appeal. I sat down on the office stairs in front of the banks – I was nearly to say the rack – and on calling each name of our party, I was looking into the called person's eyes and no one dared to be "against" under my stare[13]".

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[11] Marian Enache, *op. cit.*, p 127

[12] Tudor Draganu, *Constitutional Law*, (Editura Didactica si Pedagogica, Bucharest 1972), p. 170

[13] Constantin Argetoianu, *For those of tomorrow. Memories of those of yesterday*, vol. VI, And Publishing House, preface Stelian Neagoe, Bucharest, 1996, p. 235 – 236, taken from http://www.ioanscurtu.ro/content/view/112/28

After a five-year reign, Carol I noted in a dateless Memory[14] the insufficient level of development of the Romanian parliamentary regime caused by the existing traditions and continuous confrontations among politicians and came to the conclusion that the Constitution of 1866 needed to be revised for the parliamentary power to be limited, using: withdrawal of the right to control finances, the Lord's approval for the election of the president of Assembly of Deputies, the reduction of time assigned to questions addressed to ministers and the debates related to the vote for the answer of the throne message. But, following "the received suggestions from the diplomatic groups of Berlin"[15], that desire of the monarch was to remain at the level of a mere initiative.

The constitution of 1866 suffered a series of revisions in 1879, 1884, 1917, but the amended dispositions are not important for the subject approached in our research.

The new social, economical and political reality of the country will be regulated by the Constitution of 1923, one of the most European democratic Constitutions of the inter-war period[16], based on the governmental act of 1866, of which 87 articles were entirely kept. The state powers were equally kept, but some improvements were brought in, regarding the Parliament control over the Government.

Besides the MPs' rights to start investigations (article 50) and to address questions and petitions received from citizens to ministers, the obligation to answer the questions was established within the terms provided by the rules of each chamber (article 52), but also the obligation to give explanations about the forwarded petitions (article 53- ministers are obliged to give explanations over their activity each time the Assembly asks for it).

Regarding the subjects approached by the members of the two chambers within the questions addressed to ministers, those had in view matters of different fields as economy, culture, external politics, minorities, education, various social categories, etc.

It is interesting to notice that concerning the collaboration between powers, provided in article 96 of the Constitution[17], this gets new values by the amendment of the two chambers' regulations, in the sense that public sessions of the two Assemblies could only be opened in front of at least one minister.

As an innovation regarding the executive power, the Government is regulated as a distinct body in article 92: „The Government performs the executive power on the King's behalf as established by Constitution" and the Council of Ministers is established in article 93 being ruled by a person appointed by the monarch in order to create the Government: „The gathered Ministers constitute the Council of Ministers which is presided under the title of President of the Ministers' Council by the one in charge with the government creation".

Under the auspices of those new fundamental laws, they also kept the ministers' liability and the practice of censure votes given in Parliament, a minister or even the entire Government being likely to resign in the event of receiving a vote of non-confidence within the Assemblies.

During that period, the executives manifested their tendency to prevail over the Parliament power, but also to elude the debates on the normative acts of the two Assemblies by using the decree-law method, method which was frequently used starting from 1934 by the governments ruled by Gheorghe Tătărescu.

In 1938, on an intense political tension background and on external threats as well, the King Carol II installed the monarchical dictatorship by introducing a new Constitution approved by the

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[14] A.N.I.C. fond Casa Regală, file 12/1871, p. 1-36, taken from http://foaienationala.ro/carol-si-constitutia-romna-de-la-1866.html

[15] *Memories of King Carol I of Romania. By an eyewitness*, vol. II, Bucharest, (Scripta Publishing House, 1993), p. 146-147, taken from http://foaienationala.ro/carol-si-constitutia-romna-de-la-1866.html

[16] Gheorghe Gh. Tănase, *op.cit*, p. 263

[17] If ministers are not members of the Assemblies, they can attend law debates without having the right to vote.
At the Assemblies' debates, the presence of at least one minister is necessary.
Assemblies can request the ministers' presence at their deliberations.

Referendum of the 24th of February, held under a state of siege conditions, by open vote, with a separate list for opponents.

The democratic rights and freedoms were severely limited, but the mimed principle of state power separation was maintained. The Parliament's power was diminished, being granted the limited right of normative initiative[18], and the executive power, the King, was assigned a more important role being the "head of the state". The Constitution stipulated throughout Chapter 3, *About the Government and Ministers* the composition of the government, the necessary requirements for acceding the office of minister or secretary of state, liability and restrictions after the mandate expiry.

In the parliament control field, we can't find anymore the right of parliament chambers to initiate inquiries and to submit the received petitions to ministers, art. 25 stating as follows: „ Anybody has the right to address petitions, undersigned by one or more persons, to public authorities, but on behalf of the undersigned only. The authorities have the right to address collective petitions by themselves".

Ministers are accountable from the political point of view only to the King, the Parliament has no more power to sanction and dismiss the Government, having only a small influence, most of the time invested with a greater importance by some authors of the time[19], just from their desire to justify the new constitutional provisions.

Interpellations were replaced by the institution of the parliamentary questions, article 55 stating as follows: „Each member of the Assemblies has the right to address questions to ministers to which they are obliged to respond within the regulation provided term". The debates are avoided in this way within the Parliament which could have led to the passage of motions and to a censure vote for government as the „question didn't have the value of a question anymore"[20].

The Constitution was suspended in the fall of 1940 following to the forced abdication of King Carol II, the two parliamentary chambers dissolved and Romania was to be ruled for four years throughout decrees by Ion Antonescu's military dictatorship regime. In 1946 the Parliament restored the unicameral Chamber of Deputies and it became the Grand National Assembly by the Constitution of 1948.

This fundamental law, as well as the subsequent ones from 1952 and 1965, established the authoritarian character of the communist regime and visibly diverted from the "state power separation principle"[21]. Gheorghe Gh Tănase believed that those „did not establish the state power separation principle, as the Marxist doctrine stated the uniqueness of state power and defined it as an organized power of one class oppressing the other"[22].

We'll summarize below the means of the so-called parliamentary control stipulated in these fundamental acts, adapted means which led to the application and fulfilment of the unique party's policy, Romanian Communist Party: the questions and interpellations addressed to the Government or ministers individually, investigations and researches in any field, hearing the reports of the state administration chiefs, of the Prosecution and Supreme Court by the parliament standing committees.

After the Revolution of 1989, Romania returned to a democratic regime based on free elections, political pluralism, separation of state powers, the observance of human rights and the governors' liability before representative bodies. The new Constitution was adopted in 1991 and reviewed in 2003.

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[18] Article 31: „ The initiative of laws is granted to the King. Each of the two Assemblies may propose laws for the State public interest only by their own initiative"

[19] „Of course, an unfavourable vote, especially repeatedly, will jeopardize its situation" (Government), Andrei Rădulescu, *The New Constitution, FIVE RADIO CONFERENCES*, Ed.-II-, Cuvântul Românesc Publishing House, 1939, Bucharest, p. 49, www.dacoromanica.ro

[20] Gheorghe Gh. Tănase, *op.cit*, p. 281

[21] Marian Enache, *op. cit*, p. 130

[22] Tănase Gheorghe Gh. Tănase, *op.cit*, p 282

2.Parliamentary control – actual constitutional provisions

2.1 Control mechanisms and procedures

In his work,[23] professor Ioan Muraru underlines the parliamentary control and he divided it into six directions, mentioning the powers of the legislative:

1.control performed by giving explanations, messages, reports, programs;
2. control performed by parliamentary commissions;
3. control performed by questions and interpellations;
4. the MPs right to request and obtain necessary information;
5. control performed by settling the citizens' claims;
6. control performed by the Ombudsman.

In the French professor's opinion, Yves Mény[24] we can distinguish three types of parliamentary control over the executives:

- Partisan control, led by the opposition being efficient under the government's condition of vulnerability;
- non-partisan control, by means of the parliamentary control which can embrace various forms: questions, commissions, hearings, etc;
- control with sanction, as a censure motion, which is the most drastic, but it cannot be used many times without destabilizing the system;

2.1.1 Motion

The punitive dimension of control function refers to the effective sanction for the Government. This can be done, as in Romanian Parliament case, by censure or simple motions and it may concern, in increasing order of importance: forcing the Government to adopt certain policy measures (by approving a simple motion), the dismissing one or more ministers (by approving a simple motion where expressly required) or dismissing the entire cabinet (by voting a censure motion).

The procedure for submitting and adopting a motion is basically the same in Romania as in the other former-communist countries, with some small differences. Romania does not practice the so-called "constructive motion of censure" which obliges the initiators to mention the name of the potential prime-minister who would probably undertake that charge in case of motion approval. Poland and Hungary are the ones which apply this system. Another noteworthy difference refers to the necessary number of signatures for putting forward a censure motion. Poland has the most permissive Constitution which allows the introduction of a non-confidence vote by 46 MPs of the total of 460. As for the other Central and East European countries, the number equals to one-fifth (Bulgaria, Hungary) or a quarter (Czech Republic) of all those which have the right to initiate a motion of censure. From this point of view, Romania is part of the more restrictive states, being necessary one-third of the total number of MPs.

Due to the system drawbacks described in the previous chapter, for the MPs forming the opposition, the motion of censure has acquired another stake, which is missing for the countries where communication between Parliament and Government works normally. The initiation of a censure motion has become almost the only opportunity on which the Prime Minister may be brought before Parliament for an effective debate on actual acute problems. This is also valid for simple motions which determine the presence of the other cabinet members before the regulatory forum,

[23] Ioan Muraru, Simina Tănăsescu, *op. cit.* p.158

[24] Yves Mény*, France: The Institutionalization of Lordship*, *in Political Institutions in Europe*(edited by Josep M. Colomer), (Routledge Publishing House, London, 2002).

depending on their subject. In this way, the Romanian, "parliamentarism" is the generator of a paradoxical and abnormal phenomenon for an operative system: in conditions in which, on one hand, the information dimension of the parliamentary control function is atrophied and on the other hand the chances that a simple or censure motion to be adopted are minimal, as a translation produces between the punitive and information dimension of the control function. In other words, the second dimension – represented by motions – loses its punitive character and it assumes the role and purpose of the information dimension. Given the fact that the mechanisms designed to generate debates among the MPs and cabinet members and to ensure communication, information – interpellations and questions – slightly fulfil their role, they were undertaken by stronger mechanisms - motions. Thus, the tolls of parliamentary struggle involving sanctions are used to generate debates which questions and interpellations would have meant. This aspect explains the increasing frequency of filed simple motions in both Chambers.

Moreover, the public "attention"-enjoyed motions and in general parliamentary debate of utmost importance is extremely low. The public character of Parliament sessions does not equal and does not trigger their promotion. Only motions of censure enjoyed some publicity in the last legislation (there were 10 censure motions initiated in the actual legislature).

Simple motions filed in the Chamber of Deputies and Senate

Legislature	Chamber of Deputies	Senate
2008 – up to present	15	8
2004 – 2008	15	13
2000 – 2004	20	12
1996 – 2000	13	6
1992 - 1996	3	5

2.1.2 Questions and interpellations

These tools represent the most common and convenient way to control the executive power activities. According to article 112, par. (1) in the Romanian Constitution „The Government and each of its members shall be bound to answer the questions or interpellations raised by the deputies or senators, under the terms stipulated by the regulations of the two Chambers of the Parliament". Thus, the Romanian fundamental law, unlike other European constitutions (Austria, Bulgaria, Cyprus, Ireland, Luxemburg, Russian Federation), provides the difference between these two parliamentary tools, belonging to the so-called non-legislative activity of Parliament.

The differences between questions and interpellations are basically related to procedure and content.

Questions

In European countries with a rich parliamentary tradition, to address questions to Government is one of the most ancient rights of the members of legislative power, being used for the first time in 1721 by the House of Lords in UK. Also in that country in 1902, there was inaugurated the system of written responses for the questions which couldn't receive one due to lack of time.

This mean of parliamentary control is defined both in the Regulation of the Chamber of Deputies in article 165, par. 2, and in the Senate's in article 158, par. 2, as a "simple request to

answer whether or not a fact is true, whether or not an information is accurate, whether or not the Government or other public administration bodies will release to the Chamber the information and documents required by the Chamber of Deputies or by the Parliamentary Committees, or if the Government intends to rule on a particular matter".

Thus, certain information is required by means of questions, explanations and the Government, ministers or other leaders of public administration are their targets. An MP cannot address more than two questions in the same week.

Regarding their content, the questions of personal or private matter are not allowed, as well as the ones which aim to obtain legal advice, or refer to lawsuits pending before courts or the ones concerning the activity of some persons who do not hold public offices.

The questions raised by the Romanian MPs should have a single author, while in some countries there are regulations regarding the number of persons who can initiate such question: for instance five in Austria or Latvia or nine in Lithuania.

We can distinguish between oral and written questions, each category being subject to certain procedural rules which varies depending on parliamentary chamber.

The Chamber of Deputies has schedule for receiving questions on Monday at every two weeks, between 18,30-19,30, provided prior notification of the object, the answer being received within 15 days after sending. The answer cannot exceed 3 minutes and another 2 if there are comments from the author or clarifications are required. Also, for justified cases, the answer can be delayed, fact which occurs in the absence of the targeted minister.

Written questions are sent to the appointed secretary of the Chamber of Deputies and there should be mentioned the type of desired answer: oral, written or both which will be done within maximum 15 days from filing. No deputy can address more than two questions in the same meeting.

Questions pending on answer are published in the Official Gazette of Romania, Part II, at the end of each ordinary session.

In the Senate, although not stipulated in the Regulation, according to the parliamentary custom, the answer to the oral questions addressed by senators is given on Mondays too, being the last point on the agenda between 18:00 -19:30 and they are usually broadcasted live on public radio station. The time allocated to an intervention is also of three minutes and it may be extended with another two minutes for further clarifications or comments. If the orally asked person is not present, the answer will be given in the next week meeting.

Oral answers to written questions are given after the questions are over and the written ones are sent to the author within maximum 15 days.

Questions and answers are recorded in the transcript and they are published in the Official Gazette of Romania, Part II.

The questions' subjects cover a large range of topics and they can be both of local issues, of the parliamentary constituency and of general interest.

Sometimes, using this mean of parliamentary control can be a launching springboard, being used by the MPs to improve, enhance the public image or inside their own party. In this way, the remarks, made in the XIX century by the famous essayist and British journalist, Walter Bagehot, are still valid: „there are no limits concerning the parliament curiosity. (...) Some of them address question from a genuine desire of knowledge or a real desire to improve the subject of what they ask; others to see their names in newspapers; others to demonstrate to a vigilant constituency they are always in alert; others to go ahead and get an office in the government; others because their habit is to ask questions"[25].

[25] Walter Bagehot, undertaken by Matti Wiberg*, Parliamentary Questioning: Control by Communication*, in the work *Parliaments and Majority Rule in Western Europe*, edited by Herbert Dőring, St. Martin's Press, New York, 1996, p 181

Interpellations

An interpellation is, according to article 173, par. 1 in the Regulation of the Chamber of Deputies and article 161, par. 1 of the Senate's, a request addressed to the Government or to a minister by one or more MPs or by a parliamentary group by means of which they require explanations on Government policies.

They differ from questions both by their high importance and their regulatory procedure.

In the Chamber of Deputies, interpellations are made in writing by underlying their object and they are read in public sessions assigned to questions, following to be sent by the president to the chamber of the receiver; they occur on Mondays in the same time with the question sessions and the time of an interpellation cannot exceed five minutes. The answer has to last five minutes too and it can be extended with another two minutes if any further questions or comments from the author.

An interpellation is formulated to create a debate, sometimes its object can turn into a simple motion adopted by the Chamber of Deputies.

Interpellations addressed to the prime-minister are filed to the Secretary of the Chamber of Deputies till Wednesdays, hours 14,00, from the week preceding the prime-minister's responses and they should refer to the Government policy on important issues of its external or internal affairs and the answers are given on Mondays at every two weeks, hours 18,00-18,30, and they can be postponed one week only.

The Regulation also provides, at the request of one or more parliamentary groups or of the prime-minister, the possibility to organize political debates in the plenary with the prime-minister's attendance at issues of major interest for the political, economical and social development. The same parliamentary group can ask for a political debate just once per session, while the prime-minister can ask for maximum two political debates per session.

In the Senate, unlike the lower chamber, interpellations are filed in writing by underlying the object and the motivation, following to be sent after their reading in public session established by the Standing Bureau. The deadline for answering is of two weeks and sometimes three weeks in certain occasions.

The author of an interpellation has three minutes in the debate session and the prime-minister or his representative five. These terms can be extended by the same ones in case of replies. The answer to the interpellations addressed to the Government members is presented by the minister or, as it might be, by a state secretary.

The Senate may also pass a motion by which it can express its position on a matter which was the object of an interpellation.

As the lower Chamber of Parliament, interpellations are written, in chronologic order, in a special register and they are displayed at the Senate's.

Due to the blooming activity of the parliamentary groups in the opposition, the number of questions and interpellations addressed to Government has dramatically increased so that we can notice by comparing them to the registered figures in the Chamber of Deputies in fig. 1 for 2000 and 2010, that the number of questions has multiplied by more than 13 times and the interpellations by approx. 10 times. The Senate has recorded the same upward trend.

Another factor which increased the number of questions and interpellations is represented by the electoral law amendment, as the uninominal vote was preferred instead of the party list, a fact that generated a stronger relationship between the MP and his electoral constituency. There can be noticed the great importance of local issues within the approached topics by these parliamentary control means.

Analyzing the actual regulations of the Chamber of Deputies and Senate and the way they are reflected in practice, we can notice certain inadvertences which influence directly the relations between Parliament and Government and also the efficiency of the parliamentary control.

Thus we take into account the fact that many times the prime-minister or ministers don't answer the questions and interpellations addressed to them. In order to illustrate this fact we'll use the data presented in a report[26] elaborated by The Institute of Public Policies which reveals that 24% of the formulated interpellations in the February – June 2009 session by MPs remained unanswered.

Another important element is the fact that the direct receivers of questions and interpellations attend the plenary debates very seldom. The parliamentary rules have been amended and they allow the prime-minister's replacement with a representative and the ministers' with a state secretary, but we do consider that their direct involvement would improve the scrutiny performance and would fully justify the institution of the executives' political accountability to the legislative power as found in modern states with strongly consolidated democracy.

Also, the two-week interval, long enough for receiving answers, leads in certain situations to the topic out of date, to the loss of attention and topicality. In order to avoid such situations, we consider as compulsory the introduction of the institution of urgent questions/interpellations on current issues at least in the regulations of one parliamentary chamber as demonstrated by some member states in the EU: Austria, Denmark, France, Germany, Greece, Ireland, Latvia, Lithuania, and Luxembourg. In UK, questions can be addressed from Monday to Thursday, after exhausting the agenda and answered within maximum 3 days, except the emergencies, whose answer is formulated on the same day.

2.1.3 Committees of Inquiry

In order to conduct further inquiries, clarification of cases or circumstances related to particular events or facts, the parliamentary control can be performed the standing committees, but, basically, these powers may be assigned to some special inquiry committees.

Article 64 par. (4) in the Romanian Constitution states that „Each Chamber shall set up Standing Committees and may institute inquiry committees or other special committees. The Chambers may set up joint committees". The Chambers can also constitute joint committees; the dispositions related to their establishment and functioning are detailed within the rules of each parliamentary chamber as well as in the rules of joint meetings.

In order to establish an inquiry commission there are required signatures of at least 50 deputies coming from two parliamentary groups or of 1/3 of the number of senators, and the joint decision shall be submitted to the Standing Bureau/Joint Standing Bureaus of the respective chamber or parliament, accompanied by the list of signatures; the vote will follow in the plenary. The committee starts its activity and it can hear any person who may be aware of facts or circumstances which can lead to the truth and can also instruct for an expertise to be conducted. After finishing and submitting the report to be voted, the committee ceases its activity.

The reports originated from such a committee have a consultative character and they do not constitute legal evidences, but they can be a start for criminal prosecutions by the judiciary bodies. The influence of such an inquiry committee on the public opinion shouldn't be overlooked.

Legislature	Inquiry committees Chamber of Deputies	Joint inquiry committees
2008 – up to date	5	-
2004 – 2008	2	6-
2000 – 2004	-	-

[26] Institute for Public Policies, *MPs' activity in the February – June 2009 session***,** Bucharest, July 2009, p 45: the deputies addressed 584 interpellations and 143 of them did not get an answer at the end of the session.

1996 – 2000	2	3
1992 – 1996	-	-
1990 - 1992	2	1

2.1.4 The investigation of citizens' petitions

Citizens can send petitions to MPs in virtue of the received popular mandate, being an intermediary between citizens and the Government. In the Chamber of Deputies works the Committee for the Investigation of Abuses, Corrupt Practices, and for Petitions and in the Senate the Committee for the investigation of Abuse, Corruption and Petitions.

The cases reported by petitions are examined, processed, investigations can be made regarding the reported cases or they can notify the competent public authorities**.**

2.2 Parliamentary control on European affairs

One of the goals of the Lisbon Treaty, ratified by the member states on the 1st of December 2009, was to strengthen the role of national parliaments, making them important players for the European construction by active involvement in decision-making.

Under the Treaty decisions, the European institutions (The Commission, the European Parliament and the Council) send their draft projects of normative acts to national parliaments, the latter being able to express its motivated point of view regarding the subsidiarity principle within 8 weeks.

Thus, the Romanian Parliament is granted the competence to perform parliamentary control on the government's activity with respect to the European affairs as well. The received informational flow is also relevant (either it is about projects of normative acts, consultative documents as white, green books or communications or by the Council's agendas and minutes), which can be fructified and also the political dialogue[27] with the European Commission.

Parliamentary control on European affairs (scrutiny) is a control which has in view the following documents issued by the institutions of the European Union:

a) draft projects of eligible normative acts for checking the compliance or breach of the subsidiarity principle (it also bears the name of subsidiarity test);

b) draft projects of normative acts of the European Commission, European Union Council or European Parliament and the consultative documents of the European Commission selected by their political, economical, legal, social or financial relevance;

c) draft projects of normative acts of the EU for which the Romanian Government elaborates general mandates.

The procedure of parliamentary control on European affairs is an *ex-ante* intervention, performed before the adoption of the European acts (directives, regulations, decisions), unlike the legislative ordinary procedure, which operates after their adoption in order to be implemented in the national law. Its final product is an opinion, a point of view formulated after analyzing those policies which do not generate legal obligations and do not produce direct applicable effects, while the final product of the legislative procedure is the law itself which is directly applicable.

In order to perform this operation, it is necessary to establish a whole construction with implications to normative, institutional and administrative level. At institutional level, a cooperation

[27] Also named the „Barroso initiative". It was initiated on September 2006 and it meant an important change especially in the countries where Parliament depended on the information offered by Government regarding legislation discussed in Strasbourg or Brussels.

law is required between Parliament and Government on European affairs; finally, after a long delay the Government put forward, on the 18th of January 2012, a draft bill[28].

According to the Treaty's provisions, the Chamber of Deputies and the Senate have each one vote and also a specific procedure.

3 Relations between the Parliament and other institutions

3.1 Chief of state

We chose to use this title as, in our opinion, these two institutions, the Parliament and the chief of state, should have permanently collaboration and balanced relations, considering the fact that they both express the will of the majority among citizens and also the fact that the President is a mediator between ''the state powers and between the state and society''[29]; the control mechanisms should be used responsibly, without generating crisis and constitutional instability.

These relations between the Parliament and the President can only come from the Constitution and are determined by analyzing and interpreting the provisions of the fundamental act.

Article 88 from the Constitution gives the President the power to address ''messages on the main political issues of the nation" and does not represent a mechanism of parliamentary control; but it was long discussed when we came to the moment of the debates in the two chambers of the Parliament and lead to the conclusion that it can even be rejected, which, in our opinion, is the equivalent of exercising parliamentary control.

The Constitutional Court of Romania was called in 1994 to decide on the issue of constitutionality of Article 7 in the Standing Rules on the joint sessions of the Chamber of Deputies and of the Senate. On this occasion, the Court[30] defined the message as ''an exclusive and unilateral politic act of the President of Romania, which the Chambers, met in joint session, have … only the obligation of *receiving* it ''. Therefore, a parliamentary debate cannot be organized in order for the message to be discussed with the participation of the President, because this would mean engaging his political responsibility; after the presentation of the message, the Parliament can debate it and even adopt measures, without rejecting the message, as ''*receiving*'' cannot be confused with ''*rejecting*''. In the same document, the Court interpreted the provisions from article 88 as a ''modality of cooperation between the two authorities, elected by direct vote – The Parliament and the President of Romania".

The parliamentary control resides in other two constitutional articles: suspension from office and impeachment.

Article 95 refers to what professor Ioan Muraru calls ''the political responsibility of the President…in order to differentiate it from the criminal liability"[31]. The same author considers that the suspension from office is in fact an element of the parliamentary control exercised upon the executive power represented by the President of Romania[32].

Thus, in case of having committed grave acts infringing upon the provisions of the fundamental law, the President may be proposed for suspension from office by at least one third of the number of deputies and senators. The proposal must include a motivation, all the imputations and all the proofs. This initiative is debated in the joint meeting of the two chambers which can decide, with the vote of the majority and after a consultation with the Constitutional Court[33]. The President

[28] In more European member countries there are inserted dispositions in the fundamental acts with respect to control on European affairs – Finland, Greece, Bulgaria

[29] Muraru Ioan, Tănăsescu Simina, *op.cit.* p. 250

[30] Decision no.87 of September 30th 1994

[31] Ioan Muraru, Simina Tănăsescu, *op cit*, p. 257

[32] Mihai Constatinescu, Ioan Muraru, *Parliamentary Law, (*Gramar Publishing House, Bucharest, 1994)

[33] The Parliament debated so far two such suspension cases:

may participate in the debate in order to explain the facts which are imputed to him. After a positive vote, the Parliament decides the date for the referendum, organised for the dismissal of the President[34], but no later than 30 days, according to Law 3 / 2000. The interim chief of state is the President of the Senate, second in the state line.

When the 1991 Constitution was written, the provisions of article 95 were taken from the Austrian Constitution, but in an incomplete way, as that article states the dissolution of the Parliament in case of a favourable result in the referendum for the chief of state. This is a fair situation, so in case the initiative for the dismissal of the President fails, before term parliamentary elections should come as a natural consequence. In our opinion, this change should be also introduced in case of a future amendment of the Constitution.

The criminal liability of the chief of state is engaged in case of high treason and the members of the two chambers, in joint session, based on a two thirds votes, can impeach him, according to article 97, paragraph (1) from the Constitution.

The New Criminal Code, coming into force on the 1st of September 2012, introduces the high treason offence in article 398 and it defines the following facts: treason by transmitting secret state information, treason by helping the enemy, actions against the constitutional order, which are punished with life imprisonment or prison from 15 to 25 years and prohibition of certain rights.

The decision issued by the Parliament and signed by the presidents of the two chambers is sent to the General prosecutor for the High Court of Cassation and Justice to be notified.

3.2 Authorities of the public administration

The fundamental law institutes three types of control for the activity of the authorities of the public administration: parliamentary – the Government and other bodies of the public administration have the obligation to present the information and documents requested by the Chamber of Deputies, the Senate, or parliamentary committees, through their respective presidents (article 111), judicial – article 25 and 52 and administrative – article 102.

Some of the instruments presented above are also used in this type of control performed by the Parliament: questions, interpellations, inquiry committees, but in this case we shouldn't be dealing with a strict political control aiming for the law, human rights and citizens' freedoms to be observed, for the prevention and sanctioning of the abuses of the public servants.

A peculiar aspect is represented by the autonomous administrative authorities which may be established by an organic law and are also situated in the area of the parliamentary control. They are not under the authority of the Government but they have a special relation with the legislative body, either by presenting annual reporst or by having their leadership appointed by the Parliament:

- Court of Accounts
- Legislative Council
- Romanian Ombudsman
- Romanian Intelligence Service
- Competition Council
- Foreign Intelligence Service
- Guard and Protection Service
- Special Telecommunications Service

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1. On the 4th of July 1994 regarding Ion Iliescu's suspension, initiated by 167 members of the Parliament; it was rejected with 242 votes against and 166 votes in favour.

2. On the 19th of April 2007 regarding Traian Basescu's suspension, initiated by 182 members of the Parliament; it was adopted with 322 votes in favour, 108 votes against and 10 null votes.

[34] The Referendum for Traian Băsescu's dismissal took place on the 19th of May 2007 and the results were: 24,75% in favour and 74,48% against.

- Insurance Supervisory Commission
- National Audio-Visual Council
- Romanian Broadcasting Society
- National Council for the Search of Security Archives
- Romanian Television Society
- National Authority for Communications
- National Council for Combating Discrimination
- Private Pension System Supervisory Commission
- Romanian National News Agency AGERPRES
- National Bank of Romania
- Romanian National Securities Commission

As for the parliamentary oversight of the intelligence agencies, there are The Joint Standing Committee of the Chamber of Deputies and the Senate for the exercise of parliamentary control over the activity of the Romanian Intelligent Service SRI and The Joint Standing Committee of the Chamber of Deputies and the Senate for the exercise of parliamentary control over the activity of the Foreign Intelligent Service SIE. These committees permanently evaluate the manner in which the political option is converted and applied. Thus, the parliamentary control represents a dimension of the decisional activities accomplished by the public supreme authority.

The powers of the two committees extend over examining the observance of the constitutional provisions and of other acts in this field, controlling the way the money from the state budget is spent, approving the draft bills and resolving the complaints and petitions of the citizens which consider their rights and freedoms affected by the means used in intelligence.

4.Conclusions

The dimension of the mechanisms of parliamentary control, their intensity and quality may vary according to the state's form of governance – political regime, electoral system, unicameral/bicameral organization of Parliament, its political structure, criteria which are also heightened by the tradition and parliamentary culture of each state. An interesting situation and transformation might follow in case of the announced changes to take place in Romania: unicameral Parliament (as a result of the referendum held on the 19th of May 2007), amendment of the electoral laws (also from the point of view of the results of the census conducted in 2011), establishment of regions as a new form of territorial organisation of the Romanian state (political as in Spain or administrative as in France).

The Romanian Parliament must prevent any possible slippages which sometimes are common in practice and avoid becoming a voting machine without amending the texts put forward by the Government. A very dangerous approach, an abuse in the relation between the Parliament and Government is the use of the responsibility assumptions (14 times for 19 laws during the last 3 years) and government ordinances by eluding the legislative debate and thus threatening the democracy rules. Thus, in our opinion, it is necessary to provide in the constitutional text a limitation in time and number regarding these instruments.

Using the sociological method, in our next future papers we intend to conduct a poll/survey among the members of the actual legislature of the Romanian Parliament, from all political parties represented, regarding the efficiency of the parliamentary on the executive by the means presented in our current study. The questionnaire, the sample and the methods for data interpretation will be set in collaboration with experts in sociology.

None of the three powers in the state prevails, there are many cooperation, collaboration areas, traced wider or narrower and despite its critics, Montesquieu's principle remains one of the main values of contemporaneous democratic political regimes.

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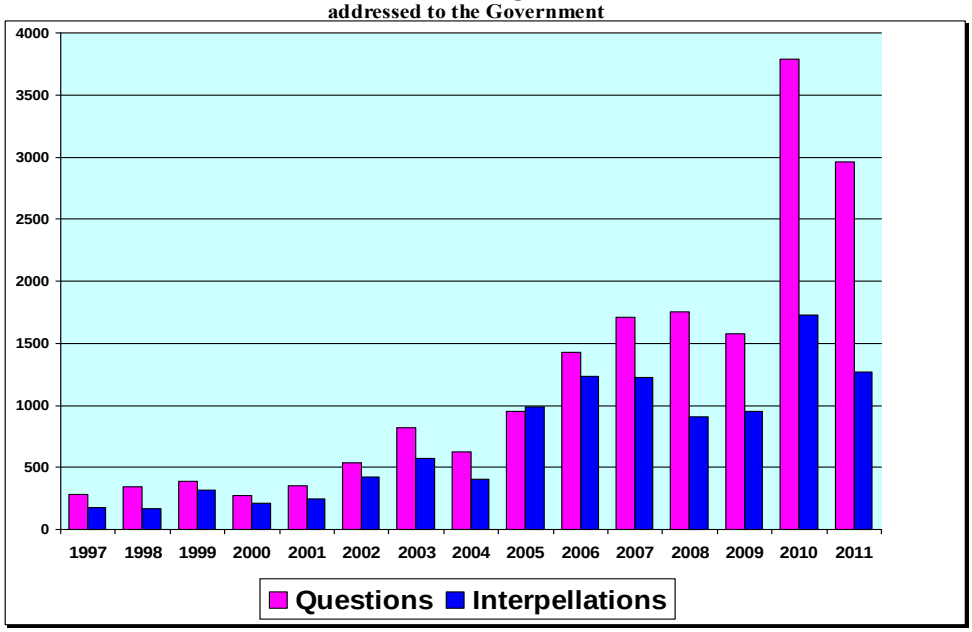
Fig 1. Chamber of Deputies
Questions and Interpellations
addressed to the Government



CLASSIFICATION OF FUNDAMENTAL RIGHTS AND FREEDOMS – A DIACHRONIC APPROACH AND CURRENT TRENDS

NICOLAE PAVEL*

Abstract

What seems relevant to this study is the current trend of the classification of rights and fundamental freedoms according to the universal and indivisible values criterion, criterion established by the Charter of Fundamental Rights of European Union. Taking as reference the new scientific criterion, we propose a diachronic approach classification in terms of rights and fundamental freedoms in the light of juridical doctrine and in terms of European and international documents on human rights and citizen. It is necessary to point out from the beginning that the classification of fundamental rights and freedoms does not imply a hierarchy and, from this point of view we consider it necessary to classify or group the rights and fundamental freedoms by scientific criteria, at least from the following reasons: it facilitates their explanation, their general characteristics and basic understanding, and the progress of their content and scope. By this approach, the proposed study opens a complex and complete vision, but not exhaustive on the classification classification of the current human and citizen rights. That is why the study begins with preliminary specifications that establish the terminology used in the content of the study, the correlation between domestic regulations and international human rights and the relationship between law and the law of European Union. Following a key – scheme we analyse successively the two major parts of the study, namely the classification of fundamental rights and freedoms in terms of constitutional doctrine and the doctrine of human rights, and the current trends on the classification of fundamental rights and freedoms.

Keywords*: fundamental rights, fundamental freedoms, diachronic approach, current trends, values.*

1. Introduction The subject of scientific endeavor will be circumscribed to the scientific analysis of two large parts of it: 1. The diachronic and selective approach of the classification of fundamental rights and freedoms in terms of *Romanian and French constitutional doctrine and the doctrine of human rights*; 2. Current trends regarding the classification of fundamental rights and freedoms, their diachronic and selective approach *in European and international documents on human and citizens rights* from the Universal Declaration of Human Rights and other subsequent documents adopted at international and European level, *in the Romanian constitutional doctrine and the doctrine of European human rights* and in *the constitutions of certain EU member states*.

In our opinion, the study is important for the constitutional doctrine in the field, the doctrine of human rights and for the European law doctrine of human rights, as by this scientific approach, we propose to establish, diachronically and selectively, a complex and complete illustration, but not exhaustive of the entire current trends on the classification of human rights and fundamental freedoms. For full but not exhaustive coverage of the field of study, following the preliminary specifications, we propose the classification of fundamental rights and freedoms in the Romanian constitutional doctrine. This classification was made according to a conceptual model representing the analysis on the contribution of Romanian authors of constitutional law, starting with the holder of the first constitutional law course at the Law Faculty of Bucharest, from 1915 until today.

By comparing the legislation, we selected for this study the French constitutional doctrine and the doctrine of human rights, as described in Section 3.1, which was the primary source of inspiration for the Romanian constitutional doctrine.

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Also, from the French constitutional and human rights doctrine we present briefly, in a diachronic and selective approach, classifications of public freedoms, which in our opinion are synonymous with the classification of fundamental rights and freedoms of Romanian constitutional doctrine.

In terms of full but not exhaustive coverage of the area of classifying the fundamental rights and freedoms, we have introduced in the conceptual model, a diachronic and selective approach of the current trends on classification of rights and freedoms. By this approach, we aim to identify the classification of human rights and citizen in the Universal Declaration of Human Rights and other subsequent documents adopted at international and European level, in the Romanian constitutional doctrine and European law doctrine of human rights, and in the constitutions of certain states of the European Union.

Even if the classification of fundamental rights and freedoms traces back in time from the adoption of the first written constitution, the theoretical interest to resume it is determined by the fact that the existing literature in the field has not always paid sufficient attention to theoretical classification of fundamental rights and freedoms.

Moreover, in the literature considered, in our opinion, the approach has not reflected diachronicaly and selectivele the complex and complete but not exhaustive classification area of fundamental rights and freedoms.

In addition, in the study we have analysed the new criterion of universal and indivisible values for classifying the universal and fundamental rights and freedoms.

2. Preliminary specification

This study is a continuation and extension of the scope of previous research on human rights and fundamental freedoms. The previous study focused on the study of *Concept of fundamental human rights in the light of juridical values theory.*[1]

The study includes in paragraph 3 the diachronic approach to the concept of fundamental rights in terms of classic constitutional doctrine and the doctrine of human rights. At the end of the study, we defined the concept of fundamental rights in the light of juridical values theory.

The concept of fundamental rights approached from the perspective of juridical value theory reads: *"Fundamental rights are those subjective rights of man and citizen, components of the human dimension, which in axiological approach are vital to the dignity and freedom of the people and for the free development of human personality, universal values, common European values and Romanian supreme values enshrined and guaranteed in the universal and European standards and in the Romanian Constitution and which subsumes four determinations of relativity: first determination of relativity relates to approaching the temporal evolution of human rights, the second determination of relativity relates to addressing the economic, social, political and cultural context of a society organized in a state, the third determination of relativity refers to the lack of synchronicity between the provisions at universal or regional level and those at state or national levels, and the fourth determination of relativity refers to the diversity of approaches to human rights issues explained by the heterogeneity of the international community."*

Regarding the components of fundamental rights concept outlined above, for this study we observe the following:

a) Fundamental rights and freedoms have the same juridical status, both being subjective rights.

b) We define *subjective rights as prerogatives or powers guaranteed by the Constitution and law to the will of the subjects to the juridical relation to act or not in a particular way, which implies recognition of a sphere of individual autonomy, or to require an appropriate attitude from the other*

[1] Nicolae Pavel, *Defining the Concept of Fundamental Human Rights in the Light of Juridical Values Theory* (Bucureşti: Pro Universitaria, 2011), 779-793, accessed 2011, cks.univnt.ro/download/48_cks_2011_ebook.pdf.

subject or subjects, and ultimately to seek protection for his right from state authorities if it is illegally harmed. As mentioned in the previous study, we observed that in legal terms, the right is a freedom and freedom is a right, and, in this regard, between the two terminological nuances there is no difference in terms of legal nature, which in our opinion constitutes one fundamental concept, namely *the fundamental right.*

c) The terminological distinction of *fundamental right* and *fundamental freedom* has at least one historical explanation.[2] Initially, the so called liberal *freedoms* appeared in the catalog of human rights as exigencies of man as opposed to public authorities, and *these freedoms required the other only a general attitude of restraint from any action that might prejudice these freedoms*.

The development of freedoms, in the broader context of political and social development, resulted in *a crystallization of the concept of human right*, concept with complex legal content and meaning. Furthermore, in relation to state authorities, *human rights* involved also correlative obligations, at least of protection. In time, these freedoms *were not only proclaimed, but also promoted and especially protected, guaranteed.*

d) Throughout the study we use the terms *rights and fundamental freedoms*, with reference to Chapter II of Title II of the Romanian Constitution, republished in 2003, and entitled *Rights and Fundamental Freedoms*. In our opinion, the title of this chapter is such a formulation at least from the following reasons.Within a state, there are citizens, foreign citizens and stateless persons. According to article 15 paragraph (1) of the Constitution of Romania, republished, *citizens enjoy the rights and freedoms enshrined in the Constitution and other laws*. In accordance with the article 18 paragraph (1) of the Romanian Constitution, *foreign citizens and stateless persons shall enjoy general protection of persons and property, guaranteed by the Constitution and other laws*. Furthermore, in accordance with article 1 paragraph (3) of the Romanian Constitution, republished, *rights and freedoms are supreme and guaranteed values.*

Also, in the present study we use the terms *fundamental rights and freedoms of citizens* when we refer to *rights and freedoms enshrined in the Constitution and other laws.*

e) We note that the European standards on human rights and fundamental freedoms make use of the term *right to freedom*. This term can be found in European standards in article 5 of the Convention on Human Rights and Fundamental Freedoms and in article 6 of the Charter of Fundamental Rights of European Union, and proclaims the right to freedom of any person. In our opinion, by using this term, the initiators of the mentioned documents wanted to establish an additional guarantee to the freedom proclaimed at the European level, by combining the general attitude to refrain from any action that might prejudice this freedom by the state or European authorities with the obligation of these authorities to protect it.

f) In our opinion, the need to classify the fundamental rights and freedoms does not imply a hierarchy, and in this regard we consider it necessary to classify or group rights and fundamental freedoms by scientific criteria, at least taking into account the following two reasons: *to facilitate their explanation and understand their general and essential characteristics*.

g) The study of classifying the fundamental rights and freedoms is also necessary in terms of *the current trend to classify the fundamental rights in universal and European standards on human rights and the newly revised constitutions of member states of the European Union.* This trend, in our opinion should be correlated with constitutional regulations in the field, regarding the relationship between domestic, international and European law. From this perspective, we must mention at least three basic rules:

[2] Muraru, Ioan and Tănăsescu, Elena Simina, *Constitutional Law and Political Institutions*, 13 edition, Vol. I. (Bucharest: All Beck, 2008), 141.

- A first fundamental rule in the matter is identified in the content of the article 11 paragraph (2) of the Romanian Constitution,[3] revised, referring to *Relationships between international and domestic law,* and establishes that *Treaties ratified by the Parliament, by law, are part of the domestic law.*

- The second fundamental rule in the matter is established by the article 20 of the Romanian Constitution, republished, referring to *International treaties on human rights*, and also establishes the following two constitutional rules: the first rule states that *the constitutional rights and freedoms shall be interpreted and applied in accordance with the Universal Declaration of Human Rights, the covenants and other treaties to which Romania is part,* and the second states that *if there is a conflict between the covenants and treaties on fundamental human rights to which Romania is part, and the national laws, international regulations shall take precedence, unless the Constitution or domestic laws comprise more favorable provisions.*

- The third fundamental rule is stated in the article 148 paragraph (2) of the Romanian Constitution, revised, and establishes the relationship between domestic law and EU law, as follows: *Following the accession, constituent treaties of the European Union and other mandatory community regulations have precedence over the provisions of the national laws, in compliance with the act of accession.*

3. Classification of fundamental rights and freedoms in terms of constitutional doctrine and the doctrine of human rights

3.1. Classification of fundamental rights and freedoms in terms of Romanian constitutional doctrine

The need for classification, an order in grouping and enumerating the fundamental rights, appeared only after these rights were proclaimed in declarations of rights and especially in constitutions[4]. We must observe from the beginning that many classifications of fundamental rights and freedoms were made in the constitutional doctrine in diachronic evolution. This multitude of classifications can be explained by the evolution of constitutional regulations in time, both in terms of content and scope of fundamental rights and freedoms and human and citizen rights generations.

For this study, we mention that the second chair of constitutional law in Europe was founded only in 1834, in Paris, and it was entrusted to Pellegrino Rossi, an Italian. The author, in his Treaty of French Constitutional Law, *considers insufficient the classification as civil and political rights and prefers the classification as private rights, public or social rights and political rights.*[5]

Of the Romanian constitutional doctrine we present briefly, in a diachronic approach, the classifications of fundamental rights and freedoms of citizens, proposed by various authors.

a) In Romania, the field of constitutional law is strengthened by teaching and publishing the course *Constitutional Law*[6] by Professor Constantin Dissescu at Faculty of Law, University of Bucharest, in 1915. The author names Chapter IV of course *The Rights of Romanians*, but defines *right as a regulation of freedoms and notes that the fundamental problem of social organization is the harmonization of freedoms in their coexistence*, and concludes that the fundamental law of the United Principalities in 1866 regulates these freedoms and guarantees them in articles 5-30. The author states that *when accepting a form of government, freedom and its cases may be reduced to*

[3] *** *Romanian Constitution*, revised in 2003, was published in the Official Gazette, Part I, no. 767, of October 31, 2003.

[4] Muraru, Ioan and Tănăsescu, Elena Simina, op. cit., 153.

[5] *** www.universalis.fr/.../pellegrino-rossi

[6] Dissescu, Constantin. *Constitutional Law*. (Bucharest Bookstore SOCEC & Co. Publishing, limited liability company, 1915), 460-461.

three types. Based on this conclusion, he classifies the different types of freedoms into *three major types of freedoms*

a.1.) *individual freedom*, includes the right not to be arrested illegally, inviolability of domicile, judicial guarantees, ie the right not to be distracted from his natural judges, freedom of locomotion and emigration and religious freedom, which includes: freedom of conscience, religious liberty and freedom of propaganda.

a.2.) *civil liberty*, includes freedom of labour, that give rise to the right to property, freedom of speech and correspondence, and in connection to it, the freedom of press, freedom of assembly, freedom of association, and freedom of education.

a.3.) *political freedom* includes the right to vote, the right to stand as candidate, the right to hold public office, to serve on a jury and to serve in the military.

b) For the present study, it is appropriate to mention Professor Paul Negulescu's[7] contribution to the classification of fundamental rights and freedoms, of course, with the terminology of the historical period in which he conducted the study.

In our opinion the author proposed the classification of *civil liberties* based on the idea of *individual liberty proclaimed by the French Declaration of Human Rights and Citizen which shows that public rights*, *also called public freedoms*, *or the rights of man and citizen*, *are faculty, opportunities recognized by the constituent legislative to all members of society except for specific restrictions in order to help improve and preserve the individual himself.* Also, from the course *Romanian Constitutional Law* results that the professor had as reference the normative content of the Constitution of the United Principalities in 1866 and the Constitution of the United Kingdom of Romania in 1923.

According to the author's opinion, public freedoms fall into three categories: primary or basic freedoms, secondary or complementary freedoms, and collective freedoms.

b.1.) *Basic or primary* freedoms are: individual freedom, freedom of movement, inviolability of domicile, freedom of labour, trade and industry, the right to property, freedom of opinion, freedom of conscience and of religion.

On these freedoms, the author states: *All these freedoms are absolutely necessary, without them the safety of the individual is inconceivable, we can not talk about individual freedom.*

b.2.) *Secondary or complementary freedoms*: freedom of press, freedom of association or assembly.

On these freedoms, the author mentions that these freedoms shall be exercised without prior authorization, but that which, in their exercise, violates public policy, will suffer the consequences arising from this course.

The content of the course also gives way to a subclassification, named by the author *Collective freedom.* These are *the right to association and assembly*, enshrined in the article 28 and article 29 of the Constitution of the Kingdom of Romania in 1923.

In connection with the paragraphs a) and b) above, we also observe the following opinions:[8]

A typical aspect of the juridical literature before the Second World War was that *the classification of rights included neither the socio-economic rights* (which, of course, were not proclaimed by the constitutions), *and with some exceptions, nor the political rights,* because based on the fact that the French Declaration of the Rights of Man and Citizen of 1789 *did not include any aspect in connection with the political rights,* it seems that the authors of the Declaration did not considered them rights, *but ways of exercising a function*. Meanwhile, new aspects on their classification have been revealed.

Building on the above in the paragraphs a) and b), we observe the following aspects:

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[7] Negulescu, Paul, *Romanian Constitutional Law Course*. (Bucharest: Edited by Alex. Th. Doicescu, 1927), 512-537.

[8] Muraru, Ioan and Tănăsescu, Elena Simina op. cit., 153-154.

1. Both authors cited were *influenced by the French Declaration of the Rights of Man and of the Citizen and by French studies in the field*.

2. The three categories of freedoms proposed by the first author *correspond to three categories of relations that the individual can experience* when he exercises his freedoms: in relation to himself, in relation to things and in relation to the other people.

3. The second author *groups public liberties in the two categories* that correspond, the first one to ensuring the individual's safety, and the second enablesman to spread his ideas.

4. For the first time in the Romanian constitutional doctrine before the Second World War, *Collective Liberties* are mentioned, and in our opinion this classification takes into account their way of exercise.

5. From the above, we note that although the Romanian Constitution of 1866, 1923 and 1938 constantly proclaim in the Title II *Romanians' Rights,* they are mentioned in the stuies in the field as *public liberties*, or *public rights*, or *rights of man and citizen*.

c) After the Second World War, after the totalitarian regimes were installed in Eastern Europe, including Romania, and especially after adopting the Universal Declaration of Human Rights and the two Pacts, many of the states Constitution were inspired by this model, incorporating its provisions, which led to increasing the complexity of the classification of rights and freedoms of citizens.

During the totalitarian regimes in Romania, we note for the present study, the classification of fundamental rights and freedoms proposed by Professor Nistor Prisca, in his course of Constitutional Law[9]. The author names the Title IV of the course *Rights and fundamental duties of citizens*, and in Chapter II of the mentioned Title, *using the content criterion of fundamental rights of citizens, determines their classification*. The author takes as reference of his classification the normative content of the Constitution of the Socialist Republic of Romania of 1965, republished[10].

On the opportunity to classify the fundamental rights of the citizen, the author states that this *classification is necessary to facilitate explanation and understanding of many rights granted to citizens, it is necessary to group, to classify them according to certain criteria.*

Thus, after some theoretical explanations, Nistor Prisca suggests the following classification of rights and freedoms of citizens:

c.1.) *equal rights of citizens*, Equality is defined by the author, as *the right of citizens to have and equally exercise all rights under the Constitution and other laws, the right to participate equally in political, economic, social and cultural life, without any discrimination and the right to be treated on equal terms, both by the state and other citizens.*

c.2.) *socio-economic rights*, which include: the right to work, right to rest, the right to material security from the state, the necessary conditions of physical and intellectual development, personal ownership, right of inheritance.

c.3.) *social and political rights and freedoms* of the citizen, which includes political rights: electoral rightsand rights to association and *democratic freedoms*: freedom of speech, press, meetings, and demonstrations, freedom of conscience.

c.4.) *inviolability,* which includes: personal inviolability, inviolability of the home and the secrecy of correspondence and telephone conversations.

c.5.) *rights guarantees,* which includes: the right to petition and right of the injured in his right by an illegal act of a state body, to request the competent bodies, as provided by law, its annulment and damages.

Building on the above in the paragraph c), we observe the following aspects.

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[9] Prisca, N. *Constitutional Law*. (Bucharest: Editura Didactică şi Pedagogică, 1977), 239-278.

[10] *** *Constitution of The Romanian Socialist Republic of 1965*, republished, was published in the Official Gazette of Romania, of February 20, 1968.

1. We notice that in the Romanian literature in the field, during the reference period under review, important changes occur in connectiom with the classification of fundamental rights and freedoms of the citizen.

2. These changes can be explained by the reception in the Constitution mentioned of the fundamental rights and freedoms contained in the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights, ratified by the Romanian state.

d) After the Romanian Revolution of December 1989, the Constitution was adopted in 1991, revised in 2003, and republished. With reference to normative content of the Romanian Constitution of 1991, Professor Tudor Drăganu[11], in his course *Constitutional Law and Political Institutions*, *reveals that for solving scientific classification of fundamental rights and freedoms it is necessary to apply a uniform and substantial criterion.*

The author concludes that *a classification can not claim to be scientific if the distinction between the groups of analyzed phenomena starts from a certain aspect of their own, while for others, on a different basis*.

On the other hand, classification of phenomena studied in general *must be based on consideration of their fundamental aspects, since only thus can reach the knowledge of the essential nature of the matter studied.*

Using *regulatory object criterion*, the author sets the following classification of the fundamental rights of citizen:

d.1.) *individual freedoms*, which includes: the right to life and physical and mental integrity, right to live in the state and to move both at home and abroad, security, inviolability of domicile and residence, secrecy of correspondence and other means of communication, freedom of conscience and religious freedom, right to information.

d.2.) *socio-economic rights*, which includes: the right to work, right to health, right to strike, right to private property, right to inheritance, right to education, the right of the injured in its right by a public authority, through an administrative act or failure to solve a legal term requests to obtain recognition of his right, annulment and damages act, freedom of access to justice.

d.3.) *political rights*, which includes: the right to elect representatives in Parliament, the right to elect the President, the right to vote in the referendum, the right to initiate, together with the number of citizens eligible to vote according to art. 73 of the Constitution and the conditions there set the enactment, amendment or repeal of an ordinary or organic law, the right to initiate, together with the number of citizens eligible to vote according to art. 146 of the Constitution and the conditions there set revision of the Constitution, the right to elect representatives to local and county councils the right to be elected in Parliament, President of the Republic, member of the local authority in villages and towns.

d.4.) *social and political rights,* which includes: freedom of expression of thoughts, opinions or beliefs of any kind, by speech, writing, images, sounds or other means of communication, freedom of religion, freedom of assembly; freedom of association, right to petition.

d.5.) *equal rights*; on equal rights, the author sets the following clarifications. Equality refers to the universality of rights and obligations of citizenship. Also, equality encompasses all areas in which the person operates.

e) For this study, we note the contribution of professors Ioan Muraru and Elena Simina Tănăsescu to the classification of fundamental rights and freedoms[12]. Regarding the scientific criterion used for classification of fundamental rights and freedoms, the authors mention that *the*

[11] Drăganu, Tudor *Constitutional Law and Politrical Institutions*, *Elementary Treaty*, vol. I. (Bucharest: Editura Lumina Lex, 2000), 154-187.

[12] Muraru, Ioan and Tănăsescu, Elena Simina *op. cit*. 153-158.

scientific criterion, verified, of the rights of citizens is that of their content, knowing that it is risky to give a classification of human rights based on their weight or importance.

Folosind *criteriul conținutului drepturilor şi libertăților cetățeneşti*, conținut ce determină şi finalitatea acestor drepturi, autorii clasifică drepturile şi libertățile fundamentale ale cetățenilor români în următoarele categorii:

Using the content criterion of rights and liberties, content that determines the purpose of rights, the authors group the rights and freedoms of the Romanian citizens in the following categories:

e.1.) *inviolability*; those rights and freedoms which by their content, ensure life, the possibility to move freely, the physical and mental health, individual and home safety. In this category are included: the right to life, right to physical integrity, right to mental integrity; individual freedom; the right to defense; the right to free movement; right to private life and private family protection; inviolability of domicile.

e.2.) *socio-economic and cultural rights and freedoms*, those rights and liberties that ensure by their content the social and material life conditions, education and the possibility of protection. This category includes: the right to education; access to culture; right to health; right to a healthy environment; right to employment and social protection of labor; the right to strike, ownership, right to inheritance; right to a decent living; the right to marry; the right of children and young persons to protection and assistance; the right of people with disabilities to special protection.

e.3.) *exclusively political rights*; ie rights which by their content may be exercised only by citizens for participating in governance. In this category are included: the right to vote and be elected, including to the European Parliament.

e.4.) *social and political rights and freedom;* ie those rights and freedoms which by their content may be exercised by choice, either to solve social and spiritual issues, or to participate in government. This category includes: freedom of conscience; freedom of expression; right to information; freedom of assembly, freedom of association, and secrecy of correspondence.

e.5.) rights guarantees, ie those rights which by their content play mainly the role of constitutional guarantees. This category includes: the right of petition, the right of the person injured by a public authority.

f) Throughout this study we observe the contribution of Professor Ion Deleanu[13] to the classification of rights and freedoms.

On the *classification and nomination of the main rights and freedoms*, the author makes the following preliminary comments; *the complexity of discourse universe, multiplicity and variety of criteria that can lead to a possible classification* make it difficult for this trial; the difficulty of classification is increased by the fact that one and the same freedom can be examined in various facets, in other words, it is likely to group it in two or more categories; however, attempts have been made, each with advantages and disadvantages; all these criteria and classifications have a formal character; yet in some degree, they involve and evoke both the substance of that right or freedom, and the purpose targeted by enshrining and ensuring that right or freedom; the nomination of main rights and freedoms is also difficult.

Under such difficulties and methodological limitations, the author proceeds to the classification and nomination of the main rights and freedoms, *using the mode of exercising them as criterion, thus:*

f.1.) *rights and freedoms exercised individually or in person:* f.1.1.) *rights and freedoms that protect person and private life*: the right to life, right to citizenship, right to personal security, privacy, freedom and inviolability of domicile, the secrecy of correspondence, the right to move; f.1.2.) *rights and freedoms that protect individual options in private and social life*: the right of person to dispose of himself, freedom of thought, freedom of speech, freedom of press, right to

[13] Deleanu, Ion, *Constitutional Law and Political Institutions*. Vol. I. (Bucharest: 1991), 76-78.

education, freedom of conscience, electoral rights, the right of petition, right to health insurance, the right to start a family, right to work or freedom of employment, social security, right to rest, freedom of association, right to strike, right to property, inheritance rights, freedom of trade and industry;

f.2.) *group exercised freedoms*: freedom of association, freedom of assembly, freedom demonstrations.

g) For the present study, we observe the contribution of the study author to the classification of rights and freedoms. [14] Also, we mention that we use the term *rights* for classification, since rights and freedom have the same legal status.

Using *as method of study the theory of criterion relativity in terms of rights and fundamental freedoms' content; complex content with interdependent variables that can be analysed under different aspects, for the classification of these rights and freedoms and their nomination relativity according to this criterion*, we establish the following classification:

g.1.) *The right to equality.*[15] From the systematic analysis of constitutional provisions it results that *equality* is a constitutional principle proclaimed in the article 16 paragraph (1) of the Constitution, and applies to fundamental rights and freedoms, but in our opinion, it can be approached as a *subjective right*. In this respect, equality is a possibility given to a person in his interest, allowing him to enjoy something of value or to require someone else a benefit; *equality is part of subjective rights* in the sense that it is a legally protected interest enjoyed by individual and that also is an obligation for public authorities.

As a *subjective right*, equalty enables people to claim infringement of the principle of equal rights before the Constitutional Court by raising the objection of unconstitutionality, and attacking the administrative acts before the administrative court.

g.2.) *Inviolability*. In our opinion, indicating inviolability in the classification of rights and freedoms is necessary because the inviolability of rights and freedoms is provided expressis verbis in the normative content of the Romanian Constitution republished. Inviolability guarantees human dignity and free development of human personality. This category can include: right to life and physical and mental integrity, individual freedom, right to defense, free movement, private life, the right to family and private life, inviolability of domicile.

g.3.) *Economic, social and cultural rights*. These rights guarantee: Protection of economic interests of the person, the right of everyone to social security, right of everyone to a decent living, that right of everyone to enjoy the best physical and mental health, the right of everyone to education and right to participate in cultural life.

g.4.) *Political rights*. It represents the rights that are guaranteed to citizens to participate in government, at state, local and at EU level. These rights include the *right to elect and to be elected.*

g.5.) *Social and political rights*. These rights have a complex content, social or political.

g.6.) *Rights guarantees*. These rights are at constitutional level guarantees to other rights and freedoms against their illegitimate violation.

g.7.) *The right of asylum*. In our opinion, this right may be mentioned in the catalog of classifying fundamental rights and freedoms, even if under the Constitution of Romania, it is part of the contents of Chapter II of Title II, entitled *common principles on rights and fundamental freedoms*. Furthermore, *the right of asylum is mentioned expressis verbis in article 18 of the Romanian Constitution*; it is true that it does not apply to Romanian citizens, but foreigners and stateless persons are guaranteed under the current constitution and enjoy general protection of persons and property.

Building on the above paragrapfs d), e), f) and g) we observe the following aspects:

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[14] Pavel, Nicolae, *Constitutional Law and Political Institutions*, Volume I, General Theory. (Bucharest: România de Mâine Publishing, 2004), 85.

[15] Pavel, Nicolae, Equality in Rights of the Citizens and Non-Discrimination. (Bucharest: Universul Juridic Publishing, 2010), 235-236.

1. For classification of fundamental rights and freedoms, nominated authors use two criteria: the content of these rights and the exercise thereof.

2. Although the authors use the same criteria for classification, ie the content of rights and fundamental freedoms, their actual classifications differ, in our opinion, *because of the complex content with various interdependencies that can be analysed under different aspects.*

3.2. Classification of fundamental rights and freedoms in terms of French constitutional doctrine and the doctrine of human rights

For this study, we have chosen the French constitutional doctrine and the doctrine of human rights for the reason that, as we have mentioned in the section 3.1., it was the primary source of the Romanian constitutional doctrine.

Moreover, from the French constitutional doctrine and that of human rights, we present briefly, in a diachronic approach, the classifications of public liberties which, in our opinion, are synonymous to the classification of fundamental rights and freedoms in the Romanian constitutional doctrine, classifications proposed by various French authors.

a) A. Esmein considers that the list of individual rights was gradually completed and the theory and historical facts successively signal the importance of two major categories: [16]

a.1.) *civil equality* includes: equality before the law, equal justice, equal taxes, equal eligibility for functions and public office.

a.2.) *individual freedoms* includes: individual liberty, individual property, inviolability of domicile, freedom of trade, labor and industry, freedom of conscience and religious liberty, freedom of assembly and freedom of press, freedom of association and freedom of education.

b) George Burda states that public freedoms have gained the city rights (status of special privileges in legal terminology), being for individuals or groups an opportunity to request an attitude of the state, constituting an obligation to it. According to the author, public freedoms could be included in a list with two entries that can not be disputed:[17]

b.1.) *rights that under the classical tradition are considered inherent to human nature.* They are basically those rights through which the autonomy of individuals is stated: individual security, freedom to go and come, freedom of privacy, freedom of opinion and belief, property. To this list the author adds rights that, also from the traditional perspective, appear as an addition to the above as they allow more fully pursue: the right to join or unite with others, the right to celebrate religious cults, the right to choose education for children.

b.2.) *economic and social rights*. Given the generosity with which they are listed by the authors of the Declarations and Preambles, it is necessary to distinguish among them. There are: *the right to organize, right to strike, right to safety at work.*

Differently from public freedoms, the author considers *civil rights* as those rights through which citizens participate directly in political decision.

c) Taking into account the exercise of public freedoms, Jean Morange classifies these into two major categories:[18]

c.1.*) individual freedoms* rely on the individual in society, and include*: individual autonomy*: the freedom to go and come, security, privacy and *liberties of free chioce*, freedom of conscience, freedom to dispose of himself.

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[16] A. Esmein, *Éléments de droit constitutionnel français et comparé*, septième édition, tome premier. (Paris: Librairie de la société du Recueil Sirey Paris, 1921), 553-544.

[17] Georges Burdeau, *Les libertés publiques*. (Paris: *Librairie générale de droit et de jurisprudence,* 1972), 21-23.

[18] Jean Morange, *Droits de l'homme et libertés publiques,* 2e édition. (Paris, Presses Universitaires de France, 1985), 117- 331.

c.2.) *collective liberties*, which involve the individual's right to act with others, noting that ther are no collective freedoms without individual freedoms, which is a dogma of liberal democracies. These include: freedom of association, freedom of press, freedom of broadcasting, free education, and freedom of religion.

d) Jacques Robert, [19] before proceeding to the classification of public freedoms, makes the following terminological comments on the definition of freedom. When the philosopher attempts to define human freedom is tempted to research on his inner and spiritual freedom, above all. The lawyer, as he is concerned, has no access to the inner life because the right is a rule of social constraint, so external. He will consider only material freedom in its meaning, as *most of opportunities and choices left to individuals.* From this perspective, the author analyses the natural liberty and legal freedom. In a first sense, freedom is the quality of which is not subject to constraints, namely physical, psychological or moral. It is a negative quality since it results specifically from the lack of constraint. Coercion occurs when a man's actions are subject to the will of another man, serving not his own purpose but the purpose of the other. *Freedom means the guarantee of private sphere so that each is master of himself*. It follows that the freedom of a being is self-being. In a second sense, to be free to act is to have the right or power to commit an act or another.

The author also distinguishes between public freedom and private freedom. Public freedom is a freedom for all that its exercise by everyone not in any way affects the exerciseof the same freedoms to another. *The criterion of public freedom is that it belongs to everyone.* Conversely, private freedom is characterized by being reserved only to some individuals. It is a privilege granted to a small number, refused to others.

Moreover, the author distinguishes between *freedom-autonomy* and *freedom-participation.* These two forms of freedom involve a distinction between rulers and ruled. Each brings a very different answer to the question raised by the relationship between the two parties. *Freedom - participation* lies in control of the ruling government, in the permanent attitude of certain rulers to become one day the ruled. *Freedom - autonomy* implies the absence of any social constraints.

It is difficult to establish a specific criterion for classifying public liberties. To establish this criterion, the author *defines public freedoms in narrow and broad sense*. *In narrow sense*, public freedoms are freedoms enshrined in the texts of Declarations of Rights, the purpose of Declarations and Preambles being certainly *to state the essential rights and freedoms.* But any public liberty is not a liberty declared constitutionally. *Broadly speaking*, would be, on the contrary, considered as public liberty any right recognized by law, this course encompassing constitutional texts and declarations of rights.

Jacques Robert, after stating that liberties have a *fundamental component when there is a coincidence between the public freedoms and human natural rights*, he propose a classification of the public liberties into two categories, *personal liberties and collective freedoms.*

d.1.) *Personal freedoms* include: d.1.1.) *physical or individual freedom*, ie freedom to move freely, not to be arbitrarily arrested or seized, to be tried with all legal guarantees, not to affect their physical integrity, their privacy. d.1.2.) *spiritual freedoms*, i.e. freedom of speech, of religion, freedom of press, freedom of education. d.1.3.) *economic freedoms* including: the right to work, freedom of trade and industry.

d.2.) *collective freedoms,* including: freedom of assembly and association, freedom of organization, right to strike.

e) Claude Albert Colliard[20] states that the terms *public freedoms* comes from the article 34, paragraph (2) of the French Constitution of 1958, which reserves the field of *public freedoms* to be

[19] Jacques Robert, *Droits de l'homme et libertés fondamentales*. (Paris : Montchrestien, 1993), 19-21.
[20] Claude Albert Colliard, *Libertés publiques*, Septieme édition. (Paris, Edition Dalloz, 1989), 21-29, 230-234.

regulated exclusively by Parliament. According to the paragraph mentioned, the Law establishes the rules on *civil rights and fundamental guarantees granted to citizens to exercise the public freedoms*. The author also states that the law must define the content and the precise meaning of the concept of *public freedoms* as the *doctrinary definition is never very precise, being always based on excesses of exegesis or refinements of subtlety*.

Following these considerations, we propose a general definition of *public freedoms which are rights enjoyed by individuals and are analysed by their recognition for an area of autonomy.*

Regarding the collective character of *public freedoms*, *this means that public freedoms are individual, but when the individual acts without constraint and the action takes place in a social context in relation to other people, they can gain collective character.*

Claude-Albert Colliard proposed a classification of public freedoms on the one hand according to the opposite relationship between freedoms of economic nature and other freedoms and on the other hand, according to the character strictly individual and the collective character. Thus the author classifid them into three distinct categories:

e.1.) *fundamental freedoms or individual liberties*, which include: security of person, freedom to go and come, bodies and individual freedoms, respect for personality.

e.2.) *freedom of thought or intellectual freedoms*, these include: freedom of speech, freedom of religion, freedom of education, freedom of thought, theater system and film-television broadcasting system, freedom of assembly and freedom of association.

e.3.) *freedoms of economic nature*, they include: labour freedom, right to property, freedom of trade and industry.

Building on the above, we observe the following aspects:

1. The same variety of classification of public freedoms exists also in the French literature in the field.

2. We observe that the French literature studied above addresses *human rights, public freedoms, rights and freedoms of citizens and the fundamental freedoms.*

3. We observe that the terminology is not uniform.

4. The Romanian concept of *fundamental rights and freedoms* is synonymous with the concept of *public freedoms* in the French literature.

4. Current trends on the classification of fundamental rights and freedoms

a) In our opinion, a first classification of human rights universally has been established by the personalities who participated in drafting the Universal Declaration of Human Rights. According to UN document, named *UN Activities in the Field of Human Rights*[21] we learn the following specifications: Universal *Declaration of Human Rights consists of a preamble and 30 articles setting out the essential rights and fundamental freedoms to which without discrimination can claim all men and women around the world.* These articles concern civil and political rights (article 3 – article 21) and economic, social and cultural rights (article 22 – article 27). This universal classification includes *civil and political rights and economic, social and cultural rights.*

Often, the literature cites the definition of human rights given by the French jurist René Cassin who participated in drafting the Universal Declaration of Human Rights: *the science about human rights is defined as a distinct branch of social science and studies human relationships in accordance to human dignity to determine the rights and faculties that overall are necessary to personality development of every human being.*[22]

This document, as its title indicates, is merely a declaration and not a legally binding agreement. Due to its moral status and legal and political importance acquired over time, the

[21] *** Activités de l'ONU dans le domaine des droits de l'homme. (New York, Nations Unies, 1986), 10.

[22] Apud, Yves Madiot, *Droits de l'homme et libertés publiques*. (Paris, New York, Barcelone, Milan, Edition Masson 1976), p.13.

Universal Declaration of Human Rights stands next to Magna Carta, the Declaration of Independence of America, the Bill of Rights and the French Declaration of the Rights of Man and Citizen.

Given the above, UN adopted the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights on 16 December 1966. These documents are legally binding, being ratified by the states, and *include content development of universal human rights under the Universal Declaration of Human Rights, in areas established therein.*

b.) The second current trend of classification of human rights is their *classification on generation of rights.* Of the Romanian constitutional doctrine, we observe for the present study the classification of human rights that includes four generations of rights[23]. Regarding the causes of this classification, the authors point to the existence today of a whole range of legal issues in the field. One of them refers to the heterogeneity of human rights, both in terms of their origin and of the goals they declare and pursue. Also, technically speaking*, it has now become common for human rights to be presented in a classification that includes four generations*, allowing an overview with historical character which emphasizes their complementarity, both at the moment of claim and at the moment of legal recognition.

b.1.) *First generation rights encompass civil and political rights*, considered the most necessary to assert the individual against state power. Civil and political rights and especially the individual freedoms *have appeared mainly as measures to protect individuals against violence and arbitrary government,* as claims of a legal position equal before the law.

Also, these rights *are defined by the action of their owner, who draws a sphere of individual autonomy, which implies and determines a specific abstention of the state power to intervene in such protected areas.* The role of state power is reduced in this situation to protect freedoms in general, by providing guarantees of self-limitation of its action.

b.2.) *Rights of the second generation include economic, social and cultural rights,* involving state action, measures, and guarantees. These rights are recognized to all individuals, but not on the basis of their quality as human being, but as members of specific social categories based on criteria that are closely connected with the production or their social or economic status.

b.3.) *Rights of third generation* came amid increasing internationalization of the concept of human rights, *and they are called solidarity rights,* such as right to peace, right to development, right to a healthy environment etc. They express new social and political aspirations that any individual can validly oppose to public power. These rights raise many questions, because it is not clear yet whether the holder is an individual or humanity as a whole.

It is also not clear yet whether the public power is national or international. But without doubt these powers can not be acheived in their content by individual countries, but necessarily involve the cooperation of states.

b.4.) *Rights of the fourth generation*. Facing the unprecedented development of information and communication technologies, some authors have mentioned *a fourth generation of rights, which would include the right to personal data protection, right to privacy, etc.*

The analysisof the above classifications of human rights shows in our opinion that the authors took as reference the universal standards of human rights standards and the scope of human and citizen rights established in the field by these standards.

c) The third trend of classification of human rights, observed for this study, is the tendency for the classification of rights guaranteed in Europe, in European human rights law doctrine.[24]

At the beginning of this classification, the author makes the following preliminary comments:

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[23] Muraru, Ioan and Tănăsescu, Elena Simina, op. cit. 142-144.

[24] Renucci, Jean-François, *Treaty of European Human Rights Law*. (Bucharest: Hamangiu Publishing, 2009), 80, 85, 533-534, 843.

- Proposing distinction between human rights *can be in itself objectionable, internationally established principle is that of the indivisibility of these rights. The principle of indivisibility* is, of course, important and meaningful to the extent that all human rights contribute to the development of human dignity, which is clearly not divisible.

- However, in the positive law, *all rights enshrined in this area, although essential, can not be placed on an equal footing, and can not have the same legal status.*

- Human rights, being exclusively rights of individuals, *should be considered only individual rights, even though we can not deny the collective dimension of some of them*.

Given the indications mentioned, the author, using the criterion of protection of human rights considered fundamental rights, classifies at first these data into three categories as follows:

c.1.) *Rights of the first category*: From human rights, some are particularly important *because their they form the hard core*: the right to life, the right not to be subjected to ill-treatment, the prohibition of slavery and servitude and the right to protection from retroactivite criminal law or the prohibition of discrimination. *These rights, because of their importance require absolute protection.*

c.2.) *Rights of the second category*: other human rights *being conditioned*, they benefit only of a relative protection, *the state may affect them in certain conditions.*

c.3.) Rights of the third category: their protection is quasi-absolute, and can not be suspended except in time of war or other public emergency threatening the life of the nation.

The second classification proposed by the author, is *a ranking of four generations of rights:*

c.1.1.) The first generation of rights encompasses civil and political rights. Civil and political rights are essential rights: they are the backbone of the European Convention on Human Rights, its reason to exist, although the Convention has also established some economic and social rights. These rights called of the first generation, which are the most fundamental rights and freedoms appear to be resistance rights, involving freedom of choice and action of individuals, and abstention from the state. On the other hand, in this category of resistance rights, we can distinguish between the rights – freedoms, which notably includes human rights and labor rights, and rights – participation, which are those of citizens, and finally, rights-guarantees, rights of the litigants.

c.1.2.) *The second generation of rights encompasses economic and social rights*. Economic and social rights are usually presented as human rights of the second generation. *In the Council of Europe, economic and social rights are enshrined primarily* but not exclusively, in two texts: on the one hand, *the European Convention on Human Rights* which is quite limited on this plan, and prevents a strong guarantee of some economic and social rights retained; on the other hand, *the European Social Charter,* a text centered specifically on these rights and, finally, completes the Convention in this regard. These rights have the following particularity: the state should play a more active and demanding role to ensure economic and social rights. Regarding *the role of the EU Charter of Fundamental Rights* in this matter, the author states that: *the reference to the text of the Amsterdam Treaty and the Charter of Fundamental Rights can only enhance its importance.*

c.1.3.) *The rights of third generation include rights of solidarity*. These rights are: *the right to peace, development, environment and the right to respect the common heritage of humanity.* However, the problem in question is to know precisely *whether these rights of solidarity can be considered as human rights.* It is true that they are universal values. But their assimilation with human rights is not obvious, especially since the European Convention on Human Rights does not refer to them. Certainly, an extension of human rights is always possible, but it is necessary to pay attention to the potential negative impact that might weaken, ultimately, the fundamental rights.

c.1.4.) *The rights of the fourth generation*. In connection to these rights, the author states the following: It *is, however, very difficult to propose a classification of human rights universally accepted*, because difficulties may arise and appearances are often misleading, *especially since the fourth generation rights appeared*, in order to protect human dignity from certain abuses of science. *But we should also avoid too great an extension of fundamental rights*; a perpetual addition of new rights would be dangerous to liberty itself.

d) For this study, we propose to retain the current trend of classification of fundamental rights and freedoms, enshrined in the juridical content of the Constitutions of European Union member states.

d.1.) *Constitution of the Italian Republic of 1948*[25]. Constitution of the Italian Republic in its Part I, entitled *Rights and duties of citizens*, classifies these rights and duties into four basic categories, namely: *Civil Relations (*art. 13 - art. 28), *Ethical and Social Relations* (art. 29-art. 34), *Economic Relations* (art. 35-art. 47) and *Political Relations* (art. 48-art. 54). In our opinion, the four relations mentioned in the Constitution, *put out a true classic classification of rights and duties of citizens, namely: civil rights, ethical and social rights, economic rights, and political rights.*

d.2.) *Spanish Constitution of 1978*[26]. The Spanish Constitution in Title I, entitled *Fundamental Rights and Duties*, establishes the following principles, rights and duties grouped into five basic categories, namely: *Spaniards and Foreigners* (Art. 11-13); *Rights and Freedoms*: Fundamental Rights and Public Freedoms (art.15-art. 29), Rights and Duties of citizens (art. 30-art. 38), *Guiding Principles of Social and Economic Policy* (art. 39 - art. 52), *Guarantees for Fundamental Rights and Freedoms* (art. 53-art. 54), *Suspension of Rights and Freedoms* (art. 55).

d.3.) *Constitution of the Portuguese Republic*, the seventh revision of 2005.[27]

Constitution of the Portuguese Republic in Title II, entitled *Rights, Freedoms and Guarantees*, establishes the following classifications, grouping them into three basic categories, namely: *Personality Rights* (art. 24-art. 47); *The Fundamental Rights, Freedoms and Guarantees of Political Participation* (art. 48-art. 52); *The Fundamental Rights, Freedoms and Guarantees of Workers* (art. 53-art. 57). Also, in Title III, entitled *Economic, Social and Cultural Rights and Duties*, establishes the following classifications, grouping them into three basic categories, namely: *Economic Rights and Duties* (art. 58-art. 62), *Social Rights and Duties* (art. 63-art. 72), *Cultural Rights and Duties* (art. 73-art. 79);

d.4.) Constitution of the Slovak Republic of 1991[28]. In Title II establishes Human Rights and Fundamental Freedoms (art. 14-art. 65), and in Title III establishes Economic and Social Relations (art. 66-art. 79).

e.) For this study, we propose to retain *the current trend of classification of fundamental rights and freedoms by four universal and indivisible values,* proclaimed in the preamble to the Charter of Fundamental Rights of the European Union[29], namely: *human dignity, freedom, equality* and *solidarity.*

e.1.) *Dignity.* The Charter does not specify the meaning of the concept of dignity, but dignity in our opinion, is acclaimed as a genuine inviolability, *respecting and protecting the dignity as universal value and treated as indivisible.*

Also *to respect and protect the dignity as universal and indivisible value* the Charter subsumes: right to life; right to integrity of person; prohibition of torture and inhuman or degrading treatment or punishment; prohibition of slavery and forced labor.

e.2.) *Freedoms*. On *freedoms*, we find that in connection with this fundamental category, *the Charter does not establish the notion of freedom as a universal and indivisible value*, but subsumes to freedom the following components: the right to liberty and security, right to privacy and family, protection of personal data, the right to marry and right to found a family, freedom of thought, conscience and religion, freedom of expression and information, freedom of assembly and

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[25] *** *Constituzione della Republica Italiana*. (Roma: Camera dei Deputati, Segreteria Generale, 1990), 189-200.

[26] *** *La Constitution Espagnole*. (Madrid: Publicaciones del Congreso de los Diputados, Imprime Rivadeneyra S. A.,1989), 13-28.

[27] *** *Constitution de la République Portugaise*, app.parlamento.pt/site.../CRP_VII.pdf.

[28] *** *Constitution de la République de Slovénie*, mjp.univ-perp.fr/constit/si.htm

[29] *** *Charter of fundamental rights of the European Union*, (2010/C 83/02) EN 30.3.2010 Official Journal of the European Union C 83/389.

association, freedom of the arts and sciences, right to education, free of choice of occupation and right to work, freedom to conduct a business, property rights, right to asylum, protection from removal, expulsion or extradition.

After listing the components of *freedom*, in our opinion, it follows that the source of inspiration for the Charter was the European Convention on Human Rights, of course taking into account the extensions introduced by it.

e.3.) Equality. On equality, we also notice that to this fundamental category the *Charter does not establish the concept of equality approached as universal and indivisible value,* but it subsumes the following components: equality before the law; non-discrimination; cultural, religious and linguistic diversity; equality between women and men; child rights; the rights of the elderly; the integration of persons with disabilities.

After listing the components of *equality*, it follows in our opinion, that the source of inspiration for the Charter was the European Convention on Human Rights, which seems substantial, but of course not exclusive.

e.4.) *Solidarity*. On *solidarity,* we notice that also to this fundamental category the Charter does not establish *the concept of solidarity approached as universal and indivisible value,* but subsumes the following components: the right of workers to information and consultation within the undertaking; the right of negotiation and collective action; right of access to placement services; protection for unjustified dismissal; fair working conditions; prohibition of child labor and protection of young people at work; family and professional life; social security and social assistance; health protection; access to services of general economic interest; environmental protection; consumer protection.

Listing the components of *solidarity*, it follows in our opinion that these components are *economic and social rights*, and draw their inspiration from the European Social Charter and the Community Charter of Fundamental Social Rights of Workers, and also from the articles on consumer and environment, namely: article 153 and article 174 of the Treaty establishing the European Community, the consolidated version[30]. Environmental and consumer protection are new components introduced in the Charter that created controversy regarding their application.

5. Conclusions

The objective of the study on classification of rights and fundamental freedoms in diachronic and selective approach, and to identify trends of these classifications, has been achieved, in our opinion. The main directions of study for achieving the goal were the following:

1. the diachronic and selective, but not exhaustive, approach of the classification of fundamental rights and freedoms in terms of constitutional doctrine and the doctrine of human rights. This section contains two parts.

The first part of the section is dedicated to the classification of fundamental rights and freedoms from the perspective of Romanian constitutional doctrine and is systematically divided into three great periods. The first period refers to the contribution of the Romanian authors of constitutional law to the fundamental rights and freedoms up to the World War II. The second period includes the contribution of Romanian authors of constitutional law to the classification of fundamental rights and freedoms, after the installation of totalitarian regimes in Eastern Europe, including Romania; the adoption of Constitution of this period and up to the Revolution of 1989. The third period refers to the contribution of Romanian authors of constitutional law to the classification of fundamental rights and freedoms after the Revolution of December 1989, the adoption of Romanian Constitution of 1991 and its revision in 2003, up to date.

[30] *** *Version consolidée du Traité instituant la Communauté Européenne*, Journal officiel n°C 325 du 24 décembre 2002.

Studying the periods mentioned above, we have identified the terminology used, the criteria proposed by the mentioned authors to classify the fundamental rights and freedoms and the classifications resulting from scientific endeavor.

The second part of the section studies the classification of fundamental rights and freedoms, in terms of French constitutional doctrine and the doctrine of human rights. Throughout this section we present selectively in a diachronic approach, the classifications of public freedoms, which in our opinion, are synonymous with the classification of fundamental rights and freedoms in the Romanian constitutional doctrine. Applying the same grid, we have identified the methodological terminology used, the classification criteria proposed by the mentioned authors for grouping the civil liberties, and the classification resulting from the scientific enterprise of French authors.

2. current trends on classification of fundamental rights and freedoms, by diachronic and selective approach, in the European and international documents on human rights and citizens, starting from the Universal Declaration of Human Rights and other subsequent documents adopted at international and European level, in Romanian constitutional doctrine and the doctrine of European human rights and also in the Charter of Fundamental Rights of the European Union and in the Constitutions of European Union member states. Studying the documents and specialized doctrine, mentioned above, we have identified the development trends for the classification of human and citizen rights and freedoms.

The two parts of the study can be considered a contribution to expanding research on classification of fundamental rights and freedoms, in line with current trends in the field.

We also mention that the above study opens a complex and complete vision, but not exhaustive, in the area.

Given the selective approach of classifying fundamental rights and freedoms, the proposed key – scheme can be multiplied and extended to other studies in the field.

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ASPECTS ON THE INTERNATIONAL LEGAL PERSONALITY OF INTERNATIONAL ORGANIZATIONS

NICOLAE PURDĂ*

Abstract

An international organization is an association of states, holder of rights and duties which it acquires by the will of the founding states and which acts as an entity which is distinct and independent from the states that form it. The constituent instrument of the organization proclaims the establishment of such, as well as its character of being a subject of international law, but at the same time it delimitates the domain in which the international legal personality can manifest and also the content of its capacity.

Keywords: *Subjects of international law, international organization, legal personality in municipal law, international legal personality, Viena Convention.*

1. Introductory Considerations

An international organization represents a form of harmonization of efforts of certain states targeted in the direction of an international collaboration, for the achievement of which the said states have created a legal-organizational (institutional) framework - structures with permanent status.

The contemporary notion of international organization features a relatively recent origin. A precise definition of the international organization has yet to be established, especially one that is unanimously accepted.

In the definition he proposed, El-Erian (special *rapporteur* with the U.N. International Law Commission) appreciated the international organization as a legal entity created by states or international organizations with a certain purpose and which possesses a will that is expressed through its own permanent structures.

In the Comment to Vienna Convention in 1975 regarding the representation of states in their relations with international organizations with universal character, it is shown that, with regard to the international organization, was considered"*an association of states constituted through a treaty, having constituent instruments and its own structures, as well as a legal personality which is distinct from that of the member states that form it"*.

A definition of the concept of international organization is also to be found in the Vienna Convention of 1969, regarding the treaties' law, which, in article 1, paragraph 1, letter "i" stipulates that "*by the expression international organization*" it is understood "*an inter-government organization*".

In the same terms is defined the international organization in art. 2, paragraph 1, letter "i" of the Vienna Convention of 1986, regarding the law of treaties concluded between states and international organizations or between international organizations.

It is generally acknowledged that international organizations are secondary subjects of international law. The international legal order has been in place before the appearance thereof and, in theory, it can exist without it.

International organizations are defined by several elements, as follows: they have an inter-state character, they are created by states by means of international treaties, on a voluntary basis, they

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have permanent structures, they have autonomous will, they have their own competencies and pursue to achieve a cooperation between states in order to promote common interests[1].

International organizations possess certain features that allow us to distinguish them both from states and from other institutions with international status, namely: they are created by means of international treaties, they feature a functional competency, in virtue of this competency, they adopt acts that are directly attributed to them, independent from the member states, their activity is regulated to a certain extent directly by the international law[2].

At the origin of any international organization lies a conventional act, negotiated and concluded by the subjects of international law creating it.

The willful agreement for the creation of an international organization is most often expressed in a written treaty which determines the objectives and purposes of the organization, the competencies that it has in order to achieve these objectives and purposes and the structure of the organization.

Characterizing these constitutive treaties in a relatively recent advisory opinion, the International Court of Justice stated that "*instruments constituting international organizations are, furthermore, treaties of a special kind; their object is to create new subjects of law, endowed with a certain autonomy, to which the parties entrust the task of achieving common objectives"*.[3]

Treaties that represent the constituent instruments of international organizations regularly have sovereign states as parties. However, depending on the objective of the said treaties, international organizations too can become parties thereto.

International organizations receive, through the treaties through which they are created, a specific competence in various fields of activity, in order to exert determined functions. International law practice and doctrine have established the concept of functional competency of international organizations.

A series of acts adopted thereby binds them as organizations, can be attributed to them as such, independent from the member states. They have at their disposal structures that, in view of exerting their attributed competencies, adopt such acts which cannot be attributed to the member states.

The activities of international organizations are directly regulated by the international law, to the extent to which they engage in relations with other subjects of international law. This ensues directly or implicitly from their constitutive treaties.

By all means, international organizations also have their own internal order which regulates the operation of their various structures, their respective competencies, including those of the structures that bind the organization, the internal dependencies, procedures, the rights and duties of the officials thereof. The respective provisions are included in the treaty as well as in other norms, adopted based on the treaty.

2. The Legal Personality of International Organizations

2.1 The Legal Personality of Municipal Law of International Organizations

International organizations have their own legal personality, both with regard to the municipal legal order (in the state on the territory of which the organization is headquartered and carries on its activity), and with regard to the international legal order.

Public (inter-government) international organizations have a civil legal capacity and are therefore endowed with legal personality of municipal law.

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[1] **Ion Diaconu** ,*Manual de drept internațional public, (*"Lumina Lex" Publishing House, Bucharest, 2007), p.147,

[2] **Andrei Popescu, Ion Diaconu** , *Organizații europene și euroatlantice* **, (***"*Universul Juridic" Publishing House, Bucharest, 2009), p.19-23,

[3] Report of the ICJ, 1996, paragraph 19,

The recognition of the legal personality of municipal law of international organizations is usually established in their constituent instruments, so by means of explicit provisions.[4]

Headquarters agreements come to develop the provisions included in the constituent instruments. The act, which is opposable to the states which are parties to the treaties, whereby is established the acknowledgment of the legal personality of an international organization by the said states takes place in virtue of this act. The rule is formulated as follows: *"The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes (art. 104 of the Charter of the U.N.; art. XII of the U.N.E.S.C.O. Constitution; art. 4 of the North-Atlantic Treaty; art. 39 of the I.L.O. Constitution, etc.)".*[5]

In the constituent instruments of most international organizations, it is stipulated that the organization shall have the legal capacity as may be necessary for the exercise of its functions or, even more specific, that it shall have the legal capacity and the capacity to contract, acquire and have at its disposal movable and immovable properties and to make use of legal procedures.[6]

With regard to international organizations with legal personality of municipal law it is said that in each national legal system they must benefit from a treatment at least equal to that of foreign legal person.

The holding of a legal personality of municipal law by international organizations is not equivalent to the assimilation thereof to subjects of municipal law in these states, because international organizations have certain privileges and immunities which derogate from the common law.[7]

2.2 The legal personality of international law of international organizations

The notion of *"international legal personality"* is in close relation with that of *"subject of international law"*, these notions being often defined one through the other. For the identification of a subject of international law it is required to ascertain whether such subject possesses legal personality in the international legal order, in other words, whether it has the legal capacity to act internationally.

The analysis of the concept of subject of international law was made accurately by the International Court of Justice (ICJ) which, in its Advisory opinion of April 11th 1949 issued at the request of the U.N. General Assembly in the case *"Reparations for injuries suffered in the Service of the United Nations"* shows that U.N. is a subject of international law, which means that it *"capable of possessing international rights and duties and that it has the capacity to maintain its rights by bringing international claims"*.

In the same advisory opinion, the ICJ shows that U.N. enjoys functions and rights *"which can only be explained based on it possessing to a greater extent the international legal personality and the capacity to act internationally"*, and as a consequence *"The Court reached the conclusion that the organization is an international person [...] which means that it is capable of possessing international rights and duties"*.[8] Although the advisory opinion of the ICJ only refers to the United Nations, for the identity of reasons, it may also be applicable in the case of all the other international organizations which through their constituent instruments obtain rights and assume duties within the international law order.

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[4] Ion M.Anghel *„Subiectele de drept internațional, (*"Lumina Lex", Publishing House, Bucharest, 2002), p.361

[5] Dan Vătăman, *Organizații europene şi euroatlantice,(* "C.H.Beck" Publishing House, Bucharest, 2009), p.14

[6] Ion M.Anghel, *idem*, p.362

[7] Dan Vătăman, *idem*, p.15

[8] For details refer to "Reparation for Injuries Suffered in the Service of the United Nations. Advisory Opinion", in ICJ Reports, 1949, p.179

Until year 1945 there was a live controversy on whether international organizations could be deemed to have international legal personality and whether they were subjects of international law.

Nowadays, however, it is generally accepted that all public international organizations have a certain international legal personality, limited, of course, to the domains in which they have the competency to act and in practice almost all international organizations make acts governed by the international law. Despite all that, there are few constitutive texts which explicitly establish the legal personality of international organizations.[9]

The only multilateral regulations in which the international legal personality is *expressis verbis* recognized are the provisions of art. 10 of **The International Fund for Agriculture Development** ("The Fund shall possess international legal personality") and art. 18 of the **Convention on the Settlement of Investment Disputes between States and Nationals of Other States** (Washington, 1965), where it is stipulated that the Center shall enjoy "full international legal personality". The **Treaty of Rome** by which was instituted the **European Economic Community** also explicitly states that the respective organizations possess international legal personality (art. 250; idem, art. 6 of E.C.S.C.). The acknowledgment of the international legal personality is explained in the case of E.C.S.C., E.E.C and EURATOM (The community possesses legal personality - art. 210 of the C.E.E.)

Lately, constituent instruments have been increasingly explicit (the **U.N. Convention on the Law of the Sea** (1982) - art. 176; W.T.O., art. VIII); the **Rome Statute of the International Criminal Court** ("*The Court shall have international legal personality*"); in the **Treaty of Lisbon** it is stated that the European Union possesses legal personality (art. 47).

It must be said that not any international organization has the quality of being a subject of international law and that the simple establishment of an international organization is not equivalent obligatorily with the appearance of a new subject of international law. In some cases, states establish an international organization on which they confer the quality of subject of international law - at least implicitly. In other cases, states can only confer on it attributions and competencies, but not the quality of subject of international law.[10]

The international legal personality of different international organizations is not identical, but it is different not only depending on the quality of the subject (state or international organization), but also on the character of the competencies established through the constituent instruments and it varies from one organization to another or, at the least, from one category of organizations to another. Being derivative subjects of international law, they cannot have a personality identical to that of states and in any case, their capacity is limited to what indicates the purposes and functions of the respective organization; in other words, the coverage of the personality varies from one organization to the next. [11]

The concept of international legal personality appears to be firmly established, but infinitely variable, and the ultimate criterion of control is constituted by the provisions in the constituent instruments of each organization.

The international legal personality of an international organization is essential for the proper operation of such. The constituent instruments of several international organizations establish such organizations with rights and duties that confirm that the said act at least confers on it a limited degree of international personality.

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[9] Ion M.Anghel, *Dreptul diplomatic şi dreptul consular, (*„Universul Juridic" Publishing House, Bucharest, 2011), p.394

[10] Ion M.Anghel, *Subiectele de drept internațional,(* "Lumina Lex" Publishing House, Bucharest, 2002), p.366

[11] Ion M.Anghel , *Dreptul diplomatic şi dreptul consular, (*„Universul Juridic" Publishing House, Bucharest, 2011), p.397

The international legal personality of international organizations is characterized by two fundamental elements: - the existence of attributes - the legal rights and duties the organization is mainly entitled to in its relation with the member states; - the existence of its own structures within the organization by means of which it carries on its official activity as a subject of international law.[12]

2.2.1 Forms of manifestation of the international legal personality of international organizations

International organizations have a capacity limited to what constitutes their personality. They have the right to conclude treaties, the right of legation (active and passive), the right to bring international claims, the right to recognize other subjects of international law, financial autonomy and the capacity to have their own budget at their disposal.

A) The capacity to conclude treaties

International organizations have the capacity to conclude treaties with states, with each other and with other subjects of international law.

In the Vienna Convention on the law of treaties between states and international organizations or between international organizations (1986), it is stated that: *"The capacity of an international organization to conclude treaties is governed by the rules of that organization"* (art. 6), while the expression *"rules of the organization"* is defined as *"in particular the constituent instruments, decisions and resolutions adopted in accordance with them and the established practice of the organization"* (art. 2.1, letter j).

The treaties concluded by international organizations generally refer to their administrative operation and to the activity they can carry on, either on the territory of the states, or in the relations between them, in order to attain their purposes and objectives. This category includes headquarters agreements, agreements regarding the privileges and immunities the organization and its officials enjoy, as well as the agreements concluded with other organizations regarding the cooperation between them or the coordination of their respective activities.[13]

With regard to the headquarters agreements, it should be stated that it is considered not only the agreement with the state in which the main headquarters is located, but also the agreements with the states on the territories of which are established secondary headquarters or headquarters of structures belonging to the respective organizations. This category includes the agreements regarding regional headquarters, headquarters of offices, of administrative or information centers, or even of legations found on territories of certain states for temporary missions.

International organizations also conclude other types of agreements, more directly related to the attainment of their objectives and purposes, namely technical assistance agreements regarding the attainment of economical and social development projects, of certain public works, of feasibility studies regarding the evaluation of natural resources, granting of loans, organizing conferences, assemblies and others, depending on the specificity and objectives of each organization. The Charter of the U.N. explicitly stipulates that member states can make available to it armed forces, assistance and facilities, based on special agreements, in order to contribute to maintaining international peace and security (such agreements were concluded in connection with the peace maintaining operations in Cyprus and Congo).

The conventions concluded by international organizations are subjected to the same rules as the conventions concluded by states. This clearly ensues from the fact that the text of the Convention adopted in 1986 on the law of treaties concluded between states and international

[12] **Ibidem,** p.398
[13] **Ion Diaconu** – *idem*, p 150

organizations or between international organizations is almost identical to that of the 1969 Vienna Convention on the Law of Treaties.[14]

B) The capacity to establish diplomatic relationships (the right of legation)

International organizations possess what is traditionally referred to as "right of legation". They receive and send diplomatic representatives from and to other subjects of international law. Thus, member states usually send permanent missions to the main organizations they are part of.

Although there are many similarities between embassies to states and permanent missions to international organizations, one fundamental difference requires emphasizing. If the embassy represents a state and acts on its behalf in relation with another state, the permanent mission ensures not only this representation within the respective international organization, but it also participates in fulfilling its functions. Thus, the diplomats of permanent missions represent, together with delegates in the country of origin, their state within structures of the organization which adopt decisions and act on behalf of the organization.

Even certain states which are not members are represented by permanent missions within organizations (Switzerland within the U.N., New York, until year 2002 when it became a member), and numerous states are represented by separate permanent missions within the European Union or within NATO.

The representation of states in their relations with international organizations of a universal character is regulated by the 1975 Vienna Convention bearing the same title.

In turn, international organizations send representatives within other international organizations. Most specialized institutions are represented by permanent offices within the U.N., in New York, in order to attend the activities of the U.N. and, if needed, to coordinate common schedules of activity. The U.N., the International Labor Organization and the European Council are represented at Brussels within the European Union.[15]

The U.N. and specialized institutions also have representatives in numerous states. The United Nations Development Program, a structure of the U.N., disposes of more than 100 representatives in various countries, some providing representation in several states. In order to coordinate various development and assistance programs, performed by several structures of the U.N. and by specialized institutions, the U.N. General Assembly decided in 1997 to create the position of resident coordinator.

According to the Charter of the U.N., the representatives of U.N. member states and the officials of the organization enjoy the privileges and immunities as are necessary for the independent exercise of their functions in connection with the organization. The organization itself enjoys on the territory of the member states the privileges and diplomatic immunities as are necessary for the fulfillment of its purposes (art. 105).

C) The capacity to bring international claims

The right to bring international claims for damages suffered by the organization, as a distinct entity, or by its agents, is not explicitly provided in the Charter of the U.N. or the constituent instruments of other organizations. However, in order to fulfill its functions and to protect its agents (who can suffer damages in the exercise of their attributions), international organizations must benefit from the possibility to regulate their differences which may ensue from their activity and which could make them opposable to states or to other international organizations.[16]

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[14] **Andrei Popescu, Ion Diaconu** – *idem*, p.32-33

[15] **Ibidem**, p.34

[16] **Raluca Miga-Beşteliu,** *Organizaţii internaţionale interguvernamentale, (*"C.H.Beck" Publishing House, Bucharest, 2006), p.45-46

These objective determinations caused the International Court of Justice to show in its advisory opinion related to the case regarding the Reparation for Injuries Suffered in the Service of the United Nations, with reference to the issue of determining whether the U.N. could bring a claim in international law: *"the competence to bring an international claim is... the capacity to resort to the customary methods recognized by international law for the establishment, the presentation and the settlement of claims. Among these methods may be mentioned protest, request for an enquiry, negotiation and request for submission to an arbitral tribunal or to the Court"*. On the same occasion, the ICJ recognized the right of the U.N. to bring international claims regarding the suffered damages, even against states which were not members, also stating that the U.N. can bring claims for the damages incurred to its agents.

A dispute between the international organization and a state, an international organization or a private party on the one side, regarding the coverage of the competencies, the modification of a decision made by such and so on, could not be settled except using the ways and modalities provided in its constituent instruments.[17]

Thus, in the case of the U.N., the 1946 Convention on the privileges and immunities of the United Nations (art.VIII) stipulates that for dispute settlement, the Organization shall have to establish appropriate settlement methods. With regard to any appeal regarding the interpretation or application of the Convention, such is to be submitted to the ICJ. If a dispute arises between the U.N. and a member of the organization, there shall be a request, according to art. 96 of the Charter and art. 65 of the Statute of the Court, for an advisory opinion on any legal question. The Charter of the U.N. stipulates that the General Assembly or the Security Council may request an advisory opinion from ICJ. Similar provisions are also to be found in the case of the specialized institutions of the U.N., and other international organizations also drew inspiration from these models, to a greater or lesser extent.

D) The right to recognize other subjects of international law

The right to recognize new subjects of international law constitutes, basically, a prerogative of states. However, international organizations too can recognize new subjects of international law, for instance by admitting new states as members. In practice, the admission of a state as a member of an inter-government organization is much more important than the recognition by individual states, as it operates as a decision of the bodies formed by the representatives of those states. States would not vote for the admission of a member they are not willing to recognize. At least for most of them, the admission in the organization also means the recognition as subject of international law. Certainly, for the organization admission also means recognition.[18]

E) Other aspects regarding the legal personality of international law of international organizations

In some cases, international organizations constituted, on their own behalf, armed forces and undertook peace maintaining operations. Thus, armed forces bearing the flag of the U.N. participated in military operations in Egypt (1956), in Congo and in Cyprus, and more recently in Somalia and Bosnia-Herzegovina. In some cases, the U.N. concluded agreements with the countries involved in the conflict (with Egypt in 1957, with Congo in 1961, with Cyprus in 1964) and adopted regulations for the respective armed forces. These acted as a body of the United Nations, under the authority of the organization which assumed the duties arising from this situation. [19]

In many cases, international organizations are depositories of international treaties, fulfilling attributions specific to a depository. According to the Charter of the U.N., international

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[17] **Ion M.Anghel**, *Subiectele de drept international, (*"Lumina Lex" Publishing House, Bucharest, 2002), p.381
[18] **Ion Diaconu** – *idem*, p.152
[19] **Andrei Popescu, Ion Diaconu** – *idem*, p.35;

treaties and agreements concluded with member states must be registered with the Secretariat of the U.N. and are to be published by such (art. 102).

A special case is represented by organizations that tend to achieve the economical, even political integration of member states, especially with regard to the **European Union**, which currently comes in succession after the three communities created in the Western Europe after World War II - the Coal and Steel Community, the European Economic Community and EURATOM.

By the **Treaty of Lisbon** for amending the Treaty on the European Union and the Treaty Establishing the European Community (signed on December 13th 2007), was instituted the European Union which is based on the T.E.U. (amended) and the Treaty on the Functioning of the European Union. This treaty signals a new stage in the process of creating an increasingly profound Union, a lead forward, indispensable and unavoidable, bearing a political significance.

According to the **Treaty of Lisbon**, disposing of an adequate institutional structure - and the member states, by the transfer of some of their attributes of sovereignty, conferring competencies on it (based on the principle of attribution), the European Union has **legal personality** (art. 47) By this short provision, it is stated comprehensively and in a non-differentiated manner that the E.U. has a **general legal personality** in the international, community and municipal law order.

The legal personality of the E.U. is one of unique complexity, it is heterogeneous (a mixture of stability and international structures, with a community, above-state segment, for governing and a inter-government segment for the policies of cooperation).[20]

The **treaty of Lisbon** brings important changes with regard to the legal and institutional standing of the U.E., as well as with regard to the mode of functioning thereof. Becoming for the first time a subject of international law, but not being a legal-political entity, which is a state, but at the same time more than an international (inter-government) organization and impossible to include in any of the existing patterns, the E.U. appears as a *sui generis* institution, a player of a new and atypical kind on the contemporary international stage.

Thus, the **European Union** enters the category of international organizations, having the typology thereof; an association of states, done with a certain purpose, constituted as an entity which is distinct and independent from the states that form it - with its own legal order, established based on a multilateral international treaty (the institutive treaty) -, disposing of its own bodies ordered following a certain organization and functioning structure and being conferred legal personality, the E.U. does not constitute, however, an international organization in the classic sense of the concept (inter-government), but it is a supranational one, with substantial supranational attributes that change its essence of association of states into a union of states that share a part of their sovereignty - by transferring sovereignty attributes from states to the E.U., all to way to complete fusion (pursuing their integration).[21]

The **European Union** is becoming a full and reckoned player of the international scene. It has at the basis of its legal capacity the attributes of a subjects of international law: capacity of representation in view of establishing and maintaining relations with the other subjects of international law; capacity to participate in international conferences; a certain capacity to conclude treaties on its own behalf, as well as on the behalf of its member states; capacity to stand trial; capacity to bind itself to be liable according to the international law; the capacity to enjoy privileges and immunities.

In the **Treaty of Lisbon** there is a special set of regulations by which is considered the external side of its legal personality, pertaining to its legal capacity as a participant to the international life, meaning its external actions. Thus, the E.U. is developing a common foreign policy and security policy, it concludes agreements with one or more international organizations, it

[20] **Ion M.Anghel** – *Dreptul diplomatic si dreptul consular, (*"Universul Juridic" Publishing House, Bucharest, 2011), p.438

[21] **Ibidem,** p.438-439

concludes treaties on behalf of the member states, it establishes any form of cooperation useful within the U.N. and within its specialized institutions with the European Council, it develops privileged relations with neighboring countries, the delegations of the Union in third party countries or in international organizations ensures its representation and others. Moreover, the European Union concludes those legal acts of international law that are adequate for the attainment of its objectives and for its functioning, it earns rights and assumes duties, it has the capacity to make claims and ask for damages. The duties assumed by the E.U. bind both itself and its member states.[22]

In the **Treaty** (art. 6) it is provided that *"The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg on 12 December 2007, which shall have the same legal value as the treaties"* and that *"The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms".*

In accordance with art. 343 (former art. 291 T.C.) of the Treaty on the functioning of the European Union, the **Union** enjoys on the territories of its member states the privileges and immunities as are necessary for the fulfillment of its mission, in the conditions defined by the 1965 Treaty on the privileges and immunities of the European Community. This provision of principle is transposed and developed in the Protocol (no. 7) on the privileges and immunities of the European Community (annex to the Treaty on the European Union, pursuant to the amendments made by the **Treaty of Lisbon**). Subsequently, the buildings of the European Union shall be inviolable, and shall be exempt from search, requisition, confiscation or expropriation. The property and assets of the Union shall not be the subject of any administrative or legal measure of constraint without the authorization of the Court of Justice. The archives of the Union shall be inviolable and the official correspondence and other official communications shall not be subject to censorship. The Union, its archives, revenues and other property shall be exempt from all direct taxes.

For their official communications and the transmission of all their documents, the institutions of the Union shall enjoy in the territory of each member state the treatment accorded by that state to diplomatic missions.

Conclusions:

International organizations, subjects of international law, with functional legal capacity, remain instruments of inter-state cooperation, the activity and even existence of which depend constantly on the cooperation between states and consequently on their will.

The requirements of international cooperation and interdependence determined the increasing growth of the competencies of organizations, and so the extension of their capacity as subjects of international law to new domains and activities, especially with regard to the conclusion of treaties. They represent a path to conciliate the sovereignty of states with the requirements of a permanent and institutionalized cooperation.

Currently, there is a constant tendency of adaptation of international organizations to the new requirements of international relations, to the changes that occur in the world. These reflected into preoccupation for modifying the statutes, as well as the organization and functioning of international organizations.

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[22] **Ibidem**, p.439

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OVERVIEW ON THE PRINCIPAL MEANS OF APPEALS LODGED BEFORE THE COURTS OF THE EUROPEAN UNION

OANA-MĂRIUCA PETRESCU[1]

Abstract
Knowledge and understanding the means of appeals lodged before the courts of European Union (Court of Justice and Tribunal – a. n.), limited only to the points of law, are very important taking into account that the modality to control a judgment delivered by an inferior court exists since ancient times, being governed, among others, by the Latin principle: res judicata pro veritate accipitur.
In the following, we will examine, in general, the judicial control of the judgments and orders delivered by the General Court and by the Tribunal of Civil Service, as a specialized tribunal on civil servant issues, but also the sui generis means of appeals and the extraordinary means of reviews of the judgments and orders. We have to mention that all of them are exercised in accordance with the rules of procedure of the European courts and the Statute of the Court of Justice of the European Union.
Another aspect to be mentioned is that the judgments of the Court of Justice cannot be challenged to another court, as they remain final and irrevocable.

Keywords: *Treaty of Lisbon, European courts, means of appeals, sui generis means of appeals, extraordinary remedies.*

I. Introduction

The theoretical and practical importance of knowledge the role that the means of appeal have for each of national judicial system, including for the European Union, has determinate the analysis during the present paper of the following issues:

- the appeal, which can be brought before the Court of Justice against the judgments and orders of the General Court and against the decisions of the Civil Service Tribunal, as a specialized tribunal with observance of the European provisions on the conditions to lodge an appeal, the general and special procedural terms, the principal categories of the judgments that can be appealed, the grounds for appeal which shall be concise, clear and without any other meanings;
- the *sui generis* means of appeal (opposition and complaint when the court omitted to give a decision on a specific head of claim or on costs), as exceptions from the ordinary procedure, which can be exercised when the court does not take into consideration the defendant defences for various reasons or when the court omitted to decide on one of the heads of complaint invoked by the applicant in his application. Bearing in mind all these, we can observe that the specificity of these means of appeal consist in combining characters of many means of appeals which may be brought before the European courts;
- exceptional review procedures (third – party proceedings and revision), which represent the possibilities offered to interested parties, in the cases and conditions stipulated by the Statute of the Court of Justice and in the rules of procedures of the European courts, to request the court that delivered the contested judgment or decision to withdraw its own judgment or decision and to proceed to a new trial. This seems to be fair since any new fact discovered, relevant and unknown prior to the original judgment, may determine a different solution.

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II. The appeal

In the European Union law, the appeal represents the mean of appeal by which the parties (e.g. institutions, bodies, agencies and offices of the European Union, the Member States, the natural and legal persons or other persons) may request to Court of Justice or General Court, as the case maybe, cancellation of the judgment, whenever it is consider to be illegal. The general rules concerning the appeal are provided in the article 256[2] of TFEU[3] para.1 in accordance to which the "*decisions given by the General Court*[4] […] *may be subject to a right of* ***appeal to the Court of Justice*** […]*"* in "*the actions or proceedings referred to in articles 263, 265, 268, 270 and 272, with the exception of those assigned to a specialised court set up under article 257 and those reserved in the Statute for the Court of Justice"* limited only to *"points of law, in the conditions and the limits provided for by the Statute"*, while the judgments delivered by the Civil Service Tribunal in the first instance, according to art. 270[5] of TFEU **can be challenged with appeal** to the General Tribunal, on points of law, such as: grounds of lack of competence of the Civil Service Tribunal, a breach of procedure before it which adversely affects the interests of the appellant; the infringement of Union law by the Civil Service Tribunal.

We can noticed that once the General Court have been established in 1989, and later, the Civil Service Tribunal in 2004, the court in Luxemburg received the second grade of jurisdiction, namely court of appeal[6], underlining that the judgments and the orders delivered by the latest remain final and irrevocable, as the court in Luxembourg "*doesn't know these means, as it judges in first and last instance*[7]*"*.

In the following we shall analyze shortly the principal elements of appeal, as follows:

a. Categories of decisions that can be appealed

According to the above mentioned, we can notice that the appeal may be lodged in the cases strictly provided by the Treaty on the Functioning of the European Union and in accordance with the rules of procedure of the European courts, in the following situations:

- before the Court of Justice against the judgments delivered in first instance by the General Court and before the later one against the judgments and orders delivered by the Civil Service Tribunal, in first instance;
- before the Court of Justice or the General Court against the decisions when the General Court or Civil Service Tribunal, as the case maybe, are *"disposing of the substantive issues in part only or are disposing of a procedural issue concerning a plea of lack of jurisdiction or inadmissibility"*, in accordance with article 56 of the Statute of the Court of Justice and article 9 of Annex I to the Statute of the Court of Justice concerning the Civil Service Tribunal;

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[2] Former article 225 of TEC.

[3] The Treaty on the Functioning of the European Union.

[4] Augustin Fuerea, *Manualul Uniunii Europene*, III edition, revised and added, (Universul Juridic Publishing House, Bucharest, 2006), p.116 and the following. The General Court (former known as Court for First Instance(CFI)), as jurisdictional instance of the Court of Justice of the European Union, has been created by Council Decision of 24 October 1988 establishing a Court of First Instance of the European Communities (88/591/ECSC, EEC, Euratom) as amended by the corrigendum published in the Official Journal of the European Communities in order to strength the judicial guarantees to individuals through the establishment of the second level of judicial authority. The General Court is an independent Court attached to the European Court of Justice.

[5] Former article 236 TEC.

[6] Fabian Gyula, *Drept instituțional comunitar*, 2nd edition, (Sfera Juridică Publishing House, Cluj – Napoca, 2006), p.306.

[7] Augustin Fuerea, *Instituțiile Uniunii Europene*, (Universul Juridic Publishing House, Bucharest, 2002), p.132.

• against the decisions delivered in the *sui generis* means of appeal and exceptional review procedures[8].

A special situation exists when the decision have been delivered in absence of the defendant, in which case the appeal can be lodged only against the second decision, which is adopted following the opposition lodged by the defendant.

Regarding the latest aspect, in the doctrine[9] has been raised the question if the first decision delivered in the original dispute, in which the defendant was absent, can be appealed by him/her, jumping over the trial of the opposition. Answering to this question the specialised literature considered that[10] if the rules of procedure of Civil Service Tribunal does not provide such situation, then no appeal against such decision should be lodged by the defendant who have missed in the original dispute bearing in mind the Latin principle: *ubi lex non distinguit nec nos distinguere debemus*. We are agree with this opinion having regard the defendant cannot appeal a decision which is not be enforceable to him/her, but only one that will take effects to him/her.

Finally, can be appealed the following:

- the decisions delivered in the cases when the application to intervene in the original dispute, formulated by the intervener, was dismissed (article 57 of Statute of the Court of Justice);
- the decisions of the General Court concerning: suspension of a measure taken by a institution of European Union (art.278[11] of TFEU); suspension of the necessary interim measures provided in article 279[12] of TFEU etc. (art.57 para. 3 of Statute).

b. Categories of applicants

Without going into further details, in general, the applicants are provided in article 56 para.2 of the Statute of the Court of Justice which stipulates that the appeal: *„may be brought by **any party**[13] which has been unsuccessful, in whole or in part, in its submissions[14]"*. However *"**the interveners**, other than the Member States and the institutions of the Union, may bring such an appeal only where the decision of the General Court directly* [and independently] *affects them"*, in all the cases when such decision has violated their rights by rejecting the application to intervene in the original dispute, without waiting for the original parties to lodge the appeal as well[15].

In addition, according to paragraph 3 of article 56 of the Statute of Court of Justice and „*with the exception of cases relating to disputes between the Union and its servants, an appeal may also be brought by **Member States and institutions of the Union** which did not intervene in the proceedings*

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[8] Fabian Gyula, *Curtea de Justiție Europeană, instanță de judecată supranațională*, Rosetti Publishing House, Bucharest, 2002, pag.119; Koen Lenaerts, Dirk Arts and Ignace Maselis, Procedural Law of the European Law, second edition, (Sweet and Maxwell Publishing House, London, 2006), p.459

[9] Fabian Gyula, *Drept instituțional comunitar*, op. cit., p.306.

[10] *Ibid*

[11] Article 278 of TFEU stipulates that: *„actions brought before the Court of Justice of the European Union shall not have suspensory effect. The Court may, however, if it considers that circumstances so require, order that application of the contested act be suspended"*.

[12] In accordance with art.279 of TFEU *„the Court of Justice of the European Union may in any cases before it prescribe any necessary interim measures"*.

[13] We mean natural and legal persons, Member States, institutions, bodies, agencies and offices of the European Union – a. n.

[14] Case C-383/99 P Procter & Gamble Company vs. Office for Harmonisation in the Internal Market (OHIM), judgment of 20 September 2001, published in JOCE C no.3 din 05.01.2002, webpage: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2002:003:0009:0010:EN:PDF.

[15] Fabian Gyula, *Curtea de Justiție Europeană, instanță de judecată supranațională*, op. cit., pag.113; article 9 para 2 of the Annex I of Statute of the Court of Justice

before the General Court […]", which means that they become interveners, with a view to comply with the legal order of the European Union[16].

Instead, the Court of Justice of European Union, through the Advocate-General, cannot file an appeal against the delivered judgment taking into account its neutral position to the parties in the litigation, but also the position of the Advocate-General who „*acting with complete impartiality and independence",* makes *"in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require his/her involvement*" (article 252 para.2 of TFEU).

c. Terms of appeal

As the term of appeal against the decisions delivered by the General Court and the Civil Service Tribunal is concern, the European Union provisions[17] stipulate that, in principle, the term is **two months from the notification date of the decisions** and "*in accordance with article 278 or article 279 or the fourth paragraph of article 299 of the Treaty on the Functioning of the European Union or article 157 or the third paragraph of article 164 of the EAEC Treaty*".

Within the same term of appeal can be also challenged the decisions of the General Court ordering, amongst other things: suspension of a measure taken by a institution of European Union (article 278 of TFEU); suspension of the necessary interim measures provided for in article 279 of TFEU or suspension of the enforcement of the decision (article 299 para. 4 of TFEU).

Notwithstanding from the above rules, the Statute of the Court of Justice[18] regulates **a special term of appeal,** that can be filed by any person to the Court of Justice or General Court, as appropriate, of "***two weeks*** *from the notification of the decision dismissing the application*" to intervene in the original dispute.

Bearing in mind the lack of any explicit procedural provisions, we share the point of view issued by the specialised literature[19] according to which the terms of appeals above-mentioned cannot be prolonged, because of the particularities of this mean of appeal.

Furthermore, taking into consideration that the doctrine did not analyse the character of the term of appeal, we consider that, similar to the Romanian civil procedural law, this term is imperative and peremptory[20], which means that its violation will lead to the forfeiture of the interested party from the right to exercise this mean of appeal, so that the unchallenged decision will remain irrevocable on the date of expiring the term of appeal.

Another aspect to be highlighted refers to fact that the European provisions and the doctrine in the field do not stipulate, directly or indirectly and in a clear manner, the situations in which the term of appeal can be suspended. In this context, we believe that, at the European level, the term of appeal can be suspended rightful in the following situations, which should be applied only to the natural and legal persons and provided *expressis verbis* in the rules of procedure of the European courts, namely:

- the death of the natural person;
- opening the judicial reorganization and bankruptcy of the legal person based on a final decision rendered by the national court of the respective legal person;
- the death of the advocate who assists or represents the party in the dispute;

[16] Fabian Gyula, *Drept instituțional comunitar*, op. cit., pag.306; Koen Lenaerts, Dirk Arts and Ignace Maselis, op. cit., pag.462; Case C-434/98 P. Council of the European Union v Silvio Busacca and Others and Court of Auditors of the European Communities, judgment of 5 October 2000, published in European Court reports 2000, webpage: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61998J0434:EN:HTML.

[17] Articles 56 and art.9 of the Annex I of Statute of the Court of Justice.

[18] Articles 57 para.1 and art.10 of the Annex I of Statute of the Court of Justice.

[19] Fabian Gyula, *Curtea de Justiție Europeană, instanță de judecată supranațională*, op. cit., p.113.

[20] Ioan Leș, *Drept procesual civil*, (Lumina Lex Publishing House, Bucharest, 2002), p.594.

- the intervention of a fortuity situation, which is beyond the control of the natural person to exercise this mean, which can be, from our point of view, an unforeseeable and unavoidable event such as: natural disasters (e.g. flood, fire, earthquake), state of siege, state of emergency or state of urgency.

d. The grounds of appeal

According to the provisions regulated by the Statute of the Court of Justice[21], the appeal to the Court of Justice or General Court, as the case maybe, shall be limited to "*only points of law*[22]", based on:

- *grounds of lack of competence of the General Court,*
- *a breach of procedure* [...] *which adversely affects the interests of the appellant as well as*
- *the infringement of Union law* (by the General Court or the Civil Service Tribunal – a. n.)

Instead, the appeal cannot be lodged against the taxes and the costs or the party cannot be forced to pay the costs[23], otherwise the appeal will be declared inadmissible.

Similar to the grounds of appeal invoked in the Romanian procedural law[24], those invoked before the court in Luxemburg must be concise, precise and clear; they can be resolved regardless the order in which they have been mentioned in the application initiating an appeal. Also, it is important that the grounds of law should be written in detail in order to understand better which the grounds for cassation the contested judgment are because it is not enough only to write them, briefly[25].

Amongst the most invoked grounds of appeal[26], we can mention:

a. procedural errors. In order to be admitted by the court several conditions should be meet:

i. the applicant shall demonstrate that its interests have been affected, directly and substantially by misapplication of certain rules of procedure, except those which aren't the basis of the solution adopted by the court or those who have been tacitly accepted by the applicant during the original dispute[27].

ii. a serious prejudice to the interests of the applicant should be brought by the procedural error. Concerning this condition, from our point of view not any prejudice is likely to justify the interest for the appellant to file an appeal against the judgment delivered by the European court.

b. another ground of appeal which is raised by the appellants very often is the infringement of Union law. Moreover, the phrase *"infringement of Union law"* is generally used to designate the primary and the secondary law, the principles of law generally recognized as well as the fundamental

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[21] Articles 58 and art.11 of the Annex I of Statute of the Court of Justice.

[22] Case C-362/95 P Blackspur DIY Ltd, Steven Kellar, J.M.A. Glancy and Ronald Cohen v Council of the European Union and Commission of the European Communities, judgment of 16 September 1997, published in European Court reports 1997, webpage: http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61995J0362; Case C-174/97 P. Fédération française des sociétés d'assurances, Union des sociétés étrangères d'assurances, Groupe des assurances mutuelles agricoles, Fédération nationale des syndicats d'agents généraux d'assurances, Fédération française des courtiers d'assurances et de réassurances and Bureau international des producteurs d'assurances et de réassurances vs. Commission, order of 25 March 1998, published in European Court reports 1998, webpage : http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&numdoc=61997O0174&lg=en.

[23] Article 58 para.2 of the Statute of the Court of Justice; Case C-39/00 Services pour le groupement d'acquisitions SARL v Commission of the European Communities, order of 13 December 2000, published in European Court reports 2000, webpage: http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=62000O0039 .

[24] Ioan Leş, *Drept procesual civil*, op. cit., pag.596.

[25] Fabian Gyula, *Curtea de Justiţie Europeană, instanţă de judecată supranaţională*, op. cit., p.115.

[26] Article112 para.1 point. c) of the Rules of Procedure of the Court of Justice; Art.138 para. 1 point. c of the Rules of Procedure of the General Court.

[27] Fabian Gyula, *Drept instituţional comunitar*, op. cit., p.308.

rights. In many cases, the applicant seeks to obtain a new management of evidence in the court, when in the original dispute he/she either did not have enough time to provide evidence or he/she did not provide the useful evidence at that moment to assure the winning of the dispute or other reasons[28].

In the end, as a general condition provided by the rules of procedure of the European courts[29], the appeal cannot modify the object of the litigation filed before the General Court or Civil Service Tribunal, which means that the parties shall present the same final conclusions as those presented before the first instance[30].

e. Trial the appeal and the legal effects of the judgment

The procedure of trial the appeal is regulated, in detail, both by the Statute of the Court of Justice[31] and the rules of procedure European Court, according to which *"where an appeal is brought* [….] *the procedure before the Court of Justice shall consist of a written part and an oral part"* which can be eliminated in the conditions established by the court in Luxembourg.

A basic condition to trial an appeal in good conditions is represented by the preliminarily admissibility of the application, which will be considered filed "*by lodging* [it] *at the Registry of the Court of Justice or of the General Court"*. Whenever it is lodged directly to the Registry of the General Court or the Civil Service Tribunal, the court *"shall immediately transmit to the Registry of the Court of Justice* [or the General Court, as the case maybe] *the papers in the case at first instance and, where necessary, the appeal"*. Furthermore, the application initiating an appeal shall be drafted in the language of the case used in the judgment delivered by the General Court or by the Civil Service Tribunal which is appealed by the interested party[32].

In other manner of speaking, an appeal shall meet the same formal requirements, as those required for the written application; otherwise the sanction will be the dismissal of the application as inadmissible.

After the trial of the application initiating an appeal, the judges can delivered one the following solutions[33]:

a. **the applicant withdraws his appeal**, in conditions stipulated by the rules of procedure. If, meanwhile, the term for appeal has expired, the principal effect of the judgment will be the irrevocability of it, gaining *res judicata.* Also, the case will be erased from the Registry of cases and the appellant shall pay the costs, except when these costs have been provoked by the defendant or when the court in Luxembourg order the parties to share the costs where equity so requires, according to article 69 para.3 of rules of procedure of the Court of Justice;

b. when the appeal is obviously inadmissible or unfounded, **the Court of Justice or the General Court, as the case maybe, may** anytime, based on the report of the Judge-Rapporteur and after the hearing of the Advocate-General, to **dismiss the appeal**, in whole or in part, through reasoned order. With the same occasion, the court shall decide related to the costs, as well. Usually,

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[28] Fabian Gyula, *Drept instituțional comunitar*, op. cit., p.309.

[29] Article 113 para 2. of the Rules of Procedure of the Court of Justice; Art.139 para.2 f the Rules of Procedure of the General Court.

[30] Case C-341/00 Conseil national des professions de l'automobile, Fédération nationale des distributeurs, loueurs et réparateurs de matériels de bâtiment-travaux publics et de manutention, Auto Contrôle 31 SA, Yam 31 SARL, Roux SA, Marc Foucher-Creteau and Verdier distribution SARL v Commission of the European Communities, order of 5 July 2001, published in European Court reports 2001, webpage : http://eur-lex.europa.eu/smartapi/cgisga_doc? smartapi!celexplus!prod!CELEXnumdoc&numdoc=62000O0341&lg=en.

[31] Article 59 of the Statute of the Court of Justice

[32] Fabian Gyula, *Drept instituțional comunitar*, op. cit., p.309; Article111 of the Rules of Procedure of the Court of Justice; Article 137 of the Rules of Procedure of the General Court.

[33] Fabian Gyula, *Curtea de Justiție Europeană, instanță de judecată supranațională*, op. cit., p.117; Article 61 of the Statute of Court of Justice; Article 119 of the Rules of Procedure of the Court of Justice; Article 145 of the Rules of Procedure of the General Court.

this decision is taken before opening the oral procedure or at latest by hearing the Advocate-General[34] or the judge in charge with this attribution, as in the case of General Court;

c. **admission of the appeal, in whole or in part, by the Court of Justice or General Court, as the case maybe**, in which situation:

i. the decision delivered in first instance by the General Court or Civil Service Tribunal is dismissed or;

ii. the dispute is trailed by the Court of Justice or General Court, as the case maybe, when the case may be tried by the court which was filed it;

iii. the case is transmitted to the General Court or Civil Service Tribunal, as the case maybe, but only regarding the points of law.

Regarding the modality to trial the appeal, although the European provisions in the matter does not provide for anything, we believe that several elements concerning the judgment in first instance of the written application (e.g. modality to deliberate and to deliver the judgment) can be apply by similarity taking into consideration that during the appeal *"the judgment shall be delivered in open court; the parties shall be given notice to attend to hear it*[35]*"* (article 64 para.1 of rules of procedure of Court of Justice). In this context, the minute or the operative part of the judgment shall be presented in public session.

In addition, "*the Registrar shall record on the original of the judgment the date on which it was delivered*[36]*"*, which means that the judgment *"shall be binding from the date of its delivery"* (article 65 of rule of procedure of Court of Justice). Furthermore, the written text of the entire judgement together with the grounds are at the disposal of the interested parties in the language of the case or in French language, in front of the trial room[37].

In other formulation, similar to the file lodged before the Romanian courts[38], the judgment delivered by the European court of appeal aims to solve any dispute brought before, aiming at achieving a more effective judicial control made by the court of appeal (whether is the Court of Justice or the General Court) than the first court and at avoiding that a illegal judgment shall become final.

In general, the judgment delivered by the court of appeal produces its effects upon the parties and the interveners or in other manner of speaking; they are *inter partes* and not *erga omnes*. In addition, an appeal shall not have suspensory effect[39] (in accordance with article 60 of the Statute of the Court of Justice), except when the Court of Justice decides otherwise, in articles 278 and 279 of the Treaty on the Functioning of the European Union or in article 157 of the EAEC Treaty.

Another effect consists of in divesting the court of appeal, by delivering its judgment, which shall determinate the enforcement of the judgment by the party who won the trial, automatically.

III. *Sui generis* means of appeal

In principle, the decisions, regardless the legal order in which they have been delivered by the courts (national, European Union or international) may be appealed through ordinary or extraordinary means of appeal.

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[34] Fabian Gyula, *Drept instituțional comunitar*, op. cit., p.311.
[35] Koen Lenaerts, Dirk Arts and Ignace Maselis, op. cit., p.579.
[36] Article 64 para.3 of the Rules of Procedure of Court of Justice.
[37] Fabian Gyula, *Drept instituțional comunitar*, op. cit., p.274.
[38] Ioan Leș, *Drept procesual civil*, op. cit., p.622-623.
[39] Koen Lenaerts, Dirk Arts and Ignace Maselis, op. cit., p.466.

In European Union law, in comparison with the judicial system of the Member States, including Romanian, the judgments can be also appealed through *sui generis* means of appeal, namely: opposition and complaint when the court omitted to give a decision on a specific head of claim or on costs.

Using these means of appeal represents an exception from the ordinary procedure, taking into account that they combine characters of many means of appeals which may be brought before the European courts.

The doctrine[40] considers that one notion is proper to be used as regards these means of appeal such as *"opposition"* taking into consideration that both of them are having a common origin, namely: for various reasons the court either did not consider the defendant defences or does omit to give a decision on a specific head of claims coming from the applicant[41].

a. The opposition

According to the Statute of the Court and the procedural provisions[42] whenever the defendant "*after having been duly summoned, fails to file written submissions* [through the defence]*, in the proper form within the time prescribed, the applicant may apply* [to the court] *for judgment by default*".

After the written procedure is finalised, the court shall decide the date for opening the oral procedure in order to continue the debates in the absence of the defendant, hearing the conclusions of the Advocate General and analyzing, in the same time, whether:

- the appropriate formalities have been complied with;
- the conclusions of the applicant are well founded. Their validity is verified only briefly and regarding the state of facts, whilst the legal grounds shall be analysed in detail[43].

In addition, the court shall rule on the admissibility of the written application, in which situation shall decide, if necessary, conducting preparatory inquiry[44].

The decision rendered, in a case when the defendant has been absent, is final but it can be "*challenged* (by the defendant – a. n.) *within one month from the date when it was notified*[45]*"* through an opposition, *"which must be lodged in the form prescribed by Articles 37 and 38 of these Rules"*. In this context, *"the objection shall not have the effect of staying enforcement of the judgment by default unless the Court of Justice decides otherwise"* (article 41 of the Statute of the Court of Justice).

Bearing in mind all the above mentioned, we can observe that the opposition is a genuine written application, when the defendant asks either for the annulment of the judgment rendered *in absentia* or the admission of his claims formulated against the applicant[46]. This application shall meet the formal formalities provided for in the rules of procedure of the European courts.

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[40] Fabian Gyula, *Curtea de Justiție Europeană, instanță de judecată supranațională*, op. cit., p.121.

[41] Fabian Gyula, *Drept instituțional comunitar*, op. cit., p.318.

[42] Article 41 of the Statute of Court of Justice; Article 94 of the Rules of Procedure of Court of Justice; Article 122 of the Rules of Procedure of General Court; Article 116 of the Rules of Procedure of Civil Service Tribunal.

[43] Fabian Gyula, *Curtea de Justiție Europeană, instanță de judecată supranațională*, op. cit., p.122.

[44] Mădălina Voican, Ruxandra Burdescu, Gheorghe Mocuța, *Curți internaționale de Justiție*, (C. H. Beck Publishing House, Bucharest, 2000), p.98; Augustin Fuerea, *Instituțiile Uniunii Europene*, op. cit., p. 127; Fabian Gyula, *Drept instituțional comunitar*, op. cit., p.318.

[45]; Mădălina Voican, Ruxandra Burdescu, Gheorghe Mocuța, op. cit., p.100; Augustin Fuerea, *Instituțiile Uniunii Europene*, op. cit., p. 127.

[46] Fabian Gyula, *Curtea de Justiție Europeană, instanță de judecată supranațională*, op. cit., p.122; Augustin Fuerea, *Instituțiile Uniunii Europene*, op. cit., p. 132.

After the notification of the opposition, the court sets the date by which the other party may submit written comments, and the following procedure is carried out by general rules, no matter the court of European Union before which the case was brought.

Nevertheless, the court may decide to suspend the enforcement of the judgment until the trial of the opposition lodged by the defendant, in accordance with the provisions of the rules of procedure.

Regarding the application lodged in term by the defendant, the court shall decide by way of a judgment which may not be challenged again with another opposition[47], but may be contested with appeal.

To avoid the abuse of using this *sui generis* mean of appeal by the parties and taking into consideration that the European legislation keeps the silence related to it, in our opinion the defendant is allowed to use this mean of appeal only one time.

The original of this judgment shall be annexed to the original of the judgment by default and a note of the judgment on the opposition shall be made in the margin of the original of the judgment by default[48].

b. Complaint when the court omitted to give a decision

Another *sui generis* mean of appeal is complaint when the court omitted to give a decision[49], which can be filed by any interested party (applicant, defendant, intervener, which can be, as the case maybe: an institution, an agency, a body or office of the European Union, a natural or legal person) "*within a month after service of the judgment*" or the decision when "*the court* [omitted] *to give a decision on a specific head of claim or on costs*", in which situation the court rendered *minus petitia* (article 67 para. 1 of the rules of procedure of the Court of Justice). The same situation can be found in other national legislations of the Member States, including Romanian[50].

Although the rules of procedure of the General Court and Civil Service Tribunal[51] do not mention anything, from our point of view these provisions should be modified and amended, by allowing the two courts to rule not only on the costs of the dispute but also on a complaint when the court omitted to give a decision on a specific head of claim, which should be decisive and different from the others heads of claim, according to the doctrine in the field[52].

Through the Registry, the application is notified to the opposite party in the dispute and the *„President shall prescribe a period within which that party may lodge written observations". "After these observations have been lodged, the Court shall, after hearing the Advocate General, decide both on the admissibility and on the substance of the application [53]"* in order to stop parties to suffer to much the consequences of an error committed by an European court when rendered its first judgment[54].

To be admissible, the complaint, as the opposition lodged by the defendant, shall meet the same formal conditions, taking into account that both of them are *sui generis* means of appeal. The

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[47] Fabian Gyula, *Drept instituțional comunitar*, op. cit., p.319.

[48] Fabian Gyula, *Curtea de Justiție Europeană, instanță de judecată supranațională*, op. cit., p.122.

[49] Mădălina Voican, Ruxandra Burdescu, Gheorghe Mocuța, op. cit., pag.99; Koen Lenaerts, Dirk Arts and Ignace Maselis, op. cit., pag.598; Article 67 of the Rules of Procedure of Court of Justice; Article 85 of the Rules of Procedure of General Court; Article 85 of the Rules of Procedure of Civil Service Tribunal.

[50] Mihaela Tăbârcă, *Drept procesual civil*, volum I, (Universul Juridic Publishing House, Bucharest, 2005), p.392.

[51] Article 85 para.1 of the Rules of Procedure of General Court; Article85 of the Rules of Procedure of Civil Service Tribunal.

[52] Brânduşa Ştefănescu, *Curtea de Justiție a Comunităților Europene*, (Scientific and Encyclopaedia Publishing House, Bucharest, 1979), p.127; Fabian Gyula, *Drept instituțional comunitar*, op. cit., p..319.

[53] Brânduşa Ştefănescu, op. cit., p..128; Article 67 the Rules of Procedure of Court of Justice; Article 85 the Rules of Procedure of General Court; Article 85 of the Rules of Procedure of Civil Service Tribunal.

[54] Brânduşa Ştefănescu, op. cit., p..128.

application will be also admissible when, by its error, the court omitted to give a decision on a specific head of claim or on costs from the original judgment.

Although the procedural rules of the General Court and Civil Service Tribunal keep the silence in the matter, in our opinion, the decision can be appealed in the similar way as the origin judgment that has been the object of the complaint.

IV. Exceptional review procedures

In the proceedings brought before the courts of the European Union, the judgments can be also appealed with third-party proceedings or revision, which can be considered to be exceptional review procedures because of their special nature.

These two exceptional review procedures represent the possibilities given to the parties and other interested parties to ask to the court that delivered the contested judgment to dismiss its own judgment or decision and render a new decision in the case, with the observance of the conditions stipulated in the Statute of the Court of Justice and the rules of procedures of the European courts.

Bearing in mind the above mentioned, we highlight then fact that these exceptional reviews procedures do not imply a new trial before a higher-level court, as it is in the case of appeal.

a. Third-party proceedings

Without putting in discussion the principle *res judicata pro veritate accipitur,* the third-party proceedings[55], well known as contestation in annulment, represents one of the two exceptional remedies procedures, which can be lodged exclusively by the third parties, in the following conditions:

- *"in the cases and in the conditions* [stipulated] *in the rules of procedure"*;
- against the decisions delivered by the courts of the European Union;
- "*to contest a judgment rendered without their being heard, where the judgment is prejudicial to their rights*[56]", especially when the third parties haven't the possibility to participate in the original dispute[57], because of independently reasons.

The specialised doctrine[58] emphasized that to file an application for third-party proceedings the contested judgment shall bring serious damages to the rights of the third-parties. In this context, it is not enough for them to have a legitimate interest to protect, as it is regulated in article 97 para.1 letter b.) of the rules of procedure of the Court of Justice.

Furthermore, the prejudice suffered by the third party shall be resulted from the content or from the motivation of the judgment, in which situation the court will analyse from case to case, in a seriously manner, if their rights have been prejudiced or not.

The category of the third parties who can file such application is broad and can include the institutions, the bodies, the offices and the agencies of the European Union, the Member States as well as the natural and legal persons[59].

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[55] In Frenchn is well known as *„la tierce opposition"*.

[56] Brânduşa Ştefănescu, op. cit., p.129; Augustin Fuerea, *Instituţiile Uniunii Europene*, op. cit., p.132; Fabian Gyula, *Drept instituţional comunitar*, op. cit., pag.315; T.C. Hartley, *The fundations of European Community Law*, sixth edition, (Oxford University press, USA, 2007), p.63; Article 42 of the Statute of the Court of Justice.

[57] Koen Lenaerts, Dirk Arts and Ignace Maselis, op. cit., p.589; Fabian Gyula, *Drept instituţional comunitar*, op. cit., p.315.

[58] Koen Lenaerts, Dirk Arts and Ignace Maselis, op. cit., pag.590; Fabian Gyula, *Drept instituţional comunitar*, op. cit., p.316.

[59] Article 42 of Statute of the Court of Justice.

The application initiating third party proceedings will be considered inadmissible when it is introduced by:

- the intervener, who participated in the original dispute;
- the legal persons who, although they had the possibility to intervene as interveners in the original dispute, from reasons non imputable to them, they did not participate in the original dispute[60].

Instead, an application initiating third party proceedings shall be admissible if it is lodged only by the parties who, theoretically, could take part in the original dispute, but practically weren't present in the litigation as interveners.

Natural and legal persons can not intervene in the disputes regulated by articles 258 and 259 of TFEU, having as main object failure of the Member States to fulfil an obligation under the Treaties, by lodging an application initiating third party proceedings even when they have been prejudiced in their rights[61].

According to the rules of procedure[62], in order to be admissible an application initiating third party proceedings shall meet the same formal conditions and shall respect the same procedural terms, as in case of written application. In addition, the application shall include supplementary mentions regarding: *"the judgment* [or the decision] *contested; the* [legal reasons why] *that judgment is prejudicial to the rights of the third party; the* [facts] *reasons for which the third party was unable to take part in the original case*" and shall be also supported by relevant documents.

The application initiating third party proceedings is *"made against all the parties to the original*" dispute and the term to file the application is within *"two months of the publication"* of the judgment contested in the Official Journal of the European Union, according to the provisions stipulated in the rules of procedure of the European courts.

Upon the request of the third party, the court may suspend the enforcement of the judgment contested, but only for justified reasons.

Analysing the application lodged by the third party, the court may take one the following solutions:

- admission of the application in which case the judgment appealed shall be modified accordingly;
- dismissal of the application, which can be appealed in the same conditions as for the judgment contested.

Finally, "*the original of the judgment in the third-party proceedings shall be annexed to the original of the contested judgment. A note of the judgment in the third-party proceedings shall be made in the margin of the original of the contested judgment"* (article 97 of the rules of procedure of the Court of Justice).

b. Revision

The revision[63] represents the second exceptional review procedure regulated by the rules or procedure of the European courts[64] and can be lodged by the interested party against the final judgment rendered by the courts of the European Union. In this context, a new trial of the original dispute is required, whenever "*the court expressly recording the existence of a new circumstance"*

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[60] Fabian Gyula, *Curtea de Justiție Europeană, instanță de judecată supranațională*, op. cit., p.119.

[61] Koen Lenaerts, Dirk Arts and Ignace Maselis, op. cit., p.589 -590.

[62] Brânduşa Ştefănescu, op. cit., p.129; Koen Lenaerts, Dirk Arts and Ignace Maselis, op. cit., p.590; Article 97 the Rules of Procedure of Court of Justice; Article123 - 124 the Rules of Procedure of General Court; Article 117 the Rules of Procedure of Civil Service Tribunal.

[63] In French is well known as *"la révision"*.

[64] Augustin Fuerea, *Instituțiile Uniunii Europene*, op. cit., p. 133; Fabian Gyula, *Drept instituțional comunitar*, op. cit., p.316; Articles 98 – 100 the Rules of Procedure of Court of Justice; Articles 125 – 128 of the Rules of Procedure of General Court; Article 119 of the Rules of Procedure of Civil Service Tribunal.

"which has a determined influence and, before the rendering of the final decision, was unknown by the court and the party that request this revision", from reasons non imputable to the parties[65].

In the European doctrine[66], in order to be admissible, an application for revision shall meet certain conditions, as follows:

a.the existence of new circumstances, which can be only *"facts"* having decisive influence on the context of the judgment rendered, which could change the judgment, least from the theoretical point of view. In this case it is about previous facts unknown by the court or by the party from reasons beyond of their will[67];

b. the previous fact, unknown by the court or by the party, should have decisive influence in the case. Instead, the measures adopted by the European Commission to enforce a contested judgment cannot be considered as decisive facts[68].

In order to open the revision on the grounds concerning the contested judgment or decision, the court shall proceed to an examination of admissibility of the application[69].

Concerning the moment when an application for revision may be lodged, the European procedural provisions[70] regulate that the application *"shall be made within three months of the date on which the facts on which the application is based came to the applicant's knowledge"* but no later than *"the lapse of 10 years from the date of the judgment"* (article 44 para.3 of Statute of the Court of Justice). The latest term, from our point of view, is calculated from the delivery of a judgment is a limitation period, which means that any overcoming of the term determinates the loss of the right by the interested party to file the revision.

To be admissible, in accordance with the European procedural provisions[71], the application for revision shall meet the same formal conditions as the written application and shall respect the same procedural terms. In addition, the application for revision shall *"specify the judgment* [or the decision] *contested; indicate the points on which the judgment* [or the decision] *is contested; set out the facts on which the application is based; indicate the nature of the evidence to show that there are facts justifying revision of the judgment* [or the decision]*, and that the time-limit laid down in Article 98 has been observed"* and shall be also supported by the appropriate documents.

In addition, *"the application must be made against all parties to the case in which the contested judgment* [or decision] *was given"*(article 99 last para. of rules of procedure of the Court of Justice).

Although the European provisions in the field keep the silence, nevertheless we share the point of view stated by the Fabian Gyula in his work "Dreptul institutional comunitar", that: *"the application for revision may be filed only by those who have participated in the original dispute as a party"* under the article 44 of the Statute of the Court of Justice, moving forward to the idea of providing special regulations in its rules of procedure to allow the intervener to file the application as well, whenever he/she considers that the fact of which he/she was aware, subsequently, has a

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[65] Fabian Gyula, *Curtea de Justiție Europeană, instanță de judecată supranațională*, op. cit., p. 120; T.C. Hartley, op. cit., p.64; Article44 para.1 of the Statute of the Court of Justice.

[66] Augustin Fuerea, *Instituțiile Uniunii Europene*, op.cit., p. 133; Fabian Gyula, *Drept instituțional comunitar*, op. cit., p.317.

[67] Koen Lenaerts, Dirk Arts and Ignace Maselis, op. cit., p. 593.

[68] *Ibid*

[69] Fabian Gyula, *Drept instituțional comunitar*, op. cit., pag.317.

[70] Article 98 of the Rules of Procedure of Court of Justice; Article125 of the Rules of Procedure of Civil Service Tribunal.

[71] Brânduşa Ştefănescu, op. cit., p.130; Article 99 of the Rules of Procedure of Court of Justice; Article126 of the Rules of Procedure of General Court; Article 119 para. 2 of the Rules of Procedure of Civil Service Tribunal.

decisive influence for the dispute. Instead, the doctrine considered that *"it must be prevented the possibility for the intervener to invoke reasons for revision about which, for the party in the original dispute, the limitation period has already occurred*[72]*"*.

"Without prejudice to its decision on the substance", after the hearing of the Advocate – General and taking into consideration the written observations of the parties, the court shall analyze, *in camera,* the admissibility of the application for revision and give the decision, in accordance with the procedural provisions. This decision is likely to find, specifically, the existence of a new fact, recognizing its characters that allow the opening of the revision.

"The original of the revising judgment shall be annexed to the original of the judgment revised. A note of the revising judgment shall be made in the margin of the original of the judgment revised[73]*"* and the new judgment shall be notified to the parties.

Since the European procedural provisions do not mention anything we believe that the revising judgment can be challenged with appeal, in the similar conditions as the contested judgment.

V. Conclusions

A better knowledge of the role that the means of appeal have for every judicial system, including for the European Union determinateed an in-depth research of these means, bearing in mind the Latin principle of *res judicata pro veritate accipitur* (the decision of a court is assumed to be correct).

Thus, the appeal cannot be understand better without analyzing the main components of it, as follows: the notion; the modalities to lodge an appeal and its general and special terms; principles categories of judgments and decisions that can be appealed by the interested parties; the applicants and the grounds of appeal.

Analyzing this mean of appeal have shown us that only the judgments and decisions of General Court and Civil Service Tribunal can be challenged with appeal, whilst the judgments delivered by the Court of Justice remain final and irrevocable, as the court in Luxembourg *"doesn't know these means of appeal, as it judges in the first and last instance"*.

Whenever the court do not taken into consideration the defendant defences or omitted to decide on a specific head of claims filed by the applicant, the interested party can use one of the *sui generis* means of appeal (the opposition and the complaint). The specificity of these means, as an exception from the ordinary procedure, consist in combining the characters of many means of appeal which can be brought before the Court of Justice, and can be used only in the conditions provided for by the rules of procedure of the European courts.

Finally, the Statute of the Court of Justice and the rules of procedure of the European courts regulated specific conditions for lodging the exceptional review procedure (third –party proceedings and revision) as possibilities for the interested parties to request to the court that delivered the contested judgment or decision to withdraw it and to proceed to a new trial. From our point view, this seems to be since every new fact discovered, relevant and unknown prior the delivery of the judgment or decision, may determine a different solution from the European court.

[72] Fabian Gyula, *Drept instituțional comunitar*, op. cit., p.318.

[73] Article 100 of the Rules of Procedure of Court of Justice; Article 127 of the Rules of Procedure of General Court.

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ACRONYMS

- a.n. – author note
- art.- article
- op. cit – paper cited
- pag. – page
- para. – paragraph
- TEC - Treaty establishing the European Community
- TFEU The Treaty on the Functioning of the European Union

CHILD RIGHTS AND THE LIMITS OF PARENTAL CONSENT IN MEDICAL PROCEDURES

OANA-MARIA HANCIU*

Abstract
Parental consent regarding a child includes the right of them to consent or not to a certain treatment on behalf of the child, but for this to be valid it must be governed by the child best interest.
Even if the parents believe in a sincere way of the rightness of their decision regarding the child interest, if the procedures are not adequate for the child age and for his real needs and this has a irreversible and damaging effect, the parental consent must be limited.
Also, the right for life and medical treatment of a minor child is prior to any religious beliefs of parents.
This paper has the purpose to present some procedures in order to protect the children and to limit the parental consent, so that the parental rights to determine medical treatment for the child will not be used in damage of child best interest.

Keywords: *child rights, parental rights, limits, decision factors, health professionals.*

1. Introduction

One of the most important achievements of the Council of Europe, as an intergovernmental organisation, is the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). This international treaty defines the inalienable rights and freedoms of all citizens and asks the State parties to guarantee these rights. Meanwhile, it institutes an international system of protection: the states and private individuals may inform the authorities from Strasbourg in case of the Convention violations. Romania has ratified both the European Convention of Human Rights and the European Social Charter.

The international community, particulary in the second half of the last century, has permanently expressed interests related to the issue of human rights. In this respect, was adopted in 1948 the Universal Declaration of Human Rights by the General Assembly of the United Nations and two international covenants of human rights, further followed by different treaties, resolutions and declarations related to the protection of human rights.

Concerning the protection and promotion of children's rights on 20th November 1989 the General Assembly of the United Nations developed the Convention on the Rights of Child, followed by the Optional Protocol to the Convention relating to the Rights of the Child, on the involvement of children in armed conflicts, and Optional Protocol to the Child's Rights Convention, concerning the sale of children, child prostitution and child pornography in 2000. In Romania, the human rights and therefore the children's rights are promoted and mainly protected by the Romanian Constitution which specifies in article 15: *The citizens benefit from rights and freedoms established through the Constitution and any other laws and have the duties stipulated by them.*

In Romanian legislation, the protection of the children's rights is mainly governed by Law no. 272/2004 concerning the protection and promotion of the children's rights. But, as member state of the Convention on the Rights of the Child, Romania has assimilated in its internal law the principles and standards assumed by the international commitments related to the protection of the children's rights.

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This paper aims to present the importance of observing the superior interest of children in the medical procedures, and as well presenting some procedures for their protection even by limiting of the parental consent when this is not in accordance with the child best interests.

The Human Rights legislation is relevant to health care providers, since it regulates the relationship between individuals and medicine. Doctors should be well aware of the human rights legislation and be focused on patient interests closely linked to the law requirements.

Therefore, in the present case, it is of paramount importance that state institutions and medical staff closely observe the children's rights and when doctors and parents disagree about the best interest of the child, the courts should be in the position to determine the destiny of a sick child.

2. Law impact related to the child rights and medicine

The the human rights law influences directly the medical decisions. It is important for the decisions made, both from the individual point of view and from the medical deontology point of view, to be adopted with transparency and accuracy and by observing the human rights.

Human rights are legal instruments which represent fundamental human interests and are therefore closely aligned with ethical practice. As part of the general ethical treatment of patients, all health professionals should be familiar with their obligations keeping in mind fundamental human rights regulations in accordance with human rights legislation. As for instance, in 1998 in United Kingdom was adopted the Human Rights Act by Medical Ethics Department[1].

Relevant to health professionals are the articles from ECHR, as follows:

• right to life (Article 2)
• prohibition of torture, inhuman or degrading treatment or punishment (Article 3)
• right to liberty and security (Article 5)
• right to a fair trial (Article 6)
• right to respect for private and family life (Article 8)
• freedom of thought, conscience and religion (Article 9)
• freedom of expression (Article 10)
• right to marry and found a family (Article 12)
• prohibition of discrimination (Article 14)

According to the European Convention, the rights can be divided into three types: [2]

- absolute rights (Article 3), from which no derogation is permitted although even these rights are open to interpretation;
- limited rights (Article 2, 5 and 6) where the limitations are explicitly stated in the wording of the Article; and
- qualified rights (Articles 8, 9, 10 and 12) where derogation is permitted but any action must: be based in law, meet Convention aims, be non-discriminatory, necessary in a democratic society and proportionate.

The introduction of a "right to life" in the European Convention does not mean that doctors must always strive to prolong life but that specific consideration must be given to this right as part of the medical decision-making process. Article 2 imposes positive and negative obligations on public

[1] The impact of the Human Rights Act 1998 on medical decision-making Guidance from the BMA's Medical Ethics Department, 2007, UK http://www.bma.org.uk

[2] The impact of the Human Rights Act 1998 on medical decision-making Guidance from the BMA's Medical Ethics Department, 2007, UK http://www.bma.org.uk

authorities. They have *positive* duties to take adequate and appropriate steps to protect the life of individuals in their care, as well the *negative* duty not to take life intentionally[3].

By all means, patient 's best interest should be the priority to any medical decision and if there is a dispute between doctors and patient wish or patient relatives, the courts will be often asked to determine which is the best decision regarding patient's best interest.

Many decisions in medical practice involve patients' human rights. The rights that are affected needs to be identified first. The next stage of the process is to consider whether it is legitimate, in the circumstances, to interfere with those rights. In order to assess this, it is necessary to be familiar with the concept of proportionality.

Any interference with a Convention right must be proportionate to the intended objective. This means that even if there is a legitimate reason for interfering with a particular right, the desired outcome must be sufficient to justify the level of interference proposed. This involves a similar thought process to that used by doctors in many contexts, for example, to decide whether a breach of confidentiality is justified in the public interest. In those cases, doctors must consider whether the legitimate aim in disclosing information (to prevent or detect a serious crime, for example) is sufficiently serious to justify breaching confidentiality. These decisions are made by balancing the competing interests and by careful assessment of the individual factors in the particular case. In some cases a breach of confidentiality will be justified and in others it will not and those making the decision may be called upon to justify their actions. Although the term "proportionality" may be new to doctors, the concept is not.

In every decision doctors must consider relevant Convention rights and must be able to demonstrate legitimate grounds for interfering with such rights.Where different rights come into conflict (such as Articles 2 and 3), the doctor must be able to justify choosing one over the other in a particular case. Any decision, either to provide or withhold treatment, could be open to challenge using the Human Rights Act. It is therefore essential to build into the decision-making process consideration of how the decision could be justified from a human rights[4] perspective.

There are some cases, like emergencies, when doctors may proceed without parental consent or court authority. For example, it could be the case of parents who are Jehovah's Witnesses and refuse to consent blood transfusion for a child, transfusion which is vital to child survival. In this case parents would say that article 8 (endorsing their right to family life) and article 9 (guaranteeing religious freedom) of the European Convention of Human Rights offers them the right to decide child medical treatment. But in this case, when it is a matter of survival, the child best interest should be prior to any parents religious convictions.

In contrast with this example, the decision of ECHR[5] in *Glass versus United Kingdom* is relevant. According to this decision doctors are warned not to stretch the definition of emergency. It also places a strong emphasis on a presumption of parents' right to make decisions about the treatment of their young children.

David Glass was a child with multiple disabilities. In 1998, he suffered a series of infections after a tonsillectomy. Doctors believed that David had little awareness or pleasure in his surroundings, and that he was dying. They decided that if David stopped breathing he would not be resuscitated, and administrated diamorphine to relieve any distress. His mother vehemently objected both to the administration of diamorphine and the doctors' decision not to resuscitate David. On one occasion she successfully resuscitated David herself. The relationship between Davids' family and doctors deteriorated into acrimony and violence. Mrs. Glass unsuccessfully challenged her son to

[3] The impact of the Human Rights Act 1998 on medical decision-making Guidance from the BMA's Medical Ethics Department, 2007, UK http://www.bma.org.uk

[4] The impact of the Human Rights Act 1998 on medical decision-making
Guidance from the BMA's Medical Ethics Department, 2007, UK http://www.bma.org.uk

[5] Glass v. The United Kingdom, Application No. 61827/00, Judgement of 9 March 2004

English Courts. She eventually took his case to the European Court of Human Rights in Strasbourg and won. The court rules that administrating diamorphine to David, against the wishes of his mother, violated Article 8 of European Convention on Human Rights. Doctors violated David's right to respect for his privacy, notably his bodily integrity. Where children are too young, or otherwise unable to make their own decisions about medical treatment, doctors must normally seek consent from the parents who speak on their child's behalf. Where doctors consider that parents are not acting in the child's interests, they must seek authority from a court before overruling the parents – except where intervention is immediately necessary to save the child's life[6].

Also, the Convention related to the children's rights specifies in Article.3par.1:

In all actions concerning children, made by the institutions of public or private social assistance, courts, administrative or legal authorities, the children's interests will prevail.

2. The Party states engage to provide to the children the necessary protection and care in order to assure their welfare, taking into account the rights and obligations of their parents, legal representatives or of any other persons to whom they were legally trusted and for this all the appropriate legislative and administrative measures will be taken.

Parental responsibility refers to the rights, duties, powers and responsibilities that most parents have in respect of their children. Parental responsibility includes the right of parents to consent to treatment on behalf of their children, providing the treatment that it is in the interests of the child.

Parental responsibility means that parents have a statutory right to apply for access to their children's health records, and if the child is capable of giving consent, he or she must consent to the access. Competent children can decide many aspects of their care for themselves. Where doctors believe that parental decisions are not in the best interests of the child, it may be necessary to seek a view from the courts, whilst meanwhile only providing emergency treatment that is essential to preserve life or prevent serious deterioration.

Parental responsibility is a legal concept that consists of the rights, duties, powers, responsibilities and authority that most parents have in respect of their children. It includes the right to give consent to medical treatment, although as it is discussed below, this right is not absolute, as well as, in certain circumstances, the freedom to delegate some decision-making responsibility to others.

People with parental responsibilities are entitled to give consent for medical treatment on behalf of their children. Usually parents wish to make the right decision about their young child's best interests, and most decision making is, rightly, left to children and parents with appropriate input from the clinical team. In cases of serious or chronic illness, parents may need time, respite facilities, possibly counseling, and certainly support from health professionals, but in most cases they are best placed to judge their young child's interests and decide about serious treatment. There are limits on what parents are entitled to decide, however, and they are not entitled to inappropriate treatment for their children or to refuse treatment which is in the child's best interests.

The decision capacity of the children, related to the agreement with medical treatment, depends on several factors, such as: the intelligence degree, the comprehension level and their capacity to assess correctly the medical advice.

Competent minors may be able to invoke their rights to challenge a decision to provide treatment against their wishes. It is possible that a young person could use the Convention rights (in Articles 5, 8, 9 or 14) to appeal against a decision to provide treatment against his or her wishes. So, people under 18 can give valid consent to treatment, proving they have sufficient understanding of the proposed treatment.

However in case the treatment is dangerous and might generate permanent sequels, obtaining the parents agreement becomes compulsory. Also, in all the agreements concerning the

[6] Brazier M. & Cave E. , *Medicine, patients and the law*, (London, Penguin books – 2007), p.390

medical procedures, there should be a balance between the real psychical capacity and the legal capacity of agreement, in this respect being some essential differences.

In the support of this statement is the *Declaration from Helsinki*, updated by the World Medical Association in 1996, which mentions: *"In case of legal incapacity, the agreement should be obtained from the legal guardian, as stipulated by the national laws. Where the physical or mental incapacity makes impossible to obtain an agreement in full knowledge or when the subject is a minor, the agreement of the relatives who are liable for him replaces that of the subject, always in compliance with the national laws. When the minor is indeed able to express his own agreement, this should be obtained together with that of the legal guardian."*

For instance, in Switzerland, Germany, England, concerning minors, the agreement in full knowledge, signed of the parents or of those exercising the tutor authority, is enough. In France, it is necessary, except the parents agreement also the interference of three experts, of which two doctors outside the team that will assess the taking-off or the transplant. In case of taking off from a minor unable of any agreement, recently the Convention on bioethics has set that, unto the general forbiddance to take off organs or tissues from a subject unable to express his agreement (art. 20, paragraph 1), take off regenerative tissues (such as bone marrow) from a subject unable of agreement may be consented under some specific conditions [7](art. 20, par. 2).

However the parents rights to determine a medical treatment for their children derives from the parental liability and these rights may be removed only under the conditions when there are clear indications that the superior interest of the child is damaged by the inopportune and inadequate decisions of the parents. The usual procedures and the preventive measures do not generate any problem. The situation becomes more complicated when these procedures have a harmful and irreversible effect, case when if the parents decisions are not compliant with the best interests of the children, their agreement should be limited, even ig they believe sincerely that they act in the superior interest of the children.

As to the above stated, it may be the case of the cosmetic operations. Does the parent have the right to submit his child to such an intervention only to be promoted in his career of model or simply just for esthetical reasons absolutely useless? Certainly not. It is not any longer the case of the best interests of the child, but of some parental ambitions.

So any medical procedure should be conceptually based on the best interests, and also, except the cases of medical emergency when life is in danger, the administration of a medical treatment in the absence of a consent may be considered an illegal action.

Also[8] the treatment of the persons not being able to make a decision, may require a certain behaviour to the clinician:

- Act in the superior interest of the person
- Follow a legal provision or a regulation, valid for the respective case or
- Use one of the substitutes for the decision factors.

Nevertheless, the doctor should protect the patient life when the patient is not enough informed about his denial or he has an irrational decision behaviour and in this case the doctor may address to the courts for an equitable and legal settlement of the situation. The patient denial should be recorded by the doctor in the observation chart both when it is about the personal denial of the patient or when the patient appoints somebody else for this.

The principles which should govern both the medical activity and the patient autonomy are the patient safety, the absence of the negative effects and the justice principle.

[7] Stan C (2009)., *Malpraxisul medical*, (Editura Etna, Bucuresti), p. 62
[8] Stan C (2009)., *Malpraxisul medical*, (Editura Etna, Bucuresti), p. 64

3. Conclusions

In conclusion when there are different opinions related to the child treatment between the parents and the medical staff, the solution is granted in the care of the courts. In principle the parental rights are practiced commonly by both parents. However there are cases according to the New Civil Code, when this minor protection may not be obtained by the aid of the parents, the tutor or guardianship, assign to foster home or any other measures specially provided by the law may be instituted.

Also, when a child is able to communicate, they should take into account his opinion related to the medical treatment that he is going to be subject to. There should be a balance between his best interests and his will or not his to attend the treatment. There is a good practice to obtain the child agreement in these cases. The forced treatments which imply a major psychic stress of the child should have a strong justification.

The general principle that should have the precedence is saving the life.

The challenges of the modern world in the medical field should be compliant with the legal system of the human rights protection.

It is however necessary to put in practice better the internal, European and international law, in force related to the superior interest of children in medical procedures and a greater legal liability of all the decision factors.

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COMPARATIVE STUDY ON FISCAL-ADMINISTRATIVE SOLICITOR'S OFFICE AND FISCAL SOLICITOR'S OFFICE

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Abstract

The fiscal-administrative solicitor's office represents the activity of solving litigations between tax payers and the fiscal administration, litigations whose purpose is to cancel totally or partially a fiscal-administrative document, document considered by the tax payer harmful for his legitimate right or interest recognized by law.

The fiscal solicitor's office represents the activity of solving litigations whose purpose is to cancel or correction of acts of enforcement of tax claims.

Research goal is to identify of the two institutions as many times between them is confusing.

Study objectives: analysis the current stage of research in the field, definition of fiscal-administrative solicitor's office, definition of fiscal solicitor's office, the identification of elements similarity, the identification differences between the two institutions.

Keywords: *fiscal-administrative solicitor's office, fiscal solicitor's office, fiscal-administrative document, act of enforcement, title executory.*

Introduction

Comparative study of fiscal-administrative solicitor's office and fiscal solicitor's office seeks to highlight the two institutions of the fiscal law. Comparative scientific research of fiscal-administrative solicitor's office and fiscal solicitor's office is important because through these procedural means taxpayers can defend their rights and interests are violated when the tax administrative bodies, being the major means of achieving fiscal equity.

By means of the two institutions, taxpayers are given the opportunity to bring their conflict with the tax before a judge who will decide on the conflict, thus restoring the legal order.

Intended objectives are to analyze the current state of research on fiscal-administrative solicitor's office and fiscal solicitor's office, definition of fiscal-administrative solicitor's office, definition of fiscal solicitor's office, analysis of the two institutions and to identify features and characteristics regarding the subject action, the time limit for action, courts of law, the parties, the identification of similarity between fiscal-administrative solicitor's office and fiscal solicitor's office and to identify differences between the two institutions.

Scientific research was done based on comparative study of national legislation (Government Ordinance no. 92/2003 regarding the Fiscal Procedure Code, republished, with subsequent amendments, Law no. 554/2004 on administrative solicitor's office, as amended and supplemented, Code Civil Procedure), by addressing the literature in the field, and jurisprudence.

Addressing fiscal-administrative solicitor's office and fiscal solicitor's office is based on the work of specialists in administrative law, financial law and fiscal procedure and fiscal-law of civil procedure.

Paper content

In our approach will start from the classification of the institution of solicitor's office, which the literature[1] was classified according to several criteria, as follows:

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[1] Ioan Santai *Drept administrativ şi ştiinţa administraţiei*, vol. II, (Publishing Risoprint, Cluj-Napoca, 2005), 281.

- generated by the subject stands out constitutional solicitor's office, administrative l solicitor's office, fiscal solicitor's office.

- by the authority before which settlement takes place, solicitor's office may be: judicial solicitor's office (the jurisdiction of the courts) and jurisdictional litigation (the competence of administrative courts or the very special nature).

- parties involved in nature and effects delivered solutions, solicitor's office may be: internal solicitor's office and international solicitor's office.

Analyzing the first criterion, which classified the solicitor's office after the dispute, we propose a different classification by this criterion, namely: constitutional solicitor's office, administrative solicitor's office (which in turn is subdivided into general administrative solicitor's office and administrative-fiscal solicitor's office, the species general administrative solicitor's office) and common law fiscal solicitor's office[2].

The fiscal-administrative solicitor's office is a species of administrative solicitor's office[3]. The special character of fiscal-administrative solicitor's office of regulation appears different, namely the administrative phase of its regulation by Ordinance no. 92/2003 regarding the Fiscal Procedure Code, republished, with subsequent amendments[4], as well as recognition of fiscal-administrative solicitor's office as part of administrative solicitor's office by Law no. 554/2004 on administrative solicitor's office.

In the legal literature of our country, the fiscal-administrative solicitor's office was defined as „all the rules for the conduct of litigation documents and discussing the effects of fiscal administrative acts committed by public power"[5], or a recent definition, The fiscal-administrative solicitor's office is „all legal remedies against acts of tax which requires the reduction or cancellation of taxes, contributions to special funds, the delay increases and penalties and fines or other sums found and applied by the fiscal authorities central and local authorities, by law, to conduct the audit or tax, which is solved by a special procedure by administrative bodies and / or courts"[6].

The fiscal-administrative solicitor's office is defined as „all disputes between the public and manage the generated tax acts"[7] or, in another definition, the fiscal-administrative solicitor's office is regarded „as a means derived from human rights, for the purposes procedurally, all actions and remedies that are resolved by the judicial authority of the state, the power of truth all legal disputes arising from the tax and put in front of the taxpayer (natural or legal person) and the fiscal and administrative the state"[8].

Also, the fiscal-administrative solicitor's office was defined as all legal remedies against debt and other fiscal-administrative acts, which requires the reduction or cancellation of taxes, contributions, customs duty and the increase of delay times other amounts identified and measures implemented by administrative bodies and local tax, which is solved by a special procedure of administrative bodies and courts[9].

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[2] Octavia Maria Cilibiu, *Justiția administrativă şi contenciosul administrativ-fiscal*, (Publishing Universul Juridic, Bucharest, 2010), p.175.

[3] Octavia Maria Cilibiu, *Justiția administrativă şi contenciosul administrativ-fiscal,p.*175.

[4] Last modified by Law no. 188/2011 on the management fees collected in implementing the common agricultural policy and which are part of the financing of EU funds for agriculture, as well as own resources of the European Union, published in the Official Gazette, Part I, no. 763 of 31 October 2011.

[5] Teodor Al. Bălan, *Contenciosul fiscal*, Bucharest, 1935, 15.

[6] Constantin D. Popa, *Noțiunea, natura juridică şi importanța contenciosului fiscal*, R. D. C. no. 7-8/2001, 302.

[7] Emil Bălan, D*rept financiar*, Edition III, (Publishing All Beck, Bucharest, 2004), p.237.

[8] Constantin D. Popa, *Noțiunea, natura juridică şi importanța contenciosului fiscal, p.*302.

[9] Constantin D. Popa, *Noțiunea, natura juridică şi importanța contenciosului fiscal,p.* 302.

In our opinion, the fiscal-administrative solicitor's office is the activity of disputes between taxpayers and tax, litigation dealing with the cancellation of all or part of an administrative act, tax act by which the taxpayer is considered a right or injured in legitimate interest recognized by law[10].

Organized in two phases, phase administrative (fiscal appeal) and phase jurisdictional the fiscal-administrative solicitor's office comes to the taxpayers provide free access to justice, leaving the first to comment on litigation fiscal-administrative, trying to rule on conflict situations .

In terms of the fiscal-administrative solicitor's office object, we must have regard to the object of fiscal and object to administrative appeal proceedings before the court.

Person who considers themselves wronged in their rights recognized by law by an administrative-fiscal or lack thereof can make fiscal appeal, according to the Fiscal Procedure Code, and then action.

Accordance with article 205, paragraph 1 of the Fiscal Procedure Code, the fiscal claim against the title against other administrative acts appeal may be made under the law. This article shows that the debt instrument is a fiscal administrative act, along with other administrative acts subject to the fiscal appeal. Other administrative acts which may be fiscal appeal are fiscal decision (are assimilated to fiscal decisions and administrative acts following: decisions on value added tax refunds and decisions on refunds of taxes, fees, contributions and other revenue of the budget consolidated, decisions on taxation bases decisions on payment obligations accessories, unchanging base decisions on taxation[11]), the provision of measures, the decision on establishing joint liability, compensation notes, payment notices, minutes of the interest calculation due taxpayer debt on customs duty[12] (customs declaration, which sets the protocol and specifies the customs duty, including accessories) etc.

The object may be fiscal appeal fiscal administrative act itself, typical („document issued by the fiscal authority in the legislation for the establishment, modification or termination of rights and fiscal obligations") and assimilated administrative act, atypical (no act „silence" fiscal body, that failure to resolve a claim within the legal deadline for issuing the administrative act, or unjustified refusal to resolve the request - explicit expression, with excess power will not solve the request)[13].

Accordance with article 206, paragraph 2 of the Fiscal Procedure Code is the only object of dispute amounts and measures set by the fiscal body and the debt-claim or appealed fiscal administrative act, except an appeal against unjustified refusal to issue the fiscal administrative act.

Fiscal-administrative acts can not be appealed in administrative court without fulfilling the prior administrative proceedings. If admission appeal is decided, as appropriate, annulment or dissolution of all or part of the contested act. If the decision is wholly or partly dissolved appealed fiscal-administrative act will enter into a new fiscal-administrative act will be considered strictly considerations settlement decision.

Regarding the object of fiscal-administrative solicitor's office that is the decision or order issued after settlement of appeals against fiscal-administrative acts.

We believe that the object of fiscal-administrative solicitor's office or decision-fiscal is available to resolve fiscal appeals and fiscal-administrative act indirectly to the subject of fiscal appeal[14].

Accordance with article 207, paragraph 1 of the Fiscal Procedure Code, the appeal deadline is 30 days from the date of the fiscal-administrative act, under penalty of forfeiture. This term is a period of decline and not recommendation. Notwithstanding, if the fiscal- administrative act contains

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[10] Octavia Maria Cilibiu, *Justiția administrativă şi contenciosul administrativ-fiscal,p.*178.

[11] Article 88 of the Fiscal Procedure Code

[12] Point 5. 3 of the Order of the National Agency for Fiscal Administration. 2137/2011, published in Official Gazette, Part I, no. 380 of 31 May 2011.

[13] Article 2, paragraph 1, letter h of Law. 554/2004 on administrative solicitor's office, published in Official Gazette of Romania, Part I, no. 1154 of 7 December 2004, as amended and supplemented.

[14] Octavia Maria Cilibiu, *Justiția administrativă şi contenciosul administrativ-fiscal,p.*225.

no provisions regarding the possibility of being challenged, the closing date of the appeal or the appeal body that is submitted, the deadline for appeals is 3 months of notification of the fiscal-administrative act.

The deadline for notifying the administrative solicitor's office court is 6 months, which commences from the date the response to challenge fiscal settlement date of unjustified refusal of the application deadline to resolve the fiscal dispute, that the legal deadline settlement demand, the deadline of 30 days calculated from the document issued in settlement favorable administrative application or, where applicable, the fiscal appeal. The term is six months limitation period.

For good reasons, if an individual administrative act, the application may be introduced over the term of 6 months but not later than one year from the date of the act or the date of the acknowledgment, the date of the request, as appropriate. Within 1 year is a period of decay.

Jurisdiction to hear fiscal appeal is given by the total amount of disputed amounts, taxes, fees, contributions determined by the tax payment and accessories thereof, or the total amount of fees, taxes, contributions, approved reimbursement such refund, if applicable.

Appeals against decisions of tax, fiscal administrative acts assimilated to tax decisions, decisions to regulate the situation issued in accordance with customs legislation, the tax loss mitigation measure established by measuring device, and against the decision of reverification is solved by[15]:

a) specialized structure for settling the appeals of the general directorates of public finance county or Bucharest, as appropriate, in whose jurisdiction the fiscal domicile challengers for appeals dealing with the taxes, fees, contributions, customs duties, accessories, tax loss mitigation measures, amounting to 3 million, and for appeals against the decisions of reverification, except those issued by the central bodies with powers of tax audit;

b) appeals a specialized structure for solving the general direction of public finances Bucharest county or, if necessary, jurisdiction under article 36 paragraph 3 to manage nonresident taxpayers who do not have a permanent establishment in Romania, to appeals made by them, having as taxes, fees, contributions, customs duties, accessories, tax loss mitigation measures, in the amount of up to 3 million, and for appeals against the decisions of reverification, except those issued by the central bodies with powers of tax audit;

c) the general solution of the appeals of the National Fiscal Administration Agency for appeals dealing with the taxes, fees, contributions, customs duties, accessories, as well as tax loss reduction in amount of 3 million or higher for appeals made by taxpayers, and those made against the acts listed in this article, issued by the central bodies of the inspection tax, regardless of amount.

Complaints made against other administrative acts shall be settled by issuing fiscal authorities.

The complaints raised by those who consider themselves aggrieved by unjustified refusal to issue a fiscal administrative act shall be settled by superior authority competent fiscal authority to issue that document. Appeals lodged against administrative acts issued by fiscal authorities, local government and other public authorities, by law, administer fiscal receivables are resolved by these authorities.

In the jurisdictional phase, background material competence of the courts is determined by the provisions of art. 10 of Law no. 554/2004, as follows:

- fiscal-administrative courts have unlimited jurisdiction in disputes concerning administrative acts issued or entered into by local authorities and county, and those relating to taxes, contributions, customs duties and accessories thereof up to 500,000 lei. By establishing their competence is polling in the administrative and fiscal courts;

[15] Article 209 of the Fiscal Procedure Code, republished, with subsequent amendments.

- fiscal-administrative departments of the Courts of Appeal judges in disputes over administrative fund issued or signed by the central government and those relating to taxes, contributions, customs duties and accessories thereof exceeding 500,000 lei.

The appeal shall be settled as follows:

- appeal against sentences pronounced by fiscal-administrative courts judged and fiscal administrative departments of the courts of appeal.

- appeal against sentences handed down by cutting administrative and fiscal courts of appeal shall be heard by the administrative and fiscal division of the High Court of Cassation and Justice, if the special organic law provides otherwise.

Regarding the territorial jurisdiction, in accordance with article 10, paragraph 3 of the Administrative Litigation Law, the applicant may appeal from his residence or domicile of the defendant. If the applicant has chosen to court the defendant's residence, except for lack of jurisdiction can not claim territory.

Along with fiscal-administrative solicitor's office in our country specialist authors examine the institution of common law fiscal solicitor's office that is contesting the enforcement actions of fiscal claims.

Based on the criterion of the competent body to resolve the dispute arose and procedure applicable in the legal literature specialist[16] fiscal solicitor's office was classified as common law fiscal solicitor's office and administrative-fiscal solicitor's office.

The literature[17] of common law fiscal solicitor's office was defined as the actions and remedies which common law courts resolve disputes by common procedural rules arising between taxpayers and fiscal authorities of the state or administrative-territorial units.

Whenever they are breached legal requirements relating to enforcement proceedings, the person concerned, if our taxpayer subject to enforcement, is able to notify the court of execution, seeking to obtain cancellation of acts contrary to the law enforcement. Means procedure which puts the law for this purpose to the person concerned is the challenge to execution[18].

The appeal to enforcement has been defined in the literature[19] as specific complaint that enforcement is achieved before the court, cancellation or correction of acts of enforced or sometimes even the annihilation of an enforceable effect.

Fiscal solicitor's office are identified with to appeal enforcement regulated by Title VIII, Chapter XI art. 172-174 of the Fiscal Procedure Code, the special enforcement[20] because an appeal to the general rule of enforcement complaints contained in art. 399-404 of the Code of Civil Procedure shall apply to a number of special rules contained in the Fiscal Procedure Code[21].

Accordance with article 172, paragraph 1 of the Fiscal Procedure Code, interested persons may appeal against any enforcement act done in violation of the Fiscal Procedure Code by enforcing bodies and where these bodies refuse to perform an act of execution the law.

According to paragraph 2 of the same article, the appeal may be made against enforcement pursuant to which the execution was started, where this title is not given a decision by a court or other judicial authority for such appeal and if there is another procedure prescribed by law.

The provisions on temporary suspension of enforcement by presidential ordinance under article 403 par. 4 of the Code of Civil Procedure are not applicable.

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[16] Constantin D. Popa, *Noţiunea, natura juridică şi importanţa contenciosului fiscal, p.*302-303.

[17] Adrian Fanu Moca, *Contenciosul fiscal*, (Publishing C. H. Beck, Bucharest, 2007), p.25.

[18] Gabriel Boroi, Dumitru Rădescu, *Codul de procedură civilă comentat şi adnotat*, (Publishing , Bucharest, 1996), 688, cited by de Horaţiu Sasu, Lucian Ţâţu, Dragoş Pătroi, *Codul de procedură fiscală. Comentarii şi explicaţii*, Publishing C. H. Beck, Buchares, 2008, 450.

[19] Savelly Zilberstein, Viorel Mihai Ciobanu, *Tratat de executare silită*, Publishing Lumin Lex, Bucharest, 2001, p.251.

[20] Adrian Fanu Moca, *Contenciosul fiscal*, p. 287.

[21] Dan Şova, *Contestaţia la executare silită în materie fiscală*. Part I, R. R. D. A. no. 5-6/2004, p. 8.

Thus, the object of enforcement complaints can be:

- any act performed in violation of Code Enforcement Fiscal Procedure by enforcement bodies;

- refusal of enforcement bodies to carry out an act of law enforcement;

- against enforcement pursuant to which the execution was started, where this title is not given a decision by a court or other judicial authority for such appeal and if no other procedure prescribed by law.

The appeal against enforcement is a challenge distinct from the other, but in an appeal directed against the whole execution be, or against an act of execution, the appellant may raise the issue of the validity of title[22].

- execution very

Although the Fiscal Procedure Code does not expressly govern the enforcement appeal against enforcement itself, the interpretation of article 173, paragraph 1 letter A challenge that now may be brought against all enforcement[23]. Thus, under these provisions, the appeal can be made within 15 days, under penalty of forfeiture, the date when the applicant was informed of the execution or enforcement of the act that challenges.

Accordance with article 172 paragraph 4, the complaint is lodged with the competent court shall be tried in an emergency procedure.

About the interpretation and application of article 169, paragraph 4 (current article 172, paragraph 4) has been appealed in the interest of law by the general prosecutor of the High Court of Cassation and Justice.

Representative of the general prosecutor of the High Court of Cassation and Justice, argued the appeal in the interest of law, asking to be decided in that court in whose jurisdiction the execution is made shall have jurisdiction in appeals brought against themselves or enforcement of acts of execution, writs of execution carried out pursuant to the fiscal that appeals against fiscal debt.

United polling found that in pursuance of article 169 paragraph 4 of the Fiscal Procedure Code, republished, with subsequent amendments, the courts have ruled differently on the material and territorial competence to settle complaints and appeals against enforcement of fiscal enforcement.

Appeal in the interest of law filed by the Attorney General's Office of the High Court of Cassation and Justice was admitted.

In applying the provisions of article 169 paragraph 4 of the Fiscal Procedure Code, republished, with subsequent amendments, shall:

"The judge in whose jurisdiction the execution is made shall have jurisdiction in the appeal, the enforcement against itself, an act or enforcement measures, refusal of fiscal enforcement bodies to carry out an act of law enforcement, and enforcement against under which the execution was started, where this title is not given a decision by a court or other judicial body, if for no other such appeal procedure provided by law."[24]

As the deadline to appeal, in accordance with article 173, paragraph 1 of the Fiscal Procedure Code, the appeal can be made within 15 days, under penalty of forfeiture, the date when:

a) the applicant was informed of the execution or enforcement of the act that contest, the communication received summons or other notice or, failing that, when conducting enforcement or otherwise;

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[22] Dan Constantin Tudurache, *Contestația la executare*, edition two, Publishing Hamangiu, Bucharest, 2009, p.39.

[23] Dan Şova, *Contestația la executare silită în materie fiscală*, 9; Adrian Fanu Moca, *Contenciosul fiscal,* p.296.

[24] Decision no. XIV a High Court of Cassation and Justice - United Sections - 5 February 2007, published in the Official Gazette, Part I, no. 733 of 30/10/2007, www. scj.ro

b) the applicant was informed according to letter. a) the refusal of enforcement body to perform an act of execution;

c) the person concerned has been informed according to letter. a) the issue or distribution of amounts that contest.

Under the provisions of paragraph 2 thereof, the appeal by a third person claims to have an ownership or other real right over the good sought may be brought not later than 15 days after execution.

Failure to appeal within the period specified in paragraph 2 does not prevent the third to achieve their right to a separate application under common law.

If admission to execution appeal, the court, if necessary, may order cancellation of the execution thereof challenged or correction, cancellation and termination of the execution itself, cancellation or clarification of the enforcement or carrying out of the execution of which was refused[25]. Thus, in case of cancellation of the execution or enforcement of the challenged fiscal-administrative act occurs abolish that, and for straightening of the execution or enforcement of the change that fiscal-administrative act.

In case of cancellation of the execution or termination of the execution itself challenged and enforcement of cancellation, the court may order the same decision to be returned to the entitled amount due to him from the sale of goods or deductions by attachment.

In case of rejection of appeal the appellant may be required to request the enforcement authority, to compensation for damages caused by delay in execution, and when the challenge was exercised in bad faith, he will be obliged to pay a fine from 50 to 1.000 lei lei.

From the above, identify *elements of similarity* between the two institutions, fiscal-administrative solicitor's office and fiscal solicitor's office, as follows:

- Both are means by which taxpayers, individuals or legal rights and defend their interests under the law;
- Both designate disputes occurred between taxpayers and fiscal administrative organs;
- Both are ways that change or abolish fiscal-administrative acts;

Article 47 of the Fiscal Procedure Code provides for the abolition or alteration of the fiscal-administrative acts. Thus, in accordance with this article, paragraph 1, fiscal administrative act may be terminated or modified under the Fiscal Procedure Code.

Rules for the application of O. G. No. 92/2003 regarding the Fiscal Procedure Code, provided in section 46.1 where change or abolish fiscal-administrative acts, namely: if straightening material errors; when finding invalid fiscal-administrative act; it is shown that the owner of the ownership of property or taxable value is indicated by someone other than the fiscal administrative act; as a result of the abolition or modification of the fiscal decision, subject to further verification, in case of cancellation or straightening of the execution or enforcement of the challenged, because resolution by the court of appeals to enforcement; total or partial abolition of the administrative act attack, as part of the settlement of the dispute referred to the fiscal authority.

- In terms of parties, both for fiscal-administrative solicitor's office and fiscal solicitor's office where the defendant is an administrative body which is part of fiscal administration and taxpayers who are plaintiffs are citizens, but they are a special category , namely those who owe taxes and other contributions to the budget.

The two institutions are *different*:

- The fiscal-administrative solicitor's office takes place in two phases: administrative and legal phase, whereas if we just fiscal solicitor's office jurisdictional phase;
- Fiscal-administrative solicitor's office are governed by a legal regime of public law, that the rules contained in the Fiscal Procedure Code and those contained in Law no. 554/2004 on

[25] Accordance with article 174, paragraph 3 of the Fiscal Procedure Code, republished.

administrative solicitor's office, as amended and supplemented, and in terms of fiscal solicitor's office in addition to general rules of enforcement complaints contained in art. 399-404 of the Code of Civil Procedure shall apply to a number of special rules contained in the Fiscal Procedure Code, so disputes are governed by a mixed regime;

• In the object action for fiscal-administrative solicitor's office is an fiscal-administrative and fiscal solicitor's office if the action object is an act of execution, a writ of execution;

With regard to fiscal enforcement, in accordance with article 141 par. 2 of the Fiscal Procedure Code, the debt-claim becomes enforceable claim on the fiscal is due by the payment deadline set by law or determined by the competent body or otherwise provided by law.

According to paragraph 4 of the same article, in addition to the items specified in article 43 paragraph 2[26] of the code necessary for fiscal administrative act, the enforcement will include: fiscal identification code, residence fiscal and any other identifying information, amount and nature of the amounts due and unpaid under legal binding power of the title.

• In the competent court to settle disputes, if the fiscal-administrative solicitor's office in fact be the competent court is the court or court of appeal, and for fiscal solicitor's office, the competent court is the judge.

Conclusions

Scientific research has suggested the institution's comparative study of fiscal-administrative solicitor's office and fiscal solicitor's office institution, resulting in the analysis of the two institutions and to identify similarities and differences between them.

We wanted to highlight similarities and differences between the two institutions since both belong to fiscal law and procedural means by which taxpayers are defending their rights and interests by law, and often can create confusion between the two institutions, wishing to make themselves distinction between the two institutions.

The future requires detailed analysis, punctual and to the point, the fiscal-administrative solicitor's office and fiscal solicitor's office, leading to a thorough knowledge of issues related to the two institutions, problems that arise in fiscal-administrative solicitor's office or fiscal solicitor's office.

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[26] Under these provisions, fiscal administrative act include:
- Name of the issuing fiscal body,
- The date of issuance and the date on which it becomes effective,
- Identification of the taxpayer or the person authorized by the taxpayer, if necessary,
- Subject of the administrative, fiscal,
- Reasons in fact,
- Under the law,
- Name and signature of the fiscal body of persons empowered by law
- Stamp of the issuing fiscal body,
- Can be challenged, and the appeal deadline for filing the tax appeal,
- Entries on the hearing the taxpayer.

- Constantin D. Popa, Noțiunea, natura juridică şi importanța contenciosului fiscal, în R. D. C. nr. 7-8/2001, p. 302.
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THE JURIDICAL PROTECTION ON GLOBAL DISCRIMINATION

CRISTINA OTOVESCU FRĂSIE*

Abstract
In this study I wished to evidence the main juridical documents referring to discrimination, adopted world wide by the United Nations Organization. Thus, can be identified several types of definitions concerning the discrimination against women, the race discrimination, the torture etc. within the analyzed documents. The democratic countries have laws that punish the discrimination, but, unfortunately, there are discrimination phenomena for example regarding the ethnicity, the gender, the language, the convictions, the age, at the working place, inside the family etc.

Keywords*: discrimination, law, Pact, human rights, Declaration.*

Introduction

In this study I have intended to research a very important and vast field for the contemporary world, such is the observing of the human rights at global level. Because during the last period of time discrimination is a very often met phenomenon, I have evidenced and commented the most important international juridical documents that refer to this aspect.

The study I have made is important because I have presented the main documents that were adopted under the auspices of The United Nations Organization, having as goal their popularization.

The objectives that I took upon myself in this study were the exhibiting of the international documents that refer to discrimination. During this article I have evidenced only a part of them, such are: The Universal Declaration of Human Rights, The International Covenant on Civil and Political Rights, The International Covenant on Economic, Social and Cultural Rights.

At international level, there are juridical documents concerning discrimination that have been evidenced in this article and, moreover, I have presented the events that took place abroad and regarded discrimination, to which Romania attended. The Representatives of the National Council for Fight against Discrimination (NCFD), in order to make connections with other similar institutions from Europe, attended several events on the human rights from world-wide.

In the same time, for making clear the situation of discrimination in Romania, I have used a poll, *The phenomenon of discrimination in Romania*, made in November 2010, by TOTEM and NCFD, the target population being the Romanian citizens (men and women), resident in the urban and rural area from Romania, over 18 years old, and the volume of the sample was of 1400 persons.

2. The main international juridical documents regarding discrimination

"Discrimination represents the distinct treatment applied to a person because of his/her belonging, real or presumed, to a certain social group. Discrimination is an individual action, but if the members of the same group are treated systematically in a similar way, this constitutes a social pattern of aggregate behaviour. In the social sciences, the term generally leads to a prejudiced treatment, with negative effects on the person in case. The researches identified the existence of several types of discrimination. Generally, it is operated the distinction between the direct and the indirect discrimination. The first type appears when the differentiate treatment is generated

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deliberately, while the second type appears when this treatment is based on an inequitable decision taken previously. Kirshna Mallick (2005) proposes two more typologies, based on the distinction made between the deliberate and the conscious discrimination and the unintentional one and also between the discrimination practiced by the individuals and groups and by institutions" [1].

Under the patronage of the United Nations Organization were adopted several documents regarding discrimination: The Universal Declaration of Human Rights, The International Covenant on Civil and Political Rights, The International Covenant on Economic, Social and Cultural Rights, The Convention on the Elimination of all forms of Discrimination against Women, The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, The Convention on the Elimination of all Forms of Racial Discrimination.

In this article I will render evident only a part of them: The Universal Declaration of Human Rights, The International Covenant on Civil and Political Rights, The International Covenant on Economic, Social and Cultural Rights.

The Universal Declaration of Human Rights, adopted on the 10th of December 1948, stipulates in its Preamble that "the foundation of freedom, justice and peace around the world" is constituted by "the recognition of dignity inherent to all the members of the human family and their equal and inalienable rights". The states members of the Declaration committed themselves "to promote, together with the United Nations Organization, the universal and effective respect of all the human rights and fundamental freedoms and also their universal and effective observing"[2].

In art. 1 it is stipulated that, from the moment of birth, all the human beings are free and equal in dignity and rights. Also, they are endowed with reason and conscience and they should behave towards one another in the spirit of brotherhood.

Any person can avail oneself of all the rights and freedoms proclaimed in this Declaration, without making difference regarding the race, colour, sex, language, religion, political or any other kind of opinion, national or social origin, wealth, birth or other circumstances. Thus, we must not draw a distinction regarding "the political, juridical or international statute of the country or territory to which a person belongs, either this country or territory are independent, under guardianship, non-autonomous or subjected to any limitation of the sovereignty"[3].

The law must equally protect all the people against discrimination. In art. 7 from the Declaration it is stipulated that "All the people are equal before the law and are entitled, without any discrimination, to equal protection. All have the right to equal protection against any discrimination that would violate this Declaration and against any incitation to such discrimination".

As concerning the job, according to art. 23, all the persons, without discrimination, must benefit by the right to have an equal salary for equal work[4].

The International Covenant on Civil and Political Rights was adopted and opened for signing by the General Assembly of the United Nations on the 16th of December 1966 and came into force on the 23rd of March 1967. Romania ratified The Pact on the 31st of October 1974 through the Decree no. 212, published on the "Official Gazette of Romania", first part, no. 146 from the 20th of November 1974.

In the dispositions of this Pact, the states parties commit themselves to observe and to guarantee to all the people who live on their territories and are within their competence, the right recognized in this pact, without any difference, especially as regarding the race, the colour, the sex,

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[1] Luana Miruna Pop, *Dicţionar de politici sociale*, (Bucureşti, Expert, 2002), p. 276-277

[2] Preamble, *The Universal Declaration of Human Rights.*

[3] Art. 2, The Universal Declaration of Human Rights

[4] About the European regulations regarding the equality of chances on the working market, see Maria Cristina-Frăsie, Gabriela Motoi, *Gender equality on the labor market. Case study: Romania*, April 2011, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1817563

the language, the religion, the public or any other opinion, national or social origin, wealth, the birth or any other circumstances[5].

The law forbids "any provocation to national, racial or religious hate that constitutes a incitement to discrimination, hostility or violence"[6].

In art. 26 it is stipulated that "All the persons are equal before the law and they have, without discrimination, the right to equal protection. Therefore, the law must forbid any discrimination and guarantee to all the persons an equal and efficient protection against any discrimination, especially of race, colour, sex, language, religion, political or any other, national and social origin, wealth, birth or of any other circumstance".

The moment when The International Covenant on the Civil and Political right was adopted so was its optional Protocol (the same day). Romania ratified The Protocol through the Law no. 7/1991, published in The Official Gazette of Romania, Part I, no. 18 from the 26th of January 1991.

The International Covenant on Economic, Social and Cultural Rights was adopted and opened for signing by the General Assembly of the United Nations on the 16th of September 1966 and came into force on the 3rd of January 1967.

The states parties of this Pact, commit themselves to take action, both on their own or assisted and with international cooperation, especially in the economic and technical field, though using at the maximum level the available resources, in order that the exercising of the rights stipulated in this Pact to be progressively provided though all the adequate means, including though the adopting of the legislative measures. The states parties to this Pact commit themselves to guarantee all the rights specified in the stipulations of the articles from it, being exercised without discrimination based on race, colour, sex, language, religion, political or any other opinion, national or social origin, wealth, birth or any other circumstances[7].

The most important category that need education and access to cultural and artistic activities are the children[8]. In the provisions of art. 10 it is stipulated that "Special measures of protection and assistance must be taken for all the children and teenagers, without discrimination based on parentage or other reasons. The children and teenagers should be protected against the economic and social exploitation. Using them for activities that would harm their morality or health, that would endanger their lives or affect their normal development, must be punished by law. The states should also establish age limitations under which the use of the children for paid work would be forbidden and sanctioned by law".

As referring to The International Covenant on Economic, Social and Cultural Rights, this doesn't include provisions referring to a system of individual or inter-states complaints, but it requires to the states parties to present reports that would include the measures they had adopted and also the progress registered as regarding the observing of the rights acknowledged in the Pact. The reports would be addressed to the General Secretary of the United Nations Organization, who would transmit them in order to be examined by the Economic and Social Council (ECOSOC)[9].

„The EU has some of the most advanced anti-discrimination laws in the world. European legislation in this field is based on Article 19 of the *Treaty of Lisbon* (formerly Article 13 of the *Treaty of Amsterdam*) which gives the EU powers to combat discrimination on the grounds of racial or ethnic origin, religion or belief, disability, age,sex or sexual orientation. Current legislation comprises 2 Directives:

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[5] Art. 2, Section 1 and 2, The *International Covenant on the Civil Rights*

[6] Art. 20, Section 2, *Ibidem*

[7] Art. 2, Section 1 and 2, *The International Covenant on Economic, Social and Cultural Rights*

[8] For further details regarding children's rights see Pescaru, Maria, *Asistența și protecția drepturilor copilului, (* Pitești: Editura Universității, 2010), p.17-23

[9] Bianca Selejan Guțan, *Protecția Europeană a Drepturilor Omului*, 2nd Edition, (Bucharest: C.H.Beck, 2006), p.12

- *The Employment Equality Directive* (2000/78) protects everyone in the EU from discrimination based on age, disability, sexual orientation and religion or belief in the workplace.

- *The Racial Equality Directive* (2000/43) prohibits discrimination on the grounds of racial or ethnic origin in the workplace as well as in other areas of life such as education, social security, healthcare and access to goods and services.

The Directives were agreed by all EU Member States in 2000. Each Member State was then obliged to incorporate these new laws into their national system"[10].

3. The representations of Romania to different events from abroad on discrimination[11]

The National Council for Fight against Discrimination, in Romania, is the autonomous state authority, under parliamentary control that carries on its activity regarding discrimination.

Through discrimination it is understood any differentiation, exclusion, restriction or preference based on the criteria stipulated by the in force legislation. The criteria established by the Romanian legislation are: race, nationality, ethnicity, language, religion, social category, beliefs, sex, sexual orientation, age, handicap, non-contagious disease, HIV infection, belonging to a disadvantaged category and any other criterion that leads to the restraint, the removal of the recognition, the use or the exercising of the rights recognized by the law, in the political, economic, social and cultural field or in any other field of the public life[12].

In 2010, in order to consolidate the visibility regarding the activities from the non-discrimination field and the perpetuation of the relations and the collaboration of The National Council for Fight against Discrimination (NCFD) with other similar institutions from Europe, the representatives of NCFD attended numerous international events related to the human rights, such are:

- In August, the head of the Romanian delegation, mister president Csaba Asztalos, attended the seconding of the periodic report of Romania at *The UNO Convention on the elimination of all forms of racial discrimination*. In the Romanian delegation were also included persons who represented the national minorities. In the report drawn up by Romania was accentuated the situation of the Roma people, the education in the Hungarian language, the use of the minority languages in administration, justice.

- February – The Seminar for the practitioners from the juridical field *The anti-discrimination directives 43/2000 and 78/2000 in practice* that took place at Trier, in Germany, being discussed: the European Union legislation regarding the anti-discrimination, the role of the equality institutions, the role of the evidence in case of discrimination and the situation of the Roma people from the European Union.

- The Campaign *For Diversity. Against Discrimination*

- The Reunion of the Committee of Specialists on the Roma people and Travellers (MG-S-ROM)

- The Seminar Good practices exchange on Public policies combating discrimination based on racial and ethnic origin in accessing and progressing in employment; it took place at Berlin, in Germany.

- The Reunion of the Committee of Governmental Specialists on non-discrimination from the European Commission

- The Seminar *The community legislation as regards the equality between men and women* put into good practice.

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[10] http://ec.europa.eu/justice/fdad/cms/stopdiscrimination/fighting_discrimination/Rights_and_Responsibilities/index.html?langid=en

[11] *Annual report 2010*, The National Council for Fight against Discrimination, p.14-17, http://www.cncd.org.ro/files/file/RAPORT%202010_web1.pdf

[12] Further information is available at http://www.cncd.org.ro/

- *Annual forum for Human Security*

- The Seminar *Juridical progresses and concepts on the equality of chances and non-discrimination in Europe*

- The training Seminar *Tools of evidence in discrimination cases* was organized by the Slovakian National Center for human rights and The Equinet Council Secretariat, at Bratislava, in October.

- The Annual General Equinet Assembly took place in November, at Brussels.

- The Summit of Equality was organized by the Belgian presidency of the European Union and the European Commission.

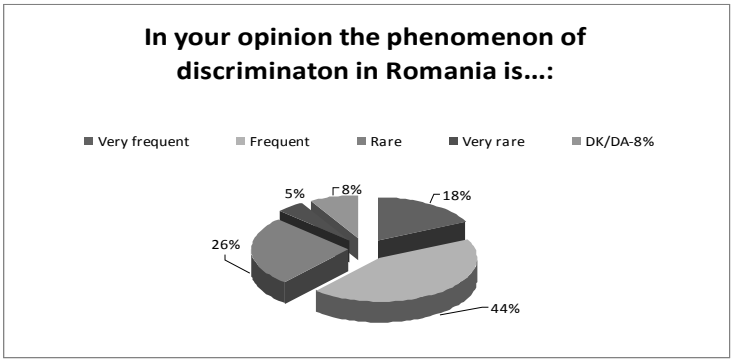
- The Conference *The fundamental rights of the people with intellectual disabilities and the people with mental health problems* took place in November, at Vienna and it was organized by the Agency for Fundamental Rights of the European Union.

- The Seminar *The anti-discrimination directives 2000/43 and 2000/78 in practice* was organized by the European Academy of Law.

It must be appreciated that Romania was set as an example of good practice in introducing the anti-discrimination law for preventing the multiple discrimination, along with other countries such Bulgaria and Denmark.

4. Case study: The phenomenon of discrimination in Romania[13]

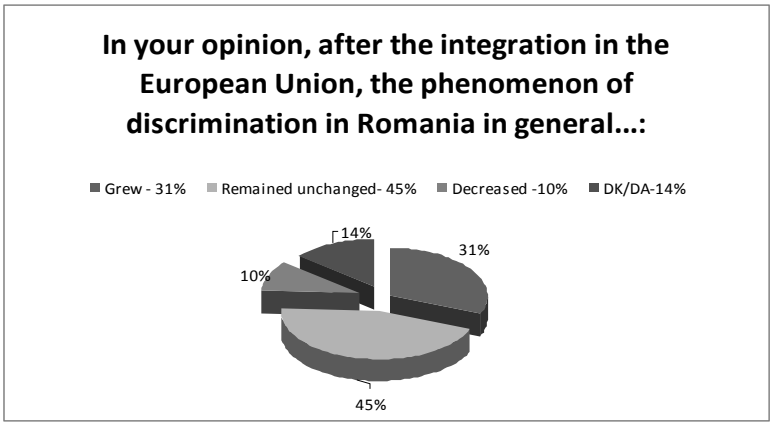
- *In your opinion, the discrimination phenomenon in Romania is...:*



As it can be seen, the respondents said that the phenomenon of discrimination in Romania is very frequent in 18% of the cases, frequent – 44%, rare – 26% and very rare or not at all met – 5%.

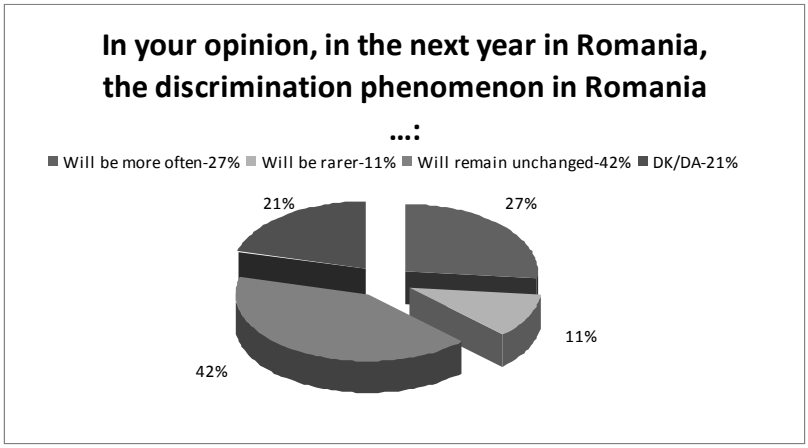
In your opinion, after the integration in the European Union, the phenomenon of discrimination in Romania in general...:

[13] *The phenomenon of discrimination in Romania*, Poll, Nov. 2010, TOTEM and CNCD, p. 9, 10, 11 and 13; The target population: Romanian citizens (men and women) resident in the urban and rural areas from Romania, over 18 years old. The volume of the sample: 1400 persons



In order to find out about the discrimination phenomenon in Romania, generally, after the integration in the European Union, was noticed that the respondents said that this phenomenon grew in 31% of the cases, remained unchanged – 45% and decreased – 10%.

In your opinion, in the next year in Romania, the discrimination phenomenon in Romania ...:



During the next year, the people appreciated that the discrimination phenomenon in Romania will be frequent – 27%, rarer – 11% or will remain unchanged in 42% of the situations.

In your opinion, do the next situation represent cases of discrimination?

	YES	NO	DK/DA
A person is dismissed because his/her Roma ethnicity	88%	7%	5%
Teachers don't allow a HIV-infected child to attend school	86%	9%	6%
A persons is dismissed because he/she is homosexual	85%	9%	6%
Forbidden access in a public place of a group of Roma persons	84%	10%	5%
The refuse of a dentist to treat a HIV-infected person	81%	12%	7%
A Roma person that is hospitalized in a separate ward...	80%	14%	6%
A person is refused for employing because is old-	78%	18%	3%

aged			
The setting up in schools of separate classrooms for the Roma children	78%	16%	6%
A person who leaves the table because one of the table companions is …	72%	18%	9%
The forbidding of gay people's street manifestations	69%	21%	10%
A person is dismissed because she is pregnant	69%	25%	6%
A person who doesn't give up the seat in a bus to a pregnant women	37%	57%	5%
A person is dismissed because he/she is repeatedly late for work	22%	72%	6%

5. Conclusions

"A major problem with which the society deals is discrimination that represents the discernment of quality and the recognition of the differences between concepts. Discrimination is impossible to eliminate, because we don't live in an ideal society. Not all the people adapt themselves in a perfect manner to the circumstances and to the people around them because they take into account certain unjust criteria. For some, this thing would mean to renounce their own identity. But we shouldn't confuse it with the prejudice that translates as negative attitude towards each individual, member of a group, being motivated only by their belonging to the group. The difference between people is the most spread form of discrimination, because of the prejudices due to some characteristic treatments to certain groups of persons. The racial or religion discrimination is illegal in most of the occidental democracies, while the merit discrimination is most of the times tolerated by the legislative systems, being explained as a form of differencing between the performances of several people. The National Council for Fight against Discrimination (NCFD) carries on its activity according to the normative documents on the prevention and sanction of all forms of discrimination, concerning the organization and the functioning of the National Council for Fight against Discrimination.

The discrimination can undermine the reaching of a high level as concerning the employment and the social protection, the increasing of the living standard and life quality, cohesion and economic and social solidarity.

A hard disease of the humankind that should be eradicated is intolerance. As dwellers of the Earth, we must fight for a society of understanding and tolerance. In order to become wiser, to gain friendship, agreement and happiness, we need tolerance. We must reject the concepts of racial discrimination, anti-Semitism and xenophobia. With wisdom one can build an empire, a society.[14]"

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- The Convention on the Elimination of all forms of Discrimination against Women,
- The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment,
- The Convention on the Elimination of all Forms of Racial Discrimination.

PROFESSIONALIZATION OF THE JUDICIARY BY RECRUITMENT AND SELECTION

VIORICA POPESCU*

Abstract
Considered as key elements of the human resources policy of an organization, recruitment and selection influence the status of human potential. Given that the main resource of each judicial system is the human resource, the present study aims to analyze the means of recruitment and selection of magistrates, both from the perspective of the national legislation, as well as from the perspective of the international provisions, identifying all vulnerabilities and directions for improvement.

***Keywords**: national legislation, human resources management, recruitment, selection, international provisions.*

Introduction

The present study which is part of the area of the judiciary organization aims the synthetic analysis of the recruitment and selection of magistrates (judges and prosecutors), both from the perspective of the international provisions, as well as from the perspective of the national legislation. As the research area approached is exclusively in the competence of the legislator, references to the literature are general and come from the area of human resources management.

Regarding my original contribution, it consists of the indication of the vulnerabilities of recruitment and selection of the Romanian magistrates, by referring both to the legislation in force, as well as to the Romanian actual socio-economic context, for in the end to present the ways in which the two managerial processes can be perfected.

The success of an organization can be ensured only if the employees are recruited and selected following the appropriate procedures. Recruitment ensures the number of persons on who the selection will be applied on. Having a bigger number of candidates, it is possible the recruitment of those who best fit the job requirements and who, by their skills guarantee performance.

Recruitment is the process by which the organization seeks candidates for its vacancies[1]. This process is unfolded continuously, permanently and systematic or spontaneous, triggered at certain time intervals[2] and must consider the following requirements: provide the organization the necessary personnel both quantitative as well as qualitative, create a rational relation between different categories of personnel, preoccupation to achieve a stability of the employees and reduce fluctuations, comply with the legal provisions in the area etc[3].

Because recruitment consumes money and resources, it is necessary to be unfolded following a methodology that will make possible the identification and attraction of the right persons and a well thought out plan[4].

On the other hand, **selection** is defined as the process by which the organization is trying to identify the candidates who possess the knowledge, skills and any other characteristics necessary for the organization to achieve its objectives[5].

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[1] Noe Raymond, Hollenbeck John, Gerhart Barry, Wright Patrick, *Fundamentals of Human Resource Management*, (New York: McGraw Hill, Irwin, 2004),.p.6.

[2] Cornescu V. and Bonciu C., *Managementul resurselor umane*, (Bucharest: Trei, 1999), p.21

[3] Cornescu V, Mihăilescu I. and Stanciu S., *Managementul organizației*, (Bucharest: All Beck, 2009), p.202

[4] Mathis Robert L., Panaite Luca and Rusu Costache (coord.), *Managementul resurselor umane*, (Bucharest: Economic Publishing house, 1997), p.85-86

Professional selection assumes a confrontation between the particularities of the job considered and the individual characteristics (skills, qualifications, personality etc) of each job seeker who applies for that vacancy[6].

1. Recruitment and selection of magistrates

Because magistrates are the best jurists, due to the social importance of the position as judge or prosecutor, democracies consider as very important the recruitment and selection of magistrates, but also of the authorities invested with prerogatives in this area, being established the principles and methodology which must be followed when these two essential processes are unfolded.

1.1 Principles and normative framework establishing the recruitment and selection of magistrates

The United Nations General Assembly, starting from the necessity of granting a special attention to judges in the legal system and to the importance of selection, training and professional conduct, adopted by the Seventh United Nations Congress and endorsed by **resolutions 40/32 of 29 November 1985 and 40/146 of 13 December the Basic Principles on the Independence of the Judiciary**[7]. According to this international document Member States have the obligation to ensure and promote the independence of justice, considering and introducing these principles in their national legislation and judicial practice. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, color, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory (Point 10).

Recommendation No 94 (12) of the Committee of Minister to Member States on judges: independence, efficiency and responsibilities[8] adopted by the Committee of Ministers on 13 December 1994 recommends to Members States to adopt or to enforce all necessary measures for the promotion of judges as individuals and of the judicial system, to state their independence and efficiency, by implementing a number of principles.

According to the first principle stated (I), selection and career of judges must be based on merit, having regard to the evaluations, integrity, skills and efficiency. The authority competent with the selection and promotion of judges must be independent from the Government or public administration. Express provisions must be stated in order to guarantee its independence, to insure the appointment of its members by the judiciary itself, the latter one having the power to decide over the procedural rules of the appointment.

For the application of the Recommendation No 94 (12), the Consultative Council of European Judges (called CCJE) adopted the ***Opinion no 1 (2001) for the attention of the Committee of Ministers of the Council of Europe on standards concerning the independence of the judiciary and the irremovability of judge***[9] stating that the independence of the judges is not a prerogative or a

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[5] Noe Raymond, Hollenbeck John, Gerhart Barry, Wright Patrick, *Fundamentals of Human Resource Management*,

[6] Dumitrescu Mihail (coord.), *Enciclopedia conducerii întreprinderii*, (Bucharest: Scientific and Encyclopedic Publishing house, 1981), p.346-347

[7] Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December the Basic Principles on the Independence of the Judiciary, available at: http://www2.ohchr.org/english/law/indjudiciary.htm

[8] Recommendation No 94 (12) of the Committee of Minister to Member States on judges: independence, efficiency and responsibilities available at: https://wcd.coe.int/ViewDoc.jsp?id=1707137&Site=CM

[9] Opinion no 1 (2001) for the attention of the Committee of Ministers of the Council of Europe on standards concerning the independence of the judiciary and the irremovability of judge, available at: https://wcd.coe.int/ViewDoc.jsp?id=1707137&Site=CM

privilege in their own interest, but also in the interest of the state of law and of those who seek justice.

CCJE has established that in the Member States there is a variety of methods by which judges are appointed, also noticing that there is a unanimous opinion that appointments must be grounded on merit and performed based on objective criteria, any political considerations being inadmissible.

Any "objective criteria" seeking to guarantee that recruitment and career of judges are based on merit, considering their professional background, integrity, capacity and efficiency can only be defined in general terms. Thus it is primarily followed the insurance of a content for the general aspirations for an "appointment grounded on merit" and "objectivism", aligning theory with reality.

In the CCJE opinion it is necessary that the authorities of each Member State responsible with the appointments and proposals for appointments and promotion to insert publish and immediately apply objective criteria insuring that selection and promotion of judges is made based on merit, considering qualifications, integrity, capacity and efficiency.

Opinion no 10 of 23 November 2007 of the Consultative Council of European Judges for the Judiciary[10] at the service of society states important provisions regarding the competencies of the authority independent of the executive and legislative, competent with the selection, appointment and promotion of judges. It is shown that, in order to maintain the independence of the judiciary, it is essential that the selection and promotion of judges be made independently by the Superior Council of Magistracy, with the exclusion of the implication of the legislative or executive powers. The Opinion emphasizes the features necessary for the appointment of magistrates: total transparency of the conditions of selection by the dissemination of the criteria for appointment and promotion, a selection based on the merits of the candidates, appreciated by their qualifications, competence, integrity, independence, impartiality and efficiency, opening the procedures for appointment for a large area of candidates, who are representative for the community.

The European Charter on the statute for judges[11], adopted in a reunion organized by the Council of Europe in 1998, regarding the procedure for the selection and appointment of magistrates, states that the selection and recruitment of judges must be performed by a court of an independent commission and must be grounded on their capacity to freely and impartially appreciate all the judicial situations they face and to apply the law in the spirit preserving the dignity of persons.

Not only the selection and career of judges have been a preoccupation for European and international organisms, but also the statute and methods of selection and appointment of prosecutors, considering the same principles. ***Recommendation 19 (2000) of the Committee of Ministers to Member States on the role of public prosecution in the criminal justice system***[12], adopted on 6 October 2000, emphasizes that Member States should take measures to ensure that the recruitment, the promotion and the transfer of public prosecutors are carried out according to fair and impartial procedures embodying safeguards against any approach which favors the interests of specific groups, and excluding discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status. The careers of public prosecutors, their promotions and their mobility are governed by known and objective criteria, such as competence and experience.

The Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (27 August-7 September 1990) adopted the ***Guidelines on the Role of Prosecutors***[13].

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[10] Opinion no 10 of 23 November 2007 of the Consultative Council of European Judges for the Judiciary[10] at the service of society, available at: http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/CCJE-opinion-10-2007_EN.pdf

[11] European Charter on the statute of judges, available at: http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/European-Charter-on-Statute-of-Judges_EN.pdf

[12] Recommendation 19 (2000) of the Committee of Ministers to Member States on the role of public prosecution in the criminal justice system, available at: https://wcd.coe.int/ViewDoc.jsp?id=376859&Site=CM

[13] Guidelines on the Role of Prosecutors available at: http://www2.ohchr.org/english/law/prosecutors.htm

These stated as main principles the need that all prosecutors possess the professional qualifications required for the accomplishment of their functions through improved methods of recruitment and legal and professional training, and through the provision of all necessary means for the proper performance of their role in combating criminality. These guidelines have been formulated as to assist Member States in their tasks of securing and promoting the effectiveness, impartiality and fairness of prosecutors in criminal proceedings, and should be respected and taken into account by Governments within the framework of their national legislation and practice.

According to these guidelines, persons selected as prosecutors shall be individuals of integrity and ability, with appropriate training and qualifications. States shall ensure that selection criteria for prosecutors embody safeguards against appointments based on partiality or prejudice, excluding any discrimination against a person on the grounds of race, color, sex, language, religion, political or other opinion, national, social or ethnic origin, property, birth, economic or other status.

1.2 Recruitment and selection of magistrates settled by the actual Romanian law – Law 303/2004 on the statute of judges and prosecutors

Title II of the Law No 303/2004 on the statute of judges and prosecutors settles the career of judges and prosecutors, the first chapter of this Title being dedicated to the admission into magistracy and the initial professional training of judges and prosecutors.

According to Art 12 of the Law No 303/2004 the "admission of judges and prosecutors into magistracy shall take place through competitive examination, based on professional competence, aptitudes and good reputation". We do not consider necessary to emphasize even more the clarity of the quoted text, the legislator establishing the rule that the admission into magistracy be made based on a competitive examination.

Starting from this rule, two different possibilities of admission into magistracy are distinguished: the promotion of the competitive examination organized by the National Institute of Magistracy or the promotion of the courses of the National Institute of Magistracy. The examinations organized by the N.I.M are performed based on a detailed methodology drafted by the Superior Council of Magistracy.

1.2.1 Admission to the National Institute of Magistracy

Legal texts (Art 13, Art 14, Art 26 Para 1 and Art 33 Para 2 of the Law No 303/2004) establish the main coordinates of the activity of the National Institute of Magistracy, namely the organization of the competitive examinations for the admission into magistracy and initial professional training of judges and prosecutors.

According to Art 14 Para 1 of the Law No 303/2004, the admission to the National Institute of Magistracy is made by observing the principles of transparency and equality, exclusively on the basis of a competitive examination. The same article establishes the requirements which have to be met cumulatively by the persons who apply for the National Institute of Magistracy, namely:

- to be Romanian citizens, with permanent residence in Romania and have full legal capacity;
- to be bachelors of law;
- to have no criminal and fiscal record;
- to speak Romanian;
- to be able, medically and psychologically, to exercise this office.

The candidates must pass theoretical exams and then an interview establishes the evaluation both of their psychological profile, and of their capacity to react accordingly to the professional deontological norms in different situations, as well as a logical test.

The persons who have promoted this examination have the quality of auditors of justice and will attend, for the next 2 years the initial professional training courses at the N.I.M, consisting of

academic education and practical training, according to the training program approved by the Scientific Council of the Institute and by the Superior Council of Magistracy, according to Law No 303/2004 and to Art 17-20 of the Regulation of the National Institute of Magistracy[14].

Based on their general average marks the graduates may choose either the position of debutant judge or prosecutor in courts or prosecutor's offices attached to these courts, in accordance with Art 21 Para 2 of the Law No 303/2004.

The length of the probation is of one year, during which the debutant judges or prosecutors have to continue their initial professional training under the coordination of a judge or prosecutor especially appointed by the president of the first instance court or, as the case may be, by the prime-prosecutor of the prosecutor's office attached to this court. After completing the probation period, the debutant judges and prosecutors shall be obliged to sit for the capacity exam, according to Art 25 Para 1 of the Law No 303/2004. The capacity exam shall consist of verification of the theoretical and practical knowledge, by way of written and oral examinations. Theoretical tests shall concern the constitutional foundations of the rule of law, the basic legal institutions, judicial organization and the Deontological Code for judges and prosecutors. The practical tests shall consist in solving moot cases and drafting judicial acts, separately for judges and prosecutors, according to the specific nature of their activity according to Art 28 of the Law No 303/2004.

1.2.2 Appointment into magistracy

This mean of appointment into magistracy is stated by Art 33 Para 1 of the Law No 303/2004, previous to its modification by the Government Emergency Injunction No 100/2007 "persons who were judges or prosecutors and ceased their activity for reasons not imputable to them, judicial specialized personnel provided by Art 87 Para 1, lawyers, notaries, judiciary assistants, legal advisers, the probation personnel with higher legal education, judiciary police officers with higher legal education, the court clerks with higher legal education, persons who have held judicial specialized offices within the apparatus of the Parliament, the Presidential Administration, the Government, the Constitutional Court, the Ombudsman, the Court of Accounts or the Legislative Council, the Juridical Research Institute within the Romanian Academy and the Romanian Institute for Human Rights, the professors at law within the accredited institutions, as well as the assistant-magistrate with the High Court of Cassation and Justice with at least 5 years length of service within the specific field, may be appointed into magistracy, based on a competitive exam, if they meet the requirements provided by Art 14 Para 2". First of all we must note the addressability of the text, this mean of appointment being opened for a large, diverse and representative for the society group of candidates, the quoted law being in accordance with the recommendations of the Opinion No 10/2007 of the Consultative Council of European Judges.

As it is shown by the Opinion No 1/2001 of the CCJE "seniority requirements based on years of professional experience can assist to support independence", this being an important condition for the promotion of magistrates, without being absolute, in the prejudice of the one regarding professional skills.

According to Art 33 Para 13 as modified by the Government Emergency Injunction No 100/2007, and approved by Law No 97/2008[15] it is necessary that the candidates admitted have the obligation to attend to professional training courses organized by the N.I.M. These courses ensure

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[14] Regulation of the National Institute of Magistracy was published in the Official Gazette Part I, No 193/31 March 2007, modified and amended by Decision No 452/21 June 2007 for the modification and completion of the Regulation of the National Institute of Magistracy, approved by Decision of the Superior Council of Magistracy Plenum No 127/2007, published in the Official Gazette Part I, No. 530/6 August 2007 and Decision No 81/2008, approved by Decision of the Superior Council of Magistracy Plenum No. 127/2007, published in the Official Gazette Part I No. 89/5 February 2008.

[15] Law No 97/2008 approving Government Emergency Ordinance No 100/2007 amending certain legal instruments in the justice area, published in the Official Gazette Part I, No. 294/15 April 2008.

training appropriate for the needs of the system, and closely respect the recommendations made by the international organisms, aiming the necessity of initial professional training for all categories of magistrates, regardless of their mean of admission into magistracy (see in this regard Recommendation R 94(12)/1994, the European Charter on the statute of judges and the Guidelines on the Role of Prosecutors).

2. Weaknesses in the area of recruitment and selection of magistrates in the Romanian judicial system

- It has not yet been established a policy of personnel for the Romanian judicial system, in accordance with the requirements of the European Commission[16], thus it is impossible both the correlation between midterm and long term needs of the system and the number of posts open for competition, as well as the stabilization of the number of posts opened for competition. From this point of view, until this moment, the decision on the number of posts opened for competition consider the near future, exclusively based on the number of posts opened at the moment of the decision. Such system promotes the present lack of balance in the future.
- Though according to the law, the main mean of recruitment into magistracy is by N.I.M, more than half of the recruitments made in the past five years were made by exceptions and simplified (including in the perspective of the rigorous selection and training subsequent to admission)[17].
- The examination based on multiple choice tests, which does not valorize professional reasoning, but shows a "muscle mind" and not a judicial thinking.
- The important elements in the profile of the magistrate remain insufficiently or not at all tested at the admission into magistracy (critical thinking, capacity to persuade in writing, linguistic competences, axiological system, general culture).
- Two years as the duration of the training courses is too long if we correlate it with the system's crisis of human resources.
- The inefficient capacity of the N.I.M to administrate the professional training of human resources necessary for the judicial system in relation to the large number of retirements.

To all of these we must add:

- Excessively rigorous selection of the candidates[18].
- The initial professional training of the auditors does not emphasize enough the social component of the training, the transfer of values and attitudes or the understanding of the economic mechanisms[19].

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[16] See the European Commission reports under the Cooperation and Verification Mechanism, avail;able at: http://ec.europa.eu/dgs/secretariat_general/cvm/progress_reports_en.htm; by Decision No 1320/27 November 2008, SCM approved the Project on the analysis of the human resources management between 2005 – August 2008 and the strategy in this area between August 2009 – 2011; this strategy was revised following a program for technical assistance financed by the EU and unfolded between December 2009 – September 2010; nevertheless, the conclusions presented are still valid, due to the short time, insufficient for the evaluation of the application of this revised strategy.

[17] SAR Policy Brief No 47, Men of Justice – Policy of personnel in magistracy on short and medium term, September 2010, (it is about 1300 persons recruited by exceptional means, out of a total of 2050 new magistrates admitted into the system between 2005-2009) available at: http://www.sar.org.ro/files/520_Policy%20memo47.pdf , since 15 June 2011

[18] The Activity Report of the National Institute of Magistracy in 2005-2009, available at: http://www.inm-lex.ro/fisiere/pag_1/det_1139/6415.pdf , since 15 June 2011.

[19] Recommendation CM/Rec (2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, Point 56 states that "Judges should be provided with theoretical and practical initial and in-service training, entirely funded by the state. This should include economic, social and cultural issues related to the exercise of judicial functions. The intensity and duration of such training should be determined in the light of previous professional experience", available since 15 June 2011 at:
https://wcd.coe.int/ViewDoc.jsp?id=1707137&Site=CM

- Insufficient practice of the future magistrates.
- The admission examination way too exaggerated, without any utility for the future magistrate.
- Within courts, the poor professional communication between N.I.M graduates, leading to vague judicial decisions and with a reduced responsibility.
- The lack of feedback from the graduates of the professional training courses organized by N.I.M and the Superior Council of Magistracy.
- Overloading the curricula with disciplines that are useless in training the magistrate as a practitioner of the law.
- The presence of theoreticians among trainers, without judicial practical experience limits the development of the practical skills of the future magistrates.
- The lack of balance between the number of judges-trainers and prosecutors-trainers.
- The absence of the evaluation of the socio-professional profile of the future magistrate.

Though the consulted factors have emphasized a series of conjunctures which have aggravated these vulnerabilities, namely:

- The deficiency of the stimulation of retirement of the magistrates against the stimulation of staying in the system.
- "The passenger entry" intro the system, the magistrate's pension it is not assimilated for other categories of personnel. The principle of the service pension is violated.
- The lack of financial motivations for the magistrate to stay into the system, as a consequence of the substantial wage cuts.

3. Directions to improve the recruitment and selection process

Because it has not yet been defined a policy for the Romanian judicial system personnel, in accordance with the requirements of the European Commission[20], it is impossible the correlation between the midterm and long-term needs of the system and the number of vacancies, but also the stabilization of the number of vacancies.

From this point of view, until this moment, the decisions concerning the number of vacancies were taken considering the near future, based exclusively on the number of vacancies available at the moment of the decision. Such system can only push to the future the present imbalances. The advantages in ensuring a constant number of vacancies are obvious: predictability of costs, the correct estimation of the number of trainers and the necessary spaces for the initial training courses etc.

The admission into magistracy, regardless of the followed procedure, as we have already shown, tests in a significant measure, the knowledge about the law of the candidates, and the important elements in the profile of the candidate are insufficiently tested or are not tested at all (critical thinking, capacity to persuade in writing, linguistic competences, axiological system, general knowledge). Psychological test is inefficient, for reasons of regulation, but also its validation on specific population.

3.1 Midterm objectives

- The correlation of the number of posts opened for competition with the midterm and long-term need of personnel of the judicial system, in accordance with the human resources policy of the Superior Council of Magistracy;

[20] See the European Commission reports under the Cooperation and Verification Mechanism, avail;able at: http://ec.europa.eu/dgs/secretariat_general/cvm/progress_reports_en.htm; by Decision No 1320/27 November 2008, SCM approved the Project on the analysis of the human resources management between 2005 – August 2008 and the strategy in this area between August 2009 – 2011; this strategy was revised following a program for technical assistance financed by the EU and unfolded between December 2009 – September 2010; nevertheless, the conclusions presented are still valid, due to the short time, insufficient for the evaluation of the application of this revised strategy.

- The stabilization of the entrances into the system on a midterm area;
- Ensuring the objective, transparent, relevant, efficient and equitable feature of the means of recruitment into magistracy;
- The attraction into the system of the most valuable law graduates of each generation.

3.2 Implementation means

Regarding the first objective, the preconditions for its fulfillment are: completion and maintain updated the magistracy human resources database; the implementation of some midterm and long-term forecasts regarding the exits from the system and the development of an appropriate human resources policy.

A second set of measures aims the stabilization of the entrances into the system, so that it is permanently ensured a correct dimension of the N.I.M (costs, spaces, trainers), as well as an equitable access to the superior levels of jurisdiction, regardless of the generation. Thus, are necessary: the establishment of a realistic target (minimal and maximal number of vacancies annually), the creation of a number of tampon/reserve posts, which will allow the amortization of occasional imbalances caused by the exits from the system, a correct dimension of the number of posts opened for promotion etc.

The achievement of the third objective – the insurance of an objective, transparent, relevant, efficient and equitable feature of the means of recruitment – assumes the adoption of some measures such as:

- The limitation of the maximum number of posts which can be occupied by extraordinary recruitment means (for instance, no more than 30% of the total number of posts annually opened for competition).
- The insurance of similar standards of difficulty for the admission into magistracy, regardless of the procedure followed and the target group of candidates.
- Rethinking the examination for the admission into magistracy, such as to verify as many as possible psychological elements from the candidate's profile and the weight shown in the profile (the reduction of the weight of the tests of law knowledge and memory skills and the increment of those which test the abilities and attitudes, including general culture and linguistic competences).
- The professionalization of the development of examination subjects (establishing a theme, selection of a team of specialists who will continuously work and concluding a collaboration with them, applying these subjects in examinations, creating a database of exam subjects, development of partnerships with institutions specialized in the development of exam subjects etc).

The last objective is probably the most difficult to be achieved in the context of the immediate financial advantages that the lawyer's profession can offer for graduates and depends, without a doubt, on the improvement of the image of justice and of the material and financial conditions attached to the statute of magistrate. Among them, can be adopted other measures, such as:

- The development of long-term partnerships between the National Institute for Magistracy – law schools, which will assume promoting campaigns in universities, the possibility of training stages into magistracy for students and
- An increased transparency, objectiveness and predictability of the exam for admission into magistracy.

Conclusions

Aiming the consolidation of the integration of Romania into the "*European Area of freedom, security and justice*", in which the preoccupations on the quality are constant and durable, the Romanian judicial system by the mechanisms offered by the human resources management is in a process of reformation and modernization, which assumes a resize of the judicial organizations so that these will be able to answer in a more efficient way to the requirements of the society, corresponding to their role to insure justice.

Though the admission into magistracy of judges and prosecutors is made by competition, based on their professional competence, skills and reputation, the recruitment means does not cover the need of personnel, nor does it insure justice above all suspicions. Even more, it is necessary a rethinking of the examinations for the admission into magistracy, so that it will test as many elements as possible from the psychological profile of the candidate and in the weight indicated by the profile, the diminution of the tests verifying law knowledge and memory skills and the appropriate increment of the test verifying abilities and aptitudes, including general knowledge and linguistic competences.

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GENERAL ASPECTS REGARDING THE PRIOR DISCIPLINARY RESEARCH

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Abstract
Disciplinary research is the first phase of the disciplinary action. According to art. 251 paragraph 1 of the Labour Code no disciplinary sanction may be ordered before performing the prior disciplinary research.These regulations provide an exception: the sanction of written warning.
The current regulations in question, kept from the old regulation, provides a protection for employees against abuses made by employers, since sanctions are affecting the salary or the position held, or even the development of individual employment contract.
Thus, prior research of the fact that is a misconduct, before a disciplinary sanction is applied, is an essential condition for the validity of the measure ordered.
Through this study we try to highlight some general issues concerning the characteristics, processes and effects of prior disciplinary research.

Keywords*: disciplinary misconduct, disciplinary sanctions, prior research, liable to disciplinary action, sanctioning decision.*

Introduction

According to Art.251 paragraph 1 of the Labor Code, no disciplinary sanction, except the written warning can be ordered before the prior disciplinary research.

In the same way, a series of normative acts regarding work reports provide the obligation of doing a disciplinary research, before taking disciplinary measures.[1]

This disposition of the Labor Code is justified by the protection of employees against the discretionary power of the employer, especially because the most severe disciplinary sanction consists in the termination of the work contract. Since a prior research is not done, the sanction cannot be individualized and its disposition discretionary, with no legal basis.

In such a way the Constitutional Court ruled, by decision no. 95/2008[2], stating that "juridical work reports have to be held in a legal surrounding, in order for the rights and duties and also the legitimate interests of both sides to be respected. In this scenery, disciplinary research prior to enforcing the sanction mostly contributes to the prevention of abusive measures, illegal or without proof, disposed by the employer, taking advantage of its dominant situation.

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[1] Law 188/1999 regarding the status of public servants, Art.78, paragraph 3: "disciplinary sanctions cannot be enforced except after a prior inquiry of the deed committed and after the public servant's hearing";

Law 303/2004 regarding the status of judges and prosecutors, Art.101: "disciplinary sanctions are submitted at the sections of the Magistrate's Superior Council, under the conditions of its laws";

Law 317/2004 regarding the Magistrate's Superior Council, Art.147: "in view of exercising disciplinary actions it is mandatory the accomplishment of prior inquiry, which is submitted by the holder of this action";

Law 567/2004 regarding the status of specialized auxiliary personnel of the courts and prosecutions connected to it, Art.87: "in the case in which there are clues of disciplinary deviations, the leaders of courts or of prosecutors connected to them, foreseen in Art.86, shall start the prior inquiry", etc.

[2] Published by Official Monitor of Romania, part I, no.153 from 28th February 2006.

The conditioning of enforcing disciplinary actions by making prior researches does not diminish at all the disciplinary responsibility of the employees and does not give them any privileges. In the situation in which the work conflict triggered by enforcing disciplinary sanctions is required to be solved in a judicial court, both parties benefit of the principle of equality of arms, each having at their disposal the same procedural means and guarantees which govern the full exercise of the right of defense and the right of a fair trial".

Article 23, paragraph 11 of the Constitution states the presumption of innocence, presumption applicable in penal matters, and by analogy the presumption also applies in the disciplinary field, its compliance being mandatory.

Stating the disciplinary deviation is as such the result of an investigation conducted by the employer named by the Labor Code: *disciplinary inquiry*. Not doing such an analysis by the employer leads to the absolute nullity of the taken measures. As such, in the case in which the courts are notified, they "will state the nullity of the decision to terminate the work contract, and as a consequence, they will admit the appeal and will issue the occupation of the former position"[3], observation which will be done without the court going further into the problem, because doing the prior inquiry is an imperative condition foreseen by the regulations of the labor right.

1.The authorities which are competent to do a disciplinary inquiry

Regarding the authorities competent to do a disciplinary inquiry, the Labor Code makes no reference. Still it provides, in Art.271, paragraph 1, that "the employer has disciplinary prerogative, having the right to enforce, according to the law, disciplinary sanctions to his employees each time he states that they have had disciplinary deviations".

It does not do, at the same time, any distinction between the employer – juridical person and the employee – physical person. Or, the category of juridical persons includes: commercial societies, autonomous administrations, national societies and companies, budgetary units, etc, which could not directly, between themselves, as juridical persons, apply disciplinary sanctions. But, all these juridical persons have lead authorities, (collegial and also individuals)[4].

In the case of physical person employers, it is obvious that he is the only one who can do the disciplinary inquiry and who can enforce sanctions.

As regards to juridical persons, these have at their disposal leading bodies, the most important role in doing the disciplinary inquiry, establishing and enforcing sanctions falling to the single individuals in leadership, no matter their positions: director, general director, administrator, etc. They have general competence in the matter, being able to apply any disciplinary sanctions. The competence of single persons in leadership results, mainly, from legal, statuary or contractual dispositions, according to which they represent the link between physical and juridical persons, and, secondly, from those who provide their prerogative to organize the selection of new employees and dismissal of personnel. Considering these facts it is obvious that they also have competence in disciplinary inquiry.

The law also foresees the possibility of delegating attributions in concern to discipline, the single person in leadership being able to delegate one of his subordinates to enforce even the harshest of sanctions, firing.

The employer can assemble a discipline commission to establish prior inquiry and to propose the enforcement of a sanction, which will be established and enforced by the employer.

[3] Plenum of the Supreme Court, guidance decision no.5/1973, paragraph 2, in *Culegerea de decizii a anului 1973*, p.14 – 16.

[4] Alexandru Țiclea, *Tratat de dreptul muncii*, Edition V reviewed. (Bucharest, Universul Juridic Publishing, 2011), p.789.

From this commission can also be part, if it is required, a representative of the syndicate from which the employee is part of.

In the case of certain categories of employees, the law states the organization of special discipline committees.

As such, the Education Law no.1/2011 states for pre-university teaching personnel a disciplinary inquiry commission competent in the matter, and for university teaching personnel, analysis and ethics commissions.

In the case of judges and prosecutors, according to Law 317/2004 regarding the Magistrate's Superior Council, modified and republished, comes into effect the discipline commission of the Magistrate's Superior Council, which initiates disciplinary action.

As regards to attorneys, Art.72 of Law 51/1995 states that within each bar it is organized and functions a discipline commission. This discipline commission judges the disciplinary deviations done by attorneys of that specific bar, and is formed of three members.

At a national level, in the case of the Union of Romanian Attorneys, the Superior Discipline Commission comes into effect.

2.The procedure of researching disciplinary deviations

Actual prior inquiry starts with the notification of the employer with the commission of a disciplinary deviation by one of its employees.

The employer can be informed by any person who has knowledge of such a fact or can act ex-officio.

After he was informed of the deviation done by one of his employees, the employer empowers a commission to make the prior inquiry. The Commission can be made especially for this purpose, through internal regulations or by any act of the employer.

In order for the inquiry to be genuine, it is mandatory for the employee to be summoned. According to Art.251, paragraph 2, "in concern to the development of the prior disciplinary inquiry, the employee will be summoned in writing by the person empowered by the employer to make the inquiry, stating the object, date, time and place of the meeting."

As it results from these legal depositions, the convocation will be made mandatory in a written form. If the employee is at its place of work and is brought to notice verbally of the reasons of the inquiry, the legal obligation of convocation is not accomplished, because the law does not distinguish in such a way[5].

In a way, we understood that "under the aspect of convocation, the legislator provides only that *it be made in writing*, not being necessary to make proof of a warrant, recommended letter with confirmation on arrival, as it is foreseen, under the sanction of absolute nullity, where the law does not distinguish, neither the interpreter can, adding in extra other conditions than those who were brought to the attention of the legislator".[6]

A "convocation note", which does not have the elements provided in Art.251, paragraph1 of the Labor Code, through which the employee is invited to e meeting which has the purpose of analyzing his activity and is in no way a disciplinary inquiry of his, dose not fulfill the conditions enforced by the law.[7]

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[5] Bucharest Court of Appeal, section VII civil and for causes regarding work conflicts and social security, decision no.1892/R/2007, in Lucia Uță, Florentina Rotaru, Simona Cristescu, *Codul Muncii Adnotat*, vol II. (Bucharest, Hamangiu Publishing, 2009), p.542.

[6] Constanta Appeal Court, civil section, for causes with minors and family, as well as for causes regarding work conflicts and social security, dec.no.72/CM/2007, in Alexandru Țiclea, *Tratat de Dreptul Muncii*, Edition V reviewed. (Bucharest, Universul Juridic Publishing, 2011), p.793.

[7] Bucharest Appeal Court, section VII civil and for causes regarding work conflicts and social security, dec.no.2634/R/2006, in Lucia Uță, Florentina Rotaru, Simona Cristescu, *Codul Muncii adnotat*, vol.II. (Bucharest, Hamangiu Publishing, 2009), p.544.

The reason for which the legislator, in Art.251 of the Labor Code, inserted the requirement of a written notice, by stating the object, date, time and place of the meeting, was that of giving the employee the possibility to prepare a defense and the evidences knowing the fact of which he is investigated for and which has to be communicated to him.[8]

In practice and in doctrine it is shown the existence of two ways regarding the communication of the action of being summoned:[9]

- *The first*, consists in the direct handing of the document to the summoned employee, which assumes his written signature of acceptance in the employers books (normally, on a copy of the convocation);

- *The second*, in the case of refusal to receive or the absence of the employee from the building, the convocation will be made through a recommended letter at the domicile or residence which the employee gave to the employer. Also an official report can be made in which it is stated the refusal to receive.

As regards to the term of convocation for the employee's disciplinary inquiry, the Labor Code does not establish any, prior to the date established for doing the inquiry. But, the employer has to fall within the terms provided by Art.252, paragraph 1 of the Labor Code. According to this legal disposition, the employer has to emit the sanction decision in term of 30 monthly days from the date in which he became aware of the disciplinary deviation, but no later than 6 months from that time.

The 30 monthly days term is a prescription term, even if the 6 months term is not accomplished.

The two terms are maxim terms for doing the prior disciplinary inquiry and for making a sanction. As such, from the date of notice, which does not have to be outside the limitation term of 6 months, the employer has at its disposal a maximum of 30 monthly days for the whole stage of prior inquiry, which is for establishing the commissions, convocation of the employee, for the actual research and for making the sanction.

We consider this term to be insufficient for such an action, taking into account that from the date of the convocation and to the date established for research has to be a reasonable period in which the employee can prepare a defense. The convocation cannot be handed in the exact day set for the inquiry[10] and neither with a day before.[11]

At the date of the meeting, the employee will present itself in front of the commission, being able to defend itself, presenting evidences and motivations which it considers necessary.

Also, according to Art.251, paragraph 3 the employee has the right to be assisted, at his request, by a representative of a syndicate which he is a member of.

There is also the possibility that that employee is not a member of a syndicate or for a syndicate not to exist in that company. For this reason it would be convenient to use the French juridical solution (Art.L1232-4 Code du travail) in the way that assistance is possible by another employee, at the request of the accused.[12]

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[8] Bucharest Appeal Court, section VII civil and for causes regarding work conflicts and social security, dec.no.2799/R/2005, in Alexandru Ţiclea, *Codul Muncii comentat*. (Bucharest, Hamangiu Publishing, 2008), p.773-774.

[9] Bucharest Appeal Court, section VII civil and for causes regarding work conflicts and social security, decision no.4048/R/2005, in Lucia Uţă, Florentina Rotaru, Simona Cristescu, *Codul Muncii adnotat*, vol.II. (Bucharest, Hamangiu Publishing, 2009), p.542.

[10] Bucharest Appeal Court, section VII civil and for causes regarding work conflicts and social security, decision no. 6350/R/2009, in „*Revista română de dreptul muncii*", no. 1, (2010):114.

[11] Bucharest Appeal Court, section VII civil and for causes regarding work conflicts and social security, decision no.235/R/2008, in Lucia Uţă, Florentina Rotaru, Simona Cristescu, *Codul muncii adnotat,* vol. II, (Bucharest, Hamangiu Publishing, 2009), p.546

[12] Ovidiu Ţinca, "Observatii referitoare la concedierea disciplinară pentru abatere gravă", in *Revista română de dreptul muncii*, no.6, (2008), p. 39.

In the doctrine there are different opinions as regards to the assistance of the accused by an attorney. As such it is considered that, according to the law, the assistance of the employee by a person outside the unit cannot be possible, even an attorney.[13]

According to another opinion[14], "the employee has the right to be assisted by an attorney, on the grounds of the proclaimed norms for exercising the profession of attorney, this right being superior and distinct to the one in which the employee can be assisted, at his request by a representative of the syndicate of which he part of".

The Labor Code[15] complies with the international rules in matter of human rights and also the Romanian Constitution, as such guaranteeing the right to defense.

The employee has the right to bring all evidences and present all necessary motivations for proving his innocence.

After hearing the employee and analyzing the evidence, the commission will draft a report in which it will mention the results of the prior inquiry, the motivation for which the employee's defense had been rejected, the proposal of sanction or proposal not to sanction as well as the possible sanction. Also it will be noted the employee's absence to the convocation, if it is the case or its refusal to defend itself.

The authority competent to enforce the sanction can take notice of the commission's proposal or can decide on itself after the analysis of the result of the inquiry provided in the act drafted by the commission.

In light of the dispositions of Art.251, paragraph 3 from the Labor Code, the absence of the employee at the convocation made under the law with no objective reason gives to the employer the right to make the sanction, without making a prior disciplinary inquiry.

The above dispositions are very clear as regards to the effect of absence with no objective reason of the employee from the prior inquiry.

But, in the doctrine, the question weather the absence of the employee legally summoned, with no objective reason, is in itself a disciplinary deviation.

The absence for objective reasons of the employee summoned legally to the prior inquiry has as a first consequence the employer's prerogative to make the sanction without doing a prior inquiry. This consequence is in fact an exception from the obligation of making a disciplinary inquiry.

A second consequence is the non-exercise to the right of subjective defense which the employee has. As such, he will no longer be able to formulate a defense and bring evidence to state his innocence, the non-exercise of the right to defense being from its own fault.

3. Individualization and enforcing sanctions

In establishing disciplinary sanctions, the employer has to take into consideration the dispositions of Art.250 of the Labor Code, dispositions which provide that the employer establishes the disciplinary sanction applicable in report to the severity of the disciplinary deviation done by the employee.

Also, the following aspects have to be taken into consideration:

a) the surroundings in which the act was committed;

b) the employer's degree of guilt;

c) the consequences of the disciplinary deviation;

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[13] See:Alexandru Țiclea, *Tratat de dreptul muncii*, Edition V reviewed. (Bucharest, Universul Juridic Publishing, 2011), 795.

[14] Ștefan Naubauer, "Observatii privind dreptul salariatului de a fi asistat de avocat în cursul cercetărilor disciplinare prealabile", *Revista română de dreptul muncii*, no.2, (2010), p.92.

[15] Art 251 paragraph 1 of the Labor Code.

d) overall behavior at the work place;

e) possible disciplinary sanctions priory suffered by him.

According to the legal rules, a sanction cannot be established arbitrarily by the employer, who has disciplinary prerogative, but respecting in all the conditions shown above. The sanction will have to be individualized taking into account the criteria stated by the law in order for the preventive role of the disciplinary responsibility to be accomplished.

For example, when the employer applies a sanction "to severe in comparison to the gravity of the disciplinary deviation done by the employee, taking into consideration its overall behavior at work and the fact that he has not been disciplinary sanctioned before" will determine the court to replace the sanction enforced with an easier one (for example 10% per month with a written warning – Bucharest Appeal Court, section VII civil and for cause regarding work conflicts and social security, decree no.3670/R/2007)[16].

The sanctions provided by the Labor Code are in a gradual order, from the smallest one – written warning, to the harshest one – the termination of the work contract.

According to the criteria showed above, the employer can set one of these sanctions, which has to be proportional to the gravity of the deviation. Still, it will be taken into account the extenuating circumstances like for example the exemplary behavior and the lack of other deviation until that time.

As such, it is noticed that although the employee did undeniably severe deviations, in order to attract an even disciplinary sanction, breaking the rules of behavior at the place of work and work discipline, still the court decided that for that person who, for 23 years since he worked there, had correctly fulfilled his tasks and had never been sanctioned before, the gravest disciplinary sanction is not justified.[17]

According to Art.249 of the Labor Code, the employer cannot decide the measure of the disciplinary sanctions, these being totally forbidden by the dispositions of paragraph 1 of the mentioned article. This legal disposition defends the employer from the dominant position which the employer has, the latter not having a discretionary power in matter of disciplinary responsibility.

Another guarantee of the balance between work reports is instituted by paragraph 2 of article 249. As such, it is forbidden the enforcement of more sanctions for the same deviation. The employee will be sanctioned in only one way, proportional to the gravity of the deviation.

In the doctrine[18] it is shown that when the Code of conduct of the profession is not respected or deviations regarding the profession are made, such an illicit fact *will attract a double disciplinary sanction*.

4. The sanctioning decision. The report between the commission's proposal of disciplinary inquiry and the juridical act of sanctioning

The result following the actual disciplinary inquiry done by the disciplinary commission will be recorded, after the employee will be heard and the evidences will be analyzed, in a report, in which will be also mentioned, the motivation for which the employee's defense had been rejected, the proposal for sanction or the proposal not to sanction him and also the possible sanction. Also, it will be noted the absence of the employee to the convocation, if it is the case, or refusal to defend itself.

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[16] Alexandru Țiclea, *Tratat de dreptul muncii*, Edition V reviewed. (Bucharest,Universul Juridic Publishing, 2011), p.800.

[17] Pitesti Appeal Court, civil section, decree no.274/2002, in *Revista romana de dreptul muncii*, no.1, (2003): 126 – 126 from Alexandru Țiclea, *Tratat de dreptul muncii*, Edition V reviewed. (Bucharest, Universul Juridic Publishing, 2011), p.800.

[18] Alexandru Țiclea, *Tratat de dreptul muncii*, Edition V reviewed. (Bucharest, Universul Juridic Publishing, 2011),p. 801.

The disciplinary inquiry procedure done by the commission will not void the employer's right to exercise its right provided by Art.40, paragraph 1 letter e of the Labor Code, which is the right to establish the committed disciplinary deviations and to enforce the appropriate sanctions, according to the law, the collective work contract applicable and the internal regulation.

As such, the employer can take into consideration the commission's proposal or can decide on its own after the analysis of the inquiry's result provided in the act drafted by the commission.

As a consequence to this analysis, the employer's decision will be seen in the sanction of the employee, if the case calls for it.

Paragraph 2 of article 252 of the Labor Code provides the conditions of validity of the sanctioning act, called by the legal rules a "decision".

Under the sanction of complete nullity, the decision of sanctioning has to include the following elements:

a) description of the fact which constitutes a disciplinary deviation;

b) stating the provisions from the statute of personnel, internal regulations, the individual work contract or the applicable collective work contract which were broken by the employee;

c) the reasons for which the formulated defenses by the employee were dismissed during the prior disciplinary inquiry or the reasons for which , under the conditions provided by Art.251, paragraph 3, an inquiry was not done;

d) the rightful ground on the basis of which the disciplinary sanction is enforced;

e) the term in which the sanction can be contested;

f) the appropriate court to which the sanction can be contested.

From the legal dispositions mentioned above it is to be understood that for the legality and validity of the sanctioning decision it is required to include all mentioned elements, condition *sine qua non* for the mentioned aspects. The lack of one of them will mean the nullity of the sanctioning decision by the employer.

As regards to the absolute nullity which appears in the case of not respecting all elements of the sanctioning decision, it is considered[19] that "this nullity has the character of an express nullity, in which case the law develops a presumption *juris tantum* of harm, as so its beneficiary does not have to prove the injury, but only the lack of observation of legal forms. The character of the legal rule is imperative, and breaking it most definitely draws the sanction of absolute nullity".

The decision has to contain the description of the deed which constitutes disciplinary deviation, respectively, what the deed is, the way in which it was committed and eventually the aggravated circumstances or, on the contrary, extenuating. By this description we have to point out the essential aspects which lead to the conclusion that the employee's deed was done in connection to his work and in violation of the rules which commit him to a certain behavior.

Beside the detailed description of the deed done by the employee, the decision will include the date of the action[20], in order to verify the legal terms regarding the disciplinary action.

Resembling the acts emitted by the courts regarding the solving of conflicts with which they are invested, and also to the requests of summons, the labor legislation provides for the decision of sanction the motivation in fact and also in right.

If the in fact motivation is done through an as detailed description as possible of the deed, the in right motivation is done by showing the provisions which were broken by the employee.

In practice[21] it was shown that the "generic mention of the intern regulation, without individualizing an express disposition whose violation draws the qualification of grave disciplinary

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[19] Galati Appeal Court, section work conflicts and social security, dec.28/R/2007, footnote 7 from Alexandru Țiclea, *Tratat de dreptul muncii*, Edition V reviewed. (Bucharest, Universul Juridic Publishing, 2011), p.804.

[20] Bucharest Appeal Court, section VII civil and for causes regarding work conflicts and social security, decree no.718/R/2007, in Lucia Uta, Florentina Rotaru, Simona Cristescu*, Dreptul muncii.Raspunderea disciplinara. Practica judiciara*. (Bucharest, Hamangiu Publishing, 2009), 2p.83.

deviation of the employee, does not have to complement the request provided by Art.268, paragraph2 letter b (the actual Art.252, paragraph 2, letter b) of the Labor Code".

This request is necessary in order for the court to verify whether the employee's deed does or does not constitute disciplinary deviation.

The decision of sanction will also include the reasons for which the defenses formulated by the employee during the prior disciplinary inquiry were removed or the reasons for which the inquiry was not made.

Stating these reasons constitutes a guarantee of the fundamental right to defense which the employee has.

But if the employee refuses to formulate a defense this must be mentioned in the act drawn by the committee as well as in the sanctioning decision.

Also, in the situation in which the employee confesses the deed charged with, the employer is no longer forced to mention why the employee's defense was removed, because they never existed.[22]

The Labor Code provides also that the rightful grounds on which the sanction is enforced, the term in which it can be contested and the court in which the contestation can be made.

In order to clarify these dispositions, the Labor Code provides in paragraph 5 of the in question article, the duration in which the employee can address the competent courts in order to contest the sanctioning decision, more exactly 30 monthly days from the starting date.

As it is noticed, the legislator did not specify a certain court but used the term of "competent court", resorting to the rules of civil procedure, common rules, in order to establish this court.

As regards to the duration in which the sanctioning decision can be contested, the moment from which it starts to develop is the date on which the employee is notified.

In this regard, the Labor Code establishes in Art252, paragraph 3 that the sanctioning decision will be communicated to the employee in at most 5 monthly days, from when it was emitted.

The date from which the sanctioning decision comes into effect is not the date in which it was emitted, but, according to the same dispositions of the Labor Code, the date when it was communicated.

From these dispositions we deduce that not communicating the decision draws the lack of its effects, the communication date being also the date in which the employer can proceed towards the implementation of the sanction and also the date when the 30 days term in which the employee can contest the sanctioning decision begins.

If the decision is not communicated within 6 months from the starting date, the employer looses the right to enforce the sanction, the decision becoming void.

The communication will be handed personally to the employee, with a receiving signature, or, in case of a refusal, a recommended letter, at the domicile or residence communicated by the employee (article 252, paragraph 4 of the Labor Code).

If new elements emerge, in favor of the employee, before a competent jurisdictional authority can give a ruling, the employer can revoke the sanctioning decision, the retraction producing retroactive effects, from the date at which it was issued.

In practice was raised the exception of unconstitutionality of the text of the analyzed article in this subsection. The Constitutional Court[23] stating that "this text is placed among those which have

[21] Bucharest Appeal court, section VII civil and for causes regarding work conflictes and social security, decree no.1857/R/6 June 2007, not published, in Lucia Uta, Florentina Rotaru, Simona Cristescu, *Dreptul muncii. Răspunderea disciplinară. Practică judiciară*, (Bucharest, Hamangiu Publishing, 2009), 281.

[22] In such a manner ruled also the Pitesti Appeal Court, section for causes regarding work conflicts and social security, minors and family through decree no.757/R-CM/2008.

[23] Through decree no.319/2007, published in Monitorul Oficial al Romaniei, Part I, no.292/29 March 2007.

as a purpose to ensure stability in work relations, their ongoing in legal conditions and respecting the rights and duties of both parties of the juridical work report. At the same time, they are meant to insure the defense of legitimate rights and interests of the employee, taking into consideration the objective dominant condition of the employer in the ongoing work reports.

Enforcing disciplinary sanctions and, especially, the termination of the work report from the single desire of the employer are permitted if there are respected certain basic conditions and strictly regulated in the work legislation, with the purpose of preventing eventual abusive conducts from the employer's part.

The mentions and statements which strictly have to include the decision to enforce disciplinary sanctions have the role, first of all to correctly and completely inform the employee regarding the rightful facts, reasons and grounds for which he is being sanctioned, including the means of attack and the terms under which he has the right to state the validity and legality of the measures disposed at the single desire of the employer.

The employer, because he has all the data, evidences and information on which the respective measure is founded, has to make proof of the validity and legality of that measure, the employee being only able to fight them through other pertinent proofs. As such, the mentions and precisions provided by the law are necessary and for the courts, in regards to the legal and grounded settlement of any upcoming litigation determined by the employer's actions."

Conclusions

Making a disciplinary research is an imperative condition as regards to the disciplinary responsibility of the employee; without this stage disciplinary actions cannot be enforced.

The dispositions from the Labor Code regarding disciplinary inquiry are justified by the employee's protection against the discretionary power of the employers, especially because the most severe disciplinary sanction is of terminating the individual work contract. Because prior inquiry is not done, the sanction cannot be individualized and its arrangement is discretionary, without legal grounds.

The procedure of disciplinary inquiry includes more mandatory stages: notifying the employer, be it from the office by the person who has knowledge of a deviation; the writing convocation of the employee; drafting the report by the commission to include the conclusions of the inquiry and proposal; emitting the decision to sanction, if it is the case, by the employer.

Within the actual research the employee can present itself in front of the commission or not. The absence for objective reasons of the employee summoned legally to the prior inquiry has as a first consequence the employer's prerogative to decide the sanction without a prior inquiry.

Before issuing the sanctioning decision, the employer has to individualize the enforced sanction. In establishing the disciplinary sanction, the employer has to take into consideration the dispositions of Art.250 from the Labor Code, dispositions which foresee that the employer establishes disciplinary sanction in report to the gravity of the disciplinary deviation done by the employee.

According to article 249 of the Labor Code, the employer cannot decide the measure of the disciplinary fines, these being strictly forbidden by the dispositions of paragraph 1 of the mentioned article. Another guarantee of the balance between the work reports is instituted by paragraph 2 of article 249. As such, it is forbidden the enforcement of more sanctions for the same deviation.

The employer will decide the enforcement of disciplinary sanctions through a decision in a written form, in term of 30 monthly days from the date on which he became aware of the deviation, but no more than 6 months from that time, according to article 252, paragraph 1 of the Labor Code.

The 30 days term and the 6 months term are prescription terms, and can be interrupted or suspended.

From the legal dispositions of article 252 we understand that for the legality and validity of the decision to sanction, this has to include all the mentioned elements, a *sine qua non* condition for

the mentioned aspects. The lack of one of these will lead to the absolute nullity of the decision to sanction emitted by the employer.

Disciplinary inquiry is a mandatory and necessary stage in order to stimulate the employee's disciplinary responsibility. The conditions for this are strictly provided in the rules of the Labor Code but also by special laws.

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ACCESSORIES OF FISCAL OBLIGATION. LEGAL REGIME

RADA POSTOLACHE[*]

Abstract
The interest – which is an institution typical to private law, has been taken over by the fiscal field and adapted to the specific features of fiscal obligation – being defined by its imperative legal regime, which has at the least the following characteristic elements: unitary character, imposed legal percentage, compulsory demand of interest, automatic application. In order to render responsible fiscal debtors, the lawmaker has reintroduced, as an accessory of fiscal obligation, delayed payment penalties, which have a distinct nature and legal regime, but without the principle non bis in idem being transgressed. Our study aims to establish the legal regime of accessories typical to fiscal obligation, from the perspective of special normative acts, but also of the common law within the field – Civil Code and Government Ordinance No. 13/2011 – by pointing out at the same time both the particular circumstances and procedural ones regulated by the Fiscal Procedure Code, shedding light upon the controversial legal nature of accessories.

Keywords: *interest, delayed payment penalty, delayed payment addition, civil interest, legal regime.*

1. Introduction

The accessories of fiscal obligation are unitary regulated by the Fiscal Procedure Code[1], Title VIII "Collecting fiscal debts", Chapter III "Interests, delayed payment penalties or delayed payment additions", articles 119-124[1], accompanying any instituted obligation which has the specific features of a tax or contribution. Special law currently operates on the basis of three notions: interest, delayed payment penalties, delayed payment additions; although they seem apparently similar, they are different one from another, being at the same time different also from civil interest. The element which sets them apart is their specific legal regime, the three bearing the influence of fiscal field and constituting the object of the current analysis

The present work will establish the legal regime of the accessories of fiscal obligation, by carrying out not only a comparative analysis of them, but also by taking common law as reference point, underlining at the same time the particular features of the accessories in question.

Since there is no complete analysis of the accessories of fiscal obligation within specialized literature, we consider ourselves entitled to elaborate a thorough study of them, on the basis of the elements which provide legal substance to them.

2. Interest

2.1. Definition

Fiscal interest has a specific meaning, different from that attributed to interest by the Fiscal Code[2], Civil Code[3] and Government Ordinance No. 13/2011 – regarding legal remunerative and penalty interest for financial obligations, but also the regulation of some financial-fiscal measures within bank field[4].

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[1] Government Ordinance No. 92/2003, republished in Romanian Official Gazette, Part I, No. 513 from July 31st 2007, called in the present work *Fiscal Procedure Code* or Special law,

[2] Law no. 571/2003 on Fiscal Code, Romanian Official Gazette, Part I, no. 1027 from December 23rd 2003.

[3] Law no. 287/2009 on the Civil Code, republished, Romanian Official Gazette, Part I, No. 505 from July 15th 2011, modified by Law No. 71/2011, Romanian Official Gazette, Part I, No. 409 from June 10th 2011; In relation to Civil Code, we will use in the current work, with the same meaning, the terms: common law

[4] „Romanian Official Gazette, Part I, no. 607 from August 29th 2011.

The Civil Code regulates interest in the context of "payment conditions", at article 1489 called "Interests for amounts of money", which constitutes the maximum general ground of interest; the article in question deals with the legal remunerative interest or the interest-price for a borrowed amount of money.

The Government Ordinance No. 13/2011, article 1 paragraph (5) – the common law in the field of legal interest[5] - attributes a broader meaning to interest, namely: "the amounts calculated in money, with interest title, but also other performances, with any title or name, to which a debtor commits himself, as an equivalent of the capital he uses". According to the normative act mentioned above, interest has two components: a) remunerative interest – "the interest which is due by the debtor having the obligation to give back an amount of money at a certain term and which is calculated for the period which precedes the maturity of that obligation" [article 1 paragraph (2)] – this is in fact the definition attributed to remunerative interest by the Civil Code as well, at article 1489 b) penalty interest – "penalty which is due by the debtor of a payment obligation, for the failure to fulfill that payment obligation at the maturity" [article 1 paragraph (3)]; the meaning attributed to penalty interest is according to provisions of article 1535 of the Civil Code, which regulates "moratory damages in case of payment duties"[6].

The Fiscal Code, at article 7 paragraph (1) point 13, attributes the following definition to interest: "Any amount of money which must be paid or received for the use of an amount of money, irrespective of the fact that it must be paid or received in the context of a debt or a deposit, or in accordance with a financial leasing contract, sale with payment in installments or any sale with payment in installments"; moreover, interest is here conceived as profit or income ("gains out of interests"), in order for the interest tax to be applied.

While the Civil Code regulates interest and damages (moratory damages, compensatory damages), the Fiscal Procedure Code institutes, by providing them with a specific meaning, the following: fiscal debt, delayed payment penalties and delayed payment additions, also called generically:

a) accessory fiscal debt title – signifies the "right to levy interests, delayed payment penalties or delayed payment additions, according to the case and legal conditions [article 21 paragraph (2) letter b) of the Fiscal Procedure Code] – from the perspective of the fiscal creditor;

b) accessory payment obligation – signifies the "obligation to pay interests, delayed payment penalties or delayed payment additions, as the case may be, corresponding to taxes, contributions and other amounts of money due to the general consolidated budget [article 22 letter d) of the Fiscal Procedure Code] – from the perspective of fiscal debtor.

According to the Fiscal Procedure Code, article 119 paragraph (1), interest, just like delayed payment penalty, is due as a result of the fact that "the debtor does not comply with his payment obligations within the maturity term"

Regulated in the context of taxes administration[7], fiscal interest has an application scope limited to the delayed payment of a fiscal obligation – expressed, by definition, in money, and which, according to article 22 of the Fiscal Procedure Code, is represented by taxes, contributions, and so on. In the field of interest is also included the interest for the amounts of money which must be reimbursed or paid back from the budget to a taxpayer, according to article 124 of the Fiscal Procedure Code; this kind of interest is nonetheless particularized at least by the elements

[5] In relation to the features of legal interest within civil law, see Silvia Lucia Cristea, "Cumulul dobânzilor cu penalitățile de întârziere", in "*Revista de drept comercial*" Magazine (6/2004): 87.

[6] According to which: "If an amount of money is not paid ad the due date, the creditor is entitled to receive moratory damages, from the due date until the payment date".

[7] Defined as all the activities carried out by fiscal authorities in relation to: a) fiscal registration; b) declaration, establishment, verification and cashing of taxes, contributions and other amounts of money due to the general consolidated budget; c) settlement of the appeal against fiscal administrative acts [article 1 paragraph (3) of the Fiscal Procedure Code]

(hypotheses[8]) which generate it and by the procedural elements, becoming comparable with the restitution of the amounts of money not due within common law.

Fiscal interest and delayed payment penalties are levied for the fiscal debts which must be paid to the general consolidated budget, except for those debts which are due to the budget of administrative-territorial units and which trigger delayed payment additions.

2.2. Characteristics

The Fiscal Procedure Code institutes a "legal" interest, which is nonetheless different from the legal interest regulated by the Government Ordinance No. 13/2011, and which is characterized, in essence, by the following elements:

a) is mandatory, so that the fiscal creditor cannot give up on it; is quantified through the decision of a fiscal authority, with the exception of article 142 paragraph (6), which provides that the quantification is performed by the enforcement authority, the interest in question constituting an income of the budget to which the main fiscal debt belongs.

b) starts to operate from the day following the maturity term of the fiscal obligation.

Yet, special law also contains some exceptions from the rule mentioned above, regarding: differences of fiscal debt titles (additional or negative, as the case may be), resulting from the amendment of statements or the modification of a taxation decision; taxes and contributions extinguished by foreclosure; taxes, contributions and other amounts of money due to the general consolidated budget by the debtor declared insolvent or who does not have incomes or assets which ca be pursued; the calculation method of the interest corresponding to the corporate tax, resulting after the annual regularization; the calculation method of the interest corresponding to the income tax, resulting after the annual regularization[9];

Fiscal interest is automatically applied, not being necessary for the fiscal debtor to be put on default. Just as it happens in common law, the creditor is not interested in the reasons for the non payment, the simple fact that the maturity term of the main obligation is overcome leading to the automatic application of interest; for that matter, lawmaker establishes an absolute guilt presumption, which cannot be challenged.[10]

c) does not have a ceiling, so that it is calculated and due after the maturity term is reached[11], until the day the fiscal obligation is extinguished (included), for each day of delay;

d) has an unitary level, the same for all fiscal obligations, which is currently of 0,04% for each day of delay; this level is established by law and can be modified only through the annual budgetary laws, law giving up at the regulation of some criteria[12] for modifying interest.

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[8] According to article 117 paragraph (1) of the Fiscal Procedure Code ("Restitution of money"): "There are restituted to the debtor, on demand, the following amounts of money: a) those paid without a debt title; b) those paid in addition to the fiscal obligation; c) those paid as a result of a calculation error; d) those paid as a result of the erroneous enforcement of legal provisions; e) those reimbursed from the state budget; f) those established by means of decisions of judicial authorities or of other competent authorities, according to law; g) those remaining after the performance of the distribution provided for by article 170 of the Fiscal Procedure Code; h) those resulting from the valorization of the seized assets or from seizures by garnishment, as the case may be, on the basis of the judicial decision ordering the abolishment of foreclosure

[9] See for that matter the provisions of article 120 paragraphs (2)-(7) of the Fiscal Procedure Code

[10] See for that matter Daniela Moțiu, "Creanțele bugetare în procedura insolvenței" (I), in *"Revista de drept comercial"* (12/2007): 63-4.

[11] The absence of financial resources for insuring the financing of debtor's activity cannot constitute a reason for removing the fiscal obligation – tax on salaries and accessories of the amounts of money due with such title; for that matter, see the Supreme Court of Justice, Department Contentious-Administrative, December, Decision No. 1093 from March 18th 2003.

[12] Previously, the value of fiscal interest was being established by taking into account the reference interest instituted by the National Bank of Romania, similar to how legal interest is established within common law.

Practically, we are talking about a legal valuation, so that interest cannot be established by the parties of the fiscal legal relation[13];

e) is generalized, being due for any fiscal duty, including for custom duties, not paid at the due time, including for the particular circumstances regulated by articles 120-124 of the Fiscal Procedure Code.

There must not be paid interests or delayed payment penalties for the following: amounts of money due as fines of any type; fiscal obligations – accessories, established according to law; foreclosure expenses; judicial expenses; confiscated amounts of money, but also amounts of money representing the equivalent in lei of confiscated assets and amounts of money [article 119 paragraph (2) of the Fiscal Procedure Code]. The modified legal text mentioned above does nothing but confirming the specificity of fiscal interest, by delimiting its scope to the main fiscal obligation, special law observing the rule *non bis in idem*;

f) it can be subject to the facilities provided for by law, which can be usually granted by the authority administering taxes and contributions, according to special norms; facilities have a regime which is imposed as well, must be justified, not leaving place for the so-called "negotiation".

g) is due also for the period for which were granted postponements or payment schedule files, in relation to the payment of the remaining fiscal obligations

2.3. Legal nature

Interest does not constitute an absolute novelty brought by the Government Ordinance No. 39/2010[14] on the modification of the Fiscal Procedure Code. It also existed under this name in a previous period, being preceded and succeeded by the institution of delayed payment additions – which actually replaces, completely preserving their legal essence – the only different element being the name.

Throughout time, the legal nature of interest was differently understood by specialized literature, as it follows: pecuniary administrative sanction[15], sanction typical to public law[16], given that it is the result of a constitutional duty being transgressed[17]; "patrimonial accountability form, typical to fiscal law"[18]; specific sanction [19] generated by administrative-financial transgressions within financial law; institution with a mixed nature – sanction for a delayed payment, but also partial damage of the state for levying with delay its rights[20].

We include interest and other accessories of fiscal obligations in the field of legal financial accountability[21], which is accomplished by a variety of sanctions, such as: fine, blocking of a

[13] According to common law, parties "can stipulate that the debtor commits himself to a certain performance in case the main obligation is not complied with", through a penal clause concluded for that purpose, according to article 1538 paragraph (1) of the Civil Code. Moreover, according to article 1541 paragraph (1) letter b) of the Civil Code, the court can reduce the penalty when it "is obviously excessive in comparison with the prejudice which could be foreseen by parties at the conclusion of the contract, in relation to the non fulfillment of the contractual obligation". In what concerns the "penal clause mutability", see Liviu Pop, „Despre reglementarea clauzei penale în textele noului Cod civil", in collective, *Noile Coduri ale României,* (Bucharest: Universul Juridic Publ. House, 2011), 279-291

[14] Romanian Official Gazette, Part I, No. 278 from April 28th 2010.

[15] Antonie Iorgovan*, Tratat de drept administrativ*, vol. II, (Bucharest: Nemira Publ. House, 1996), 230.

[16] Mihai Constantinescu, and others, *Constituția României, comentată și adnotată,* (Bucharest „Monitorul Oficial" Publ. House, R.A., 1992), 180.

[17] The Constitution of Romania regulates taxes as main duties, under the form of financial contributions [article 56 paragraph (1)].

[18] Dan Drosu Şaguna, *Drept financiar şi fiscal*. *Tratat,* (Bucharest: Eminescu Publ. House, 2000), 695.

[19] Emil Bălan, *Drept financiar*, 4th edition, (Bucharest: C.H. Beck Publ. House, 2007), 279. Moreover, the author associates fiscal duty with legal disciplinary accountability.

[20] Cristina Oneț, "Accesoriile creanțelor bugetare în lumina Ordonanței no. 61/2002", in "*Revista de drept comercial*" Magazine (5/2002), 88-95.

[21] See Rada Postolache, *Drept financiar,* (Bucharest: C.H. Beck Publ. House, 2009), 337-343.

budgetary credit, suspension from function of the persons who are responsible for committing deeds generating important damages or serious transgressions with a financial character, suspension of debtor's activity, seizures, interest, delayed payment additions, delayed payment penalties and so on, which have a legal regime provided for by the special norms which institute them.

By being included in the field of financial legal accountability, fiscal interest is clearly separated from remunerative interest, while the phrase "the non-payment at the due term generates interests" points the nature of reparatory interest of fiscal interest, having a special legal regime, governed by the provisions of the Fiscal Procedure Code. Understood like this, but preserving nonetheless its specific nature, fiscal interest can be compared with the interest for damages – moratory interest or penalty interest within common law, which is also due after the maturity date of the main obligations is reached. Following this reasoning, we consider fiscal interest as being a specific fiscal institution, reintroduced by the special law, with view to recover the prejudice caused to the general consolidated budget, by not paying in time the amounts of money due as taxes and contributions; it is easy to include fiscal obligation in the definition of legal accountability – "obligation to deal with the consequences emerging from the non observance of some behavioral rules" – here fiscal.

To conclude, as a result of interest being particularly taken over from the field of private law to the field of public law"[22], fiscal interest has a specific identity and legal regime, not being classified by the Fiscal Procedure Code in any way.

3. Delayed payment penalties

3.1. Legal nature

Together with interest, the lawmaker has reinstituted also the obligation to pay delayed penalty interests, at article 120^1 of the Fiscal Procedure Code, by attributing a distinct legal regime to them. Delayed payment penalty sanctions the delayed payment of fiscal obligations, being accordingly regulated – "for each month and/or division of a delayed payment month" ("the delayed payment is sanctioned with a penalty").

Delayed payment penalties have the quality of a typical fiscal sanction and they can be cumulated with fiscal interest ("delayed payment penalties do not remove the obligation to pay interests"), but we cannot talk about two sanctions for the same fiscal transgression, law observing the principle *non bis in idem*. The regulation of delayed payment penalties upholds rather the idea of completely awarding damages to the fiscal creditor, similarly to what happens in common law[23], but delayed payment penalties are not similar to institutions regulated by Civil Code (*damnum emergens and lucrum cessans*, author's note).

Delayed payment penalties are at the same time a legal institution which is different from the legal or conventional penalties within common law, regulated by the provisions of article 1535 and the following of the Civil Code, any analogy for that matter being absurd.

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[22] Silvia Lucia Cristea, "Cumulul dobânzilor cu penalitățile de întârziere*"*, in "*Revista de drept comercial*" (6/2004): 95.

[23] According to article 1531 of the Civil Code, "the creditor is entitled to receive complete amends for the prejudice which he suffered as a result of the non fulfillment of the legal obligation. The prejudice includes the loss effectively suffered by the creditor and the benefit of which he is deprived (…)". According to jurisprudence, the principle of *complete amends* for the prejudice caused by not paying an amount of money at the due term, allows, besides the interest which is due, also the updating of the amount of money which is due, by applying the inflation index. Interest is considered damages – moratory interests, while the amount of money resulting from application of inflation index represents damages – compensatory interests. For that matter, see the Supreme Court of Justice, Commercial Department, Decision No. 4579/2002", comment, Vasile Pătulea, in *„Dreptul" Magazine* (2/2005): 202 – 206.

In brief, interests and delayed payment penalties have a reparatory-sanctioning character, accompanying the payment over the due term of the main fiscal obligation by the fiscal debtor and being integrated to the institution represented by fiscal legal accountability.

3.2. Percentage

Delayed payment penalties regulated by the Fiscal Procedure Code are added to the amounts of money representing interests and have a percentage which is legally determined, according to the delay period (art.120^1 of the Fiscal Procedure Code):

a) if extinguishment is performed within the first 30 days from the maturity date, there are not due and calculated any delayed payment penalties for the main fiscal obligations extinguished; practically, law institutes here a grace term, with the view to motivate debtor to pay his fiscal duty;

b) if extinguishment is performed in the following 60 days, the value of delayed payment penalty is of 5% from the main fiscal obligations extinguished;

c) after the term provided for by letter b) above is reached, the level of delayed payment penalty is of 15% from the main fiscal obligations which were not extinguished.

From a procedural point of view, penalties follow the rules instituted for fiscal interest.

The situations in which delayed payment penalties are due and the particular cases are identical to those instituted for fiscal interest.

4. Special situations regarding fiscal interest and delayed payment penalties

Special law, at articles 120-124, regulates some particular situations regarding the application of interest and delayed payment penalties, thus:

a) Interests and delayed payment penalties for payments performed through bank channel

According to article 121 of the Fiscal Procedure Code, "If banking units do not transfer the amounts of money to which the general consolidated budget is entitled, within 3 working days from the date the taxpayer's account is billed, this does not exempt the taxpayer from the duty to pay the amounts of money in question and causes him interests and delayed payment penalties at the value of those provided for by articles 120 and 120^1, after the term of 3 days" [paragraph (1)]. "In order to recover the amounts of money due to the budget and not transferred by banking units, but also the interests and delayed payment interests provided for by article (1), the taxpayer can file an action against the banking unit involved [paragraph (2)]. The text mentioned above does nothing but reinforcing the principle "accessorium sequitur principalem", but also preserving the quality of fiscal debtor, not only for the amount of money withheld and not transferred by the credit institution, but also for the accessories of that amount of money, the recovery of which can constitute the object of a legal action, according to common law.

b) Interests and delayed payment penalties in case of compensation

According to article 122 of the Fiscal Procedure Code and in the spirit of common law, in what concerns fiscal debts extinguished by compensation, interests, delayed payment interests or delayed payment additions, according to the case, are calculated by the date the mutual debts of creditor and debtor exist all together, being certain, liquid and demandable.

c) Interests and delayed payment penalties due in case the insolvency procedure is opened

Interests and delayed payment penalties due for fiscal debts which emerged before or after the date when taxpayers' insolvency procedure was opened have the legal regime provided for by the law regulating the insolvency procedure (article 122^1 of the Fiscal Procedure Code).

d) Interests and delayed payment penalties relating to taxpayers for which a dissolution decision was passed

As a result of taxpayer's dissolution, ceases the obligation to pay interest and delayed payment interests (which emerged before or after the registration of taxpayer's dissolution decision at the Register office), from the date the decision on taxpayer's dissolution was registered at the

Register office. The text above points out an application of the dissolution effects – taxpayer no longer exists as legal subject and, implicitly, his rights and obligations also cease.

The abolishment of the act which was at the basis of the dissolution registration has the following effect: interest and delayed payment penalty are calculated between the date dissolution acts were registered at the Register office and the date it becomes irrevocable the dissolution decision (article 122^2 of the Fiscal Procedure Code).

e) Interests for payment facilities

Special law includes in the field of facilities: postponements, payment schedule files, exemptions, payment discounts, for the remaining fiscal obligation. According to article 123 of the Fiscal Procedure Code, for the period these facilities were granted are due (only – author's note) interests[24], excepting the accessories mentioned ad article 119 (paragraph 2) of the Fiscal Procedure Code[25].

5. Delayed payment additions

Delayed payment additions, analyzed here, were introduced in the special law, article 124^1, through the Government Ordinance No. 39/2010, mentioned above, having an applicability scope which is limited to fiscal debts titles of local budgets, law instituting nonetheless their exclusivity.

Delayed payment additions have a legal regime which is different from that of fiscal interest and of delayed payment penalties; they constitute an accessory which is also different from delayed payment additions replaced by fiscal interest.

In relation to them, law has instituted an unique quota, of 2%, from the value of the main fiscal obligations not paid at due time, calculated for each delay month or division of a delay month, starting from the day which follows the maturity term and until the amount of money is extinguished.

At this point, law leaves no grace period, sanctioning the non payment starting from the day which follows the maturity term of the main obligation, as it happens with interest, but takes as reference unit "the delay month" or "the division of the delay month", according to the case.

Even if from a procedural point of view is subject to the common provisions of article 119-124 of the Fiscal Procedure Code, instituted for interest and delayed payment interests, the delayed payment addition regulated by article 124^1 the Fiscal Procedure Code has a *hybrid* nature, borrowing elements from both fiscal interest and delayed payment penalty, law pointing out that it has both a reparatory and sanctioning function at the same time.

The existence of delayed payment additions does nothing but complicating the list of accessories of fiscal obligations, creating a non unitary legal regime for them.

6. Conclusions

Fiscal interest – civil interest. We exclude any similarity of fiscal interest with remunerative interest - regulated by Common Law, at article 1489 of the Civil Code, article 1 paragraph (2) of the Government Ordinance No. 13/201. Fiscal interest can be at most associated, according to its function, with penalty interest, which is legal, but without substituting it. Fiscal interest remains an institution typical to public law, bearing the latter's influence.

Fiscal interest – delayed payment penalty. They constitute accessories of fiscal obligation, are automatically applied, are generated by taxpayer's non adequate behavior and replenish the amounts of money due to public budget. Still, the different legal nature of the two separates them sometimes,

[24] See, for the application of article 123 of the Fiscal Procedure Code, Methodological norms for the application of the Fiscal Procedure Code, points 118.1.- 118.6.

[25] According to which: "No interests and delayed payment penalties are due for the amounts of money which must be paid back as any type of fines, fiscal obligations – accessories established according to law, foreclosure expenses, judicial expenses, confiscated amounts of money, but also amounts of money representing the equivalent in lei of the confiscated goods and assets".

as their "tandem" is not generalized for all the situations provided for by special law. Fiscal interest has essentially a reparatory character, while delayed payment penalty has an accentuated sanctioning one, but both of them are integrated to financial legal accountability.

Fiscal interest – interest for the amounts of money restitution. Their names and common percentage, currently of 0,04% for each delay day, cannot lead to their overlapping. The interest for the amounts of money restitution is not mandatory, is not automatically applied and is granted only on the demand of the taxpayer-creditor. The hypothesis which generate such interest, but also the procedural aspects, make it differ essentially from the fiscal interest – due for the non payment of taxes and contributions, reconfirming the inequality of the subjects within the fiscal restitution relation. Moreover, as it is conceived, the interest for the amounts of money restitution has rather the legal regime of a restitution of the amounts of money which are not due within common law.

The existence, *by lege lata*, of the three types of accessories, creates a non-unitary regime of fiscal obligations: some may trigger interests, delayed payment penalties, while other only delayed payment additions, according to the public budget entitled to the debt title which generates such accessories. Moreover, the existence of delayed payment penalty and the fact that the latter is cumulated with interest, lead to an elevated value[26] of the accessories due, much greater than legal interest.

By lege ferenda, we plead for the unification of the three institutions analyzed in a common concept, which should be ideally called "delayed payment addition" and not be differentiated on budget categories, by observing, naturally, some particular situations, generated by the specificity of main obligation. Moreover, *by lege ferenda*, in order to render responsible the fiscal authority, we consider that is necessary to institute a legal unitary regime for fiscal interest and for the interest corresponding to the amounts of money which must be restituted by the public budget, if such amounts are certain and demandable.

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[26] In order to see their calculation, see Silvia Lucia Cristea, *quoted works*, 98.

THE USE OF OFFSHORE JURISDICTIONS IN INTERNATIONAL FINANCIAL FITTINGS

DANIELA RADU *

Abstract

Essential legal and financial Structures, sometimes complex, had until recently been small and medium entrepreneurs away from the use of offshore jurisdictions, but the constraints of increasingly heavy taxation of excessive in certain States, you push even those with limited resources to use in these jurisdictions to protect revenue.

The purpose of this research is to analyze the offshore jurisdictions in order to determine the possibilities of use of their disadvantages in order to improve measures to combat tax evasion, as well as for the use of their advantages in order to reduce illegal migration and regular employment of capital through the analysis of specific cases of the use of offshore jurisdictions – Case Frabklin Jurado, The Bank of Commerce and Credit InternationalAmerican Express Bank International.

Scientific novelty and originality of the investigation consists of:

-the identification on the basis of international practice, some offshore jurisdictions specific items in order to reflect their fiscal policies (trade and investment, etc.)

-analysis of cases of the use of offshore jurisdictions in international financial fittings (such as the Bank of Credit and Commerce International; Franklin Jurado; American Express Bank International),

-identification of the impact paradisurilor tax and offshore financial centres of the world economy

– revealing secret financial transactions carried out within the framework of ofssore, research instruments jurisdictions and management techniques of cadrulacestor tax jurisdictions.

It is interesting to be seen through the prism of analysis of economic-fiscal financiare if a competition is beneficial or not for the welfare of States and to what extent this competition will have a say in future developments and tax paradisurilor finanaciare offshore centres.

In conclusion, I appreciate that in order to survive successfully in the global economy of the future, offshore Jurisdictions should promote a healthy tax, competing on the basis of a transparent legislation and to eliminate the possibility of the existence of financial crime, in line with the requirements concerning cooperation in the field of international economic relations.

Keywords: *Offshore Jurisdiction, taxation, financial crime, the world economy, financial strategies*

Introduction

To the context of the globalization of the world economy, the glue created between international tax system and refining strategies financial has created a climate for the optimum development of the offshore jurisdictions, which, due to lax law enforcement and fiscal regime very indulgent, bring a number of advantages of the location.

Purpose of the research is the analysis of offshore jurisdictions in order to determine the possibilities of use of their disadvantages in order to improve measures to combat tax evasion, as well as for the use of their advantages in order to reduce illegal migration and regular employment of capital through the analysis of specific cases of the use of offshore jurisdictions – Case Frabklin Jurado, The International Bank of Commerce and Credit International, American Express Bank, If The Company Enron.

The activities carried out within the framework of the offshore jurisdictions, leading to increased tax avoidance by default, with a particular emphasis on legal, lawful migration and illicit capital, causing financial instability, and by circumvention of financial control, financial crises.

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Academic level, offshore jurisdictions utilization in the context of international financial mechanisms has not been tackled as a study in its own right, but was treated by specialists within the framework of any work that is based on a thorough presentation of the paradisurilor tax and\/or financial offshore centres, such as: George Cristian Buzan, Bisa, Adrian Manaila, Claude Dauphin, Stephen c. r. Munday, etc.

At the same time, some specific cases of the use of offshore jurisdictions and have been treated in a few specialty items, including: Center for Responsive Politics, \"Enron: Other Money in Politics, Les Echos\" Stats, \"Enron: la commission d ' enquete denonceune enrichir les dirigeants machine, the US Senate Report\" Report Kerry Brown \", etc.

Methodology of scientific research is based on the use of methods of analysis and synthesis, as well as to investigate evolutionary events and phenomena. The application of these methods to perform a thorough analysis of the issue under study.

The current method of avoiding tax in a jurisdiction offshore to provide incredible advantages to businesses for the development of a profitable business.

Jurisdictions that are part of the offshore system are characterized by a wide typology of possible entities registered in these locations[1].

Banking secrecy is a tradition for the development and operation of an offshore territory.

In the absence of cooperation regarding the exchange of tax information with foreign countries in general, and to those whose citizens are unlikely to have bank accounts in their country of residence for tax purposes, for the purposes of tax evasion, in particular offshore jurisdictions that reproached them tax law and not merely permissive, is not on the same level with the international regulatory systemthe system by which you can avoid tax evasion technique or that of money laundering.

Fiscal competition among transnational companies, the pace of technical progress and increase the risk of monetary fluctiatiile and the uncertainty of a tax haven[2].

Be it by sovereign countries (Switzerland, Lichtenstein, Luxembourg, Ireland, Monaco, Andorra, San Mariono, etc.) territories, either more or less autonomous (Jersey, Cayman Islands, British Virgin Islands, the Bahamas, Bermuda, Barbados, Belize, Panama, etc.), the opacity of the financial-banking sector allows simultaneous mislead, IRS and justice national in the case of non-residents, who consider tax evasion a crimesevere, punishable by the law of their countries (from large fines to jail).

Weak or non-existent tax, political and economic stability, prompting companies and banking and competitive enterprises, respectively, to be installed in offshore territories. The liberalization of the exchange of foreign currency in cash, as otherwise the banking and commercial secrecy are other major advantages that attract considerable fortunes in the territories. A highly developed financial sector in comparison to the size of a country, i.e., the weight function to economic infrastructure, communications and transport, are a guarantee for investments.

Money wasted by the different operators by mechanisms of tax evasion (money laundering), hitting directly in social projects that he rigged countries can develop at the level at which would impose the needs of society, given that most of them are financed from fees and taxes.

In general, states shall cooperate in the field of money laundering, and many of them have adopted stringent standards in this area, but the bank secrecy neridicarea in the guise of \"Confidentiality\", making extremely difficult communication between various foreign jurisdictions and territories, bearing in mind that tax law is very different in the face of the rigged States tax haven[3].

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[1] Cristian Bisa paradisurilor, *Use between tax evasion and tax fraud, legal* (Publisher BMT Publishing House, 2005), p. 92

[2] Radu Buziernescu, *Taxation*, (Publisher Universitaria Craiova, 2009), p.. 129

[3] Z.Ahmed, Identificarea paradisurilor fiscale şi a centrelor financiare offshore, http://www.taxjustice.net/upload/pdf/identifying_tax_havens_jul_07.pdf

The frequency and diversity of transactions used for the purpose of money laundering has become increasingly conplexa, involving certain banking financial institutions as well as non-financial[4].

A classic case for the use of offshore jurisdictions which may not pass necitat is the famous case of Enron[5] who did a great vâlvă in 2001-2002.

Company Enron was founded in 1986 in Houston, Texas, USA, by the merger of the two companies producing natural gas.

The company took advantage of the removal of the Government under the control of the natural gas sector, which took place in the 1980s and started games scenes. The transformation from a producer of natural gas, in an intermediary in energy Affairs did that in a period of just 15 years, the company is located on the 7th place in the rankings of the largest 500 companies in the world[6] with a share of 25% of the world market in electricity and natural gas.

On 3 December 2001, the value of Enron stock at about collapses. 80 billion dollars to 220 million and the company has suddenly declared bankruptcy, though one year before announcing profits of 100 billion dollars. The specialists of the company made misleading public statements, some based on some unreal figures, all of these tactics in order to enforce high taxes to consumers through bold cost operations of getting electricty. At the same time, to maintain a course of actions the company announce huge profits and quarterly internal audits failed to reveal the fraud made by the company. External audits being done by Arthur Anderson that the methods used to try to protect the image of the company Enron[7].

Profits were obtained as a result of partnerships with other companies, the Commission of securities and stock exchange triggered a thorough investigation, and the end of 2001 Enron has reassessed the proceeds last 4 years announcing a reduction of more than 500 mln. $ than earlier.

The results of the surveys carried out have revealed and made by management of the company Enron, 140 managers were involved in fraud with skyrocketing wages cumulatively reaching $ 680 million, and two of them received sentences of 160 years in prison.

As a result of this scandal have been promulgated new laws in the u.s. that attempted a legislative correction of failure, increased control exercised by Government over the Securities and financial reporting.

The main conclusion of this extreme situations in which the company is that full and accurate reporting of financial statements is crucial[8].

One of the most interesting sentences from the USA which is based on the use of fiscal incentives, the paradisurilor was that of Franklin, a Colombian economist Jurado, a graduate of the Hravardului, which not only washing money for Jose Santacruz Londono, the exponent of the Cali Cartel brand, but has developed a very well thought-out scheme for money-laundering. Jurado was arrested in 1990 in Luxembourg, where enforcers confiscated several diskettes with data about 115 bank accounts from 16 locations (from Luxembourg in Budapest) and details of a vast money-laundering scheme[9].

Within the framework of the operation carried out by the famous economist is diferențiau five phases of the scheme that were created in order to legalize the amounts obtained from drug

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[4] George Cristian Buzan, tax havens and offshore financial centres in the world economy conterxtul, (Publisher C.H.Beck, Bucharest 2011), p.110

[5] Center for Responsive Politics, „Enron: Other Money în Politics Stats", www.opensecrets.org/news/enron/enron_other.asp

[6] Fortune's 50, 2001, http://money.cnn.com/2006/01/13/news/companies/enronoriginal_fortune/index.htm

[7] http://manager.euroconta.net/2010/12/inginerii-financiare-frauduloase-cazul.html

[8] Tabara Neculai, Emil Horomnea, Mirela-Cristina, I*nternational Accounting,* (Publisher Tipo Moldova, Iasi 2010)

[9] Financial Action Task Force, "The Misuse of corporate vehicles, including trusts and service providers", 2006, http://www.fatf-gafi.org/dataOCDE/30/46/37627377.pdf

trafficking and to prevent confiscation. The Jury's strategy, phases of money laundering were carefully created, because the goods to pass from a high level of risk to the one below.

The first phase was originally a warehouse, because money was still very close to their origin and so very \"hot\", it shall be carried out in Panama.

The second step consists in transferring money from Panama in Europe. Jurado coordinate transfer of panamaneze u.s. dollars in American banks in more than 100 accounts of 69 by banks in nine countries: Austria, Denmark, United Kingdom, France, Germany, Hungary, Italy, Luxembourg and Monaco, with deposits between 50,000 and 1 million dollars. This step was followed by the transfer of sums of money in the accounts opened in the name of European citizens – to hide the account holder's nationality, European open under the name such as: Peter Hoffman and Hannika Schimdt, to increased surveillance of allocated accounts opened on behalf of Hispanic or Colombians.

The last stage represent the return of funds in Colombia – through investments by companies in the Legal Affairs of facade of Santacruz, such as: restaurants, construction companies, pharmaceutical companies and real estate.

According to a later report, the Jury had washed around 30 million francs through the accounts opened by the major banks in France. He noted that France deserved attention to and identified the French financial institutions that were accessible to money laundering. The highest score earned him, then Austria Hungary (because it wanted the Western capital) and the Channel Islands (which were a tax haven)[10].

An extremely important role in the economy of a tax haven is banking. In general, tax havens, develop a policy to encourage foreign banking activities, distinguishing legal regime for residents and non-residents[11].

In July 1991, over 12 billion dollars, representing assets of BCCI – were confiscated after investigators discovered evidence of widespread fraud. The Bank's collapse was not a surprise, but he was already provided. Checks were made on driving a few years in the United States and United Kingdom, but the actions taken by the Bank and the collapse of Bank inspectors have caused great shock waves throughout the financial system.

As the results of the investigation were made public, the most shocking was the bankruptcy itself, but the fact that the Bank was allowed as long as the operation without any intervention on the part of Governments and supervisors. The Bank did not discriminate in regards to its clients, providing services to drug traffickers, dictators, terrorists, frauduloşi merchants, arms traffickers and many others. Furthermore, the BCCI has not only worked on a system based on privacy and deception, but it deliberately sold to customers as essential part of banking services[12].

Agha Hasan Abedi founded the Bank for developing countries, at the time of the collapse of the BCCI was known in some circles as the Bank scams and international criminals – Bank of Crooks and Criminals International \".

Corporate structure by splitting, bookkeeping, regulatory controls, auditing, accounting by the intricacies of the internal structures of the BCCI group, he was able to get around frequently and rutinier legal restrictions on the movement of capital and goods.

BCCI was unable to commit or to facilitate a series of crimes, through means including numreoase companies use cover \"shell companies\" (for these companies is to act as a way to launder money or to hide from tax inspectors), exploitation of offshore financial centres and banking paradisurilor and its diverse corporate structure.

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[10] http://offshorestyl.wordpress.com/2011/05/02/criminalitate-financiara-internationala

[11] Sorin Gifei, The payment of taxes using offshore companies and tax havens, in Law Magazine nr. 9\/2008, p. 213

[12] US Senate Report \"Report Kerry Brown\"

Although having its headquarters in Luxembourg, the purpose for which it was founded BCCI (stimulate the developing economies) has been that it is not responsible to a specific jurisdiction or subject to a specific set of national rules.

Surveillance system was weak at that time and this weakness was fully exploited by the Bank, which had divided operations between two auditors, none of whom have access to the picture of its activities, the position of which would have been able to give a true sense of involvement in the Bank and money washings in other forms of fraud and corruption. In addition, the BCCI has used the Cayman Islands and the Netherlands Antilles to create a maze of facade companies to form a curtain to cover the depositors and their activities. Although authorities such as the Bank of England have learned about criminal activity of BCCI, for two years have not made arrangements for closing them.

Most of the money transfers were made by BCCI Overseas, in Grand Cayman. When the new-yorkeze have prompted Bank BCCI to present data in Cayman, they were struck by a stone wall, on the ground of bank secrecy.

Finally, the US authorities have made significant progress in strengthening cooperation with the British Serious Frauds Office. Judge of Grand Cayman, a lawyer in the Midlands-England, appointed by the British Government, made an official visit \"collegiate\", these new Police Department but receiving only part of the information requested.

The company American Express (AMEX, Amexco) was founded in 1850 in New York as a delivery and courier company. Immediately after launch, the company has become the most successful express delivery company in the United States.

American Express has launched in the financial sector in the year 1882 in 1958, due to advances in technology, the company has managed to produce their first \"charge card\" (the predecessor of credit cards). The business has been run very well for this purpose, and now American Express operates in over 130 countries. Even if AMEX mainly focuses on financial transactions, the company is also known for other services, making it one of the largest travel agencies in the world. Moreover, the company is listed on the stock exchange in New York.

In 1974, it launched the blue box logo which has managed to impose over time and today one of the most famous and powerful 10 brands worldwide. In 2000, AMEX, Western Union and a subsidiary of First Data Corp. signed an agreement to send money from an agent of Western Union became possible and ATM with get[13].

To receive money, customers do not need a card. They only need to enter their identification number and the system will confirm the transaction. Datorităcombinației unique identification codes for each transaction, the process is extremmely assured.

First off the service is available only on the US market through a network of 6,000 ATMs of AMEX. After 150 years of existence, the AMEX is today a company with over 72.000 deangajati who achieved a net profit of USD 2.8 billion at 31\/12\/2004. At the end of last year there were almost 52 million cards in circulation carerealizau a volume of 300 billion dollars of transactions throughout the world.

Currently, ALL MAJOR payment cards are charged in 45 national currencies and accepted in approximately cincimilioane of locations in over 200 countries and territories[14].

The scientific study of the practicability of the face could contribute to developing and improving measures on combating tax evasion, as well as for the use of their advantages in order to reduce illegal migration and regular capital concepts of tax haven and tax evasion under the

[13] OXFAM, "Tax havens – Releasing the Hidden Billions for Poverty Eradication", (2000, Oxfam GB Policy). Paper, www.oxfam.org.uk

[14] In 1958, Bank of America headquartered in San Francisco, California, issued BankAmericard. The whole marketplace, californian State is a succesîncă card from the beginning, being the first product of its kind with facilities discovered the statement \"revolving\". Card holders allowed in repayment of amounts drawn with multerate pay monthly fees applied to the balance of the account

internationalization of national economies; the improvement of the methods of combating tax avoidance and reduction or suspension of the escape of lawful and illicit capital; as well as national practices in the application of certain tax advantages arising from the use of offshore jurisdictions.

Internationally it argues that offshore jurisdictions is not a way to tax fraud, but there are still professionals who argue that tax havens are ideal for those who obtain income goals[15].

Through these financial mechanisms and the transfer pricing practice, companies can afford the option of applying the taxation in a given country.

In this way the residents tax (natural persons or legal persons) in a State with high taxes can set up companies in the areas of taxation and benefit their business profits may accumulate in these areas. The owner of these companies may be subject to the laws of restriction of such types of operations (which can affect the effectiveness of these strategies), but a smart texturing shall compass coercive efforts may of these legal provisions. If the company making the distribution of profits, they will be charged at your destination and keeping the profits in the company, taxes are sometimes delayed or even avoided.

Conclusions

The volume of money laundering, and tax evasion techniques achieved through offshore jurisdictions are very hard to quantify, it is therefore necessary that the Member States should act to a reform of the international financial institutions and bodies to improve transperentei of financial flows and avoidance of international financial imbalances.

As a consequence, States with high\/normal taxation came into conflict with offshore financial centres, each side trying to protect their interests, respecting both the rules of international law. Onshore jurisdictions offshore financial centers accused of unfair tax competition and legal rules practice favours operations dirty money-laundering.

We believe that in future, offshore jurisdictions should promote a healthy competing tax, based on the transparency legislation to eliminate the possibility of financial crime as well as the creation of global financial imbalances.

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CONFIGURING THE ROLE OF THE UNITED NATIONS SECRETARY-GENERAL IN THE PEACEFUL SETTLEMENT OF INTERNATIONAL DISPUTES. RELATIONS WITH THE SECURITY COUNCIL AND THE GENERAL ASSEMBLY

OANA-ADRIANA IACOB*

Abstract

In an international context embracing the idealist concepts of harmony, cooperation, structural peace, illegality of war, the United Nations Organization has created a system of peaceful settlement of disputes, based on principles of justice and international law. In this framework, the organs bearing the responsibility of peaceful resolution of conflicts are the International Court of Justice, the Security Council, the General Assembly and the Secretary-General. The latter has a unique position, triggering a spectacular evolution of its role in the maintenance of international peace and security. The challenges of the international environment and the outstanding ways in which they were addressed by the distinctive personalities that filled the function of the Secretary General, creating precedents and influencing its future development, have led to a continuous enlargement of its role. The purpose of the present paper is that of defining the role of the Secretary-General in the system of peaceful settlement of international disputes created by the United Nations, by analysing the relevant provisions consecrated in the Charter and by revealing and explaining the outstanding evolution of this institution, with an emphasis on the relations of mutual influence between the High Official, on one side, the Security Council and the General Assembly, on the other.

Keywords: *peaceful settlement of disputes, Secretary-General, Charter of the United Nations, Security Council, General Assembly.*

1. Introduction

The United Nations Organization proposes a system of peaceful settlement of international disputes that is complementary to the usual means of peaceful resolution, consecrated by the international law. [1]The peaceful settlement of conflicts in the UN system is based, according to the UN Charter, on principles of justice and international law, the organs responsible in this matter being the International Court of Justice, the Security Council and the General Assembly. In addition, the Secretary General's competencies, as well as its influent position and unique role make this institution suitable to international actions of peaceful resolution.

According to the UN Charter, the Security Council is primarily responsible for the maintenance of international peace and security[2] because, due to its selective composition and permanent functioning, it was considered to be more efficient when it came to dealing with potentially dangerous situations and inter-state antagonisms. A dispute can be referred to the Security Council if it has an international character and might constitute a danger to the international peace and security. In order to settle a dispute, the Security Council may adopt non-mandatory resolutions, containing recommendations, based on Chapter VI of the UN Charter. These recommendations may be general or

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[1] "The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice." (Art.33 of the Charter of the United Nations, San Francisco, 1945, available at http://treaties.un.org/doc/Publication/CTC/uncharter.pdf, accessed 08.01.2012, art. 33, para. 1)

[2]Charter of the United Nations, San Francisco, 1945, available at http://treaties.un.org/doc/Publication/CTC/uncharter.pdf accessed 08.01.2012, art. 24

specific. [3]Although not compulsory, these resolutions are politically significant and thus, in light of the general responsibility of maintaining the international peace and security, provided for by the Charter, Member States feel obliged to take into consideration any recommendation made by the Council and to examine in good faith the possibility of conforming to it.

After the Second World War the general mentality was that the most suitable structure, when it came to settling international disputes, was the Security Council, due to its five prominent permanent members. The General Assembly had rather limited attributions in this matter. Nevertheless the Assembly had been endowed with a general competence that allowed it to discuss and make recommendations on any questions within the scope of the Charter or relating to the powers and functions of any organs provided for in the Charter[4].

Although it may be true that, regularly, issues concerning the maintenance of international peace and security are addressed and decided upon within the deliberative organs, it is the Secretary-General who, in fact, has taken most of the initiatives to settle or prevent conflicts which were threatening the international peace. The Secretary-General of the United Nations has had one of the most spectacular evolutions in the history of UN's structures. Its contribution to the peaceful resolution of international conflicts is significant, covering a wide range of actions undertaken in accordance with the authority and prestige of this function. The original manner in which the different personalities that occupied this function addressed the numerous challenges of the international environment has influenced the evolution of this institution, increasing its political autonomy. With the expansion of its political space of manoeuvre towards fields that were traditionally under the jurisdiction of the deliberative organs, new tensions have arisen between the Secretary-General, on one side, and the Security Council the General Assembly and certain Member States[5], on the other. The different personalities who occupied this position have conducted an intense activity of promoting and developing the role of the Secretary-General, while trying to ensure the cooperation with the deliberative bodies, in order to maintain the institutional balance of the United Nations.

Within the institutional framework configured by the UN Charter, having in view the vague wording of the articles establishing the Secretary-General's attributions, leaving room for wide interpretations of its role, and also taking into consideration the constant international challenges that UN has to cope with, one can say that the High Official exercises a certain influence on the deliberative organs' activities. Defining influence as "the performance of an action by an agent that results in a change in some state of another agent" [6], it can be inferred that the Secretary-General's acts of influence on the political organs' actions are responses to the demands and expectations of the latter, as they are defined in a particular international context. It is important to note that any influence exercised by the Secretary-General on the main organs is also based on their acceptance and need. Using available resources consecrated by the UN Charter (such as the wording of a mandated assignment, the right to make oral and written statements before the principal organs, the regular or the requested reports and "the special right" of initiative before the Security Council provided by art. 99) and taking advantage of the neutral stance specific to its function that is often indispensable for the efficiency of the process of peaceful settlement, the office holders have had the

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[3] Raluca Miga-Beşteliu, *Drept internaţional. Introducere în dreptul internaţional public*, (Bucharest:All Beck, 2003), p. 368

[4] Charter of the United Nations, San Francisco, 1945, available at http://treaties.un.org/doc/Publication/CTC/uncharter.pdf, accessed 08.01.2012, art. 10

[5]The Soviet Union ostracized Hammarskjold during his second term for surpassing his responsibilities. The US, in 1993, reminded Boutros Boutros Ghali that he is only the 'servant' of the embers, a view sustained France and the United Kingdom (T.M. Franck, *The Secretary-General's Role in Conflict Resolution: Past, Present and Pure Conjecture,* 6 EJIL (1995), 363).

[6] J. Knight, *On the Influence of the Secretary-General: Can We Know What It Is?*, "International Organization", Vol. 24, No. 3, 1970, p.597

opportunity to leave an imprint on the evolution of their office and of the Organization as a whole as well as on the general world order.

The present paper undertakes the task of defining the Secretary-General's role in the peaceful settlement of disputes by exploring its capacity to influence through means made available by the Charter, taking into consideration the historical evolution of the function and the existing research on the personal leadership styles of the office holders. This study will have in view the relevant literature on the influence of the Secretary-General – for instance, Gordenker's and Rivlin's edited work *The Challenging Role of the UN Secretary-General. Making „The Most Impossible Job in the World"* containing valuable studies on the Secretary-General's role and evolution, and Michel Virally's insightful analysis of the High Official's political role, *Le rôle politique du Secrétaire Général des Nations Unies*, published in 1959 in "Annuaire français de droit international" – as well as the existing research on the relationship between the personal qualities of the office holder and its political behaviour, explored by Kent J. Kille in his work *From Manager to Visionary. The Secretary-General of the United Nations*. The analysis of the function's evolution, from legal and historical perspectives, corroborated with the existing research results on the political behaviour of the Secretary-General will be used to determine the extent to which the distinctive occupants of the function, endowed with different personal features and placed in an ever-changing political context, have identified and used the possibilities to exert influence in the process of peaceful settlement of disputes.

2. The Secretary-General's competencies according to the Charter of the United Nations

The Secretary-General is the head of the Secretariat – UN's administrative and technical service – the chief administrative officer of the Organization, appointed by the General Assembly upon the recommendation of the Security Council, for a 5 – year mandate, with the possibility of renewal. The high importance of this position in the institutional structure of the Organization is apparent even from the appointment procedure. The designation of the chief administrative officer of the Organization implies a major political stake. It is, in fact, a legally organized political act which requires a minimum of consent or, at least, passivity on the side of the permanent Members of the Security Council. The permanent Members, because of their recognized right of veto, have, if not the power to impose their preferences, at least the ability to prevent an application. The different appointments that took place over time illustrate this negative capability and explain the generally neutral position of the states whose nationals have come to occupy this function. [7]

The statute and the powers of the Secretary-General are unique, specific to the Organization, without any equivalent in other international or internal structures.[8] This high official has a strategic position as head of the only international universal organization with a multidimensional purpose. "Through the Secretary-General and its office pass all the interrelations represented by the United Nations Organization."[9]

The Charter sets out the Secretary-General's competencies in a few articles with a rather vague wording. According to article 97 of the Charter, the Secretary-General is "the chief administrative officer of the Organization". Article 98 provides that "the Secretary-General shall act in that capacity in all meetings of the General Assembly, of the Security Council, of the Economic and Social Council, and of the Trusteeship Council and shall perform such functions entrusted to him

[7] A. Pellet, & J. P. Cot, *La Charte des Nations Unies. Commentaire article par article,* (Paris:Editions Economica, 1987), 1310

[8] Magdalena Denisa Lungu, *Rolul organizaţiilor internaţionale în soluţionarea paşnică a diferendelor internaţionale*, (Bucharest: Universul Juridic, 2010), 268

[9] Benjamin Rivlin, *The Changing International Political Climate and the Secretary-General"* in Benjamin Rivlin, Leon Gordenker (eds.) 1993 *The Challenging Role of the UN Secretary-General. Making „The Most Impossible Job in the World" Possible,(* London: Praeger, 1993), 5

by the other principal organs", which, naturally, may include those in the field of the prevention and peaceful settlement of disputes. The same article establishes that the Secretary-General shall make an annual report to the General Assembly on the work of the Organization. Art. 101 states yet other responsibilities of the Secretary-General, establishing its control over the appointment of the Secretariat's staff, while art. 100 emphasizes the necessity of ensuring the independence of the Secretary-General and of the Secretariat's staff from any possible influence of the Member States. However, of all the Charter's provisions, art. 99 is the one that confers the Secretary- General the possibility to exercise its direct influence upon the activities of the Organization, enabling it to bring to the attention of the Security Council any matter which in its opinion may threaten the maintenance of international peace and security.

As a fundamental principle of any administrative structure, the hierarchical power is the faculty recognized to the highest official of the UN structure to ensure the adequate functioning of the secretarial services, the proper execution of the instructions and the overall control of the Secretariat. As head of the administration, the Secretary-General shall prepare and implement the budget, direct the staff, manage assets and represent the organization in front of private or public agencies and bodies, outside the United Nations. [10]

The importance of the manner in which the administrative and representational attributions are accomplished, depending on the political context and the personal features of the office holder, is not negligible. Depending on the international context and on the way each of the occupants of this function has interpreted the role of the Secretary-General, some of them have tried to make suggestions regarding the administrative reform, observing the existing gaps and proposing solutions to redress them. Also, the Secretary-General could use the activities of representation and participation at the meetings of the deliberative organs to try to exercise a political influence and interfere in the decision-making process. On the other hand, some of the Secretaries preferred, for various reasons, to keep a low profile and to limit their activities to the mere execution of the administrative tasks.

In addition to the technical-administrative and representational responsibilities, specific to this function, the High Official undertakes other type of actions as well, in accordance to the Charter's provisions: good offices, mediations, consultations with government representatives, research in various fields, organizing of international conferences, information activities and coordination of peacekeeping operations.[11]

Although, the attributions consecrated by the UN Charter for the Secretary-General seem to have mainly a technical and administrative character, a co-reading of art. 97, representative for the executive-administrative character of this function, art. 98, opening the door to a measure of political responsibility, and art. 99, illustrating its true political, autonomous character in the maintenance of international peace and security, demonstrates the dual nature of the Secretary-General's role, deriving from "a unique mixture of independence and dependence".[12] Thus, the Secretary- General will act as head of the administration in the management of the Secretariat, while, on the international stage and before all UN structures, it will act as a high official vested by the UN Charter with a very special right: a right of diplomatic initiative, of political nature, consecrated in art. 99. In fact, art. 98 entitles the General Assembly and the Security Council to "entrust the Secretary-General with tasks involving the execution of political decisions even when this would bring him – and with him the Secretariat and its members - into the arena of political conflict." The political responsibility implied by art. 98 is different from the political authority accorded by art. 99, but in perfect conformity with its spirit. Of course any political stance taken by the Secretary-General must not depart fro the

[10] A. Pellet, *op. cit.,* 1309

[11] Magdalena Denisa Lungu, *op. cit., p.*269

[12] Howard H. Lentner, *The Political Responsibility and Accountability of the United Nations Secretary-General,* "The Journal of Politics", Vol. 27, No. 4 (Nov., 1965), p.839

concept of "neutrality". Neither art. 98 nor art. 99 could be implemented without "the complement of art. 100 strictly observed in letter and spirit".[13]

The Rules of Procedure of the General Assembly, as well as those of the Economic and Social Council and of the Trusteeship Council have confirmed over time the extensive interpretation of the Secretary -General's competences. Therefore, the Secretary-General shall act in this capacity in all meetings of the General Assembly of the Economic and Social Council and of the Trusteeship Council, but also of their committees and subcommittees. The dispositions of the rules of procedure state the unity of the Secretariat and the primacy of the Secretary-General, regardless of any merger of the subsidiary organs. "Through the Secretary-General pass all communications between the Organization and any of its organs. By performing its attributions, the Secretary-General must do so that the activities undertaken by the different organs form a whole and ensure that this entirety functions in the best conditions and efficiently". [14]

As head of the Secretariat, one of UN's main organs, the Secretary-General disposes of a certain degree of power within the Organization, in the sense that it is endowed with attributions of control over the staff of its office and representation inside and outside of the Organization. "Externally, in the arena of world politics, he may have influence, but he has no real power. He may have influence as a moral voice or because he is well informed, being at the centre of diplomatic activity or because he is able to facilitate contacts between leaders who wield real power."[15] Although lacking any decision-making powers and despite the some-what limited attributions formally consecrated by the Charter, the High Official is still able to influence UN's policy. Through its strategic position, the Secretary-General often has the opportunity to influence the way decisions are taken and implemented in the Organization. Many of the activities that have become nowadays specific to this function, developed in time based on a broad interpretation of the Charter's provisions, triggered by the need to adapt the Organization to new international challenges. Therefore, the Secretary-General's role should not be judged solely in terms of the Charter's provisions as they only establish a framework, a "skeleton".[16]

3. The style of leadership and the degree of involvement in the peaceful settlement of disputes

If the Charter provides an invariable framework for the position of the Secretary-General, a "skeleton" that has not changed yet, the personal profile of the occupant along with the political context in which it operates constitute two variable elements of high importance for the proper understanding of this institution.

"Each incumbent brings to the office a different cultural background, life experience, personality, intellectual acumen, ideology and mode of operation. These factors play an important role in determining the manner in which a Secretary-General functions in any particular international political climate."[17]

The Secretary-General's role in the peaceful settlement of disputes was configured progressively and often on the basis of precedents created by the various office holders through their specific manner of addressing the international issues they had to cope with. Thus, the political

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[13] Eric Stein, *Mr. Hammarskjöld, the Charter Law and the Future Role of the United Nations Secretary-General,* in "The American Journal of International Law", Vol. 56, No. 1 (Jan., 1962), p.14

[14] A. Pellet, *op. cit., p.*1311

[15] Stephen M. Schwebel, Arthur W. Rovine, James Barros and David A. Morse, *A More Powerful Secretary-General for the United Nations?* in „The Amercian Journal of International Law", Vol. 66, No. 4 (September 1972), p.85

[16] Kent J. Kille, *From Manager to Visionary. The Secretary-General of the United Nations*, (New York: Palgrave Macmillan, 2006), 17

[17] Benjamin Rivlin, *op. cit., p.*6

behaviour of each occupant has the power to affect the authority and prestige of the function in a particular context, as well as its future evolution.

Previous researches on the political behaviour of leaders have identified three styles of leadership: managerial, visionary and strategic. Kent J. Kille used these previous findings in order to explore the Secretaries' distinctive ways of interpreting their role within the Organization and on the international arena and the extent to which each of them managed to make a difference in the evolution of their Office.

In order to distinguish between the different types of leadership styles, there have been identified six relevant features: the capacity to react (sensitivity towards the context and analytical abilities), confidence in the personal ability to influence events, need for recognition of efforts and labour, need to relate to others, internationalism (defined as attachment to the UN and desire to protect its values), emphasis on solution identification and task accomplishment.[18] All the office holders possess these qualities, to some extent. But in order to determine which of these traits are predominant for each incumbent and, thus, determine which style of leadership is more fitting, researchers have put to analysis primarily their spontaneous manifestations, for instance statements made during press conferences, focusing less on their previously prepared official discourses. On this basis there have been observed the past incumbents' inclinations towards a particular pattern of behaviour: the managerial style will register higher scores at the capacity to react and need to relate; the strategic style has as predominant features the capacity to react, the confidence in the personal ability to influence events, the need to relate and the internationalism, while the visionary style will focus primarily on the confidence in the personal ability to influence events, the need for recognition of the personal efforts, the internationalism and the emphasis on solution identification and task accomplishment. According to the results of this research, Lie, Hammarskjöld and, then, Boutros-Ghali are predominantly visionary, Thant, Waldheim and Perez de Cuellar are mainly managerial, while Annan is mostly strategic.[19]

Keeping these coordinates, we could determine the various occupants' degree of involvement in the peaceful settlement of disputes and the extent to which each of them contributed to the configuration of the Secretary-General's role. Thus, it has been noted that the managerial style is specific to those incumbents that prefer to receive and execute instructions and less compatible to activities of peaceful settlement of disputes, which imply a greater degree of independence and confidence in the personal ability to influence events. These office holders will limit their involvement in the peaceful resolution of conflicts to merely executing mandated assignments, without any intention to exert influence on the deliberative organs. Any independent initiatives would often be less efficient, lacking the necessary sustained effort.

The visionary style is probably the best suited for activities of peaceful settlement. If managers are ideal executants, visionaries are creators. They prefer independent actions and even when they are mandated an assignment they try to contribute to its shaping and give a personal interpretation to its *modus operandi.* Visionaries always try to exert influence and are in a constant search for solutions to the major issues that affect international peace and security. For instance, Dag Hammarskjöld's personality, the original and creative manner of approaching the international issues of his time, his confidence in UN's mission and values have played an outstanding part in the evolution of the Office, of the Organization, as a whole, and of the world's perception on its role on the international arena. The echo of its actions is still found today in the way some of the attributions of the Secretary-General are shaped.

The strategic style implies a rather moderate desire to influence. Strategists prefer consensus and act cautiously without forcing the events, waiting for the right moment to intervene, so that their

[18] Kent J. Kille, *op. cit., p.*18
[19] *Ibidem*

actions would benefit from a favourable framework that would enhance their efficiency. Strategists opt for a slow, but certain evolution of their demarches.

A brief analysis of these patterns of political behaviour would lead us to the conclusion that the visionary and the strategic styles are more inclined towards an active involvement in the peaceful settlement of disputes, determining in greater measure the evolution of the Secretary-General's role in this field. Nevertheless it is important to note the fact that all the office holders possess features that are specific to each of the three styles and that can be activated in the sense of exerting a specific approach on international issues, when favoured by other factors such as the international context and the general evolution of international law.

3. The Secretary-General's relations with the Security Council and the General Assembly – potential influences of the decision-making process

Having in view the above-mentioned analysis of the incumbents' pattern of behaviour, it becomes obvious that the Secretary- General's relation with the deliberative organs varies in intensity and content, depending on the political context and the individual occupying the position.

Legally speaking, as we have noted in a previous section of this study, and also taking into account the further evolution of the Secretary-General as mediator and provider of good offices (imposed by a reconfiguration of the peaceful settlement of disputes system, as a result of the continuous developments of the international relations) the High Official's attributions in the field of peaceful settlement of disputes derive either from the assignments mandated by the Security Council and the General Assembly (art. 98) or from its voluntary involvement (under art. 99) on its own initiative or at the request of the parties to the conflict.[20]

3.1. Assignments mandated by the General Assembly or the Security Council, under art. 98 of the UN Charter

Considering exclusively the Charter's dispositions, it could be said that the Secretary-General is, normally, an executive body, subordinated to the instructions and decisions of the deliberative organs. The only exception is art. 99 establishing the Secretary-General's initiative function. This article has sometimes been interpreted as providing a specific legal basis for the Secretary's informal political activity. Initially, during the first decade of the Organization's existence, while the Secretary-General was evolving as a valuable agent of peaceful settlement of international disputes, the High Official would most often act under the Security Council's or the General Assembly's mandate.[21]

The further development of this function, based on the extensive interpretation of the Secretary- General's role in the UN's institutional architecture covering areas that were traditionally under the jurisdiction of the deliberative organs, has often generated tensions. The Secretary-General was caught between "the idealism and the hope that find their bright expression" in the Charter's provisions and the national interests of UN members, in particular those of the permanent members of the Security Council, as powerful, influential states, largely sustaining the Organization's financial and constitutional performance.[22] Sometimes, the Secretary-General's missions of peaceful settlement have been obstructed by constraints imposed by the Security Council, the General Assembly or important Member States. Some would argue that, sometimes, these very constraints helped protecting the impartiality and the reputation of the tenure, subject to various pressures.

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[20] Magdalena Denisa Lungu, *op. cit., p.*271

[21] For instance, Resolution 203/14.05.1965 on the Dominican affaire and Resolution 294/15.07.1971 on the conflict between Portugal and Senegal gave such mandates to the Secretary-General.

[22] Simon Chesterman, *Secretary or General? The UN Secretary General in World Politics*, (New York: Cambridge University Press, 2007), p.9

It is important to notice that over the years the number of assignments has grown significantly. The magnitude and the wide range of executive functions entrusted to the Secretary-General have, in themselves, a political significance. In time, it becomes somewhat evident that the Secretary-General, as head of the Secretariat, one of the main UN organs and legally based participant at the meetings of the deliberative organs, is best qualified to execute resolutions, even if the given assignments surpassed the limits of simple administrative services.

When mandated such an assignment, there rise opportunities for the High Official to exercise its own influence on the way a certain situation is approached. Thus, the Secretary-General has "the power to interpret the mandate".[23] Of course, the given instructions can be more or less precise, more or less coordinated, but the Secretary-General often enjoys a certain autonomy in the performance of its attributions. Many assignments, because of their vague wording, leave the Secretary-General a significant freedom of appreciation and, sometimes, even the independence of entirely choosing the means of execution. Nevertheless, the degree of autonomy is highly dependent on the incumbent's personal features. Researchers of the Secretary-General's political behaviour have concluded that each style of leadership is different from this point of view. Visionaries, like Lie and Hammarskjöld, have the tendency to act more autonomous, strategists are more cautious, while managers, like Thant, Waldheim and Perez de Cuellar tend to act carefully, seeking the approval of the main organs. However, it is important to note the fact that each and every one of the Secretaries have contributed to the evolution of the function. Visionaries were the most creative and independent incumbents, leaving behind a precious legacy that was to be developed by their successors.

Placed in various international contexts, the Secretary-General's autonomy has proven to be a useful instrument, ensuring and preserving, as much as possible, the institutional balance and the effectiveness of the Organization. During the Cold War, the Secretary-General would often use its growing political independence in order to mediate the antagonistic positions of the two superpowers. However, through these actions, the Secretary-General often risked to undermine the very authority of his Office, if, for instance, he lost the support of one superpower or if the function itself became the object of an international dispute. Nevertheless, in this turbulent international context, the position of the Secretary-General knew the most spectacular evolution, from Trygve Lie, who founded the independence of the Office, and continuing with Dag Hammarskjöld, who, among other things, trying to avoid blockage of the collective action through the so-called "Peking formula", obtained the autonomy of the Secretary-General in implementing mandates on international peace and security. Also, the second Secretary-General prepared the ground for the establishment of the UN Emergency Force (UNEF), in order to put an end to the Suez crisis in 1956.[24] Seeking a creative use of limited resources – especially military resources - Dag Hammarskjöld, in partnership with the General Assembly's President, Lester Pearson, established UNEF, creating an original pattern for peacekeeping missions, the so-called "Chapter VI and a half" of the Charter, which have actually been used very often ever since. Important developments also occurred during the mandates of U Thant, Kurt Waldheim and Javier Perez de Cuellar, each of them trying to maintain the delicate institutional balance of the Organization.

The end of the Cold War brought an infusion of optimism, of expansive and proactive practice within the deliberative organs. The number of mandates establishing peacekeeping and peace building missions, as well as legal and administrative activities, increased.[25] At the same time, the political space available to the Secretary-General expanded, generating tensions that had to be coped with by the High Official (in particular by Boutros Boutros-Ghali and Kofi Annan).

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[23] Kent J. Kille, *op. cit.,p.* 52

[24] Simon Chesterman, *op. cit., p.*19

[25] For example, in the five years after 1988, as many peace-keeping operations were authorized as in the previous forty-three years. (UN Press Release SG/SM/4748,13 May 1992, at 1-2)

Subsequently, the Secretary-General's efforts to mediate and to ensure the cooperation and the balance within the Organization have not diminished. From the ingrate position of reconciliation agent, caught between the interests of the Western states, facing new challenges to their security, international terrorism and nuclear proliferation, on one hand, and the interests of the developing states, troubled by other issues and having totally different priorities, on the other, the Secretary-General has sought to defuse the inevitable tensions.

In the field of international peace and security, over time, the Secretary-General had to assume increasingly numerous executive functions, while the practice of peacekeeping missions has charged the Secretary-General with responsibilities that were much higher than those initially envisaged by the Charter. In the absence of any tradition or indication coming from the deliberative organs, the founding principles on which these operations were conducted were elaborated by the Secretary-General himself. Many of the aspects regarding the peacekeeping mechanism were developed on the initial principles defined by Dag Hammarskjöld in 1956. Frequently, the vagueness of the mandate prompted the Secretary-General to provide its own interpretation to the resolution and to adapt the operations to the international situation and the local situation. Sometimes, the imprecision of a mandate on a peacekeeping operation triggered serious consequences. For instance, because of the inability of the Security Council and of the General Assembly to properly define the UN mission in Congo, in 1960, when the civil war was imminent and the threats of secession were pressing, Dag Hammarskjöld and his representatives were forced to solely assume the responsibility for the UN action in the field. The whole situation was extremely controversial and led to a serious financial and constitutional crisis within the UN. In this context, the USSR proposed to replace the Secretary-General with a triumvirate, with the risk of importing the antagonisms existing within the political organs into the executive, thus creating a blockage of its activity. Some years later, in 1967, U Thant decided to withdraw the United Nations Emergency Force which was established ten years earlier in the Middle East on the basis of a resolution adopted by the General Assembly without determining any time limit for its existence. The further attacks against the Secretary-General, following this decision, left a deep imprint on his work until the end of his mandate. As a result, peacekeeping operations began to be established for a limited period and subjected to a periodic review and renewal, every 3 or 6 months. Thus, at short intervals, the Secretary- General was to report to the Security Council, recommending the renewal of the Force, if applicable, describing any problems that had to be faced and making suggestions to improve its efficiency and to adapt its objectives to the changing context. Based on this report, the Security Council would make a decision. Thus, the Secretary-General's activity was to be periodically evaluated and its mandate reconfirmed.[26]

In the diplomatic field, the General Assembly and the Security Council have charged the Secretary -General with increasingly numerous and rather vague responsibilities, which, eventually, led to the gradual enlargement of the office's capacity to influence world events and of its independence. Very often, the Secretary was vested with mediation and good offices missions, which tended to fill in the gap created by the inaction of the normally competent bodies. The High Official was sometimes asked to commit to the urgent implementation of resolutions that were adopted years ago, to renew its efforts in order to reach a global solution to issues that were a few decades old, to promote "the implementation of the present resolution" in crisis that were completely beyond UN's capabilities. Often, especially in the context of the Cold War, the only form of action upon which the Member States were able to agree consisted of a Secretary-General's report on the situation that was to become the basis of a new resolution.[27] In such situations, regardless of the leadership style, the Secretary-General had to be more creative than usually and to assume a greater degree of autonomy. This is a double-edged situation as what could lead to the enlargement of its role, could also affect its

[26] A. Pellet, *op. cit.,* 1315
[27] *Ibidem*

credibility, with negative consequences on the long run. Thus, the involvement of the deliberative organs in the sense of establishing rules and limits in the Secretary-General's activity can sometimes have a protective effect.

Confronted with controversial political situations, when receiving assignments from the deliberative organs, Dag Hammarskjöld took an emblematic stance: he addressed the dilemma of the Secretary-General's proper course of action when carrying out its tasks, by invoking the full regard to its international obligations under the Charter and the neutrality of its position, translated in the lack of "subservience to a particular national or ideological attitude." Hammarskjöld believed that in accomplishing its attributions, the Secretary-General should use the varied means and resources made available, of which primarily important are: the principles and purposes of the Charter and the body of legal doctrine and precepts, supplementing the Charter's principles, "accepted by states, generally and particularly, as manifested in the resolutions of the UN organs." In order to reduce the margin of discretion and ensure that its stance is representative for the opinion of the Organization as a whole, the Secretary-General should us constitutional means such as: "consultations with permanent missions of the United Nations safeguarded by diplomatic privacy" and advisory committees, "composed of representatives of the governments most directly concerned and representing diverse political positions"[28]. If even so the Secretary-General inevitably keeps a large area of discretion and risks to become subject of political controversy, Hammarskjöld considers that:

"The international civil servant cannot be accused of lack of neutrality simply for taking a stand on a controversial issue when this is his duty and cannot be avoided. But there remains a serious intellectual and moral problem as we move within an area inside which personal judgement must come into play. Finally we have to deal here with a question of integrity or ….a question of conscience." "... If integrity in the sense of respect for the law and respect for truth were to drive hi into positions of conflict with this or that interest, then that conflict is a sign of his neutrality and not of his failure to observe neutrality – then it is in line, not in conflict with his duties as an international civil servant."[29]

Experience has proved that the deliberative organs must be very careful when mandating an assignment to the Secretary-General. In order to ensure the efficiency of the Secretary –General's mandated assignments and to protect its credibility as an independent negotiator, the deliberative organs should abstain from using the High Official as a messenger when the actual intention is to use force for the settlement of a particular dispute.[30] Also, failure has taught UN the lesson of not giving the Secretary-General assignments which are hopeless because of the obduracy of the parties[31] or of the unwillingness of UN Members to supply the adequate funds and personnel[32] or, simply, because the international community is not really interested in a settlement in that particular moment[33]. Probably the worst mistake that could be made would be to assign the Secretary-General diplomatic functions as a way of shifting responsibility for failure or of dropping uncomfortable issues that some Members wish to forget, in order to create the illusion of action. In such situations, a solution would

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[28] Eric Stein, *op. cit.,* 20-21

[29] *The International Civil Servant in Law and in Fact,* Address by the UN Secretary-General, Dag Hammarskjöld, at Oxford University, May 30, 1961 UN Press Release SG 1035 (May 29, 1961), p.19-20

[30] For instance, the 1992 crisis regarding the British-French-American demands on Libya for the extradition of suspected terrorists involved in two airline bombings.

[31] For example, the case of Cyprus and the UN peace-keeping forces trying to sooth relations between the Greek-Cypriot and the Turkish-Cypriot.

[32] For instance, UNAVEM, the original UN election verification mission to Angola was understaffed and its failure became evident when hostilities resumed, subsequent to the 1992 elections.

[33] In early 1994, in the context of the escalating tribal war and genocide in Rwanda and Burundi, the Secretary-General's diplomatic efforts were obstructed by the lack of political will because of UN members' reluctance to shoulder additional policing burdens.

be that the Secretary-General is given the possibility to use a private or public way in order to decline an assignment known to be ill-conceived or insufficiently supported within the Organisation.[34]

Over the years, incumbent by incumbent, the Secretary-General's role in the peaceful settlement of disputes was configured as clearly separate from and, sometimes, even at variance with the policy of one or other of the deliberative organs. Nevertheless, while keeping a neutral stance on issues concerning international peace, the High Official had to be careful that his independence doesn't conflict with UN's definitive policy positions in order to ensure coherence and efficiency in all its activities. In order to act as a credible intermediary, the Secretary –General needs a wide margin of discretion. However, if a UN political organ expresses an obvious adversarial stance towards the actions of a state with which the High Official is trying to negotiate, the Secretary-General must retain, using diplomatic skills, the margin of discretion necessary for the proper accomplishment of the peaceful settlement activities.[35]

3.2. Regular or requested reports to the General Assembly and to the Security Council

An opportunity to exercise an influence on the way a certain dispute is approached also arises with the presentation of regular or requested reports to the General Assembly and the Security Council. Thus, the High Official can make suggestions on how the efficiency of the Organization could be increased, through the improvement of certain aspects that depend on the Secretary-General's involvement.

The Secretary-General has often used the annual report on the work of the Organization that had to be presented to the General Assembly, as an occasion to expose its points of view on various issues. This responsibility – consecrated in art. 98 of the UN Charter – has been interpreted in different ways by the office holders, knowing an interesting development. Inherited from the League of Nations, this disposition was slightly diverted from its original purpose. Initially, it was neatly placed within the framework of strictly administrative attributions. Obviously, the report had to be a « compte-rendu », without implying any decision-making opportunities for the Secretary-General. It was soon to be noted that although the report must remain impartial and objective, it could not be just a chronology or a mere description of acts adopted by the various UN organs. The Secretary had to somehow juxtapose the events and the reactions they triggered within the Organization as well as the subsequent decisions adopted by the UN organs. In addition, the High Official had to make note of the consequences implied by any of the aforementioned. In other words, the annual report could not lack a certain degree of interpretation of the international conjuncture and the role of the United Nations within it, as well as an evaluative and predictive tendency.[36] Thus, the annual report has gradually become less of an administrative report and more of a diplomatic document, in which the Secretary-General expresses its own view on the overall UN policy. Although the analysis could be rather descriptive, the magnitude and the complexity of UN's activities asked for an effort of synthesis, allowing a general overview of the international arena. Trygve Lie understood very well these requirements and conceived his first annual report as divided in two parts: a general introduction, elaborated by the Secretary himself and the actual report as a historic description of UN's activities undertaken during the past year, anonymously drafted by the Secretariat. Dag Hammarskjöld introduced a new element, by publishing separately a substantial introduction. The annual report, published 45 days before the opening of the session, as established in art. 48 from the General Assembly's Rules of Procedure, became a "supplement" to the introduction that appeared in the General Assembly's session. The report remained a purely technical summary, while the much-

[34] T.M. Franck, *The Secretary-General's Role in Conflict Resolution: Past, Present and Pure Conjecture,* 6 EJIL (1995), 367

[35] *Ibidem*

[36] Michel Virally*, Le rôle politique du Secrétaire Général des Nations Unies* in "Annuaire français de droit international", vol. 4, 1958, p.366

awaited event was, in fact, the publication of the introduction containing the Secretary-General's analysis and suggestions. "The supplement" has gradually become a working document, a mere repertoire of dates and references with no actual development. The real "annual report" was, in fact, the document in which the Secretary-General made a synthesis of the events and expressed his views on the functioning of the Organization, on its strengths and its limits. It is clear that such a synthesis implied a use of interpretational skills and a personal appreciation on the value and the opportunity of UN's adopted decisions as well as a value judgement of UN's action or lack of it and its subsequent consequences. Of course, as an impartial and neutral agent the Secretary has to exert a certain degree of prudence and reservation when drafting the report, but in the same time, it manifested a unique authority in this sense. Surprisingly, this way of conceiving the annual report has not been criticized, but rather appreciated by the General Assembly and the Security Council alike. Nowadays, it is no longer a mere text made available to delegations and the public, summarizing discussions, decisions and the most important texts on the issues treated by the United Nations during the year, but a genuine diplomatic document. This means of asserting the moral and political authority of the Secretary-General illustrates an important power of influence.[37] Some would argue that because it focuses on past events and situations, the annual report couldn't be an efficient means of exerting influence on the actual way of approaching issues. In fact, it creates an effective opportunity to enhance past suggestions and announce future ones.[38]

Given this evolution, it could be said that the annual reports, alongside other reports requested by the General Assembly and by the Security Council, can be effective instruments of exercising influence on the activity of the deliberative organs in the field of international peace and security. This does not mean that all the office holders have used them to this end. Having in view the personal features of each occupant, the evolution of the function and the international context which had to be coped with, some of the Secretaries used the reports to make important political suggestions in various fields, from the administrative reform to the major issues concerning the maintenance of international peace and security, while others were more reserved in expressing their opinions mostly in order to avoid antagonizing some permanent Members of the Security Council and, thus, endanger their office. Using the paradigm of the leadership style, it can be observed that visionaries and strategists are more likely to use reports to exert influence and assert their authority, while managers rarely shape the content of their mandate and, if they do, they immediately seek the approval of the political bodies.

3.3. Oral and written statements before the deliberative organs

The High Official's right to make statements is highly linked to UN Charter's provisions establishing some degree of political competence. Thus, if according to art. 99 the Secretary-General may seize the Security Council with any issue which in its opinion may threaten the maintenance of international peace and security, naturally it must have the right to say why and how it was estimated the danger of a certain issue. Therefore the Secretary-General must be endowed with the right to make statements before the Security Council whenever it finds necessary to take a stance against a potentially dangerous situation. Art. 98 providing that "the Secretary-General shall act in that capacity in all meetings of the General Assembly, of the Security Council, of the Economic and Social Council, and of the Trusteeship Council and shall perform such functions entrusted to him by the other principal organs", also offers a legal ground for this right, as a logical consequence of any participation at such events.

The Secretary-General's power to influence the activity of the deliberative organs through the exertion of the right to make statements, also has a legal basis in their rules of procedure. Thus, the Secretary-General, in addition to the responsibility of coordinating the Secretariat's specific services,

[37] A. Pellet, *op. cit., p.*1316
[38] Michel Virally, *op. cit., p.*369

in accordance to the deliberative organs' rules of procedure[39], also has the possibility of making oral and written statements on any issue under consideration and the right to suggest the insertion on their daily agenda of those problems considered by the High Official to be worthy of discussion within these organs. The corroboration between art. 98 and the General Assembly's Rules of Procedure[40] offers the Secretary-General, in relation to the plenary organ, prerogatives that are comparable to those conferred by art. 99, in relation to the Security Council. On the other hand, associating art. 98 with the Security Council's Provisional Rules of Procedure[41], the Secretary-General has the opportunity of intervening within this organ, without invoking the controversial dispositions of art. 99.[42]

The Secretary-General often used its right to make statements within the Security Council and the General Assembly in order to make its views known. However, the exercise of this right in the General Assembly is very delicate in practice, as the Secretary-General risks to compromise its authority and prestige in endless debates. [43] Similarly, the High Official avoided for the same reasons, the explicit invocation of art. 99, which establishes the High Official's initiative function in front of the Security Council, although many of the activities undertaken by the Secretary-General in the field of international peace and security were based on the extensive interpretation of this article.

Of course, in this case as well, the extent to which the various office holders have used this right in order to exercise their influence depended on the international context and on the personal view about the function and its role. Researchers concluded that the incumbents with a predominantly visionary style would most often make statements in order to express political opinions and voice a point of view on a situation; also strategists would sometimes make use of this right to this respect, while managers would rather avoid taking a personal stance in their statements. On the other hand, it would be reasonable to affirm that regardless of any leadership style, the Secretary-General should manifest a great deal of prudence when intervening, even if the form of intervention is that of a simple statement within a wider political debate before the General Assembly or the Security Council. Hammarskjöld himself once stated that the Secretary-general should avoid taking a public stance on any conflicts between Member States. This discretion is dictated by a political concern: that of preserving the utility of the function.[44]

3.4. Article 99 – "letter" and "spirit"

Article 99 establishes for the Secretary-General attributions that lack any equivalent in other international structures: "the Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security". Obviously, the Secretary-General is endowed with a responsibility in the maintenance of international peace and security. To this respect, the High Official also has the duty to observe the

[39] It consists, essentially, in the preparation, translation and distribution of documents, the organization of sessions, as well as in ensuring the availability of the necessary personnel for the deliberative organs, when needed.

[40] „The Secretary-General, or a member of the Secretariat designated by him as his representative, may at any time make either oral or written statements to the General Assembly concerning any question under consideration by it." (*Rules of Procedure of the General Assembly*, art. 70, accessed 112.12.2011, available at http://www.un.org/ga/search/view_doc.asp?symbol=A/520/rev.17&Lang=E)

[41] „The Secretary-General, or his deputy acting on his behalf, may make either oral or written statements to the Security Council concerning any question under consideration by it." (*Provisional Rules of Procedure of the Security Council,* art. 22, accessed 12.12.2011, available at http://www.un.org/Docs/sc/scrules.htm)

[42] A. Pellet, *op. cit., p.*1319

[43] The occasions in which the Secretary-General urged the inclusion of a political issue on the General Assembly's daily agenda often had the opposite results than what it was expected, rather showing the limits of UN's activity than increasing its efficiency. This was the case of Trygve Lie whose proposal of the 20 year Program, in 1950, had quite a low audience. Similarly, Kurt Waldheim's attempt to include, in 1972, the "Measures to Prevent International Terrorism", on the Assembly's daily agenda, had a low impact.

[44] Michel Virally, *op. cit., p.*374

evolution of the international conjecture in order to detect and evaluate potential dangers, using any available means (mostly those that don't imply a particular juridical habilitation): public information, communications from governments, any relevant contacts with officials or even particulars, the right to conduct investigations etc.[45]

Surprisingly, the article was adopted without difficulty in 1945, at the Conference in San Francisco, the states agreeing, in principle, to confer the Secretary-General an important political dimension. The Charter's authors' intention to consolidate the Secretary-General's political authority emerges from the interpretation of this article, given by the Preparatory Commission:"The Secretary-General may have an important role to play as mediator and as an informal adviser of many governments, and will undoubtedly be called upon from time to time, in the exercise of his administrative duties, to take decisions which may justly be called political. Under art. 99 of the Charter, moreover, he has been given a quite special right which goes beyond any power previously accorded to the head of an international organization: to bring to the attention of the Security Council any matter (not merely any dispute or situation) which, in his opinion, may threaten the maintenance of international peace and security. It is impossible to foresee how this article will be applied; but the responsibility it confers upon the Secretary-General will require the exercise of the highest qualities of political judgement, tact and integrity.[46]

Article 99 was to constitute the legal basis for the High Official's initiatives surpassing the Charter's provisions. The only debates generated, at the time, were limited to whether the faculty recognized by this article was, in fact, a right or an obligation, whether "may" should to be replaced by "shall". It was finally decided that the exercise of this power should be left to the Secretary-General, without being imposed as an obligation. The same discretion was left to the Secretary-General when evaluating issues that could be considered worthy of being brought to the attention of the Security Council. [47]

However, art. 99 provides for a discretionary right that could prove to be very difficult to exercise. For the Secretary-General to exercise this right, it would have to previously make a judgement on an international situation, considering it to be a threat to international security. This implies a personal appreciation and a political choice as there aren't any precise and universally accepted criteria upon which it could be determined whether a certain situation constitutes a threat to international security or not. Thus, if a group of states could consider a certain issue as representing a danger to international security, others could see it as strictly a matter of internal jurisdiction. By invoking article 99, the Secretary-General decides that such an issue is of interest for the international security and, therefore, should be discussed within the organization, anticipating a similar appreciation from the Security Council. This initiative could be full of consequences, in particular if the Secretary-General, overestimating its power of influence, brings to the attention of the Security Council an issue that one or some of the permanent members refuse to take into consideration. In such a case, by invoking art. 99, the Secretary-General could endanger the prestige and the reputation of its office. Therefore, the High Official must be cautious in implementing this provision for the following reasons: because it implies a value judgement on a situation that may be controversial; it anticipates a favourable response from the Security Council; but also because the Secretary-General would assume a risk by associating its office to any subsequent measures taken by the Security Council.[48] In fact, art. 99 gives the Secretary-General similar prerogatives to those conferred to the

[45] *Ibidem,p.* 369

[46] Report of the Preparatory Commission of the United Nations (23 December 1945), Chapter VIII, section 2, para. 81 in Chesterman, S 2007, *Secretary or General? The UN Secretary General in World Politics*, Cambridge University Press, New York, 244-245

[47] A. Pellet, *op. cit.,* 1316

[48] *Ibidem,* 1319

General Assembly, under art. 11 paragraph 3, with the difference that the Secretary-General does not have the same means to exert them as the plenary organ.

For all these reasons, the office holders have avoided using explicitly art. 99, this disposition being invoked, in the context envisaged by the Charter, only in the case of the Congolese crisis, on July, the 13th 1960, when Dag Hammarskjöld asked the Security Council's President to urgently convoke the Council, under art. 99. The Council was reunited on the 13th of July, the Secretary-General making, on this occasion, a long exposure in which he was justifying his decision to invoke art. 99 for the first time in the history of the United Nations and was asking to be granted an extended mandate that would allow him to take adequate measures in order to provide military assistance to the Congolese government. The fact was unprecedented.

Later, in November 1979, the Security Council was reunited again at the urgent request of the Secretary-General, Kurt Waldheim, stating that the prolonged detention of U.S. diplomatic personnel in Iran constituted a threat to the international peace and security. Waldheim did not cite explicitly art. 99, but situated his approach under the general exercise of the responsibilities incumbent upon him, according to the UN Charter. However, the Member States have rightly interpreted this initiative as an application of art. 99.[49]

In other cases, although this article was not invoked openly, its provisions have been used to draw the Council's attention on some issues and to make known the Secretary-General's point of view on serious situations that were not on the Council's daily agenda.[50]

Usually, when an issue that is considered threatening for the international peace and security is not brought to the Security Council's attention by any of the Member States, it means that the political obstacles are so high that the Secretary-General would, unnecessarily, compromise the reputation of its office, by taking a potentially controversial initiative. That is why art. 99 was rarely applied in its letter, but its "spirit" has allowed the Secretary-General to make full use of the means consecrated in the UN Charter, in order to justify an extensive interpretation of its function and exercise its prerogatives in relation to the deliberative organs and the Member States. Thus, using a dialectical interpretation of Articles 97 and 99, each of them reinforcing the other, the first UN Secretary General put forth, from the start, his right to freely intervene in the Council's discussions in order to offer his own interpretation on issues concerning the international peace and security and make suggestions.[51] Relying on the its spirit and on the need to collect all information in order to determine whether he should literally cite art. 99, the first Secretary-General also affirmed his right to conduct any research and investigation he considered necessary. If the Secretary-General may bring to the Security Council's attention any problem that could endanger the maintenance of international peace and security, an extensive interpretation of this provision could lead to the conclusion that the office holder has the responsibility to keep a high level of information and awareness on issues of international security that would, therefore, justify their independent initiatives of exploring potentially dangerous areas and situations, so that any decision to refer the matter to the Security Council would be thoroughly documented. When the Secretary-General gathers information on a dangerous situation or investigates an unstable area, there is no legal obligation to inform the Security Council on these details, unless those activities have been mandated.

Keeping the extensive manner of interpreting this article, one would conclude that the Secretary- General not only has the possibility of examining conflicts, but also the opportunity of intervening in their regulation. Thus, based on this provision, the Secretary-General disposes of wide

[49] *Ibidem*

[50] U Thant, on the 20th of July, 1970, referring to the refugee problem in East Pakistan; on the 11th of May, 1972, similarly, Waldheim sent a memorandum on the conflict in Vietnam to the President of the Security Council. In such cases, the Secretary General drew the attention of the Security Council leaving to their disposition whether and how the respective issue would be examined and approached.

[51] A. Pellet, *op. cit.,* 1320

competencies to initiate operations of inquiry, good offices or other forms of diplomatic activity, carried out with the scope of maintaining the international peace and security.[52]

To this respect, Dag Hammarskjöld considered that it was his responsibility to develop the full potential of this unique diplomatic instrument created by the UN Charter. Aware of the fact that he had a special vocation, Hammarskjöld, a true visionary, gradually elaborated an extensive theory on the role of the United Nations and of its Secretary-General. Adept of discrete reconciliation diplomacy, he also developed a theory on preventive diplomacy, giving a new dimension to the function of the Secretary-General and, thus, justifying all his personal initiatives when it came to appeasing potential conflict situations and preventing their deepening. Hammarskjöld's legacy is today an invaluable construction of great vision and bearing the mark of a lucid and penetrating spirit.[53]

Dag Hammarskjöld's theoretical construction (broadly reflected in his Introductions to the Annual Report) has influenced determinately the evolution of the Secretary-General's role, all of his successors taking their inspiration from his actions and assuming their political functions in conformity with the "spirit" of art. 99. Naturally, this considerable expansion of the Secretary-General's role was not always agreed. [54] In such a situation, having to cope with some resistance, U Thant, although more managerial and less innovative than his predecessor, reiterated the Secretary-General's diplomatic function, at the same time, enunciating the legal basis for his actions. In his opinion, seeking a supplementary support for his actions, this basis consists in the association of art. 99 and art. 33 (which requires that the parties to a dispute seek resolution by peaceful means).Thus, "if the parties to a dispute request or accept the Secretary-General's involvement, in order to fulfil the obligation consecrated by the Charter to seek a peaceful solution to the dispute, the Secretary-General is, manifestly, empowered to offer its contribution."[55]

U Thant had in view an extensive interpretation of art. 99, which would allow him to act only according to the will of the parties to the dispute, the Secretary-General's obligations towards the Security Council being limited to "informing" without "consulting". Progressively, based on this broad view on the Secretary-General's powers, the notion of "political responsibility" and than that of "moral responsibility" emerged. U Thant and Waldheim often gave expression to this tendency, considering that it was their "duty" to intervene, whenever they could, in order to seek a peaceful solution. Perez de Cuellar also gave a similarly generous interpretation to the Secretary-General's role. In his first annual report, he insisted on the necessity to intensify the High Official's preventive role, envisaged by art. 99 of the UN Charter and announced his intention to develop a wider and more systematic capacity of fact-finding in areas of potential conflict. [56]

Using the aforementioned theory on the Secretary-General's leadership style, it can be noted that visionaries like Lie and Hammarskjöld, being more likely to invoke art. 99 and to fully act according to its spirit, set the direction of evolution for their function, while their successors, although maybe less creative, had to take it over and expand it further, in order to keep a coherent stance on the Secretary-General's role. The result has been a continuous ten dency to increase it and enhance its visibility within UN's institutional architecture.

Thus, the Secretary-General's independent initiatives are the result of a gradual evolution of its role, influenced by the ever-changing international context, by the continuous necessity to adapt the institutional structures to the international realities and, last, but not least, by the outstanding personalities that occupied this function. The constantly growing responsibilities entrusted to the

[52] Magdalena Denisa Lungu, *op. cit., p.*371

[53] Michel Virally, *op. cit.,* 382

[54] For instance, the USSR letter dated the 30th of September 1966, addressed to the President of the Security Council, in which the soviets expressed dissatisfaction with U Thant's good offices in Cambodia and Thailand.

[55] A. Pellet, *op. cit.,* 1323

[56] *Ibidem*

Secretary-General were often dictated by political circumstances and international crisis and its initiatives were sometimes imposed by necessities of the moment, but some of these had to become permanent features of the function in order to ensure its coherence and efficiency. Naturally, every Secretary-General had his own policy, his own view on the position and its role, but the invariable elements considered to be at the core of the function would always be integrated.

"It had become unremarkable for the incumbent to venture where States could not or would not go, guided solely by an understanding of the principles and purposes of the Charter. In effect, successive Secretaries-General had established a right to act on their own to safeguard what they perceived as minimum standards of world order."[57] It seems that only prudence, manifested in a given international context, and the political ability of an office holder, could limit the margin of initiative with which the Secretary-General is considered to be vested, in accordance with "the spirit" of art. 99.

4. Conclusions

The function of the Secretary-General, as it is presently configured, is mostly the result of a creative long-term process that, eventually, made available for today's office holder a repertory of practices defining a strong, influential role in the maintenance of international peace and security. The Secretary-General's capacity to exert influence on the decision-making process gradually increased along side its ability to master the various instruments provided by the UN Charter. Using the existing research results on the political behaviour of the Secretary-General when analysing its possibilities to exert influence in the decision-making process can lead us to a better understanding of the function's evolution. Thus, identifying an incumbent's leadership style and analysing its actions within a certain international context may offer a pattern of argumentation and "diagnosis" for its past and present behaviour as well as an instrument of prediction of its future reactions.

Generally, in relation to the political organs, regardless of their leadership style, the occupants of this function, whether they are acting on their own initiative or at the request of the parties to the dispute, whether they are mandated by the Security Council or by the General Assembly must coordinate their activity with that of the plenary and executive organs, in order to ensure the effectiveness of their interventions and to keep the institutional balance within the United Nations. There are situations in which the Secretary-General's independent activities subsequently obtain the official recognition from UN's main organs. In other situations, where discretion is essential, the High Official may be involved in informal consultations with the executive organ and some of the Member States.

However, the Secretary-General's power to influence and its unique role are the result of its growing independence and find their basis in its general neutrality. In a world where national interests prevail, the Secretary-General does not operate with the concept of sovereignty, enabling it to act as "impartial intermediary, investigator of abuses and voice of world conscience, at the same time" [58]. The office holders do not represent any state and should not defend the position of any political community.Unlike the deliberative organs, inevitably subjected to a combination of national interests, the Secretary-General can be a genuine interpret of UN's ideals. Its involvement in the peaceful settlement of disputes often has a discrete nature and its diplomatic services are considered increasingly reliable, being sometimes requested by the parties to the dispute. However, even so, the Secretary-General's activity in the field of the peaceful settlement of disputes, together with the Security Council's and the General Assembly's actions should be regarded as a whole aiming to maintain the international peace and security.

[57] T. M. Franck, *op. cit.,* p.365
[58] *Ibidem,* p 366

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THE ROLE OF INTERNATIONAL NON-GOVERNMENTAL ORGANISATIONS IN HUMAN RIGHTS PROTECTION

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Abstract
One of the main concerns of democratic states and intergovernmental or supranational international organisations is referring to the respect of human rights. International nongovernmental organisations have also an important role in establishing human rights violations, boosting in taking measures for their removal, and also in the improvement of specific international regulations.
For awareness of the role of these organizations, it is necessary to investigate their involvement in activities of human rights protection, with the argumentation of the necessity in extending their actions regarding the cooperation with intergovernmental institutions and organizations, in order to prevent or terminate violations of human rights and to eliminate negative consequences arising from such facts

Keywords: *human rights, non-governmental organizations, international community, defence measures of human rights, United Nations Organization.*

1. Introduction

Throughout history, the cooperation between the states of the international community has been diversified, along with the relations among stated, thus creating forms of international coordination and collaboration, by the intermediary of transnational organizations.

Concerning the point of view of the quality of members, the international organizations may be:

- Inter-governmental organizations, created by agreement of the states;
- Supranational international organizations, which are created by the states, but their institutional bodies operate similar to the bodies of state power, administration or jurisdiction;
- International non-governmental organizations, which are situated between the public sector, because of the services it performs and the private sector, due to the manner of organization.

International non-governmental organizations have an old history, as in the year 1914 they had already founded 1083 similar organization[1]. They had, throughout their evolution an important contribution in sustaining the movements against slavery, for the rights of women or in other domain regarding the protection of human rights. As a result, the study concerning the role of these organizations in protecting the human rights, aiming at knowing the mechanisms and means by which they may intervene in the situation of the breach of these rights, presents a particular importance, as only by presenting these mechanism may the methods of action be improved in view of preventing the acts by which the respective values are negatively influenced, in the same time taking the best measures to avoid the negative consequences of the mentioned acts.

2. The appearance and characteristics of international non-governmental organizations

In ancient times, social philanthropic issues were left to the church, however, with the commencement of society's evolution, because of its impossibility to deal with the increasing level and complexity of social problems, the governments were compelled to assume more liabilities for the poor or the persons that faced different social problems. Similarly, the non-governmental

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[1] Oliver P. Richmond and Henry F. Carey, *Subcontracting Peace - The Challenges of NGO Peacebuilding* (Aldershot: Ashgate Publishing, 2005), p.21.

organizations appeared which were permanently developing, thus reaching a functional division of liabilities between the state and the volunteering[2].

In the present numerous international non-governmental organizations such as: Amnesty International, International Committee of the Red Cross[3], Human Rights Watch, International Institute of Humanitarian Law, „Article 19" etc. develops an intense activity regarding the defence of human rights.

The notion of „non-governmental organization" began to be used more frequently after it was introduced in the constitutional documents of the United Nations Organization, in the year 1945, thus accepting the consultative role of the respective organizations[4], following their request to officially participate in the works of the bodies belonging to the United Nations Organization[5].

International non-governmental organizations represent international associations, without a lucrative purpose, created from a mixt or private initiative, which groups natural or legal persons with different nationalities, in conformity with the domestic law on the territory of which they are headquartered.

The notion of *international non-governmental organizations* is used for designating international organizations which were not founded by an international treaty[6], being created and administered by private persons, which do not officially represent the state. They are organizations of the civil society, that does not develop a political activity, but which functions in the public sphere, completing or influencing the activities of the government in the sense of improving the social activities from certain domains[7].

International non-governmental organizations are defined by certain common *traits*:

- Embody a legal personality, thus they activate in their own name;
- They are private, functioning separately from governmental institutions, but they may receive governmental support or include in their councils of administration members or representatives of the governments;
- Do not offer profit to the members, and if it is accomplished, it will be reinvested for the benefit of the organization;
- They control their own actions by procedures of internal management, benefiting from a high degree of autonomy;
- Involves a significant level of voluntary participation.

Although their quality of being a matter or international law is not explicitly acknowledged, in conformity with present regulations, the non-governmental organizations embody a legal personality, and in certain limits it contributes to creating the international law, in cooperation with certain inter-

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[2] Cristian Jura, *Rolul organizațiilor nonguvernamentale pe plan internațional* (Bucharest: All Beck, 2003), p.10 and foll.

[3] Oleg Balan, *Protecția drepturilor omului în conflictele armate: Monografie* (Chisinau: Universitatea de Studii Europene din Moldova, 2009), 18 and foll.

[4] In conformity with art. 71 of chapter 10 from the United Nations Organization Charter, „The Economic and Social Council may take any appropriate disposition for consulting the non-governmental organizations which deal with issues in accordance with its competence".

[5] Thomas Buergenthal and Alexandre Kiss, *La protection internationale des droits de l'homme* (Strasbourg et Arlington: N.Q. Engel et Kehl, 1991), 155 and foll.

[6] In accordance with the Resolution no. 288/1950 of the Economic and Social Council „each international organization which is not created by intergovernmental agreements will be considered an non-governmental international organization". See also Paragraph 7 from the Resolution no. 1296 (XLIV) of the Economic and Social Council regarding relative dispositions to consultations with non-governmental organizations from the 23th of May 1968.

[7] These are *non-profit*, *private* organizations by form and *public* by the services performed. Although the non-governmental organizations are private from the perspective of domestic law, as simple associations submitted to state legislation in which they were founded, they may sometimes play an important role in the framework of the international law.

governmental organizations from the U.N.O system, thus acknowledging certain competences that are limited in the framework of relations of international law[8].

An argument in favour of considering international non-governmental organizations as a subject for the public international law would be that, as this quality was acknowledged in other (intergovernmental) organizations, not only sovereign states, it should be also acknowledged for non-governmental organizations, as the later will be able to freely exercise its activities, at an international as well as at a national level; until the present, however, the only legal instrument whose regulations are in favour of acknowledging the character of subjects of the international law of these organizations is the *Convention on the recognition of the legal personality of international non-governmental organizations*, adopted by the Council of Europe, in April 1968.

3. Categories of activities achieved by international non-governmental organizations in the domain of the defence of human rights

Non-governmental organizations have an important contribution regarding the observance of human rights, as they bring valuable information to the bodies of the U.N.O. which are commissioned to solve the issues in this domain, signal the acts that breach the human rights [9] and contribute to promoting and applying the norms that refer to these rights[10]; when they must deal with issues concerning human rights[11], *the bodies from the system of the United Nations Organization* frequently require the non-governmental organizations with a consultative status to supply *information*, especially upon the situations at hand [12].

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[8] By the Resolution 1996/31, adopted on the 25th of June 1996, the Social and Economic Council of the U.N.O. was pronounced for acknowledging the consultative statute of non-governmental organizations in relation to the United Nations Organization, establishing many applicable principles in the relations between non-governmental organizations and the U.N.O., the manner of establishing consultative relations, the participation conditions of non-governmental organizations to the international conferences of the U.N.O. and to their preparation process, as well as suspension or cancellation of the consultative statute. By this resolution, the non-governmental organizations are acknowledged a certain capacity of international law, in relation with the U.N.O., however they did not acquire a veritable legal statute of an international subject in this respect.

[9] An example of the implication of non-governmental organizations in stating the infringement of human rights is the „Written Declaration" of the *International Association against Torture*, non-governmental association with a special consultative statute, presented to the *Human Rights Commission* at the 54th session, from the 17th of March, in which it is stated that the Association wishes to attract the attention of the Commission concerning the obstacles in implementing the Commission regarding the prohibition of torture. The negative aspects presented by the Association come from Spain and the United Nations of America, concluding that, because of the fact that underdeveloped countries, such as the ones presented below, have committed infringements of human rights, the Commission will have to act immediately. As a result, the Association demanded the Commission to denominate a special rapporteur to investigate these situations, as no other way of ensuring the liability of the countries that persisted in breaching he human rights, established by the treaties and conventions ratified existed

[10] In the framework of U.N.O., different control mechanisms within which the non-governmental organizations play a role of major importance were established. Thus, for example, when presenting the reports regarding the observance of human rights, by the state parties, a significant number of non-governmental organizations send the experts that are charged with examining these reports, information regarding the real situation from those countries, which are very useful for them.

[11] At the San Francisco Conference in 1945, when the United Nations Organization was founded, approximately 40 non-governmental organizations representing syndicates, women, ethnic groups and religious groups united their forces in order to impose a common language for the human rights, their *lobbying* resulting in the adoption of several norms concerning this domain, which were incorporated in the United Union Charter. Thus, in the Preamble of the Charter it is stated: „ the faith in fundamental human rights, in the dignity and value of the human individual, in the equality of rights of both men and women …", and in the art. 1 it is stated that one of the main tasks of U.N.O. is to promote „the respect for human rights and for the fundamental liberties of all the individuals".

[12] In some cases, the information presented to the Economic Council by the non-governmental organizations are based on specific requests which were addressed to them, such as the Resolution of the Social and Economic Council no. 1987/5 from the 26th of May 1967 by which information was demanded referring to the observance of rights contained in the International pact for economic, social and cultural rights.

Decentralized and diverse, they act rapidly upon issues that seem grave for the majority of the inter-governmental organizations, whose activity is, above all, bureaucratic and political.

In the framework of the U.N.O, the relations with the non-governmental organizations are regulated by the resolutions of the Social and Economic Council 288B(X) from 1950 and 1296(XLIX) from 1968.

Together with the expansion of non-governmental organizations interested in human rights the possibility of affirming themselves opened within all the relevant bodies of the United Nations Organizations. Thus, by means of the U.N.O. Conference regarding human rights from 1993, in Viena, the indispensable role of the non-governmental organizations within the protection mechanism of human rights was emphasized; as a result, certain humanitarian non-governmental organizations were also engaged to work together with the U.N.O, for the defence of human rights within the conflicts that exist on the planet[13].

These international organizations also participate, in the activity of *specialized institutions in the defence of human rights*, by supplying information from the states involved, by informing and involving the public opinion in cases of serious breaches of human rights or by putting pressure on international organizations, for taking certain measures such as: sending special rapporteurs, organizing work groups etc. Moreover, non-governmental organizations frequently elaborate reports parallel with those belonging to the states, in certain issues concerning the observance of human rights, which they present to the international institutions.

There exists an older practice of the cooperation between the United Nations, Council of Europe, Organization for Security and Cooperation in Europe and certain non-governmental organizations, as the Council of Europe annually submits to the attention of the Council of the United Nations for Human Rights reports concerning its activity[14].

The Council of Europe had recognized from the year 1952 the importance of non-governmental organizations in certain domains of activity, as well as their contribution to these activities, by accepting to consult the respective organizations on issues that belong to the competence of the Council[15]. In the year 1972, the Committee of Ministers of the Council of Europe adopted the Resolution 72(35), which contains new regulations referring to the relations of the Council with non-governmental organizations, irrespective of the fact that they benefited of a consultative status or not.

International non-governmental organizations with a consultative status are liable to the Council of Europe [16]:

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[13] Bianca Selejan-Guțan, *Protecția europeană a drepturilor omului*, 4-th edition, (Bucharest: CH Beck, 2011), 18 and foll.

[14] There is a Memorandum of Understanding between the United Nations and the Organization for Security and Cooperation in Europe, one with the Bureau for Democratic Institutions and Human Rights and, also, many agreements with different organizations. U.N.O. is working with the Bureau for Democratic institutions and Human Rights at several projects, including, for example, founding national institutions in Central Asia and preparation courses, referring to human rights, for those responsible with the monitoring in Kosovo. Similarly, there were different forms of cooperation and exchange of information with the missions of the Organization for Security and Cooperation in Europe from Bosnia-Herzegovina, Croatia and Kosovo. The United Nations founded, along with the Organization for Security and Cooperation in Europe, *joint human rights offices* in Abkhazia, Georgia. All these forms of cooperation developed with the support of international non-governmental organizations, involved in the issue of human rights.

[15] The cooperation regulations between the Council of Europe and the non-governmental organizations are governed by the Resolution of the Committee of Ministers no. (93)38, in art. 2 of this resolution being stated that the consultative state will be guaranteed for the international non-governmental organizations, which are representative in their domain of competence and at an European level. In the present, more than 400 non-governmental organizations have a similar statute within the Council of Europe.

[16] Jura, *Rolul organizațiilor nonguvernamentale pe plan internațional*, 142.

- To supply information, documents or notifications, that the General Secretary may require related to their domain of competence;
- To maximize the advertising of the initiatives taken by the Council of Europe or its achievements, in the domain of their competence;
- To submit every two years to the General Secretary a report within which the following must be identified: their participation to the works of different bodies of the Council of Europe (committees of experts, parliamentary committees etc.), to the manifestations organized by the General Secretary (reunions of general informing, sectorial reunions), to the reunions of groups belonging non-governmental organizations, on sectors of interest, which entertain relations with the corresponding sectors of the General secretary, as well as in the reunions, that were organized and to which the Council of Europe was invited to participate, thus also maintaining the actions performed in view of promoting the activity developed by the Council of Europe.

Non-governmental organizations are getting more and more involved in the activities of *international inter-governmental organizations* regarding the defence of human rights as representatives of non-governmental organizations participate in the works of these organizations and to the process of *issuing certain norms of international law of human rights*, by promoting new ideas in the filed or by proposals to adopt norms or amendments.

The involvement of non-governmental organizations in the redaction and adopting of the Statute of International Penal Court, fact which resulted in important consequences upon their direct participation before this court is noticeable Thus, in conformity with article 15 from the Statute of International Penal Court, the Prosecutor must analyse the information received from the part of non-governmental organizations[17].

An important role is played by the international non-governmental organizations before the international jurisdictions from the domain of human rights. Thus, they may be involved in the initiation of certain requests addressed to these courts [18], may support actions in their capacity of plaintiffs before an international jurisdiction, and their representatives may become representatives of the individual plaintiffs, in the litigations in front of the international jurisdictions, or even *amici curiae*, when they express their opinion upon several serious issues of general interest, regarding a certain cause or presents a report concerning the above-mentioned issues, before the court. These actions are possible, as, when flagrant and systematic breaches of the human rights occur, the international non-governmental organizations are better placed than the individuals in apprehending the competent authorities (national and international), as well as in the preparation and presentation of the communications necessary[19].

By this type of activities, non-governmental have considerably influenced the working methods and even the reasoning of several international courts, such as the European Court of Human Rights. Moreover, the participation of non-governmental organizations such as *amici curiae* influenced the regulation procedure developed before these courts, thus consolidating the equality of weapons in favour of the plaintiff.

Concerning the jurisdictional activity of the European Court of Human Rights, international non-governmental organizations may develop numerous activities in order to establish infringements on human rights. Thus, in conformity with art. 25 par. 1 from the European Convention of Human Rights, these organizations may file complaints referring the claimed violations of the Constitution,

[17] This article already received a practical application, in the month of February 2003, when the non-governmental organization *International Federation of Human Rights* formally brought, the first case before the International Penal Court. It refers to the situation in the Central-African Republic, where the organization mentioned stated the certain executions, rapes, murders regarding the civil population were performed.

[18] Frequently the plaintiffs are guided by the non-governmental organizations to file complaints, when a right has been breached.

[19] Raluca Miga-Beşteliu, *Drept internaţional. Introducere în dreptul internaţional public*, Third edition (Bucharest: All Beck, 2003), p.206.

however only if they are the victims of those violations[20]. Moreover, non-governmental organizations may offer consultance or ensure the legal representation for persons who wish to file complaints to the European Court of Human Rights[21].

In the cases heard by the European Union of Human Rights, non-governmental organizations are permitted to submit short files *amicus curiae*, that ensure the necessary information to the analysis of the issues raised. In the virtue of the Rules of Court, „any person interested, except the applicant", may submit commentaries written on different specific topics. The individuals or groups, must, however, prove that they manifest an interest for the case presented and, similarly, that their intervention has bee done in the interest of a better legal administration[22].

4. Conclusions

Given the above-mentioned, it can be stated that, in the context in which the observance of human rights constitutes one of the most important problems of contemporary life, the role of the international non-governmental organization is becoming more and more important, even existing opinion that these are the „locomotives" in the evolution of the international law of human rights. Of course, not all NGOs will be able to make a significant contribution to human security or will even be interested in engaging with questions of human security.

Pressures from NGOs on state institutions are necessary in order not to limit their activities only in the adoption of laws. Relations between states and NGOs are difficult and deficient, without proper communication, and, although the authorities are open to promote human rights, however changes in attitude and mentality are necessary.

One of the main objectives of the United Nations is strengthening the advocacy role of NGOs in maintaining and supporting democracy, human rights, access to information, freedom of expression and media independence, judicial independence and fight against corruption, professionalization of NGO movement and the development of cooperation with the UN human rights.

Nevertheless, numerous international non-governmental organizations collaborate with the inter-governmental organizations and the international institutions for the defence of human rights, and over 1500 of these organizations have a consultative status in addition to the Social and Economic Council[23], thus contributing to the process of making decisions[24]. The non-governmental organizations are, also, involved in the activity of subsidiary bodies of the Social and Economic Council such as: the *Human Rights Commission, Commission for sustainable development, the Commission on the Status of Women and the Subcommittee on Prevention of Discrimination and Protection of Minorities.*

The cyclic and unpredictable nature of international aid funding, the conflict with government inherent in addressing political threats to human security, and the costs and difficulties associated with building strong NGO networks are all obstacles to full and effective NGO participation in

[20] The majority of complaints referred to the liberty of manifestation, right to association or public assembly.

[21] Non-governmental organizations may also help to elaborate complaints, however rarely file complaints before the court, as they generally appeal to lawyers to perform this task.

[22] Art. 36 par. (2) from the European convention of Human Rights, as amended in the Protocol no. 11, explicitly stipulates, what the intervention of a third party implies: an oral or written intervention form any person interested and who is not required, at the invitation of the President of the Court.

[23]The legal framework for the participation of non-governmental organizations to the works of the Economic and Social Council, is established by the Resolution 1296(XLIV) regarding the dispositions referring to consultations, which can be made in writing or orally, adopted by the Council on the 23rd of May 1968 and reviewed by the Resolution no. 31/1996. The Council acknowledges that these organizations must acquire the possibility to express their point of view, as they possess a special experience and valuable technical knowledge for the activities of the Economic and Social Council.

[24] For example, *The Conference regarding the environment from Stockholm*, in 1972, occurred subsequent to the pressures exercised upon governments by the non-governmental organizations, in this sense.

human security initiatives. Addressing these barriers will be one task for interested actors like the United Nations and the Commission on Human Security and will require the organization and facilitation of considerable dialogue between NGOs, governments and aid agencies. This will be a worthwhile task for such organizations to undertake, however. Despite the many pressures which NGOs already face on their time, the links which exist between human security and human development, and the connections and resources that NGOs stand to gain from their involvement in human security initiatives will all encourage NGOs to make a full and meaningful commitment to human security

However, we believe that in addition to the work of NGOs, it is necessary that people be more active in protecting their rights, knowing them. One of the solutions consists in heavily promote human rights in schools and also mass media has to draw attention to the problem and inform people how to defend their rights.

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CASE-LAW ASPECTS CONCERNING THE REGULATION OF STATES OBLIGATION TO MAKE GOOD THE DAMAGE CAUSED TO INDIVIDUALS, BY INFRINGEMENTS OF EUROPEAN UNION LAW

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Abstract
The priority principle of EU law in relation to the internal law of the Member States, a principle enshrined by the Court of Justice case-law and the principle of direct effect allow the national court to give full effect to EU law. Breaching the EU law by Member States draws under certain conditions their responsibilty for the breach thereof. Unlike public international law, the constitutive treaties do not contain provisions relating to liability of Member States for breach of EU law. As in other cases, the Court was the one that, over time, has defined a right of redress, which has its foundation in EU law and in the conditions necessary to engage the victims' right to repair.

Keywords: *Liability of Member States, EU law, priority principle of EU law, Court of Justice, case-law aspects.*

1. Introduction

The priority principle of EU law in relation to national law of Member States, jurisprudentially enshrined by the Court of Justice, and the principle of direct effect allow the national court to provide absolute effect to EU law. The non-compliance with EU law, by Member States, draws, under certain conditions, the states' liability for its breach.

Unlike public international law, the constituent Treaties do not contain provisions relating to the liability of Member States for breaching EU law.

As in other cases, the Court of Justice is the one that, over time, has defined a reparatory law, which is grounded on EU law and on the necessary conditions in order for the right to compensation to be committed, in the victims' benefit. Thus, the Court has supplemented this protection of litigants' rights, by enshrining the principle of state liability for breaching EU law. This principle applies when a Member State fails to transpose or when it incorrectly transposes an EU rule, but also for the breach of EU rules, with or without direct effect.

Next, we shall highlight the main moments in the consecration, by judicial way, of the principle of states obligation to make good damage caused to individuals, by breaches of EU law.

2. Francovich Judgement[1]

The Court of Justice enshrined for the first time, the principle of Member States liability for the breach of EU law in *Francovich*[2] Judgement, from 1991.

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[1] ECJ Judgement of 19 November 1991, *Francovich and Bonifaci* v. *Italy*, C-6/90.

[2] Circumstances of the case: Andrea Francovich, part in the main proceedings in Case 6 / 90, was employed to the CDN Elettronica SnC enterprise in Vicenza. From his position, he had received only occasional payments, in advance, of the amounts which were rightfully his, as wages. Consequently, Francovich brought an action before the competent Italian Court, which condemned the accused company to pay a sum of approximately 6 million Italian liras. During the execution phase of the decision, the executor of the Court issued a report finding the debtor's insolvency. Under those circumstances, Andrea Francovich invoked his right to obtain, from the Italian State, the guarantees provided in Directive 80/987 or, alternatively, damages-interests. The Directive invoked has to provide employees a minimum of protection at Community level, in case of insolvency of the employer, subject to more favourable national provisions, regulating, in particular, specific guarantees for payment of wages. The Directive had to be transposed into national law of Member States, no later than October 23, 1983. By the Judgement of February 2, 1989, the ECJ found

By the Ordinance of July 9, 1989, registered at the Court on January 8, 1990, the national Court[3], under article 234[4] TEC, filed an application for a preliminary ruling on the interpretation of the third paragraph of Article 249[5] of the Treaty establishing the European Community and on Council Directive no. 80/987 on the harmonization of Member States laws on the protection of employees in case of insolvency of their employer. Thus, the national Court asked the Luxembourg Court if the Italian Government's liability for failing to transpose a directive, which had caused damage to an Italian citizen, could be committed, on the one hand, and if the individual could require an indemnity[6], from the Member State which had not fulfilled its obligation to transpose the directive, on the other hand.

Regarding the first question, the Court established that the directive had no direct effect[7], therefore people injured in their right, could not invoke before the competent national Court, the Directive provisions against the State.

We consider that the point of view of the Luxembourg Court is interesting for our study, more exactly the point of view regarding the second question of the Italian Court, namely the existence and extent of state liability for damages caused by the infringement of obligations arising from EU law. In its decision, the Court referred to the following aspects: the principle of extra contractual liability of a state; the conditions under which state liability can be committed, the principle of the obligation to compensate and state liability limits.

2.1. The consecration of the principle of extra contractual liability of Member States

We notice, to a careful analysis of the Court's Judgement that the Luxembourg Court starts in its motivation, primarily from highlighting the major principles developed by judicial interpretation. Thus, the Court reiterates that the Treaty establishing the European Economic Community creates its own legal order, integrated in the legal systems of Member States, which is imposed not only to them, but also to nationals of Member States[8]. The Court recalls that national Courts are obliged to apply EU law, to ensure the full effectiveness of EU rules and to protect the

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that Italy had not fulfilled its obligation to transpose the Directive. For details, see **Sergiu Deleanu, Gyula Fabian, Cosmin Flavius Costas, Bogdan Ionita**, *"Curtea de Justiţie Europeană. Hotărâri comentate"*, (Editura Wolters Kluwer, Bucureşti, 2007), p. 233.

[3] Pretura di Vicenza, Italy.

[4] The current art. 258 TFEU.

[5] The current art. 288 TFEU.

[6] Emphasis added.

[7] In its argumentation, the Court recalled that the provisions of a Directive may have direct effect only if they are unconditional and sufficiently precise. In this case, the examination of the accomplishment of those criteria was made by determining the beneficiaries and content of the guarantee, as well as the identity of the guarantee debtor. In terms of beneficiaries and content of the guarantee, the Court held that they were sufficiently precise and unconditional. However, regarding the identity of the debtor, the conditions are not achieved, as long as Member States may finance the public funds of the guarantee with exclusively public means, but also they may resort to the employers' contributions. As a result, the Court stated: although the directive provisions are sufficiently precise and unconditional, as for the determination of the beneficiaries of the guarantee, its content does not offer sufficient evidence for individuals to be able to invoke the provisions of a directive before national Courts. In this respect, on the one hand, these provisions do not specify the identity of the guarantee debtor and, on the other hand, the state can not be considered debtor for the sole reason that it has not taken the necessary measures to transpose the directive within the prescribed period.

[8] According to paragraph 31 of the decision: "We recall that the Treaty establishing the EEC has created its own legal system, integrated into the legal systems of Member States and which is imposed to their judicial organs, that the subjects of this legal system are not only the Member States, but also their nationals and that, as the Community law creates obligations for individuals, in the same manner the Community law can also create rights included in their legal heritage; these rights arise not only when they are specifically mentioned in the Treaty, but also under obligations that the Treaty imposes both to individuals, as well as to Member States and Community institutions".

rights that EU law confers on individuals[9]; next, the Court indicates that the effectiveness of Union rules, as well as the protection of rights would be jeopardized if the possibility of obtaining compensation was not recognized to individuals, in the case where their rights from EU law were violated, breach attributable to the state[10]. Moreover, the Court states that the principle of state liability for damage caused to individuals, as result of the infringement of Community law, is inherent in the system of the Treaty[11], and the obligation of Member States to make good such damage is grounded on article 5[12] of the Treaty[13].

In paragraph 37 of the Judgement, it is clearly stated that Community law imposes the principle under which Member States are compelled to repair the damage caused to individuals, by the breach of Community law, attributable to them.

After analyzing the Union Court's reply, we can say that the ground for state liability in this case, is found both in provisions of the Treaty establishing the European Community, as well as in the Court's previous case-law that covers the relation between EU law and national law of Member States, in general and the direct application (together with the direct effect), as well as the application, as a priority, of EU law before national law.

Thus, the principle of state liability was consecrated. This principle is specific to EU law and represents "a right to compensation in the benefit of individuals, allowing, as outlined in the doctrine, the material and financial concretization of Community rule"[14].

2.2. The conditions under which state liability may be committed

Point b) of the Judgement intends to identify the conditions under which states can be held liable. According to the Court, while the state liability for damages caused to individuals by infringements of EU law, for which it is responsible, has its legal basis in the EU law itself, the conditions under which a right to compensation arises, depend on the nature of the EU law breach which is at the origin of the damage caused[15]. In this case, when a Member State ignores its obligation under the Treaty, to take all measures necessary in order to achieve the result required by a EU rule, the full effectiveness of that rule requires the granting of a right to compensation, if three conditions[16] are met, namely:

- the directive must create rights in the individuals' patrimony;
- the content of these rights must result from the directive provisions;
- the existence of a causal link between the infringement of any obligation, by the state and the damage caused to the person injured.

The Court considers that these three conditions are sufficient to give rise, in the individuals' benefit, to a right to receive compensation, right that is directly grounded on Community law[17].

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[9] In this regard: paragraph 32 of the decision, according to which it should be remembered that, under the constant case-law of the Court, the national judicial bodies are responsible with the application of Community provisions, with ensuring the absolute effectiveness of these rules and with the protection of rights that they confer on individuals.

[10] Paragraph 33: It should be recognized the fact that the very effectiveness of Community rules would be jeopardized and that the protection of rights that they enshrine would be diminished, if individuals were not able to obtain compensation when their rights were breached by failure to comply with Community law, attributable to the State.

[11] Paragraph 35 of the Judgement.

[12] The current art. 4 TFEU. According to this article, Member States shall take all necessary measures to ensure the fulfilment of incumbent obligations, under EU legal rules.

[13] Paragraph 36.

[14] **Roxana Munteanu**, *"Rolul jurisdicţiilor naţionale în aplicarea principiului răspunderii statului pentru daunele cauzate particularilor prin încălcarea dreptului comunitar"*, in *Dreptul comunitar şi dreptul intern. Aspecte privind legislaţia şi practica judiciară*, (Editura Hamangiu, Bucureşti, 2008), p. 63.

[15] Paragraph 38 of the decision.

[16] These are clearly shown, in paragraph 40 of the decision.

[17] Paragraph 41.

The Judgement covers naturally, only those conditions under which the state is liable before individuals, for failure to implement or for incorrectly implement a directive. Thus, in *Francovich* Case, the Court's Judgement does not provide answers, but questions such as: may the state liability be committed in cases other than those when the state breaches obligations relating to the transposition of directives? Is the state liable only if it breaches a Union rule which has direct effect, or may its liability be committed also in other EU rules? Given that the conditions required are fulfilled, is the state liability lawfully committed (without checking other elements, such as: guilt, possible causes of removing liability)?

The Luxembourg Court of Justice answered at some of those questions, developing in time an important case-law.

3. Brasserie du pêcheur[18]

Francovich Judgement has the merit to have grounded the principle of European Union Member States obligation to make good damage caused to individuals, by breaches of EU law, but it "has also unleashed an avalanche of studies and analysis that whether noticed the attitude of the Court of Justice or they strongly contested it"[19]. It should also be noted that although the Court gave response to concerns about the protection of individuals' rights, by the proclamation of that principle, *Francovich* Judgement generated a series of new issues referring on the one hand, to the scope of the principle, and on the other hand, to the general conditions for committing liability. According to the General Attorney, Giuseppe Tesauro, the issue of state liability for infringements of Community law, very important both in terms of principles and consequences that a comprehensive and general definition of such liability might have for Member States, is complex and certainly has some traps, as demonstrated in the rich doctrinal debate developed in this respect, in recent years[20].

A key decision to ground the principle of Member States obligation to make good for damage caused to individuals, by the breach of EU law, was ruled in the *Brasserie du Pêcheur* Case [21]. In that case, since the Luxembourg Court had already established that the Member State was responsible for the infringement of EU law, *Brasserie* requested German courts to cover the prejudice suffered, meaning the profit losses caused by the restrictive provisions of German law. The national court, Bundesgerichtshof, ruled that, under the German law for Government's liability, the state did not have to be held liable for the inaction of the state legislative power, especially since it did not contain provisions covering the protection of rights of a third party. In this case, estimating that German law does not provide any basis for allowing a repair of the damage caused to the applicant, the German court sent to the Luxembourg Court a request for a preliminary ruling to

[18] ECJ Judgement, 5 March 1996, *Brasserie du pêcheur / Bundesrepublik Deutschland and the Queen / Secretary of State for Transport, ex parte Factortame e.a.* C-46/93.

[19] **Carol Harlow**, *"Francovich and the problem of the disobedient state"*, European Law Journal (1996), p. 103.

[20] Conclusions presented at the meeting of November 28, 1995.

[21] Circumstances of the case: *Brasserie du pêcheur* SA, a French brewery based at Schiltigheim (Alsace), was forced to discontinue exports of beer to Germany in late 1981 on the grounds that the beer it produced did not comply with the "purity" requirement of the Biersteuergesetz ("BStG"). Further controls on retailers, made by the German authorities, who contested the compliance of the beer quality with the law, determined the only German importer of *Brasserie du pêcheur* not to renew the distribution contract. By Judgement of 12 March 1983, the Court held that the prohibition on marketing beers imported from other Member States, considered inconsistent with BStG, was incompatible with Article 30 EC. *Brasserie du pêcheur* brought an action against the Federal Republic of Germany for reparation of the loss suffered by it as a result of that import restriction between 1981 and 1987, seeking damages in the sum of DM 1.8 million, representing only a fraction of the loss actually incurred. The action being dismissed by lower courts, *Brasserie du Pêcheur* maintained the same conclusions in the appeal before the Bundesgerichtshof. As the infringement mentioned must be considered as an omission of the legislative body, because it did not change BStG in accordance with Community law, the Bundesgerichtshof points out that the damage reparation is provided in the Federal Republic of Germany, by the German Civil Code provisions – *"BGB"* and the Basic Law (Grundgesetz).

determine if the principle of state liability for damage caused to individuals, by the breach of EU law, damage attributable to the state, as shown in *Francovich* Judgement, applies also to the litigation brought before that court. More specifically, the Court was asked to answer the following questions:

- does the principle of EU law, according to which Member States are obliged to pay compensation for damage suffered by an individual as a result of infringements of Community law attributable to the state also apply where such an infringement consists of a failure to adapt a national parliamentary statute to the higher-ranking rules of Community law?;

- may the national legal system provide that any entitlement to compensation is to be subject to the same limitations as those applying where a national statute breaches higher-ranking national law, for example, for where an ordinary Federal law breaches the Grundgesetz of the Federal Republic of Germany?

- may the national legal system provide that entitlement to compensation is to be conditional on fault (intent or negligence), on the part of the organs of the State responsible for the failure to adapt the legislation?

- if the answer to the first question is affirmative and the answer to the second question is negative:

a) may liability to pay compensation, under the national legal system, be limited to the reparation of damage done to specific individual legal interests, for example property, or does it require full compensation for all financial losses, including lost profits?

b) does the obligation to pay compensation also require the reparation of the damage already incurred before it was held in judgement of the Luxembourg Court of March 12, 1987 (C-178/84) that article 10 of the German Biersteuergesetz breached higher-ranking Community law?

In other words, the Court had to determine if the State had any obligation to make good the damage and, if so, under what conditions and for which types of damage, towards individuals who had suffered prejudices due to the application of national laws contrary to EU law.

First, the Court had to determine if it was necessary, in that case, to define *the obligation to make good damages* caused by the application of a national law contrary to rules of the Union, given the fact that in *Francovich* Judgement, the Court had stated that the failure to transpose a directive, under certain conditions, was committing the state liability.

Secondly, it was necessary to determine if, subject to the reservation of limits identified by the Court, the conditions for liability were the proper conditions of each national legal order or if EU law required, at least, the sufficient *substantive conditions* in order for the defaulting Member State to be required to make good the damage caused. Also, in terms of causation, it was necessary to assess if, by its nature, the infringed Union provision allowed the individual to directly defend his rights in order to eliminate the already established illegality regarding the substance.

Finally, it was necessary to bring into discussion *the procedural conditions* regulating the right to compensation, and the criteria for evaluating the damage dimension.

What has the *Brasserie du Pêcheur* Judgement brought new? First, through this decision, the Court clarifies the principle of Member States obligation to make good for damage caused to individuals, by the breach of EU law and, on the other hand, the extension of the mentioned principle scope is found[22]. Thus, as for the clarification of the principle, we notice that the Judgement contains a list of general conditions to be fulfilled in order for the obligation of the defaulting state to be committed, namely:

- the breached rule of law must confer subjective rights on individuals;
- the breach must be sufficiently serious;
- there must be a causal link between the breach of obligation and the damage suffered.

In addition to this list, we find also the clarification of these conditions and the

[22] **Paul Craig, Gráinne de Burca**,*"EU Law. Texts and Cases"* (Oxford University Press, London, 2003), p. 330.

necessary tools for their adequate application. If, as for the first[23] and third condition, things are clear, with no difficulty whatsoever in their application, in the case of the second condition, its application (check) has encountered some difficulties. Why? Because we believe that it is quite difficult to give an objective answer on the following two questions: "what is a sufficiently serious breach"? and where begins the limit when the breach becomes *sufficiently* serious? This time too, the Court attempts and for the moment also manages to present a series of tools, which could be used to provide an accurate assessment of the gravity of EU law infringement, by the respective Member State. In this respect, according to the Court, the concrete analysis of each case must take into account the following factors[24]:

- the degree of clarity and precision of the rule infringed;
- the extent of discretion that the rule infringed leaves to the national authorities;
- the intentional or culpable character of the rule infringed;
- the excusable or inexcusable character of any possible error of law;
- the extent to which the Community institutions attitude contributed to the infringement by the Member State.

And yet, what is a breach of EU law, given the tools provided by the Court? For example, a breach of EU law is manifest, meaning serious enough, if the state persists to infringe EU law, although there is a decision establishing this fact or a constant case-law of the Court, which establishes that the respective conduct represents a breach of EU law.

With regard to the extent of the principle scope, it follows from the content of the decision that the principle is applicable, regardless of the state body that has breached EU law.

Compared with *Francovich* Judgement, where the breach of EU law was represented by the failure to transpose a directive, in the *Brasserie du pêcheur* case, there was an infringement resulting from the fact that the national law was contrary to EU law.

4. Köbler[25]

Although the *Brasserie du pêcheur* Judgement brought additions and clarifications in the matter of EU Member States liability for breaching EU law, another aspect remained, however, unanswered, namely: does the Member States liability for acts of the judicial authorities represent grounds for committing liability? This issue appears because, from the content of the *Brasserie* Judgement, one can infer (interpret) that the principle is also applicable in the situation where the EU infringement is committed by a national Court. However, this interpretation does not result explicitly from the ruling of the Court. Thus, seven years after the ruling in *Brasserie du pêcheur* case, this aspect was also clarified in the decision to *Köbler* case[26].

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[23] What is, however, *"to create subjective rights in the individuals' patrimony?"* How can it be checked, in practice, if a rule meets this condition? In the *Brasserie du pêcheur* case, the Court of Justice did not provide any definition, but only noted that in that case, the condition was fulfilled.

[24] Paragraph 56 of *Brasserie du pêcheur* Judgement, cited above.

[25] ECJ Judgement of 30 September 2003, *Gerhard Köbler c. / Republik Österreich*, C-224/01.

[26] Circumstances of the case: Professor Gerhard *Köbler* had worked at various universities in Germany and Austria. In 1996, he requested the Administrative Court (Verwaltungsgerichtshof) to compel the employer to grant him an age addition, addition provided in Austrian law and taken into account when calculating the pension. *Köbler* showed that even though he had not worked 15 years at an Austrian university, he was meeting that condition of length of service, taking into account the years when he had been professor at other universities in Member States of the Community. He had demonstrated that it was meeting that condition of service, taking into account the years of activity from other universities in the Community. Mr. *Köbler* also claimed that disregarding the period in which he had been professor at other universities in the Community, constituted indirect discrimination contrary to Article 39 of the Treaty and Council Regulation no. 1612/68 on the free movement of workers within the Community. The Austrian Administrative Court, by the closure of 22 October 1997, required a preliminary ruling asking the ECJ if Article 48 TEC could be interpreted in the next situation: if when calculating the length of service, the seniority obtained in other European countries should be also included.

In this case, *Köbler* sued the Austrian state for compensation, showing that the Austrian Administrative Court had infringed EU law, causing him damage by not paying the proper addition based on seniority. The Austrian state defended itself arguing that the Administrative Court decision had not breached EU law, since the purpose of such bonus was the reward of employees' loyalty who had been working at least 15 years continuously, serving the same employer, meaning the Austrian state[27].

However, Austria's representatives argued that the state obligation to offer compensations could not be grounded on an ultimate ruling (as it was the Austrian Administrative Court ruling). In this dispute, the Court that had to rule on Mr. *Köbler's* claims, considered necessary to receive further clarification of the Luxembourg Court, in order to solve the case, which is why it addressed several questions to the Luxembourg Court of Justice[28], of which, relevant to our analysis, is the next: "does the Court case-law according to which the State liability is committed in case of Community law infringement, regardless of the Member State body which is being held liable for this breach (especially *Brasserie du Pêcheur* joined decisions) apply also if the alleged behaviour of the body, contrary to Community law stems from a decision of the Supreme Court of a Member State, in this case of Verwaltungsgerichtshof?"[29]

The Luxembourg Court gave to this question, a very clear answer, namely: the principle according to which Member States are obliged to make good damage caused to individuals, by infringements of Community law for which they are responsible is also applicable when the alleged infringement stems from a decision of a court adjudicating at last instance. That principle, inherent in the system of the Treaty, applies to any case in which a Member State breaches Community law, whichever is the authority of the Member State whose act or omission was responsible for the breach. It is for the legal system of each Member State to designate the court competent to adjudicate on disputes relating to such reparation. Subject to the reservation that it is for the Member States to ensure in each case that those rights are effectively protected, it is not for the Court to become involved in resolving questions of jurisdiction to which the classification of certain legal situations based on Community law may give rise in the national judicial system"[30].

In other words, the Court held that, given the "specificity of the judicial service" and the legitimate requirements of security in legal relations, the State liability for damage caused to individuals, by infringements of EU law in cases where the infringement resulted from a Court decision, was governed by the same conditions as any other infringement of EU law, by the state. Thus, the ruling "puts the judicial grounds for the developing of the law of Member States liability for infringements of Community law"[31], started by *Francovich* ECJ Judgement.

Köbler Judgement too represents only a stage in the evolution of the principle of Member States liability for damage caused to individuals, by infringements of EU law.

5. Traghetti del Mediterranea[32]

Three years after the ruling in *Köbler* case, on June 13, 2006, the European Court of Justice issued a new decision, which has the merit of having cleared conditions under which a Member State is liable for damage caused to individuals by infringements of EU law, as a result of decisions of national Courts adjudicating at last instance.

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[27] According to paragraph 11 of *Köbler* Judgement.

[28] **Sergiu Deleanu**, **etc**., *op. cit*., p.367-368.

[29] **Laura Ana-Maria Vrabie** (coordinator), *"Jurisprudența istorică a instanțelor comunitare - culegere de hotărâri integrale",* vol.2, European Institute of Romania, Translation Coordination Department, Bucharest, 2008, p. 450.

[30] *Ibidem*, p. 443-444.

[31] **Camelia Toader**, *"Curtea de Justiție a Comunităților Europene. Hotărârea Curții din 30 septembrie 2003"*, Analele Universității din Bucureşti, Seria Drept, no. IV/2004, (Editura All Beck, Bucureşti, p. 129.

[32] ECJ Judgement, 13 June 2006, *Traghetti del Mediterraneo SpA v. / Repubblica Italiana*, C-173/03.

In the *Traghetti del Mediterraneo*[33] case, the Geneva Courthouse asked the Luxembourg Court to answer the following questions: does EU law, in particular principles set out by the Court in *Köbler* case, oppose to a national regulation, in this case the Italian law, which on the one hand, excludes any Member State responsibility for damage caused to individuals by infringements of EU law, by a national Court adjudicating at last instance, the breach resulting from the misinterpretation of EU law or from the incorrect assessment of facts or evidence and, on the other hand, is this kind of liability limited only to cases of intent or serious negligence of the Court.

Starting from the idea according to which excluding the possibility that the State responsibility would be committed when the EU law infringement resulted from the interpretation of a Union provision or incorrect assessment of facts or evidence, would prejudice the effectiveness of the liability established by *Köbler* decision, the Court answered both questions, as it follows[34]:

- Community law makes inapplicable the national legislation which excludes State liability, in general, for any damage caused to individuals by infringements of Community law, caused by a Court of last instance, when the breach is the result of a misinterpretation of a Community rule or an incorrect assessment of facts and evidence;
- Community law makes inapplicable the national legislation which limits such liability solely to cases of intentional fault or serious negligence by the Court, if such a restriction leads to the removal of state liability in other cases where a manifest breach of the applicable rule was committed.

6. Kapferer[35]

Remaining loyal to the principle of Member States responsibility for damage caused to individuals by infringements of EU law, the Luxembourg Court of Justice adjudicates again, in 2006, and the decision is part of the post-*Köbler* evolution of the principle mentioned.

In this respect, we bring to the forefront of attention the *Kapferer*[36] Judgement. In this case, the Court of Appeal (Landesgericht Innsbruck) filed a request for preliminary ruling. One of the questions was related to the fact if the national Court had, and if so, under what conditions, the

[33] Circumstances of the case: in 1981, the shipping company *Traghetti del Mediterraneo* ("TDM") sued a rival company, *Tirrenia di Navigazione*. TDM wanted to obtain compensation for damage caused by the competitors because of practicing a low tariff policy on routes between Italy and Sardinia, respectively, Sicily, policy made possible by benefiting of public subsidies. TDM claimed that the granting of such public subsidies was an act of unfair competition, being prohibited by the Treaty establishing the European Community. TDM's action was dismissed, in turn, both at first instance, as well as on appeal and recourse. Considering that the judgement of the Court of Appeal was based on an incorrect interpretation of the provisions of Community law, TDM, company that, meanwhile, went into liquidation, sued the Italian state, before the Genoa Court. TDM requested the Court, the reparation of damages that the company had suffered because of the misinterpretation of the Court of Appeal. TDM also wanted to be demonstrated that the mentioned Court had infringed the Community law, by not complying with its obligation of asking ECJ for a preliminary ruling.

[34] *Communiqué de presse n° 49/06*, 13 June 2006 (http://curia.europa.eu/jcms/upload/docs/application/pdf/2009-02/cp060049fr.pdf)

[35] ECJ Judgement, on 16 March 2006, *Rosmarie Kapferer v. / Schlank & Schick GmbH*, C-234/04.

[36] Circumstances of the case: as a consumer, residing in Tirol (Austria), Ms. *Kapferer* received from Schlank & Schick company (company established in Germany), a promotional material by which she was announced that she could win a prize of 3906,1 €. Receiving the award was subject to an order-test without, however, involving any commitment. Ms. *Kapferer* sent the order form to Schlank & Schick, but it was not possible to determine whether, in fact, she had ordered something on that occasion. By not having received the prize she thought she had won, Ms *Kapferer* brought an action against Schlank & Schick, before Bezirksgericht Hall in Tirol (the Austrian Court), seeking payment of € 3906.1, plus interest. Schlank & Schick claimed, under Regulation no. 44/2001 on case-law, recognition and enforcement of judgements in civil and commercial matters, that the Austrian Court had no jurisdiction, as defined in the Regulation, to hear the case. Bezirksgericht Hall in Tirol dismissed the application. Under those circumstances, Ms. *Kapferer* brought the case before the Landesgericht Innsbruck. Schlank & Schick did not appeal the first instance judgement, so in that respect, the judgement was final.

obligation to reopen a case and to invalidate a final and irrevocable decision contrary to EU law regarding the international case-law.

Starting from the idea that the principle of *res judicata* is recognized both in the legal systems of EU Member States and in the European Union, the Court stated that, in order to ensure the stability of legal relations and the proper administration of justice, it was important that Court decisions which would become final after having exhausted all appeals or after the expiry of their exercise periods, could not be brought again in discussion[37].

Thus, according to the Court, the answer to the question formulated by the Court of Appeal is negative, meaning that the principle of cooperation, provided by article 4 TFEU does not compel a national Court not to apply its own rules of procedure, in order to review and repeal a final and irrevocable decision contrary to Community law[38].

7. Conclusions

The principle of obligation of Member States of the European Union to make good the damage caused to individuals by infringements of EU law is one of the fundamental principles ensuring the full effectiveness of EU law.

The consecration of this principle is one of the most significant developments of the case-law, along with other principles, such as the direct effect and the priority of EU law in relation to national law.

Without the recognition of this principle, the direct effect of EU law would have probably been only partially effective for the exploitation of the legal rights conferred on individuals, by EU rules.

It should be noted that the affirmation of the principle of states responsibility for damage caused to individuals was evolutionary, if we consider the extension scope, starting from acts of the executive to all State authorities, whichever is their function, using, however, the same argument and logical line from *Francovich* Judgement and from other judgements fundamental for the shaping of EU law, as autonomous legal order.

In *Brasserie du pêcheur* Judgement, the Court held that the principle of state responsibility, being inherent in the system of the Treaty, was valid for any breach of EU law, whichever was the national body whose act or omission was responsible for the breach[39]. By this statement, the Court no longer acts only under the EU Treaty system, but also under the mandatory principle of the uniform application of Community law and of the useful comparison with state responsibility in international law[40].

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[37] *Communiqué de presse n° 423/06*, 13 march 2006 (http://curia.europa.eu/jcms/upload/docs/application/pdf/2009-02/cp060023fr.pdf)

[38] *Idem*.

[39] Paragraph 32 in conjunction with paragraph 31 of *Brasserie du Pêcheur* Judgement.

[40] According to conclusions of the General Advocate Philippe Léger in *Köbler* Case, presented on 8 April 2003, paragraph 42.

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THE ROLE OF THE EUROPEAN UNION CHARTER OF FUNDAMENTAL RIGHTS IN THE NEW EUROPEAN CONTEXT

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Abstract

The Charter of fundamental rights of the European Union was proclaimed by the European Commission, the European Parliament, and the Council of the European Union at the European Council held at Nice on the 7 December 2000, was modified on 12 December 2007 at Strasbourg, and, today, according to article 6 in the Treaty on European Union, the Charter gained the juridical value of an constitutive European treaty.

The way it has been conceived, the content of the Charter reflects the Union's desire for the autonomy of the juridical order.

The Charter clearly states the fact that it solely seeks to protect the fundamental rights of the individuals with regard to acts undertaken by the EU institutions and by the member states in applying of the Union treaties. A protocol to Lisbon Treaty introduces specific measures for the United Kingdom and Poland seeking to establish national exceptions to the application of the Charter.

The new treaty provides a new legal basis for accessing of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms.

Keywords: *autonomy, rights, courts, institutions, European Convention.*

1. Introduction:

The protection of the human rights at the European Communities and European Union level has been increased in the same time and in a complementary way with the Convention for the Protection of Human Rights and Fundamental Freedoms and the case-law of the European Court of Human Rights.

The Cologne European Council (3-4 June 1999) entrusted the task of drafting the Charter to a Convention and she is is the end-result of a special procedure, which is without precedent in the history of the European Union and may be summarized as follows:

the Convention held its constituent meeting in December 1999*)* and adopted the draft on 2 October 2000,

the Biarritz European Council (13-14 October 2000) unanimously approved the draft and forwarded it to the European Parliament and the Commission,

the European Parliament gave its agreement on 14 November 2000 and the Commission on 6 December 2000,

the Presidents of the European Parliament, the Council and the Commission signed and proclaimed the Charter on behalf of their institutions on 7 December 2000 in Nice[1].

The Nice European Council decided to consider the question of the Charter's legal status during the general debate on the future of the European Union, which was initiated on 1 January 2001. The Lisbon Treaty guarantee the enforcement of the Charter of Fundamental Rights, which are legally binding not only on the Union and its institutions, but also on the Member States as regards the implementation of Union law.

The European Union Charter of Fundamental Rights sets out in a single text, for the first time in the European Union's history, the whole range of civil, political, economic and social rights of European citizens and all persons resident in the EU.

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[1] http://www.europarl.europa.eu/charter/default_fr.htm#.

They are based, in particular, on the fundamental rights and freedoms recognized by the European Convention on Human Rights, the constitutional traditions of the EU Member States (see the case of the European Court of Justice - *Internationale Handelsgesellschaft, 11/70)*, the Council of Europe's Social Charter, the Community Charter of Fundamental Social Rights of Workers and other international conventions to which the European Union or its Member States are parties[2].

2. Content

In the doctrine it was sustained the idea that "the purpose of the Charter was that to emphasize the importance of the fundamental rights and their content in a easy way of understanding for the European citizens, in a critical moment, when the European construction was facing with a serious democratic deficit[3], obtaining thus, in our opinion, a more revealing nature than innovative*;* we are already mentioned that some of the rights of the Charter have been consecrated and guaranteed by the primary and secondary community law and by case-law of the European Court of Justice.

The Charter lists all the fundamental rights under six major chapters: *Dignity, Freedom, Equality, Solidarity, Citizenship and Justice*, in the light of the social and economic European Union priorities and in the respect of the Union approach values. The Preamble of the Charter sets the person in the core of European actions, affirms the European citizenship and the establishment of the area of freedom, security and justice.

Thus, being the result of an original procedure of elaboration, the Charter also confirms the fact that the EU started an unprecedented renewal process of the human rights protection4.

At present, the article 6 of the European Union Treaty, mention that "the Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties". So, the Charter is compulsory for all 27 Member States, with some exceptions[5].

The Charter will be modified in the same way as the treaties, in accordance with the procedure stated in the new article 48: "*The Treaties may be amended in accordance with an ordinary revision procedure. They may also be amended in accordance with simplified revision procedures*".

Also, the Charter will get the same features as the treaty's provisions in connection with the national law: priority/preeminence, direct effect (which will not apply to all treaty's provisions), immediate applicability, direct applicability. We consider that the Charter's provisions must get the direct effect in order to assure the effectiveness and the respect of the fundamental rights, because the principle of direct effect enables individuals to immediately invoke an European provision before a national or European Court of Justice[6]. The direct effect principle therefore ensures the application and effectiveness of European law in the Member States. When a Member State does not respect

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[2] Article 6.3. "*Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law*".

[3] R.M Besteliu, C.Brumar, *Protecţia internaţională a drepturilor omului*, Note de curs, Ed a IV-a revizuită, (Ed. Universul Juridic, Bucureşti, 2008), p. 88

[4] F. SUDRE, *Drept european şi internaţional al drepturilor omului*, (Ed. POLIROM, Bucureşti, 2006), p. 126

[5] See the Protocol (no 30) on the application of the Charter of fundamental rights of the European Union to Poland and to the United Kingdom which is annexed to the Lisbon Treaty.

[6] http://europa.eu/legislation_summaries/institutional_affairs/decisionmaking_process/l14547_en.htm

The direct effect of European law is, along with the principle of precendence a fundamental principle of European law. It was enshrined by the Court of Justice of the European Union. It enables individuals to immediately invoke European law before courts, independent of whether national law test exist.

fundamental rights when implementing Union law[7], the Commission, as guardian of the Treaties, has powers of its own to try to put an end to the infringement and may, if necessary, take the matter to the Court of Justice (action for failure to fulfill an obligation). So, in accordance with the Charter's provisions, Member States are bound by the Charter only when they are implementing Union law.

However, the European Court of Justice defined several conditions in order for a European legal act to be immediately applicable. In addition, the direct effect may only relate to relations between an individual and a Member State or be extended to relations between individuals. The article 51 of the Charter state, in this view, that "*the provisions of this Charter are addressed to the Member States only when they are implementing Union law*"; it is a mention "more accurate and rigorous"[8] than the judgment of the European Court which determines the respect of the European law only when the Member States operate within the community law.[9]

In its Communication of 19 October 2010 on a *Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union,* the Commission committed itself to strengthening the "fundamental rights culture" (a innovative concept, in our opinion) at all stages of the procedure leading to the adoption of legislation and other acts.

The Commission will check [10] the respect of the fundamental rights at the moment of the elaboration of its legislative proposal. Non-legislative measures adopted by the Commission, such as decisions, are also subject to checks on their compatibility with the Charter during drafting, even if there is no impact assessment. The impact assessments that accompany Commission proposals examine the impact of the proposal on fundamental rights when such an assessment is relevant. After the impact assessment, when the draft legislative proposal (or delegated/implementing act) is prepared, the Commission will check its legality, and in particular its compatibility with the Charter. The Explanatory Memorandums accompanying sensitive proposals will be reinforced by a summary of all the fundamental rights aspects contained in the impact assessment and the legislative proposal.

We consider that the Charter has an important external feature and the external action of the Union must take into account their provisions. Furthermore the title of Charter - "of the European Union" and not of the Union's institutions indicates its external dimension, which reaffirms the rights as they result „from the constitutional traditions and international obligations common to the Member States"; also, the Charter isn't addressed only to the European citizens, but also to the citizens of the third countries (article 15) or to all persons (article 2). In the context, the respect of the fundamental rights will be mandatory for the candidates or potential candidates States for the European Union accession (see the accession of Turkey).

The respect of the Charter will represent an important element within the external relations of the Union with the third countries, in particular within the development cooperation and the humanitarian aid. Every international treaty which will be concluded by the Union must be

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[7] 53. Declaration by the Czech Republic on the Charter of Fundamental Rights of the European Union:
The Czech Republic stresses that its provisions are addressed to the Member States only when they are implementing Union law, and not when they are adopting and implementing national law independently from Union law.

[8] M. DONY, *Droit de l'Union Européenne*, (Edition de l'Université de Bruxelles, Bruxelles, 2008), p. 50

[9] **CJCE**, *Hubert Wachauf v. Bundesamt für Ernährung und Forstwirtschaft,* case 5/88, 13 July 1989

[10] "Fundamental Rights "Check-List":
1. What fundamental rights are affected? 2. Are the rights in question absolute rights (which may not be subject to limitations, examples being human dignity and the ban on torture)? 3. What is the impact of the various policy options under consideration on fundamental rights? Is the impact beneficial (promotion of fundamental rights) or negative (limitation of fundamental rights)? 4. Do the options have both a beneficial and a negative impact, depending on the fundamental rights concerned (for example, a negative impact on freedom of expression and beneficial one on intellectual property)? 5. Would any limitation of fundamental rights be formulated in a clear and predictable manner? 6. Would any limitation of fundamental rights: - be necessary to achieve an objective of general interest or to protect the rights and freedoms of others (which)? - be proportionate to the desired aim? - preserve the essence of the fundamental rights concerned?"

compatible with the Charter, as a treaty of the Union (article 218 of the Treaty on the Functioning of the European Union), and it will be interpreted in accordance with their provisions. Since 90's all agreements on trade or cooperation with non-European Union countries contain a clause stipulating that human rights - the conditionality clause. There are now more than 120 such agreements and the most comprehensive is the Cotonou Agreement – the trade and aid pact which links the European Union with 79 countries in Africa, the Caribbean and Pacific (the ACP group). If any ACP country fails to respect human rights, European Union trade concessions can be suspended and aid programs curtailed. The European Union sees democratic political structures as a precondition for reducing poverty – the main objective of its overseas development policy and it applies the same principles to other partner countries[11]. So, this human rights clause's can facilitate the respect of these rights or can impose that the third countries should comply with them.

We consider that the Charter will activate the European Union Agency for Fundamental Rights, an advisory body of the European Union, which was established in 2007 by a legal act of the European Union[12]. This Agency helps to ensure that fundamental rights of people living in the EU are protected. It does this by collecting evidence about the situation of fundamental rights across the European Union and providing advice, based on evidence, about how to improve the situation. The European Union Agency for Fundamental Rights also informs people about their fundamental rights. In doing so, it helps to make fundamental rights a reality for everyone in the European Union. The Agency should refer in its work to fundamental rights within the meaning of article 6(2) of the Treaty on European Union, including the European Convention on Human Rights and Fundamental Freedoms, and as reflected in particular in the Charter of Fundamental Rights, bearing in mind its status and the accompanying explanations. It considers that the close connection to the Charter should be reflected in the name of the Agency.

Another important European institution - The European Parliament appreciated the new statute of Charter in its *Resolution of 14 January 2009 on the situation of fundamental rights in the European Union 2004-2008*, which mentions that "the Charter constitutes a common basis of minimum rights, and the Member States cannot use the argument that the Charter would provide a lower level of protection of certain rights than the safeguards offered under their own constitutions as a pretext for watering down those safeguards". This Resolution welcomes article 53 of the Charter, which will enable the European Court of Justice to develop its case-law on fundamental rights, thereby giving them a basis in law which is vitally important in the context of the development of European Union law and stresses that the judiciary in the Member States have a vital role to play in the enforcement of human rights; urges the Member States to introduce a system of continuous training for national judges on systems for the protection of fundamental rights.

The Charter has also an important role in accessing of the European Union to the European Convention on Human Rights and Fundamental Freedoms in accordance with the article 6 of the Lisbon Treaty (European Union Treaty), which statues that "*The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties*". Also, the European Parliament welcomes, in its Resolution of 14 January 2009, "the prospect of the Union acceding to the European Convention, even if that accession does not bring about fundamental changes, given that "when questions relating to the rights and freedoms enshrined in the Convention are raised before the Court of Justice of the European Communities, the latter treats the European Convention as forming a genuine part of the European Union's legal system".

This accession will assure "a increased coherence of the human rights protection in Europe, because the European Court of the Human Rights could guarantee the harmony between the Convention and the Charter, checking the interpretation of the Convention by the judge of

[11] http://europa.eu/pol/rights/index_en.htm
[12] http://fra.europa.eu/fraWebsite/home/home_en.htm

Luxembourg when apply the Charter"[13]; this value judgment imposes an analysis on the role of the two Courts in the field of human rights.

The Charter relaunched the idea of the accession to the Convention which had a specifically evolution at the level of the Council of Europe and the European Communities. The Court of Luxembourg opinion's – 2/1994[14] stated that the European Union has been not prepared, at that moment, for accessing, because the "accession to the Convention would, however, entail a substantial change in the present Community system for the protection of human rights in that it would entail the entry of the Community into a distinct international institutional system as well as integration of all the provisions of the Convention into the Community legal order. Such a modification of the system for the protection of human rights in the Community, with equally fundamental institutional implications for the Community and for the Member States, would be of constitutional significance and would therefore be such as to go beyond" the treaty's provisions (article 235).

At present, the European Convention on Human Rights is not directly bound on European Union institutions, but it will be once the process of accession to the Convention will be finalized; all Member States of the Union are directly bound by the Convention. Therefore, all proposals for legal acts of the Union that need to be applied by Member States must fully respect the Convention.

We mentioned already that many of the rights contained in the Charter correspond to rights guaranteed by the Convention, but it also protects certain rights that are not covered by the European Convention. The Charter precises that "*the rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions*".

Furthermore the Court of Strasbourg stated, in its case-law, the Charter as external source. For example, the article 9 of the Charter, which guarantees the right to marry ("*The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights*") "departs, no doubt deliberately, from the wording of Article 12 of the Convention in removing the reference to men and women"[15]. Or a dissenting opinion of a judge of the Court of Strasbourg[16] stated that it is obvious that the premise of the debate on genetic safeguards in a number of recent conventions and the prohibition on the reproductive cloning of "human beings" in the Charter of Fundamental Rights of the European Union (Article 3 § 2, final sub-paragraph) is that the protection of life extends to the initial phase of human life. In conformity with this dissenting opinion, the article 2 applies to human beings even before they are born, an interpretation which seems to me to be consistent with the approach of the Charter of Fundamental Rights of the European Union, and since France does not afford sufficient protection to the *foetus* against the negligent acts of third parties, "there has been a violation of Article 2 of the Convention". "As

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[13] F. SUDRE, *Drept european şi internaţional al drepturilor omului,(* Ed. POLIROM, Bucureşti, 2006), p. 130

[14] **CJCE**, *opinion no. 2/94* from 28 march 1996. „It is well settled that fundamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories. In that regard, the Court has stated that the Convention has special significance (see, in particular, the judgment in Case C-260/89 *ERT*. Respect for human rights is therefore a condition of the lawfulness of Community acts".

[15] **CEDO**, *Christine Goodwin v. United Kingdom,* no. 28957/95, 7 July 2002. The applicant claims a violation of Article 8 of the Convention, the relevant part of which provides as follows:

"1. *Everyone has the right to respect for his private ... life...*

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

[16] **CEDO**, *VO v. France***,** no. 53924/00*,* 8 July 2004.

regards the specific measures necessary to discharge that positive obligation, that is a matter for the respondent State, which should either take strict disciplinary measures or afford the protection of the criminal law (against unintentional homicide)".

On the other hand, the judge of Luxembourg interpreted the community law in the light of the Charter's provisions, before acquiring the compulsory statute; for example, in the case C-275/06, when the community judge outlined the necessity to assure a balance between the various fundamental rights guaranteed by the community judicial order[17].

3. Conclusions

In conclusion, we consider that the Charter will get an important role in the new European Union context and development, at internal and international level. The Union European action must be above reproach when it comes to fundamental rights and the Charter must serve as compass for the Union's policies and their implementation by the Member States. So, the European Union institutions and Member States are obliged to respect the rights, observe the principles and promote the application of the Charter in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it by the Treaties.

This role of the Charter could be analyzed in the context of the actual procedure of the Union accession to the European Convention on Human Rights and Fundamental Freedoms, because their provisions will be interpreted by the European Court on the Human Rights. Also, we consider that it is important and useful to elaborate a research on the application of the Charter's provisions by the nationals courts.

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[17] **CJCE,** *Productores de Música de España (Promusicae) v. Telefónica de España SAU*, C-275/06, 29 January 2008. Even if, formally, the national court has limited its question to the interpretation of Directives 2000/31, 2001/29 and 2004/48 and the Charter, that circumstance does not prevent the Court from providing the national court with all the elements of interpretation of Community law which may be of use for deciding the case before it, whether or not that court has referred to them in the wording of its question (see case C-392/05 *Alevizos* [2007] ECR I-3505, paragraph 64 and the case-law cited)...Finally, if that is not the case either, in order to provide the national court with an answer of use to it, it will have to be examined, starting from the national court's reference to the Charter, whether in a situation such as that at issue in the main proceedings other rules of Community law might require a different reading of those three directives.

CONSIDERATIONS ON THE EXISTENCE OF DISCRIMINATION IN GRANTING THE STATE PENSIONS

MĂDĂLINA TOMESCU*

Abstract
Social protection is a way that respects human dignity. This is because each citizen is a part of society and he contributes to its development. In return, the society gives to him a social protection, materialized in social services including the pension he received after a full contribution stage.
This article attempts to demonstrate that the current public pension system violates the principle contributiveness by establishing the government's pension point value and application of discrimination in the way of granting the state pensions.

Keywords*: human dignity, pension, discrimination, pension public system, the right to pension.*

Introduction

The issue of calling into question the existence of discrimination in the field of pensions by the State.

Pension rights are a very important constitutional right. Throughout our active life, all of us contribute (without having the possibility of option), to establish the State social insurance budget. Thanks to this contribution we have at the age of retirement, sometimes earlier, the advantage of the right of property on a public pension. This is a form of respect for human dignity, but also a form of from the society for all our contribution to its development.

Therefore, political decisions should have to respect the seniors, without breaking their dignity. Ensuring a decent life and the financial independence of these categories of persons should be an important aim of each Government.

Unfortunately, the Romanian system for public pensions, confirms a lot of discrimination based on various criteria. All these discrimination are the root of much dissatisfaction of the current retirees. Therefore, I decided to examine at least a part of this discrimination with the hope that I will warn the Government to remove them.

1.HUMAN DIGNITY

The 20th century was witness to propagating the idea of democracy from the political class towards the most of the domains of social life. The belief that **people are equals in dignity and rights** was confirmed by the institutions of mass societies, especially by the diversion industry that develops the ordinary person's ability of placing itself instead of others and watching the life as they would watch.

Dignity represented from 1948 an often treated subject, situated between theory and practice, sometimes with sympathy, other times disdainfully.

Human dignity is guaranteed by the two important principles of international law that governs the object of human rights, **equality and undiscrimination.** Those principles postulate the right to exercise all the established rights and the ensuring of protection to every person when facing the possible abuses of the authorities. On the contrary, the unequality and discriminationare a

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negation of fundamental rights and liberties of the human person. *"If discrimination and its incontestably the most flagrant manifestation- the rasism- continue, it is shown in a ONU document, we will not hope to to build up* ***an international society founded on human being's dignity and value"***. Or, this object is connected with the Nations' purposes and its constitutive act satates this triptych : equality, undiscrimination, dignity- in its many articles. The peoples from United Nations- shown in the second line from the preamble of the Chart- declare themselves decided to be reaffirmed "a) the belief in fundamental human rights, in dignity and value of human person, in equal rights of men and women as well as of large and small nations". Under Art.13, The General Meeting is authorized to initiate studies and to recommend in order to "b) promote human rights achievement and fundamental liberty for all, without discrimination of race, sex, language or religion". The principle of undiscrimination is enunciated in art.55 point c) and 76 point c).[1]

Regarding the definition of the concept of human dignity, this realised mostly approaching the fundamental human values, as well as through the discovery of the rapport between dignity and the right to a decent life.

The dignity shows the value, the honesty, the moral merits, the degree of appreciation as well as the achieved rank by a person in society. In the Christian teaching, human dignity in a divine gift, that irrespectue of the conditions in which the individual lives, he has the God's image as an aexample. Within society we understand dignity as the self-sufficincy and freedom of thinking and also the individual's behaviour[2].

The **human dignity** considered as fundamental and the sum of all the rights, it has been defined as **the sum of all the human values and of the respect towards the individual**, characteristics which man receives from the moment he is born and lasts tilll after his death. It is not and it cannot be considered an object irrespective of race, origin, etc. In the presence of "human dignity" as a fundamental right of freedom of the press and the right o f liberty itself, the propety rights, to life, the right of expressing opinions, of religious believes, the right to a decent life, the right to correspondence and all the pther rights are built on human dignity, the corner stone of the civilisation and the entire society[3]. Not by chance, the dignity is considered **a right that protects the individual and the image of the individual** even after a person passed the limit between life and death.

Also, it can be said that the human dignity constitutes the keystone that puts together the right to exist, the right liberty and the social right of the community that are mentioned in the Universal Declaration of Human Rights. Thus we find in this document affirmations according to whivh the human being is unique, irreplaceable, meant to a transcedent life, and not just a unity in a social entity. It has to be mentioned that the Universal Declaration of Human rights from 1948 recognises not only the individual rights of the human being, but the rights witih various human collectivities. The definition of the person as a being in communion, as a solidary entity, loving the neighbours, determines us not to dissociate the human rights by its duties or responsibilities.

So, the formal right on the other hand must be completed with the moral-spiritual dimension of human dignity. The dignity of freedom is conditioned by its ethic fondation, respectively of responsibility. From this point of view the person's rights corroborate with those of the neighbours'. The respect for our neighbour has to be at least equivalent to that we want for ourselves.

[1] Ionel Cloşcă, Ion Suceavă, *Human Rights Treaty*, (Europa Nova Publishing House, Bucharest, 2003), p. 78.
[2] See *Explanatory Dictionary of Romanian Language*, precum şi www.wikipedia.ro .
[3] http://www.dingermania.com/2010/demnitatea-umana/

2. DISCRIMINATION

Discrimination is the different treatment applied to a person because this person belong, in real or supposed, to a certain social group. Discrimination is an individual action, but it constitutes a social paternal behavior, if the members of the same social group are similarly treated.[4]

According to the Government Ordinance no. 137/2000 discrimination is "*any distinction, exclusion, restriction or preference based on race, nationality, ethnicity, language, religion, social category, beliefs, sex or sexual orientation, belonging to a disadvantaged category or any other criterion that has the purpose or effect the restriction of the use or removal of recognition or exercise, on equal terms, human rights and fundamental freedoms or rights recognized by law, in the field of political, economic, social and cultural or any other areas of public life*"

From the sociological point of view, discrimination refers to actual behavior towards the other group. It can be observed in activities which removes the members of a group from opportunities offered another. Although the prejudice most often sits on the basis of discrimination, they may exist separately. People can have attitudes marked by prejudices, but which do not always give them way.[5]

The theories which place emphasis on social stratification suggest that discrimination is "the product of social stratification based on the unequal distribution of power, status and wealth between groups".[6] The dominant groups try to keep the position by discriminatory practices. Social psychology research has revealed that the members of groups with higher status tend to discriminate more than those of subordinate groups.[7]

The real conflict theory developed by Sherif (1956) argues that discrimination occurs in conditions of competition for limited resources between the two groups. In this context, individuals tend to favor the members of their group. Also, the social identity Theory developed by Henry Tajfel (1981) shows that individuals tend to discriminate for the group they belong to obtain a superior position to the other groups. This fact leads to a positive social identity at individual level. One of the areas in which discrimination is present often is the scope of public social services (for example, the social welfare services, health services, educational services, institutions intended to maintain public order). Discrimination is present here because of the discretionary power of the officials of these institutions (Michael Lipsky,1980).

In the analysis that he makes relations between officials of public institutions and their customers, Michael Lipsky[8] identified a number of situations which may arise to customers differentiated treatments and certain groups of customers that are potentially promote. Thus, the officials will be tempted to favor, in the distribution of resources, on customers who seem to have most likely eligibility according to the criteria of bureaucracy. Also, the bureaucrats will tend to favor the citizen that can get some gratification. In this case is the same size or other officials concerned with (for example ethnic or racial). Different treatment occurs especially when there are many resources for applicants and there is no procedure either control for the way in which they were assigned, also in a situation where officials must decide whether some customers respond better to

[4] Michael Banton, *Discriminarea*, (Editura DU Styl, Bucureşti).

[5] Giddens, A, *Sociology , (*All Publishing House, Bucharest, 2010), p.235

[6] Bouhris, Turner, Gagnon „*Interdependence, Social Identity and Discrimination*", în Oakes, Penelope, Naomi Ellemers, Alexander Haslam (coord.) – *The Social Psycholgy of Stereotiping and Group Life*, (Blackwell Publishers, Oxford, Cambridge, Massachusetts)., p. 274

[7] Ibidem, p. 285

[8] Michael Lipsky is Senior Program Director at Demos, a public policy research and advocacy organization based in New York. Before coming to Demos in October, 2003, he served for twelve years as a Senior Program Officer in the Ford Foundation's Peace and Social Justice Program, where he managed a portfolio of approximately 100 grants, creating and then managing initiatives to strengthen government and public accountability in the states. He studied discrimination and the vulnerability of some social groups from 1979 till now.(http://sourcewatch.org/ index.php?title=Michael_Lipsky)

that treatment than others. In the conditions under which public servants work involves a tremendous stress, they will call the stereotypes to simplify work and will act in accordance therewith.

The groups subject to discrimination and often on the centered most studies are: ethnic minorities, racial, religious, elderly people and groups of immigrants. There was a special concern for the discrimination practiced against women. In the last period a particular interest is given to studies about sexual minorities, discrimination of persons with special abilities, and the elderly. The most investigated fields of manifestation of discrimination were the educational system, the labor market, indwelling. These socially vulnerable groups become economically vulnerable (S.M. Miller, 1996). Those who are the target of prejudice and discrimination in a society which will encounter difficulties on integration in the labor market (there they will not find employment as qualified or will be paid at the lower level of those who belong to favored groups), they will have difficulty in obtaining public benefits. However, they are vulnerable in economic terms and they are included in the category of groups with high risk of poverty.

3.THE ENSURING TO RESPECT THE HUMAN DIGNITY THROUGH PENSION RIGHTS

The pension represent the most important performance of social insurance given within the public system. Any type of pension is given to the person entitled to the requested of the entitled person, of the designated representative by this with special delegacy , of the tutor or of his curator[9].

It can thus be said that because of the contributions paid by every person employed during his active life, pension in constituted in a gained right, Thus the citizen exerts a property right on the pension and the pension right. Also, **pension both as right and element of private property, represents a claim of the state which forces it to pay and to protect**[10]. From this perspective the quantum of tehe pension is considered that it cannot be negatively modified, because it is a gained right. Even in the Criminal law domain there is the principle of criminal law more favorable, all the more so in the domain of constituting the quantum on person's pension, if a recalculation is effectuated the more favorable pension is kept with the bigger amount). It is natyral to be so, because it is proper for the society to be thus thankful to those who contributed to the society developement , in their way.

But in the same time , respecting the Resolution 3137/XXVIII from 1973 (Romania was member of O.N.U. in that moment), the obligation of the sate is that to assure the aged persons, on one side, a decent pension-to assure a financial independence and a decent living, and on the other side , the employment opportunity according to needs with the discouragement of the discriminating politics and measures. Therewith it recommended that when they elaborate national politics and programmes to be respectful of the following principles:

- To edit programmes for the sged persons' welfare, health and protection, including measures to assure them to the utmost extent economical independence and social integration;
- To elaborate measures of social security to assure them a sufficient income;
- To intensify aged persons' contribution to economical and social developement;
- To dismay discriminating attitudes, politics and measures founded exclusively on age that the employment practices;
- To encourage the conclusion of cooperation agreements on social security for the aged persons;

[9] http://www.cnpas.org/portal/media-type/html/language/ro/user/anon/page/ pensions;jsessionid=003C8E1F7316AF28E0EE1A07BB40C684

[10] http://www.facias.org/documente/Petitie%20ONG%20Romania%20-%20abuzurile%20guvernului%20Boc.pdf

- To encourage the creation of employment possibilities for eged persons, according to their needs.

Between the 26th of July and the 6th of August 1982, in Vienna, took place the World Meeting dedicated to aged persons and convoked in order to constitute a tribune destined to start a programme for an international activity meant to assure economical and social security in their own country for aged persons. This because the Meeting estimated that the numaber of these kind of persons would increase spectacularly in the following 20 years[11], but that these persons represent an important human resource, both in the economical- social domain and in what concerns the transmission of cultural patrimony[12].

These measures are meant to promote and to assure **the respect for dignity of aged persons**, because their brutal removal from the work system and the neglect or their creative capacities, because of the age has dramatical efects on the entire society.

4. DISCRIMINATION IN THE FIELD OF GRANTING STATE PENSIONS

4.1. Equality versus equalization

The Constitution of Romania (1965), art. 20 established the right of citizens to material insurance of old age, sickness or incapacity for work. According to this article, the right to material insurance for manual workers and officials was done by pensions and sickness benefits granted under the social security system, and for members of the cooperative organizations or of other public organizations was done by forms of insurance held by the latter.

In application of this constitutional provision was adopted the law No. 3/1977 on pensions of State social insurance and social assistance. According to this law, the State guarantee for every citizen, regardless of sex or nationality, the right to a pension on the basis of the provision brought to the society development.

The pensions were established in relation to the quantity, quality and social importance of the work, which is laid down the principle of achieving a fair relationship between the proceeds of the pay and pension.

The criteria for differentiation in the level of the pension were made up of length of service, salary and working group.

Initially, law No. 3/1977 has provided for the calculation, as regards the criterion of retribution, as the average of the monthly salary. Then, by variations introduced since the year 1990, it was intended as a basis for this criterion, the average fee for a period of 5 years chosen by each worker, in the last 10 years of activity[13].

The funds required for pension's payment were established from contributions made up of units and from the amounts allocated for that purpose from the State budget. Employed persons contributed 2-4% of the monthly pension contribution for the additional pension. According to the law, **the right to pension was imprescriptibly and not taxable.**

The pension rights, when all the conditions were accomplished, was triggered by "Decision"which provided the monthly amount due under this law.

The legislator adopted the law No. 19/2000 on the system of public pensions and other social insurance rights, a normative act, which entered into force on 01.04.2001. The new legislation differs substantially from the law no. 3/1977. The first difference is represented by the principles underlying the public pension system: uniqueness; gender equality; social solidarity; contribution; the distribution; autonomy.

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[11] Sice 1982 till nowadays (2012), third age population really multiplied, according with present statistics.

[12] I.Cloşcă, I.Suceavă, op.cit. p. 201

[13] Băjan, Doru, *About the right to a public pension*, http://www.consultingreview.ro/articole/despre-dreptul-la-pensia-publica.html

The big novelty is the pension point! Also, another novelty is the mode of regulation laying down the amount of the pension, determined by multiplying the annual average score achieved by the insured person during the period of contribution by the amount of a pension point in the month of removal to a pension.

In the form of the original law no. 19/2000 provided that the amount of the pension point was at least 45% of average gross monthly salary on economy, forecast for the year. This pension point is approved by the law of the State social insurance budget. In case of a deviation of more than 10% from the gross monthly salary on economy achieved compared with the forecasted, then it will re-calculate the amount of the pension point on the basis of a new forecasts of gross monthly medium salary on economy.

Contributions are due to make both of the employers and their employees being differentiated in terms of working conditions, the odds are approved annually by the law of the State social insurance budget.

Determined on the basis of the score and the value of the pension point was established the new amount of the pension, **but the favorable amount for the person**.

According to the law no. 19/2000, the pension is a benefit of social security and income replacement for loss of professional earnings as a result of old age, which represents a risk insured.

The pension rights were demonstrated by the "Decision" to set the average score achieved. Quantifying the value of the pension point is, however, from this moment, at the discretion of the State, it is losing the contact with the person's contribution to the social security budget over the life of the asset. The concrete amount of the pension becomes so dependent on public financial resources, which shall draw up by the Government, the annual budget bills through Parliament, and the majority of the approved annual budget laws, allocate them for this purpose.

There is a responsibility of the State, in this respect, to carry out the fundamental rights stipulated in the Constitution, has the reach of public and private property that belongs to and is the largest owner of Romania. Financial resources depend on the ability of the political class just to power/governance to manage this wealth.[14] Therefore, the taxpayer, despite lengthy contributions, has no control over the money which they were stopped on a monthly basis, the gross salary. So, there appears the next question: *Why there must be a political involvement on the amount of pension a person?* If the value of the pension have not exceed a percentage of maximum 45% of the gross average salary per economy, what happens to the rest of the money that helped the citizens of the (necessarily) the social insurance budget?

The answer is very clear. From my point of view there is a equalization of the citizens, and not in compliance with the principle of equal rights. This is because no matter the importance of the work.

4.2. Discrimination based on age criteria

4.2.1. The equalization of retirement ages for men and women

European Commission Program entitled "*Supporting national strategies for safe and sustainable pensions through an integrative approach*" includes a series of objectives, including the Equalization of retirement ages for men and women. Present in Romania at a seminar on the reform of pensions, organized by the Partnership for Equality Center, Susan Ward, independent consultant and author in the field of pension schemes in the United Kingdom, believes that it is very difficult to secure good pensions to those who worked for 40-45 years old, having a good job and secure income, but it is more difficult to secure decent pensions to those who have discontinued their work or have changed their place of work. This was referred to gender equality and the more flexible employment and career systems, because women are the ones that have most disruption in the period of employment or periods of employment without full time because of their role in the care of

[14] Ibidem.

children and the elderly. Ms. Ward has referred to the EU legislation in the field of social security, in particular to Directive 79/9 which stipulates equal treatment for women and men in the social insurance system, which is the age of retirement, with a few derogations, and equal treatment on the labor market. A new EU directive prohibits discrimination, including age discrimination, which entered into force in 2006, being relevant at the time of the change of pensionable age.

In the same seminar[15] has talked about how the countries of the region have opted to increase the retirement age to solve financial problems faced by national pension funds. However, there are differences in the way in which this measure has been applied.

Thus, Hungary, Estonia, Latvia and Slovakia, Governments have taken the decision to balancing out the retirement age of women with the retirement age of men. In Bulgaria, Lithuania and Slovenia will shrink the difference between the pensionable age of women and men from 5 years to 3 years to 2 years.

Retirement age In the Czech Republic will be the same for women and men, except for women who have many children, who may leave earlier retirement. Romania and Poland keep difference of 3 and 5 years.

Although the removal of the difference between retirement ages may be considered by some women as unfair or unlike, the studies carried out have shown that this is justified (for various reasons), and that is one way of achieving gender equality in this area. These reasons are related to the interaction between the changes of orientation of reform, by individualism and retirement age. In countries where it was chosen by an individualization of pensions, the real value of "benefit" of a lower retirement age for women is indirectly being dampened; in other words, women receive lower pensions, because they will contribute five years less from the Pension Fund. A simulation carried out in Poland for 2050, on the old pension scheme shows that if you continue retirement women before men (women to 60 years and men at 65), women's average pension will represent 75% of the average pension of men. If women retire at the same age as men, women's average pension will be 81% of pension of men. The same simulation on the new system, shows that if they hold retirement 5 years before women with men, women's average pension will be only 57% of the average pension of men, while if the two groups the same retires, the pension age for women will be the average of 73% of that of men.

The conclusion can be that the new system- leveling the retirement age for men is the only way of protecting women against poverty at the old age. Although it is not the most pleasant of the options, the BIM study shows that maintaining the retirement age difference not only leads to disadvantages for women. This is the best argument to justify the extent of the Equalization of retirement ages[16].

The new law on pensions in Romania–law no. 263/2010 keep the difference in retirement age between men and women, in the art. 53. Thus, women may retire at 63 years old, while males can do it at the age of 65 years old.

4.2.2. Introduction of pillar II –private managed pension[17]

According to the Commission for supervision of Private Pension System (CSSPP), introducing 2nd pillar- pension private managed represents a significant reform of pensions, because it means "expanding databases system". Here is a first case of discrimination, whereas, according to law no. 411/2004, the contribution to this pillar is compulsory for persons up to 35 years old and optional for persons between the ages of 35 and 45 years. In my view, the contribute to this pillar

[15] Elaine Fultz, Markus Ruck and Silke Steinhilber*, The gender dimension of social security reform in Eastern and Central Europe, Case studies, Czech Republic, Poland and Hungary,(* BIM SRB*,* Budapest, 2003).

[16] See *" Gender equality and reform of pensions-critical aspects for Romania"* – http://www.cpe.ro/romana/images/stories/continuturi/cateva%20aspecte%20critice%20pentru%20romania-brosura.pdf

[17] http://www.csspp.ro/pilonul-2

private managed pensions would have to be optional or mandatory for ALL those who contribute money to the national pension system, regardless of age. The introduction of age classes shows discrimination on this criterion. In other words, if a person who has exceeded the 45 years old would like to subscribe to pillar II will not be able to do so, being considered... too old.

Moreover, private managed pension may inherit, which is not valid for the public pension. Again, the age says: stop! What is different from a person who has more than 45 years to the one that is up to 45 years old at the time of the application of the law? Why does not have the same options? Answer: this person is too old; anyway ... no longer matter whether or not to leave any legacy...

In addition, another discrimination – all on the criterion of age – is just the introduction of this system, because the private managed pension "steals" of pension insurance budget a percentage (determined according to the political interests of a particular time), so this budget was a significant lack of money. Current retirees can see the situation can be considered true burden on the shoulders of the State, whose governmental activity now have no reason to deprive him of a property right – the property right on pension. In the name of an invented "crisis", the Government can now take ... charge lower pensions!!!

So, I asked myself: is it incidentally that Hungary chose undemocratic solution to nationalize the private managed pensions – 2nd pillar?

4.3. Discrimination based on the criterion of estate

Art. 14 of the Convention for the protection of human rights and fundamental freedoms "the prohibition of discrimination" obligation to ensure the exercise of rights provided for by the Convention, among other things, without any distinction on the "assets".

"Assets/fortune" is a property right which is protected by the first additional Protocol to the Convention**.**

All retirees regardless of the pension system are equal in quality for retirees with regard to the revenue obtained through the recognition of the fundamental right to a pension provided for by art. 47 of the Constitution.

By the law nr. 343/2006 was amended the tax code (approved by law No. 571/2003) fixing the taxation of the income of the monthly pension for amounts exceeding lei 1,000.

New obligations were imposed for retirees with income greater than 740 lei to pay health insurance contribution in the amount of 5.5% of the income by no O.U.G. 117/2010.

Within the meaning of art. 14 of the Convention for the protection of human rights and fundamental freedoms, such taxation only to the pensioners who carried out the pension income above a certain ceiling, means discrimination according to wealth, you can always be invoked in the courts of common law.

The pension is a good, consisting of a claim of the citizen towards the State, whose property is protected by the Convention for the protection of human rights and fundamental freedoms.

Through the taxation of pension, the State does reduce the amount of the claim of the citizen, and thus its property[18]**.**

4.4. Discrimination based on… contribution

One of the fundamental principles governing the organization and functioning of the public pension system is contribution principle, according to which our social insurance funds is established on the basis of the contributions due from individuals and legal entities participating in the public system; social security rights are based on social insurance contributions paid[19]. In other words, you get how much money you contribute. However, it is just a trap, because the contribution principle is

[18] Băjan, Doru, *About the right to a public pension*- http://www.consultingreview.ro/articole/despre-dreptul-la-pensia-publica.html

[19] http://www.drp.gov.ro/download.php?433fa673fe3895ee44e63c71729d24ca

valid only if it is implemented from scratch. Or, as the sociologists say when doing an experiment "*all things being equal*". Only that "*all things*" are not nor may it be "*equal*"[20]. Therefore, this principle of contribution should be taken into account more relative, he can never be accepted as the only rule for the award of pensions in a civilized state and considered a "*state with the rule of law*"**.**

Those of special systems did not have and do not have equal terms with other contributors. Due to their special status, policemen, the military and others have not contributed to the State insurance budget**.** They are not privileged, as some would believe**.** Special character was due to special conditions of work, which has limited rights that otherwise they would have had in civil life. In the case of the military and policemen, as in the case of persons in the National Administration of Penitentiaries, they made an oath to the Romanian people, so they were available to all their active period. **I have to specify that the oath of allegiance was made in front of this people, not for those who have the power in the state temporary.** Also, it ia very important to consider the danger they faced during their activity, as military, policeman or civil servant in National Prison Administration. Specific restrictions that prevent them from systems other than the income received from the service. And, while the system was designed so that there is no need for their contribution because their pension system was different from the other, as everywhere in the civilized world, the principle of contribution may not apply to them[21].

For all that, the law no. 119/2010 specifies in art. 3 alin.2 that „*in the situation of the pensions (...) established based on special laws, the pension in public system makes considering carried out all the conditions specified by the Law no. 19/2000*". In other words, even the legislator sanctions a lie, only for seeing made their political interest, meaning reduction the incomes of these categories of persons.[22]

Also, in the debate on the application of the law no. 119/2010 passed unnoticed provision of the article. 177 of the Law No. 263/2010, according to which, for military and similar frameworks, from the State budget will be charged the corresponding differences that these contributions, together with employers, must pay to the State insurance budget, net income of the staff have not to be affected[23].

The law also specifies that special pensions that have become "normal" and they have to be paid from the State insurance budget. Thus, in addition to a lie, this law promotes a great deal of discrimination, too. Pensions to these persons, who have not contributed, because the law at that time was required to contribute, will be paid only by those persons who have contributed and contribute, in accordance with the law to this budget. So, suddenly there was a great burden on the Social Insurance System budget and on the current taxpayers.

5. Instead of conclusions...

The pension system and the Social Insurance System needs a reform. This reform must not outline a political decision without coverage in real life. In our opinion, it has to regard a direct connection between the contribution that every active person deposits during his life and his pension. Also, it is important the fact that some categories, whose activity is extremely important not only for the citizens, but for the entire country, must benefits of a special abidance, because of the fact that their rights are not limited during his active life as employee.

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[20] Năstase, Adrian , *Contribution – a principle with perverse effects* - http://nastase.wordpress.com/2010/05/19/contributivitatea-%E2%80%93-un-principiu-cu-efecte-reale-perverse/

[21] Băjan, Doru, *About the right to a public pension*- http://www.consultingreview.ro/articole/despre-dreptul-la-pensia-publica.html

[22] At the end of January 2011, Romanian Government adopted a new Government Order changing the methodology for calculate again these pensions. The law 119/2010 is still in force, so, the lie is still in force!!!

[23] Băjan, Doru, *About the right to a public pension*- http://www.consultingreview.ro/articole/despre-dreptul-la-pensia-publica.html

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IMMIGRANTS' INTEGRATION MODELS

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ANDREEA UZLĂU[**]

Abstract

In the context of the European population aging trend, and while the birth rate is still at a low level, the immigrants may contribute to the support of the EU economy and to finance the national social protection systems. But this would be possible only if they have been fully integrated in the host countries, the integration policies being a task of the national governments. The European Union may still offer support and stimulation through financing, policies coordination and good practices exchange facilitation. The new measures should encourage local level actions, including cooperation between local authorities, employers, migrants' organizations, service providers and local population. Within the EU, there live 20.1 million immigrants (approximately 4% of the entire population) coming from outside European area. An important element of the common EU policy on immigration is the one regarding the development of a policy on immigrants' integration, which should provide a fair treatment within the member states, and guarantee rights and obligations comparable with the ones of the Union citizens.

Keywords*: immigrants, refugees, social exclusion, immigrants' integration policies and models, the European Social Model.*

Introduction

Integration problems have always been a priority on the political agenda of Europe, during the year 2010. On one hand, the European leaders accept more and more the importance of coherence between immigration policies and the integration ones and the efforts that have to be made by the migrants that have a legal residence and the host societies in order to ensure their economic, social, cultural and political participation. On the other hand, some Europeans' attitude about immigration and integration may lead to discrimination and racism, even if the anti-migration feelings do not have, often, links to the realities upon migration and its impact on economy.

Despite all the efforts, migrants are still facing some obstacles on their way to integrate in the European societies. In order to respond to these problems, the responsible ministries with integration met in 2010 in Zaragoza and re-stated their commitment on *"the integration as an essential fact of the social development and cohesion"*[1]. The Commission has launched a pilot project to identify the monitoring indicators of the integration policies results. Also, the Commission started to develop the so called "*European modules*", in order to support the national and local policies and practices in the integration matter.

At the national level, most of the member states have elaborated integration national plans and/or have set up consultative organisms, which may be questioned about integration issues. Some member states have modified their legal framework, in order to introduce tests for the third countries nationals, designed to evaluate the integration process. Legalizing the rights and obligations of the new comer migrants with the aid of an "*admission and integration contract*" went on in some member states. In many of them, a special attention have been paid to the necessity of learning the

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[1] http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/115346.pdf.

host society language and to counter the growing unemployment rates among the migrants, measures being taken in order to improve the access to a job. The trend to elaborate global strategies and monitoring systems to watch their results, have gone on as well in the most member states.

Supplementary efforts are needed in order to grow the integration efficiency. EU has to admit and to support the contribution of the migrants to the economic development, ensuring, in the same time, the social cohesion. Only through a progressive provision of an efficient social and economic integration of the third countries nationals that legally reside in EU, may lead to an acceptance of the migration idea on a larger scale, promoting the same time the fundamental European values. A synergy should be encouraged between the followed political initiatives in the context of the migration policy and the series of horizontal political initiatives for the provision of a proper and global political answer. For the Commission, an approach "from down to up", based on a well organized governance at the local/regional level, should be the best way to accomplish this goal.

Paper content

Migration is a global phenomenon, and the European continent is not an exception: all the European states are source, transit and destination countries, in different proportions. Recent estimations on migrants' population that live within the European economic area show more than 20 million foreigners, without the already naturalized or the illegal ones. An important element of the EU common policy on migration is the one regarding the development of a policy targeting the migrants' integration, and the right treatment of them on the member states' territories, as well as the guarantee of rights and obligations comparable with the ones of the EU citizens. From a macro perspective, the concept of integration regards a characteristic of the social system, of the society as a whole, and that is the intensity of the relationship between the parts (groups and individuals). During the last few years, the concept of social cohesion has been very used as an equivalent for integration.

The term of integration has a variety of dimensions, and the most important one regards the incidence, which includes, at its turn, two separate characteristics: frequency and intensity. For a proper understanding of the phenomenon, it is very important to know how these dimensions interact.

There are more theories about the migrants' integration process. One of them states that the migrants are assimilated by the new society, during two, even three generations, and, at the end of the process there are no more visible differences between the new comers and their children, on one hand, and the host society, on the other hand, only the names and appearance (skin color, etc.), maybe. The main obstacle in validating this theory has been the obvious fact that, even after a few generations, cultural differences may be observed between the migrants and their children and the host society. It is obvious, as well, that those communities, developed as a result of the immigration phenomenon wish to strengthen their own cultural identity, sometimes despite the fact that the members of these communities might have an active and full participation within the host society. Otherwise speaking, this active and full participation does not inflict necessarily, the abandon of the specific cultural identity. Thereby, what have been initially labeled as assimilation is proved to have two dimensions that do not necessarily concur, a structural dimension and a cultural one. The first shows the growth of the social participation of persons and groups within the wide society, especially at an institutional level (labor market, education, health system, etc.), while the second one represents the processes of values change and cultural identification of the migrants.

In the specific literature, when references are made to the institutional participation growth, the term of *integration* is used, and when we refer to cultural changes, *acculturation* is used to define it, a complex term which reflects the fact that total assimilation in the main culture is not the only option and, as well, it is not an absolute requirement for the success of the integration process. Social policies on migrants' integration regard mostly the institutional dimension, the ways to promote the migrants' participation within the major institutional systems of the society, and less the cultural dimension.

Integration should be understood as a process of active participation of the migrants in all the European society dimensions, process watched from two directions: both from the legal resident migrants in the EU point of view, and the host society one. This fact inflicts, on one hand, the responsibility of the host society to provide a legal framework with rights and obligations which may offer the possibility of migrants' participation in the economic, social, cultural and civil life, and on the other hand, the foreigners should respect and follow the fundamental rules and values of the European society and, in the same time, to actively participate at the integration process, without still losing their own identity (the main difference from the assimilation concept). Also, the European Commission indicates the main categories of immigrants which should benefit of the integration programs:

- Economic immigrants;
- Family re-unification immigrants;
- Refugees and persons that are granted with international protection

Because of the fact that the term "*immigrants' integration*" is a complex one, with multiple meanings, the differences between the states concerning its interpretation lead to different visions upon the social policies in the matter. However, even if the interpretations would be the same in each state, the social policies would still be different, because of the political and social circumstances, and also of the different histories relating the migration.

So, it is said that a distinction is useful between three major dimensions of the integration process: social and economic dimension, legal and political dimension and cultural dimension. Any policy related to the promotion of immigrants' integration must take into consideration these three dimensions. The ability to offer a broad explanation is limited for each dimension separately taken. That is why some authors have built models, in order to cover this complex process, models which attend to all the three dimensions.

In Europe, three models of policies can be distinguished, related to integration:

a. The model of the seasonal worker, for which Germany is the prototype. Migration process is mainly determined by the needs of the labor market, and the presence of the immigrants is only temporary. As a consequence, a legal status is not a necessity and nor a reflection on the possibility to facilitate the cultural diversity.

b. Assimilation model, for which France is representative. Immigration is considered to be permanent; migrants are welcome and get a legal status, under the condition of assimilating the behavioral models of the dominant culture. Immigrants are considered, first of all, as individuals, the concept of *immigrants' community* not being acceptable within this model.

c. Ethnic minorities model, for which Great Britain is the prototype. Immigration is regarded as permanent, but the immigrants are defined depending on their ethnic and cultural origin. They build their own communities, different from the existing ones, but the real challenge is to make these communities to live in harmony, within a multicultural society.

Castles developed another typology that tries to reconcile the different dimensions:

a. The model of exclusion based on differences, gathering Germany and the South Europe states;

b. The assimilation model, in Great Britain, France and the Netherlands;

c. The pluralist model, which can be found only in countries outside Europe, classic countries, which encourage immigration.

Despite the big differences from political and ideological point of view between the states, in all countries, within the social policies regarding migrants' integration, a point of interest is that, after granting the right of legal residence, access is facilitated, in equal conditions, to the labor market, establishments, education, health care, etc. Also, similarities can be found about the policies of citizenship granting, as well as about the efforts of countering discrimination, racism and xenophobia.

During the last few years discussions about the *European Social Model* are more often. All the European countries share common characteristics which, together, give birth to this *Model*. First of all, it is about a common commitment for social security and justice, full occupation of the labor market, universal access to the health care services, education, adequate social protection for special cases of disease, motherhood, aged people, unemployment and social assistance services in order to prevent poverty and social exclusion. These aspects are fully accepted by all European states and are included as basic elements of the legal and institutional framework and as objectives of the social policies as well. The European Social Model is based on the acknowledgement of the fact that social security and justice may contribute both to the economic efficiency and to the social progress. European governments usually embrace the idea that there is no opposition between the economic efficiency and social cohesion, but, actually, they are strongly related. In case of economic recession, the state might balance some social risks, as the unemployment, disease or disabilities risk, which the free market cannot cover at a satisfying level for all the citizens. Social policy measures have the role to reduce uncertainties created by a market economy, to strengthen the capacity of the individuals to adapt to the economic, technological and social changes, to provide the possibility to acquire new specializations and an equal framework of opportunities. Secondly, the *European Social Model* is characterized by a high degree of organization around some common interests, following the negotiation between governments, social partners and civil society regarding the aspects of social and economic policies. Fight against social exclusion is a primary objective on the EU agenda. The concept of exclusion has multiple dimensions and the measures that try to counter the social exclusion must cover a very wide area of directions, as: education, occupation, professional training, establishments, health care, social protection, etc. These measures are dedicated to the under-privileged groups, and immigrants and refugees are, in EU opinion, groups with high risk of social exclusion. Measures regarding labor force occupation and access to the social protection and assistance are considered to be the main ways to the social integration. From this point of view, the immigrants and the refugees are a target-group, as well.

National programs aimed towards the immigrants' integration are dominant in those countries where the majority of immigrants are accepted, based on the procedure of family re-unification or because of humanitarian reasons (based on the procedure of asylum), immigrants who usually do not have a work offer before entering the country and who rarely speak the host country language.

In its majority, the immigrant population feels almost the same necessities and needs services which should address them. There are, though, certain groups that need a special attention. We refer here to the refugees and to the persons that are granted with international protection, women and immigrants part of the second or third generation.

Although from many points of view refugees and persons granted with international protection are confronted with the same situation as other immigrants, issues related to the forced nature of the immigration and the special necessity of protection need a special approach of this group within the social policies for integration. It is important to remind that these persons did not choose to leave their countries for economic reasons, but for reasons of persecution they have been confronted with, and they need a supplementary support and special services in order to facilitate their integration. Integration programs addressed to refugees should be complementary to the usual social services and should be focused on the vulnerable groups within the refugees' communities. Certain specific requirements of the integration measures, limitations or obligations, which may be generally imposed to the immigrants, cannot be applied the same way to the refugees.

Local integration is one of the durable solutions to the refugees' problems and refers to their setting down, on long term, in the host country. Local integration, together with the volunteered repatriation and establishing into another country are considered to be one of the traditional durable solutions for the refugees and are based on the assumption that persons who have been granted with a refugee status would permanently remain in the asylum country. Integration is a process of dynamic

change, which must be regarded from two perspectives: from refugees point of view, integration request a preparation in order to adapt to the host society's life style, without losing the cultural identity, and from the host society's point of view, a will is requested to adapt public institutions to the population's profile changes, to accept refugees as a part of the national community and to act for facilitating their access to resources.

Also, the integration is a long term process, which starts with the moment of arrival in the host country and ends when the refugee becomes an active member of the society, from legal, social, economic, educational and cultural perspective. In the countries with great experience in the refugees area, it often happens that the integration process to extend beyond the first generation.

Conditions related to the integration

EU member states have jumped to the conclusion that, for a successful migration policy, improving the integration process is compulsory. From this point of view, many countries provide integration programs for legal migrants who have been accepted within the national territory, sometimes on a period of few years. However, it must be noticed that the request in some legislations regarding migrants' "integration potential" has significantly increased recently. On the other hand, there are more situations nowadays when the "integration potential" has to be proved before immigrating, for example by passing a test of knowledge about language and society in the destination country.

The great majority of the EU member states do not impose integration conditions as general conditions (for all the immigrants or for the not-permanent residence request). Only three states have this provision in the legislation: Netherlands, France and Austria.

There is a trend to give the integration conditions a general character in the national legal framework, especially during the past two years. Starting with March 15th, 2006, with a few exceptions, each persons aged between 16 and 65 who wants to get a longer term residence in Netherlands and has to ask for a temporary residence permit (MVV - Machtiging tot Voorlopig Verblijf), has to pass a civic integration exam, abroad. This test is an oral exam about language knowledge and with questions about the Dutch society. Questions about life style in the Netherlands, geography, history, Constitution, democracy, legislation, language and need to know it, family life, education, health, work and income may be posed. The test would be held at the Dutch embassy or consulate abroad, and successfully passing it is a former condition to obtain the temporary permit. Examination tax is 350 EUR.

On July 24th, 2006, based on the *Law regarding immigration and integration*, an integration condition has become compulsory in France, as well. A "reception and integration contract" is requested to the new comer adults and foreigners between 16 and 18 years of age, who frequently enter French territory and who requested a residence permit. Only foreigners who do not want to settle in France, as students and seasonal workers, as well as people who have studied there for at least three years of secondary school, are not object of this condition. According to the contract, the foreigner would have to attend civic formation courses and, if necessary, language courses. Respecting the conditions of the contract is taken into consideration when a temporary residence permit should be renewed or when a long term residence permit is granted.

In Austria, the obligation to fulfill integration conditions has been introduced in 2002. Foreigners who ask for a residence permit are requested at their turn to respect an "integration agreement". This agreement consists of two modules: one concentrated on "acquiring the ability to read and write" and the other one on "acquiring knowledge about German language and the ability to participate at the social, economic and cultural life in Austria". A final exam, evaluated with "admitted", is required in order to respect the agreement. It must be noticed that this is a legal condition. Consequences for not respecting this obligation may be administrative punishment, financial disadvantages or, as a last method, expulsion.

It may be seen from the above mentioned, that the states pay the greatest attention to the language knowledge. More than that, Netherlands requires civic knowledge and France civic education courses.

The biggest difference between states is the way they apply the requests and the related legal consequences. Austria and France impose an obligation that almost all the immigrants (even if there are some exceptions) to attend an integration program. Moreover, the Austrian law says that immigrants have to pass a final exam; not respecting this provision is an offence and, the worst case, the immigrant might be expelled. In France, intentionally not respecting the contract might lead to the refuse of renewing a temporary residence permit or to grant a long term one.

On the other hand, Netherlands requests that the possible immigrant to learn the language and to acquire civic knowledge, during the period he is still abroad; oppositely, the permit would not be granted. We must say again that this condition is a general one, and, consequently, it is applicable to all immigrants. Fulfilling this condition by the immigrant means in the most cases, that he would invest some money, time and efforts in order to gain the requested knowledge. It must be noticed that opportunities to learn German and Dutch language abroad are more limited than to learn English, for example. Moreover, if a possible immigrant is coming from a rural area and/or an emergent country, this condition is even more pressing. In Netherlands, the integration monitoring system in 2006 showed an decrease of the MVVs, as a possible result of the abroad imposed test (TK 2006/07, No. 39; see also Country Report for Netherlands). Without being a surprise, the general immigration conditions related to integration are object for sharp discussions, both in public and in academic areas.[2]

The Justice and Home Affairs Council adopted on November 19th, 2004 in Brussels, the European framework on integration, stipulating, *inter alia*: "Basic knowledge about host society language, history and institutions is compulsory for integration; allowing the migrants to acquire these basic knowledge is essential for a successful integration". (JHAC 2004)

While the JHA Council speaks about "allowing the migrants", it may be noticed, looking the present legal provisions on integration that an alienation of the integration perception has happened, from a positive social measure toward its perception as a measure to limit the immigration (Besselink 2006), specifically, *integration condition*. Moreover, these conditions' efficiency is in doubt. For example, reading and learning a language abroad, where there is no possibility to practice it daily, would need a bigger investment than learning it in the host country, and consequently, it is not the best method to ensure the acknowledgement (Groenendijk, 2007). The language level required in fact by the national legislation, in order to pass the tests, is, however, much too low to allow the access on the usual labor market. Also, it is reasoned that these imposed integration conditions are not the solution for the integration related issues, as urban intendance and planning or for social and cultural isolation (Besselink, 2006).

Conclusions

Integration of the third country nationals which are legal residents remains a key issue, sometime polemic. Successful integration is essential because of humanitarian and cultural reasons. It is, as well, necessary in order to maximize economic and social benefits of the immigration, both for individuals and for the society. There is not only one mean to provide a successful integration, but it is obvious that more efforts have to be made both at the EU and at national and local level, for better results. Each migrant should feel at home in Europe, respecting its laws and values, and should be able to contribute to Europe's future.

Integration needs efforts both for the migrant, and for the society which accept him. Migrants should be offered the possibility to participate at the new communities' lives, especially

[2] For examples, see: *Spiegel Online,* July 11th, 2007; *Radio Netherlands*, August 22nd, 2007; *Irish Independent*, August 26th, 2007

with the goal of learning the host country language; they need access to the labor market and to the education and health systems and have the social and economic capacity to keep up. They must be aware about the fundamental values of the EU and of the member states, in order to understand the culture and traditions of the country they live in. Migrants' integration means a balance between their rights and the respect they owe to the laws and culture of the host countries.

Increasing the efforts for the migrants' integration improvement in the destination countries is a key part of the global approach of the migration, being linked to the commercial exchanges, as well as to the investment competencies and flows. Understanding this phenomenon must be improved and actions should be intensified from the point of view of social integration and social policies adaptation (especially in the health and education matters), economic and labor force integration and fight against xenophobia and social exclusion.

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CONSIDERATIONS ON THE PHENOMENON OF DOUBLE TAXATION IN THE EUROPEAN UNION

ALICE CRISTINA MARIA ZDANOVSCHI*

Abstract
In the general context of economic globalization, international economic cooperation, the liberalization movement of goods, services, capital and persons, and the effect of the exercise of fiscal sovereignty, appears the phenomenon of double or multiple international taxation of income and assets, following the vocation of several legal systems, which contain legislative differences and can generate tax obstacles, such as, the laws of the country of origin of the revenue and the legislation of the country of destination of income.
Thus, more interesting becomes the study of the phenomenon of double taxation at EU level given the distinct presence of 27 sovereignties in full process of European integration
So, this paper aims to identify how the European Union handles the phenomenon of double taxation, making a shift from defining this phenomenon to identifying the legislation designed to avoid or eliminate the phenomenon of double taxation in the field of EU direct taxation.
Also, this paper deems necessary to stop a moment upon the fiscal harmonization and integration in the indirect taxation field of the European Union.

Keywords: *the phenomenon of double taxation, direct taxation, European Union, fiscal sovereignty, avoidance of double taxation.*

Introduction:

In the contemporary context of the liberalization of the movement of goods, services, capital and people, development and diversification of international economic and financial relations, moving from regional to a global plan of interdependence on the one hand, and in the context of the intensification of the integration process Europe, the European Union - Pillar I, on the other hand, it is considered a scientific approach to date this work.

The paper, entitled "*Considerations on the phenomenon of double taxation in the European Union*", is aimed at identifying how to manage the phenomenon of double taxation in the European Union.

For this purpose , I considered it necessary to structure this work on 10 chapters, for the present three important issues on the chosen theme in our opinion, they assumed, and i.e. (i) identifying the context in which they unfold and the phenomenon of double taxation appears in relation to the taxation at EU level, Chapter 1, (ii) identifying the management modality on the phenomenon of double taxation on the European Union Level by submitting legislative framework in current EU in the field direct taxation seeks fiscal harmonization at EU level and therefore eliminating double taxation and alignment of tax legislation by 27 different States, Chapters 2-9, and (iii) illustrating some aspects of indirect taxation in the European Union – value added tax (VAT), excise and customs duties, though, the phenomenon of double taxation is shown imposing taxes on only direct precisely because of this nature integration of the European Union, the Chapter 10.

Also, we watched the impact on the matter with changes made by *Treaty of Lisbon* with its entry into force.

Of course, this paper would not have been finished without a part of it treating the author's conclusions, thus, distinct from the paper itself, we'll present the conclusions we reached from the paper itself.

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In terms of bibliographic sources, they include both the professional literature in the field of tax law and EU law, and community legislation and case law with implications in the field.

1. Taxation in the European Union and the phenomenon of double taxation

In the general context of economic globalization, international economic cooperation, the liberalization movement of goods, services, capital and persons, and the effect of the exercise of fiscal sovereignty, appears the phenomenon of double or multiple international taxation of income and assets, following the vocation of several legal systems, which contain legislative differences and can generate tax obstacles, such as, the laws of the country of origin of the revenue and the legislation of the country of destination of income.

Integration into the European Union (EU further)[1] imposed solving the problems related to *fiscal harmonization*[2], implicitly *fiscal sovereignty*[3], as well as *the phenomenon of double taxation*[4] and its prevention.

Remember, first, that EU fiscal policy is founded on the General Principles of the Treaty of Amsterdam respectively, *Common intern market*, *non-discrimination* and *legislative approximation* and on the *freedom of movement of goods, persons, services and capital.*[5]

Thus, **harmonization of fiscal policy** *at European level is the result of* **the compromise made** *between the sovereignty of Member States and obstacles created by differences in the legal system for different categories of taxes and fees*. The current level of harmonization achieved by the Member States clearly shows that *the uniformity of taxes will not be spontaneous and will not evolve quickly*.[6]

However, at the EU level, according to doctrine[7], cannot talk about politics generally applicable fiscally, despite the introduction of the Single Market and Economic and Monetary Union.

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[1] With the entry into force of Treaty of Lisbon on December 1, 2009, *the European Union has a single legal personality, thus, EU substitutes and succeeds the European Community*. Also, *EU is based on the Treaty on European Union* (TEU) and the *Treaty on the Functioning of the European Union* (TFEU).

Furthermore, regarding the creation of European communities, the establishing of European Union, issues modifying treaties, EU enlargement, see, in detail, Octavian Manolache, *Community Law Treaty* (Bucharest, C.H. Beck, 2006), p.3-19; Augustin Fuerea, *European Union Manual* (Bucharest, Legal Universe, 2006), p.13-26, p.32-77; Tudorel Ştefan and Beatrice Andreşan-Grigoriu, *Community Law* (Bucharest, C.H. Beck, 2007), p.1-42; Gilbert Gornig şi Ioana Eleonora Rusu, *European Union Law* (Bucharest, C.H. Beck, 2007), p.8-23; Stelian Scăunaş, *The European Union* (Bucharest, C.H. Beck, 2008)*, p.*73-98, p.276-285; see, also, www.eurlex.eu.

[2] D.D. Şaguna, op. cit., p. 617 *apud* Rada Postolache, *Financial Law* (Bucharest: C.H. Beck, 2009), p.178.

[3] *The right to establish and collect taxes on a given territory* was named *fiscal sovereignty* or, in other words, *exclusive competence of the State in the field of taxation;* right that the State does not share it with anyone and the manner in exercising this right should not be answerable to any court or international organization. Currently, this last aspect *receives new nuances in the context of globalization*. For more aspects regarding fiscal sovereignty see, in detail, Alice Cristina Maria Zdanovschi, "*The concept of fiscal sovereignty*" (communication presented at the Scientific Session of Teachers of Legal and Administrative Sciences Faculty, Christian University "Dimitrie Cantemir", (Bucharest, April 7, 2011).

[4] Regarding the phenomena of double taxation see, for example, in detail, Narcisa Roxana Moşteanu, *International double taxation* (Bucharest: Didactic and Pedagogic Publishing House. R.A., 2003), p.7-31; Guerrino Sozza, *La fiscalità internazionale* (Milano: Edizioni Fag, 2010), p.99-137, Daniela Camelia Nemoianu, "*Avoiding double taxation in the context of bringing Romanian legislation to the European Union standards"* (Ph. D. Thesis, University of Bucharest, 2005)*,* 200-205, Alice Cristina Maria Zdanovschi, "*International Taxation*" (Ph. D. Thesis, University of Bucharest, 2011), p.183-202.

[5] Nemoianu, "*Avoiding double taxation.*", p.19.

[6] Regarding this aspect, see, in detail, Dan Drosu Şaguna and Tofan Mihaela, *Financial and fiscal European Law* (Bucharest, C.H. Beck, 2010), p.209.

[7] Nemoianu, "*Avoiding double taxation.*", p.19.

European primary law of basic treaties in the field of taxation contributes through secondary legislation, namely directives and regulations[8]. But they are not concerned about taxpayer only for certain taxes that they had *to adapt* to ensure *fundamental objective* of "*freedom of movement and non-discrimination*". For this reason *some taxes are in power of community institutions* that created *common rules on them*.[9]

Also, *Community directives into national law* **are part of positive law**[10] and *it stands under the direct control of the Court of Justice of the European Union* (CJEU further)[11]. Thus, note in this regard on the value added tax (VAT) as it became a real court of last resort for fixing jurisprudence[12].

According to specialized literature[13], *the general legal framework of the taxation at EU level* could be justified by the overall objective expressed in the *Treaty establishing the European Community* (TEC further)[14] at *article 3* according to which, certain tasks are required, and among them are relevant:

a) according to *article 3 paragraph 1 letter c TEC*, **a functioning internal market** characterized by the abolition of obstacles between Member States to the free movement of goods, persons, services and capital,

b) according to *article 3 paragraph 1 letter h TCE*, **the approximation of the laws of Member States** to the extent required for the functioning of the common market.

We still have to emphasize that with the coming into force of the *Treaty of Lisbon* on 1 December 2009, there were many changes in the founding treaties, thus, besides changing the name of the *Treaty establishing the European Community*, into the *Treaty on the Functioning of the European Union* (TFEU further), **article 3 paragraph 1 TEC**[15] **was repealed and replaced**[16] **by articles 3 to 6 TFEU**[17]. Also the communities' purpose was provided by *former Article 2 TEC*, now *repealed and replaced on the merits of Article 3* of the *Treaty regarding the European Union* (*TEU*)[18].

So, on the basis of the general legal framework of taxation, as existing in the repealed provisions and continuing into the new form in force, in **direct taxation** matter *have been issued a number of directives to remove tax barriers*.

Thus, in light of defending and application of freedom of establishment[19], there is *a common tax regime* applicable to the founding companies and subsidiaries of different Member States, mergers, separations, transfer of assets and exchanges of shares between societies in different Member States and the transfer of the registered office of a European society (SE) or European cooperative societies (SCE), between Member states, interest rates and royalty payments made

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[8] Radu Bufan, *"The taxation of transactions with foreign elements (I),"* *Commercial Law Journal 1* (2005): 181.

[9] See, Postolache, *Financial law,* p. 179.

[10] See, *art.11 Romania's Constitution*.

[11] Until the entry into force of Treaty of Lisbon the former title of the Court was *the Court of Justice of the European Communities* – CJCE.

[12] Regarding this aspect, Postolache, *Financial law,p.* 180.

[13] Nicoleta Diaconu, "*Tax regulations in the European Union,*" *Commercial Law Journal* 2 (2009): p.8-9.

[14] For the present paper in regard with TEC we used the consolidated version as seen on www.eurlex.eu, OJ C325, p.33, 24.12.2002.

[15] See for the former text,
http://eur-lex.europa.eu/ro/treaties/dat/12006/pdf/ce00020090212ro00010331.pdf, 44-45.

[16] See, the correlation tables, consolidated version of the Treaties, accessed 19 January 2012.
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0361:0388:RO:PDF, 367,

[17] Now art.3-6 TFUE provides areas of EU competence.

[18] See, art.3 TEU, consolidated version - www.eurlex.eu, OJ C 83/17, RO 30.3.2010, p.17.

[19] See in this regard, Raluca Moise, "*Freedom of establishment under Community law and direct taxation*," *Romanian Journal of Community Law* 3 (2005): p.64-70.

between the associated societies in different Member States, the arbitration procedure to avoid economic double taxation.

For all that, in the reasoning of such directives it shows that: "In a Single Market having the characteristics of a domestic market, transactions between companies of different Member States should not be subject to less favorable tax conditions than those applicable to the same transactions carried out between companies of the same Member State"[20], or "whereas mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States *may be necessary in order to create within the Community conditions analogous to those of an internal market* and *in order thus to ensure the establishment and effective functioning of the common market*; whereas *such operations ought not to be hampered by restrictions, disadvantages or distortions arising in particular from the tax provisions of the Member States*; whereas to that end it is necessary to introduce with respect to such operations *tax rules which are neutral from the point of view of competition*, in order **to allow enterprises to adapt to the requirements of the common market, to increase their productivity and to improve their competitive strength at the international level**;

whereas *tax provisions disadvantage such operations, in comparison with those concerning companies of the same Member State*; whereas **it is necessary to remove such disadvantages**;

whereas *it is not possible to attain this objective by an extension at the Community level of the systems presently in force in the Member States*, since differences between these systems tend to produce distortions; **whereas only a common tax system is able to provide a satisfactory solution in this respect**"[21].

In the same vein a major importance, in our opinion, in harmonizing the laws for the functioning of the common market were the provisions in art.293 TEC. Thus, art.293 TEC ruled *that Member States, as appropriate, will conduct negotiations for the abolition of double taxation in the Community for the benefit of their nationals*. Today, after the entry into force of the Treaty of Lisbon, art.293 TEC was repealed as there was no correspondent in TFEU.

Concomitantly, keep in mind that this article found it's applicability in the Convention on Arbitration[22], which established a arbitrary procedure of avoiding double taxation, but it only concerns the avoiding of economic double taxation[23].

According to this Convention, **there is no obligation for the Member States to effectively eliminate double taxation**; *bilateral arrangements are limited in foreseeing the efforts made by the States in eliminating them*.

Therefore **Member States shall keep full sovereignty on direct taxes** *bearing the responsibility in this area*. Because while indirect taxes is affecting goods and services quite independently of national structures and institutions, direct taxes underlines national visions on fiscal equity; thus, direct taxes are closely correlated with characteristics of a national legal system, with that national identity; therefore *the matter of direct taxes belongs to the Member States*[24].

This is highlighted by the **CJEU jurisprudence** and then after *commenting upon this jurisprudence* both national[25] and international[26] reference materials.

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[20] According to Directive 2003/49/EC, on this act also see *infra 7*.

[21] Directive 90/434/CEE, accessed 19 January 2012, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1990L0434:20070101:EN:PDF, see also Directive 90/435/CEE.

[22] Nemoianu, "*Avoiding double taxation.*", 24; Florin Norocel Petroşel, "*Avoiding double taxation in international relations,*" (Ph. D. Thesis, University of Bucharest 2007), p.96. See *infra 4.*

[23] Postolache, *Financial law, p.*180.

[24] Bufan, "*Taxation ... (I),*" p.182.

[25] See, for example, Moise, "*Freedom of establishment,*" 64-70; Mihai Banu, Note to cause C-376/03, D. c. Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen, Judgment made on the 5 of July 2005, not published, Journal of Romanian Community Law 3 (2006): 133-49.

Thus, in **Case C-298/05**[27] Columbus Container Services BVBA & Co. against Finanzamt Bielefeld-Innenstadt, Judgment of the Court of 6 December 2007, the Court decides the following:

"27. As a preliminary point, it must be recalled, that, according to *settled case-law***, in the absence of unifying or harmonizing measures adopted by the Community**, *the Member States remain competent* to determine the criteria for taxation of income and wealth with a view to eliminating double taxation by means inter alia of international agreements (see, in particular, Case C-307/97 Saint-Gobain ZN [1999] ECR I-6161, paragraph 57; Case C-290/04 FKP Scorpio Konzertproduktionen [2006] ECR I-9461, paragraph 54; and Case C-374/04 Test Claimants in Class IV of the ACT Group Litigation [2006] ECR I-11673, paragraph 52).

28. However, although **direct taxation falls within their competence**, the Member States *must exercise that competence consistently with Community law* (see Case C-265/04 Bouanich [2006] ECR I-923, paragraph 28, and Test Claimants in Class IV of the ACT Group Litigation, paragraph 36).

44. In this respect, *double taxation conventions* such as those envisaged in Article 293 EC **are designed to eliminate or mitigate the negative effects on the functioning of the internal market** *resulting from the coexistence of national tax systems* referred to in the preceding paragraph (Kerckhaert and Morres, paragraph 21).

45. **Community law**, **in its current state** and in a situation such as that in the main proceedings, **does not lay down any general criteria for the attribution of areas of competence between the Member States in relation to the elimination of double taxation within the European Community**. Consequently, apart from Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJ 1990 L 225, p.6), the Convention of 23 July 1990 on the elimination of double taxation in connection with the adjustment of profits of associated enterprises (OJ 1990 L 225, p.10) and Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments (OJ 2003 L 157, p.38), *no uniform or harmonization measure designed to eliminate double taxation has as yet been adopted at Community law level* (see Kerckhaert and Morres, paragraph 22).

Also, previous CJEU jurisprudence established certain rules[28]:

a) elimination of double taxation within the Community represents one objective of the Treaty,

b) apart of the Convention in 23 July 1990 concerning the elimination of double taxation in connection with profit adjustments in associated enterprises (*Convention on arbitration*), there are no

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[26] In this regard see, Timothy Lyons, "*Direct taxation and the Court of Justice: the Virtues of Consistency*" (Communication presented at the "Community Taxation: Recent Developments and Future Perspectives", Trier, October 30-31, 2003).

[27] OJ C 022, p.0003-0003, 26.01.2008**.** Case C-298/05: Judgment of the Court (First Chamber) of 6 December 2007 (reference for a preliminary ruling from the Finanzgericht Münster (Germany)) — Columbus Container Services BVBA & Co. v Finanzamt Bielefeld-Innenstadt (Articles 43 EC and 56 EC — Taxes on revenue and wealth — Conditions for taxing the profits of an establishment situated in another Member State — Double taxation convention — Methods of exempting or offsetting tax). For this case see, www.eurlex.eu, accessed May 2009.

In that respect, also see, CJEU, Case C-194/06 Staatssecretaris van Financiën against Orange European Smallcap Fund NV, Judgment of 20 May 2008, where as has been observed in paragraphs 30, 32 and 48 of this judgment*, it is for the Member States to organize their systems for taxing distributed profits and to define*, in that context, *the tax base and the tax rate which apply to the shareholder receiving them*, and that, **in the absence of any unifying or harmonizing Community measures**, *Member States retain the power to define, by treaty or unilaterally, the criteria for allocating their powers of taxation*.

See also, CJEU, Case C-101/05 Skatteverket against A, Judgment of 18 December 2007, according to paragraph 19, although direct taxation falls within their competence, the Member States must none the less exercise that competence consistently with Community law.

[28] See in detail, Mihai Banu, Note to cause C-376/03, 144.

unification or harmonization to eliminate double taxation adopted at Community level or by Member States through multilateral conventions, under Article 293 TEC[29].

On the other hand, under Article 293 TEC, now repealed, Member States, joined, when necessary into negotiations between them looking for guarantees in the interest of own nationals, of eliminating the double taxation, by *concluding of bilateral agreements*[30] between them, which found inspiration from double taxation pattern conventions on income and wealth tax, drafted by the OECD.[31]

However, *it is not for the Court competence*, under art.234 TEC[32], *to rule on possible violations of the provisions of this kind of Convention by a contracting Member State*. Thus, **the Court is unable to examine the relationship between a national measure and regulations of an agreement in order to avoid double taxation**; this aspect does not fall in the Community law[33] area of interpretation. And because *the scope of a bilateral tax conventions* concluded by Member States is *limited to individuals or legal persons specified* therein[34].

According to law enforcement application priority[35] of EU law with regards to a report between conventions to avoid double taxation and Community law, within the European Union, Member States may not agree, by *bilateral tax conventions against EU rules*. In consequence, community law prevails over provisions of bilateral tax conventions. Aspect accepted in the specialized literature[36].

It may be noted, as was noted in the specialized literature[37], there is a "*negative harmonization*" *by case law in matters of taxation*. Thus, the Court, removing from application, by its jurisprudence, national legislation incompatible stipulations, cannot form a tax system compatible with the common Market; therefore this integration takes place in a negative matter, only by abolishing the incompatible systems without proposing an acceptable alternative[38].

Also, this "negative harmonization" is given in applying the article regarding non-discrimination and those regarding basic freedoms[39]. Thus, this articles, being applied directly to individuals or legal persons in the EU, they can be invoked directly before national courts which, under certain cases, may require a preliminary decision in Court. And decisions of the CJEU *exceed the individual and leads to the harmonization of national tax rules*.

However, the specialized literature[40] holds **a Single European Tax opportunity**, *in the complex context of fiscal harmonization at EU level*, process which represents *the alignment of normative rules* in taxation matter in Member States, *to diminish* and, if possible *eliminate the negative effects* produced by *different tax systems between the Member States of the common market*.

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[29] Case C-336/96, Gilly, in ECR [1998] I-2793, pct.24 *apud* M. Banu, notă la cauza C-376/03, 144.

[30] See, for example, art.9 Directive 2003/49/CE, that states a *delimitation clause*, so, "this Directive shall not affect the application of domestic or agreement based provisions which go beyond the provisions of this Directive and are designed to eliminate or mitigate the double taxation of interest and royalties". See also, *infra* 7.

[31] Mihai Banu, Note to cause C-376/03, 144.

[32] Now art. 267 TFUE.

[33] See, paragraphs 46, 47 of C-298/05, CJEU.

[34] Paragraph 50 C-194/06, CJCE,

[35] See, for exemple, Manolache, *Treaty*, 67 and next; Fuerea, *Manual*, 172 and next; Ştefan and Andreşan-Grigoriu, *Community Law,* 187 and next.

[36] Bufan, "*Taxation... (I),*" 183.

[37] Nemoianu, "*Avoiding double taxation."p.* 25; Petroşel, "*Avoiding double taxation.*" P.97; Moise, "*Freedom of establishment,*" *p.*70; Timothy Lyons, "*Direct taxation and.".*

[38] Moise, "*Freedom of establishment,*" p.70.

[39] Terra B and P.Wattel, European Tax Law, Deventer, Editura Kluwer, 1993 *apud* Nemoianu, "*Avoiding double taxation."* 25; Petroşel, "*Avoiding double taxation."p.*97.

[40] In this regard, see, in detail, Şaguna and Tofan, *Financial*, p.205-210.

Regarding the opportunity of a single EU tax, **a measure** relatively **recent** taken at EU level is the **European Commission proposal**[41] to regulate *a common system of calculating the tax base of companies* operating in the EU - **a common consolidated corporate tax base (CCCTB)**.

According to the Commission's press release[42], the purpose of this proposal is to significantly reduce the administrative burden of compliance costs and legal uncertainty currently faced by EU companies, which *to determine their taxable profits must comply with up to 27 different national systems*.

CCCTB **objective** is that *companies benefit from a* **system of "single window"** *for submitting tax returns and to consolidate all profits and losses across the EU*. **Member States will retain full sovereign right to establish its own corporate tax rate**.

However, the CCCTB is seen to be[43], at EU level, **an important initiative in the elimination of obstacles that stand in the way of completing the single market**.

However, an increasingly powerful harmonization was done on **indirect taxes**, consumption taxes, excise duties and tax that is value added. They are governed by *common rules* that define the criteria for settlement, cases of exemption, deduction rules, *Member states keeping the right to establish rules of payment and control*.

Common internal market being an area *without borders* required *the dissolution of the mechanism of formalities and delays.*[44] The abolition of tax frontiers required the replacement of the destination *principle* with that of the **home country**, bearing the tax burden taking place in the State where the goods and services were produced, no matter where they are consumed, showing importance for indirect taxes, especially VAT which has the largest share in them.[45]

However, the appreciation is that "these taxes stays a juxtaposition of national taxes, each tax retaining the essence of fiscal sovereignty; decisions in this area are continuing to be taken by unanimity, common standards staying powerless"[46]. In other words, *a fiscal union* is not possible; any state acts to prevent fiscal erosion, to keep its fiscal sovereignty. [47]

It is noted that under the *Treaty on the Functioning of the European Union*, especially the article 113 TFEU (ex-art.93 TEC) to ensure proper functioning of the single market, the European Union has harmonization competencies of the laws on indirect taxation, including the base and tax rates[48].

Also, in a first stage, the harmonization has taken the form of total suppression of customs duties between member states followed by the adoption of a common customs tariff and the elimination of taxes and measures equivalent to customs duties, realizing *customs unification*[49].

In light of the phenomenon of double taxation which can be found only in direct taxes, there is necessary an overview of the current legislative framework in the field of European Union direct taxation[50], thus preceded by a presentation.

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[41] See, in detail, the proposal for a Council *Directive concerning on a common consolidated corporate tax base (CCCTB)***,** Bruxelles, 16.3.2011, COM(2011) 121 final, 2011/0058 (CNS), accessed 19 January 2012, http://eur-lex.europa.eu/Notice.do?mode=dbl&lang=en&lng1=en,ro&lng2=bg,cs,da,de,el,en,es,et,fi,fr,hu,it,lt,lv,mt,nl,pl,pt,ro,sk,sl,sv,&val=615635:cs&page=1&hwords=CCCTB~.

[42] *IP/11/319,* Bruxelles, 16 March 2011, see, accessed 19 January 2012, http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/171&format=HTML&aged=0&language=en&guiLanguage=en.

[43] Press Release, "Towards a single market act- For a highly competitive social economy- 50 proposals to optimize labor, commercial activities and exchanges." - COM(2010) 608, 27.10.2010.

[44] See, in detail, Manolache, *Treaty,* 221 and next.

[45] Postolache, *Financial Law,p.* 179.

[46] J. Grosclaude, Ph. Marchessou, Procédures fiscales, 3eme éd., Dalloz, Paris 2004, p.6 *apud* Postolache, *Financial Law,* 179-180.

[47] Postolache, *Financial Law,* p.180.

[48] Diaconu, "*Tax regulations*," p.13.

[49] See, for example, Gornig and Rusu, *European Union Law*, p.141 and next.

2. Council directive 90/434/EEC[51] of 23 July 1990 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office, of an SE or SCE, between Member States

This directive is destined to eliminate fiscal measures that could hamper business reorganization, and sets postponing capital gains taxation at the time of completing a merger or reorganizing of residents in European Union societies. Also, this directive was modified by Directive 2005/19/EC which brings important changes, real improvements[52], most of them related to the establishment of European societies and European Cooperative societies and they also can transfer their registered office without proceeding to their dissolution.

Thus, in this respect, the Directive establishes that *transfer of the registered office of an SE or SCE does not lead in itself to any taxation of income, profits or capital gains to shareholders*[53].

According to Article 1 of Directive 90/434/CEE, *each Member State shall apply this Directive to the following*:

a) mergers, divisions, partial divisions, transfers of assets and exchanges of shares in which companies from two or more Member States are involved;

b) transfers of the registered office from one Member State to another Member State of European companies (Societas Europaea[54] or SE), as established in Council Regulation (EC) No 2157/2001 of 8 October 2001, on the statute for a European Company (SE)[55], and European Cooperative Societies (SCE), as established in Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE)[56].

3. Council Directive 90/435/EEC[57] of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States

Under this directive the elimination of profits double taxation is tried between founding societies in Member States and subsidiaries in another Member State and to have it reducing the differences between national tax rules applicable to groups of societies organized at a national level of a Member State and groups of organized societies in EU.

According to article 1 paragraph 1 of Directive 90/435/CEE, *each Member State shall apply this Directive*:

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[50] See, Nemoianu, "*Avoiding double taxation.*", 23 and next; Petroşel, "*Avoiding double taxation.*", 96 and next; Petre Brezeanu, Ilie Şimon and Sorin Celea, *European Taxation* (Bucharest: Economic, 2005), p.215 and next; Petre Brezeanu, *European Finance* (Bucharest: C.H. Beck, 2007), 239 şi urm.; also see the incidence legislation.

[51] Directive 90/434/EEC, OJ L 225, p.1, 20.8.1990, with subsequent amendments. Entered into force on January 1, 1992.

[52] See, Moise, "*Freedom of establishment,*"p. 61-62.

[53] According to art.10d par.1 Directive 90/434/EEC, also see, art.10d par.2 Directive 90/434/EEC, and, art.10b par.1 Directive 90/434/EEC, accessed 19 January 2012, http://eur-lex.europa.eu/LexUriServ/ LexUriServ.do?uri= CONSLEG:1990L0434:20070101:EN:PDF.

[54] In this regard, see, in detail, Elena Emilia Ştefan, "*European Society (I) – (Societas Europaea),*" *Commercial Law Journal* 1 (2007): 105-19; Elena Emilia Ştefan, „ *European Society (II) – (Societas Europaea),*" *Commercial Law Journal* 2 (2007): 105-18; precum şi, Adrian-Milutin Truichici, "*General considerations in the commercial european society ('Societas Europaea'),*" *Commercial Law Journal* 11 (2008): p.48-53.

[55] OJ L 294, 10.11.2001, p.1. Regulation as amended by Regulation (EC) No 885/2004 (OJ L 168, 1.5.2004, p.1).

[56] OJ L 207, 18.8.2003, p.1. Regulation as amended by Decision of the EEA Joint Committee No 15/2004 (OJ L 116, 22.4.2004, p.68).

[57] Directive 90/435/EEC, OJ L 225, p.6, 20.8.1990, with subsequent amendments. Entered into force on January 1, 1992.

a) to distributions of profits received by companies of that State which come from their subsidiaries of other Member States,

b) to distributions of profits by companies of that State to companies of other Member States of which they are subsidiaries,

c) to distributions of profits received by permanent establishments situated in that State of companies of other Member States which come from their subsidiaries of a Member State other than that where the permanent establishment[58] is situated,

d) to distributions of profits by companies of that State to permanent establishments situated in another Member State of companies of the same Member State of which they are subsidiaries.

Also, this Directive shall not preclude the application of domestic or agreement-based provisions required for the prevention of fraud or abuse.[59]

The Directive prevents the taxation of profit distribution to subsidiaries or, alternatively, allows tax deduction, and also exempts distributions of income from taxation by the parent company to source. So, a common system of taxation applicable to societies that have subsidiaries in different Member States was introduced.

And the effects obtained are the withholding tax repealed for profit distribution by owned subsidiaries in proportion of 10%[60] by a company in another Member State and the possibility that another Member State can tax the profits so distributed only if it gives the founding society a tax credit for the tax paid by the subsidiary in this respect.

However, according to article 3 paragraph 2 of Directive 90/435/EEC, Member States may not implement the directive if minimum participation rates that determine ratio between society-subsidiary are not kept for a continuous period of at least two years. Also, Member States shall have the option of replacing, by means of bilateral agreement, the criterion of a holding in the capital by that of a holding of voting rights.

Furthermore, notice the following issue, namely that this Directive shall not affect the application of domestic or agreement-based provisions designed to eliminate or lessen economic double taxation of dividends, in particular provisions relating to the payment of tax credits to the recipients of dividends.[61]

4. 90/346/CEE Convention on the Elimination of double taxation on profits adjustment between associated enterprises, *known as* the Arbitration Convention[62]

This Convention was signed by Member States under Article 293 TEC[63], introducing **an arbitration procedure** *to prevent double taxation on profits adjusted* between societies associated

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[58] For the purposes of this Directive the term '*permanent establishment*' means a fixed place of business situated in a Member State through which the business of a company of another Member State is wholly or partly carried on in so far as the profits of that place of business are subject to tax in the Member State in which it is situated by virtue of the relevant bilateral tax treaty or, in the absence of such a treaty, by virtue of national law, see art.2 par.2 Directive 90/435/EEC.

[59] Art.1 par.2 Directive 90/435/EEC, accessed 19 January 2012, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1990L0435:20070101:EN:PDF

[60] Initially the participation rate was at least 20%, then from January 1, 2007 by 15% and from 1 January 2009 to 10%.

[61] Art.7 par.2 Directive 90/435/EEC.

[62] OJ, L 225, p.10, 20.8.1990. The Convention was signed on July 23, 1990 and came into force on January 1, 1995 for an initial period of five years. And Finance Ministries of Member States in May 1999 signed a protocol extending the Convention, which entered into force on November 1, 2004, see, Nemoianu, "*Avoiding double taxation.*", 27; Petroşel, "*Avoiding double taxation.*", p.99;

Also, in 2006 was adopted a *Code of Conduct* for the implementation of the Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises, OJ C 176, p.0008-0012, 28/07/2006.

(affiliated) from different Member States. The purpose of the Convention was to establish a resolution mechanism of disputes concerning transfer pricing and double taxation through arbitration, independent procedure where Member States may not agree on necessary adjustments.

The procedure under article 6 of the Convention would imply the transmission of a request by the taxpayer towards the competent authority of that State and this State will notify the other involved. If relevant authorities of both countries cannot reach a compromise on eliminating double taxation within two years of filing the application, then, according to article 7, an advisory committee will decide on the case within six months, according to art.11.

Concomitantly, the provisions of article 12 foresee that after a decision was issued, the Member States concerned may enter into additional consultation for another six months, but if they cannot agree on an alternative solution, the opinion of the Advisory Committee shall be binding. Also, the double taxation of profits will be considered eliminated under article 14, when:

a) profits are included in calculating the taxable income in a single state;

b) or profits paid in a state are reduced by an amount equal to tax paid in the other state.

5. The code of fiscal conduct in business[64]

According to doctrine[65], this code is a useful tool for reducing the extent of the preferential tax facilities treatment of local businesses or obstacles regarding business freedom in the EU, although it is not mandatory and directly applicable.

In the same opinion, the Council and representatives of the Member States adopted on December 1, 1997 a resolution on a code of business concerning the elimination of national fiscal measures which entail a significantly reduced lower level of taxation than any other Member States and which could influence the investment location. The code contains five commitments from Member States:

1. refraining – there will be no new damaging fiscal measures;

2. correction – the existent measures will be analyzed in order to eliminate negative effects in the shortest time;

3. exchange of information – Member States shall inform each concerning measures likely to have a negative effect;

4. evaluation[66] – Member States will organize a working group that will identify fiscal measures which shall fall under the Code;

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[63] Currently repealed by amendments brought by the Treaty of Lisbon.

[64] See, in detail, Brezeanu, *Finance*, 245-246; Brezeanu, Şimon and Celea, *Taxation*, 217-218; Nemoianu, "*Avoiding double taxation.*", 28; Petroşel, "*Avoiding double taxation.*", p.100.

[65] *Idem.*

[66] The analysis group was established on March 9, 1998 with representatives of Member States and the Commission. It identified 66 measures with damaging potential and submitted the list to the finance ministers of the EU Ecofin Council meeting of 29 November 1999. Furthermore, for the past years, several transitional periods appeared to remedy these issues, an example, the period of up to 31 December 2010 for the rules applicable to Belgian centers of coordination, or the taxation of international finances of the Netherlands, and up to 31 December 2011 for the free zone regime in Madeira.

The 66 potentially damaging measures can be divided into the following categories:

a) measures regarding the low levels of taxation;

b) measures regarding insurance activities taxation;

c) measures regarding transfer prices of in-group services;

d) measures regarding holding societies;

e) measures regarding partial or total taxation reduction of certain taxation income.

The code identifies five main characteristics which can lead to a damaging fiscal measure:

1. benefits are available only for transactions concluded with non-residents or for non-residents;

2. tax benefits are defined on the internal market;

5. promotion – Member States shall encourage third party countries repeal damaging or preferential fiscal measures.

6. Council Directive 2003/48/EC[67] of 3 June 2003 on taxation of savings income in the form of interest payments

This directive tries *to eliminate distortions in the taxation on income savings*.

The Directive tries to enhance control over taxpayers' income tax that have bank accounts and securities in an EU State other than of residence, and is evading taxation in both states, because the state where the accounts are held does not impose interest towards non-residents and the state is unable to detect them without them declaring the accounts.

According to Article 7 of Directive 2003/48/CE, this Directive shall apply to interest paid by a paying agent established within the territory to which the Treaty applies by virtue of Article 299 thereof.

The ultimate goal is the exchange of information on large scale to ensure tax payments on interest by taxpayers.

Also, similar measures were agreed with Switzerland, Lichtenstein, Monaco, Andorra, San Marino and the United States of America.

However, some states go through a transition period when a withholding tax may apply when the beneficial owner is resident in a Member State other than that in which the paying agent is established, so, Belgium, Luxembourg and Austria shall levy a withholding tax at a rate of 15% during the first three years of the transitional period, 20% for the subsequent three years and 35% thereafter.[68]

Also, according to Article 12 of Directive, 75% of tax withheld will be refunded to the resident State and the State where the tax is withheld retains 25% of income.[69]

7. Council Directive 2003/49/EC[70] of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States

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3. benefits are granted without the requirement of a presence or real and substantial economic activity in the offering State;

4. rules for calculating the profits of multinational groups do not respect internationally recognized principles (OECD);

5. fiscal measures are not transposed or are implemented at the administrative level in a transparent manner.

[67] OJ L 157, p.38, 26.6.2003. Directive 2003/48/EC, with subsequent amendments, and entered into force on Julie 1, 2005.

[68] Art.11 Directive 2003/48/EC.

[69] As for eliminating double taxation, art.14 states that:

"1. The Member State of residence for tax purposes of the beneficial owner shall ensure the elimination of any double taxation which might result from the imposition of the withholding tax referred to in Article 11, in accordance with the provisions of paragraphs 2 and 3.

2. If interest received by a beneficial owner has been subject to withholding tax in the Member State of the paying agent, the Member State of residence for tax purposes of the beneficial owner shall grant him a tax credit equal to the amount of the tax withheld in accordance with its national law. Where this amount exceeds the amount of tax due in accordance with its national law, the Member State of residence for tax purposes shall repay the excess amount of tax withheld to the beneficial owner.

3. If, in addition to the withholding tax referred to in Article 11, interest received by a beneficial owner has been subject to any other type of withholding tax and the Member State of residence for tax purposes grants a tax credit for such withholding tax in accordance with its national law or double taxation conventions, such other withholding tax shall be credited before the procedure in paragraph 2 is applied.

4. The Member State of residence for tax purposes of the beneficial owner may replace the tax credit mechanism referred to in paragraphs 2 and 3 by a refund of the withholding tax referred to in Article 11".

The Directive eliminates the taxation on interest and royalties for transboundary payments between associated societies, based on a criterion of 25% stake the European Union by effective beneficiaries, provided they are made on the open market value and ownership control is to be maintained for a period of at least 2 years.

The Directive allows transitional periods for Greece, Spain and Portugal, Czech Republic, Lithuania, Latvia, Poland, Slovakia.

According to Article 2, for the purposes of this Directive:

(a) the term '*interest*' means income from debt-claims of every kind, whether or not secured by mortgage and whether or not carrying a right to participate in the debtor's profits, and in particular, income from securities and income from bonds or debentures, including premiums and prizes attaching to such securities, bonds or debentures; penalty charges for late payment shall not be regarded as interest;

(b) the term '*royalties*' means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work, including cinematograph films and software, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience; payments for the use of, or the right to use, industrial, commercial or scientific equipment shall be regarded as royalties.

8. Directive 77/799/EEC[71] concerning mutual assistance given by the competent authorities of Member States in the field of direct taxation and taxation of insurance premiums

The Directive establishes rules concerning the exchange of information between Member States allowing the establishment of correct income and capital taxation. It does not impose an obligation to carry out investigations or provide information, if a certain State is restricted by its own law in this respect, for example commercial or state secrets. The information given will have to keep its secret character in the same measure ensured by the internal legislation.

9. Directive 76/308/EEC[72] concerning reciprocal assistance in the recovery of claims relating to certain levies, duties, taxes and other measures

This directive contributes to the harmonization of European tax systems. It requires an obligation from the Member States to collect the tax requested by another a Member State. The Directive aims to stop attempts by taxpayers to avoid paying tax obligations by settling out in another country.

According to the directive, enforcement provisions of the tax debt securities are automatically recognized and treated as directly enforceable in other Member States to expedite the collection. Member States shall treat such tax claims of another Member State as its own debts.

Although the phenomenon of double taxation is shown only in direct taxes, however, we would like to present EU integrationist character by illustrating some aspects of the indirect taxation in the EU.

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[70] OJ L 157, p.49, 26.6.2003. Directive 2003/49/CE, with subsequent amendments, and entered into force on Julie 1, 2004.

[71] OJ L 336, p.15, 27.12.1977. Directive 77/799/EEC, with subsequent amendments. See consolidated version - www.eurlex.eu.

[72] OJ L 73, 19.3.1976, p.18, with subsequent amendments, accessed 19 January 2012, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1976L0308:20040501:RO:PDF. Also see, Nemoianu, "*Avoiding double taxation.*", p.32; Petroşel, "*Avoiding double taxation.*", p.103.

10. Indirect taxation in the European Union

10.1. Directive 2006/112/EC on the common system of value added tax

Value added tax (VAT further) was instituted in the European Community since 1970.

According to doctrine[73], the purpose of this tax was to perfect national tax systems by replacing the production and consumption taxes applied in the Member States and to avoid the cascade imposition.

And, in some cases, the European Union decided that the operations subject to VAT and VAT tax base must be the same for all Member States. In terms of tax rates for VAT, there are still differences being recorded concerning the quantum in different member states.

Also, according to the same opinions, based on the provisions of article 93 EC Treaty (now, Article 113 TFEU) several directives were adopted on VAT (1-13); but the sixth Directive is most relevant, **Directive 77/388/EEC** of decided in the 17 May 1977 Council, *concerning the harmonization of Member States relations, relating to turnover taxes - common system of value added tax: uniform basis of assessment*[74].

Currently **the basic rules of the European VAT system** were established by **Directive 2006/112/EC** *on the common system of value added tax*[75].

According to section 4 of the preamble to Directive 2006/112/CE, *the attainment of the objective of establishing an internal market* presupposes the application in Member States of legislation on turnover taxes that does not distort conditions of competition or hinder the free movement of goods and services. It is therefore necessary to achieve such harmonization of legislation on turnover taxes by means of a system of value added tax (VAT), *such as will eliminate, as far as possible, factors which may distort conditions of competition, whether at national or Community level*.

Also, "(5) A VAT system achieves the highest degree of simplicity and of neutrality when the tax is levied in as general a manner as possible and when its scope covers all stages of production and distribution, as well as the supply of services. It is therefore in the interests of the internal market and of Member States to adopt a common system which also applies to the retail trade.

(7) The common system of VAT should, even if rates and exemptions are not fully harmonized, result in neutrality in competition, such that within the territory of each Member State similar goods and services bear the same tax burden, whatever the length of the production and distribution chain".

Under the provisions of The Directive 2006/112/EC, value added tax is considered *a consumption tax*. *The ultimate goal of VAT is to tax consumption goods to final consumers*.

The transferring of the tax burden on the final user, established by provisions of the Directive, is provided by the application of certain principles[76], namely: taxpayer principle; cost principle; VAT entry deduction principle; destination principle.

Regarding *the level of tax rates*, Member States applies a **standard rate of VAT**, which shall be fixed by each Member State as a percentage of the taxable amount and which shall be the same for the supply of goods and for the supply of services[77], but this *standard rate may not be less than* [78] *15%.*

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[73] Diaconu, "*Tax regulations*," p.14.

[74] J.O L 145, p.1, 13.6.1977.

[75] OJ L 347, p.1, 11.12.2006. Council Directive from 28 November 2006, entered into force on January 1, 2007, with subsequent amendments. Accessed 19 January 2012, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2006L0112:20110101:EN:PDF.

[76] See, Diaconu, "*Tax regulations*," p.14-15.

[77] According to art.96 Directive 2006/112/EC.

[78] According to art.97 Directive 2006/112/EC, which states that from 1 January 2011 to December 31, 2015, the standard rate may not be less than 15%.

However, according to art.98-99, Member States may apply **one or two reduced rates** of a list composed of a restrictive set of goods and services and the reduced rates shall be fixed as a percentage of the tax *which cannot be less than 5%.*

10.2. Directive 2008/118/EC on the general arrangements for excise duty and repealing Directive 92/12/EEC

Excise duties were introduced in early 1993 by Council **Directive 92/12/EEC** of 25 February *concerning the general arrangements for products subjected to excise duty and on the holding, movement and monitoring of such products*[79], in the context involved in the development of the internal market, which involved abolition of fiscal controls at internal borders between Member States. Over time, the legislation of this consumption taxes has been extensively modified to bring it up to date with the community directives, so the European Union harmonized the structure and set a series of minimum levels of excise duty.[80]

Excise taxes represent indirect consumption taxes or use of certain products, such as, manufactured tobacco, alcoholic beverages and mineral oils.

Currently, excise regime is established by **Directive 2008/118/EC** *concerning the general arrangements for excise duty and repealing Directive 92/12/EEC*[81], entered into force on the 15 of January 2009[82], and will apply throughout the European Union on 1 April 2010, at which date the Directive 92/12/EEC[83] is repealed.

For the implementation of the Directive, the Commission shall be assisted by a committee called "Committee on Excise Duties", according to article 43 of Directive 2008/118/EC. However, the rules of the Committee on Excise Duties are set out in Articles 5 and 7 of Decision 1999/468/EC[84] read in conjunction with Articles 43-44 of Directive 2008/118/EC.

According to article 1 of Directive 2008/118/EC the general arrangements for excise duty are established, directly or indirectly following certain products consumption:

a) energy products and electricity covered by Directive 2003/96/EC;

b) alcohol and alcoholic beverages covered by Directives 92/83/EEC and 92/84/EEC;

c) manufactured tobacco covered by Directives 95/59/EC, 92/79/EEC and 92/80/EEC.

Also, according to par.2 of art.1, Member States may levy other indirect taxes on excise goods for specific purposes, provided that those taxes comply with the Community tax rules applicable for excise duty or value added tax as far as determination of the tax base, calculation of the tax, chargeability and monitoring of the tax are concerned, but not including the provisions on exemptions.

Also, Member States may levy taxes on goods other than excise goods, provision of services, including those related to excisable products that cannot be characterized as turnover taxes. However, the collection of such taxes can not result in trade between Member States relating to border crossing formalities.[85]

Products shall be subjected to excise duty rates at the time of production, extraction or their importation in the European Union.[86]

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[79] OJ L. 76, p.1, 23.3.1992.

[80] See, Diaconu, "*Tax regulations*," p.15.

[81] OJ L 9, p.12, 14.1.2009.

[82] Art.49 Directive 2008/118/EC.

[83] Art.47 Directive 2008/118/EC.

[84] See, in detail, art.5 and art.7 from Council Decision no. 468 of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, published in OJ L 184, 17.7.1999, p.23.

[85] According to par.3 art.1 Directive 2008/118/EC.

[86] Art.2 Directive 2008/118/EC.

Excise duty shall be levied and collected and, where appropriate, reimbursed or remitted according to the procedure laid down by each Member State. Member States shall apply the same procedures to national goods and to those from other Member States.[87]

Also the directive established in art. 12 excisable products which are exempt from excise duty if they are intended for use[88]. However, these exemptions are subject to the conditions and limits set by the host Member State and Member States may grant exemption from excise duty by a excise return[89].

The Directive contains provisions on the production, processing and holding of excise products, and the movement and taxation after release for consumption.

Moreover, Directive 2008/118/EC specifies that to ensure the levels set by Member States is necessary for *the competent authorities to be able to track movement of excise goods* and, therefore, must *adopt on a system for monitoring these products*. Thus, according to the directive's preamble *the computerized system established by Decision no. 1152/2003/EC of the European Parliament and of the Council of 16 June 2003 on computerizing the movement and surveillance of excisable products* (OJ L 162, p. 5, 1.7.2003) *should be used*.

10.3. Regulation (EEC) no. 2913/92 establishing the Community Customs Code[90]

One of the aims of the European Union was to establish a **common market**[91], achieved by application and enforcement of the *four fundamental freedoms*, namely, *free movement of goods, persons, capital and services*. *Free movement of goods*[92] involved and calls for a *customs union* to address all categories of goods and involving the prohibition between Member states of customs duties[93] on imports and exports or other charges having equivalent effect, on the adoption of a common customs tariff in their relations with third countries and the elimination of quantitative restrictions or measures having an equivalent effect between Member States.[94]

The Customs Union[95] is defined in art. XXIV of GATT, as the replacement of a single customs territory of several customs territories. The customs union is characterized by the fact that the participating countries abolish tariff barriers between them, and in relations with third parties they apply a common commercial policy, based on a single customs tariff[96].

The customs territory[97] is described as the territory within which is in force a customs procedure, certain customs legislations. As a rule, the states customs territory corresponds to the

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[87] According to art.9 par.2 Directive 2008/118/EC.

[88] See, in detail, art. 12 Directive 2008/118/EC.

[89] According to par.2 art.12 Directive 2008/118/EC.

[90] OJ L 302, 19.10.1992, p.1, with subsequent amendments.

[91] *Common market* or *internal market* comprises of an area without internal borders that must operate under the same conditions as a national market: goods, persons, capital and services to be moved into it with no border controls between Member States, following lack of border control example between regions of a state. See, Manolache, *Treaty*, 221.

[92] *TFUE* regulates this freedom to Articles 28-37.

[93] *Customs taxes* represent those duties, imposed by the state when things go over the borders, respectively for import, export or transit. The most commonly used are taxes on imports, because raising the price of goods, it will ultimately be borne by consumers, is restricting the import activity and it encourages the internal production; Dan Drosu Şaguna and Dan Şova, *Fiscal Law* (Bucharest: C.H. Beck, 2011), 242.

[94] These provisions, which regulate the customs union and the prohibition of quantitative restrictions between Member States, are directly applicable, and can be invoked before national courts, Manolache, *Treaty*, 224, 237 and next.

[95] Art.25 TFEU states:"between Member States Customs duties on imports and exports and charges having equivalent effect are forbidden.. This prohibition shall also apply to customs duties of a fiscal nature".

[96] Şaguna and Sova, *Fiscal Law*, 240.

[97] Art.3 Community Customs Code/UE defines *the coverage of the EU customs territory, thus, according to* art.3 par.3 "the customs territory of the Community/Union shall include the territorial waters, the inland maritime waters and the airspace of the Member States, and the territories referred to in paragraph 2, except for the territorial

national territory. But during the interwar period, states have agreed to issue special customs regimes through territorial expansion or reduction of customs territories. Forms of expansion of the customs territory are the *customs union* and *free trade areas*[98], and the customs territory collapse is achieved by restricting the exemption from customs regime into force of a portion of a state, in this case, the customs borders no longer coincide with those of the State, these areas are called *free zones*.[99]

The *customs union* shall involve *the prohibition on trade between Member States of customs duties and other charges having an equivalent effect*. Prohibition of customs duties has a wider range[100], applying under Article 29 TFEU, not only to goods originating from a Member State, but also to those who come from a country that will be in free circulation between Member States once entered into the commercial circuit if the import formalities have been completed and any customs duties or charges having equivalent effect payable have been received in that Member State and have not received full or partial reduction of such fees and charges.

Customs duties on imports or exports or any charge having equivalent effect **includes**, as the CJEU decided that „any pecuniary charges, whatever their size and their application or name, which are imposed unilaterally on domestic or foreign goods because they cross a border and not in the strict sense of duty"; that the fee is not required for States benefit not discriminatory or protective effect, does not increase prices because it is minimal or that the goods in question are not in competition with foreign products, is without consequence[101].

Import duties on the Community Customs Code provides that these are customs duties and charges having equivalent effect on the importation of goods and import charges introduced under the common agricultural policy or under the specific arrangements applicable to certain goods resulting from the processing of agricultural products[102].

And **export duties** are customs duties and charges having equivalent effect on the exportation of goods and export charges introduced under the common agricultural policy or under the specific arrangements applicable to certain goods resulting from the processing of agricultural products.[103]

Community Customs Code or, in light of Lisbon Treaty, EU Customs Code, Article 4 paragraph 7 specifies the following:

" '**Community goods**' means goods:

- wholly obtained in the customs territory of the Community/Union under the conditions referred to in Article 23 and not incorporating goods imported from countries or territories not forming part of the customs territory of the Community/Union. Goods obtained from goods placed under a suspensive arrangement shall not be deemed to have Community/Union status in cases of special economic importance determined in accordance with the committee procedure,

- imported from countries or territories not forming part of the customs territory of the Community/Union which have been released for free circulation,

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waters, the inland maritime waters and the airspace of those territories which are not part of the customs territory of the Community/Union pursuant to paragraph 1". And art.3 par.2 Community Customs Code/UE presents the territories situated outside the territories that are considered part of the Community customs territory, taking into account the conventions and treaties applicable in their part.

[98] These areas groups two or more customs territories from which they removed tariffs and restrictive trade regulations. Block countries retain their independence in matters of trade policy; Şaguna and Sova, *Fiscal Law*, 240.

[99] Şaguna and Sova, *Fiscal Law*, 240.

[100] Manolache, *Treaty*, 223.

[101] C. 24/68, Comisia c. Italiei, in ECR, 1969, 193-201, and C. 485 şi 486/93, Maria Simitzi c. Municipality of Kos, preliminary judgment from 14 September 1995, par 14-16, in ECR, 1996, 7(I), 2675 *apud* Manolache, *Treaty*, 224.

[102] Art.4 alin.10 Community Customs Code. Also see, Council Regulation (EC) No 260/2009 on the common rules for imports (Codified version), OJ L 84, 31.3.2009, p.1.

[103] Art.4 par.11 Community Customs Code. Also see Council Regulation (EC) No 1061/2009 establishing common rules for exports, OJ L 291, 7.11.2009, p.1.

- obtained or produced in the customs territory of the Community/Union, either from goods referred to in the second indent alone or from goods referred to in first and second indents".

Also, under art.4 par.8 '**non-Community goods**' means goods other than those referred to in paragraph 7 article 4. Without prejudice to Articles 163 and 164[104], Community/Union goods shall lose their status as such when they are actually removed from the customs territory of the Community/Union.

With regard to *charges having equivalent effect*, from community practice it shows that the mandatory level of which no derogation can be made and it is applied in a Member State by forwarding Customs agents was not considered as a tax having equivalent effect to a customs duty within the meaning of the Treaty, *if importers can actually choose whether or not to use the services of such persons with the result that the fee is not mandatory for anyone wishing to make a customs declaration*[105]. However, although a charge was applied similarly to domestic and imported products, it was considered to be *discriminatory if it was intended only to support activities that bring benefits to domestic product*[106]. And, in another case[107] in which the tax was imposed on both domestic products and those imported to finance a certain products industry, it was considered that a fee has equivalent effect to a customs duty if *three conditions* are fulfilled: *1)* It has the sole purpose of funding specific activities for the benefit of the domestic product.; *2)* the domestic product subject to tax and the domestic product that benefits are the same; *3)* taxes imposed on domestic products are collected in full.

Another condition for the existence of the *customs union* is *the adoption of a* **common customs tariff** *in their relations with third countries*, which is required at Community/EU borders. Any goods that will enter Community/EU territory shall be subject to this tariff, regardless of country of entry.

At the beginning of European integration during the transition period for establishing the common market, Member States declared their readiness to contribute to the development of international trade and the lowering of customs barriers by specific agreements based on reciprocity and mutual benefit, to reduce tariffs below the general level that could beneficiary to them as a result of establishing a customs union between them. These goals were achieved either by agreements with various countries, independently, or in GATT trade rounds throughout time (Dillon, Tokyo, Uruguay).[108]

But the desire for uniform application of Community law materialized by Regulation no.950/68 of the Council of 28 June 1968 which established the Common Customs Tariff, which replaced the tariffs of the Member states. And from 1 January 1988 a new integrated tariff was established and statistical nomenclature system by Council's Regulation no.2658/87. *The Combined Nomenclature of the tariff rates* are based *on integrated tariff,* called "Taric", and takes into account the International Convention on the harmonized goods description and coding system adopted by the Customs Cooperation Council and signed by the Community.[109]

Common Customs Tariff nomenclature consists of afore mentioned tax percentages, other relevant taxes, tariff measures and tariff arrangements set out in the community[110], the current

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[104] These articles deal with the internal transit goods in the Community.

[105] C. 119/92 Comisia c. Italiei, judgment from February 1994, in ECR, 1994, 2, 393 apud Manolache, *Treaty*, 226.

[106] C. 77/72, Capolongo c. Azienda Agricola Maya, preliminary judgment from 19 June 1973, in ECR, 1973, 1, 611 (quoted in J.Steiner, L.Woods, op.cit., p.143) *apud* Manolache, *Treaty*, p.226.

[107] C. 77/76, Fratelli Cucchi Enterprise c. Alvez SpA, preliminary judgment from 25 May 1977, in ECR, 1977, 987 (quoted in J.Steiner, L.Woods, op.cit., pp.143-144) *apud* Manolache, *Treaty*,p.226.

[108] See, Manolache, *Treaty,* p.226.

[109] Manolache, *Treaty*, p.226-27.

[110] See,P.J. Kapteyn, P. ver Loren van Themaat, op.cit., p.365; W. Cairns, op.cit. pp.227-232; G. Druesne, op.cit., p.550 *apud* Manolache, *Treaty*, p.227.

version of the tariff is published annually in the Official Journal. There was also a **Community Customs Code**, adopted by Regulation no.2913/92 and for its application Regulation no.2454/93 of 2 July 1993 on the implementation of Council Regulation no.2913/92 establishing the Community Customs Code was adopted[111].

It is the responsibility of the Union in order to ensure that the imposition of taxes has a uniform impact on all Member States on trade with non-member States to determine and, if necessary, to change the customs duties and taxes payable on products from those countries[112]. We can deduce that **customs duties are the same**, *without the need to distinguish according to the day of importation, as the* **Union's external border protection is the same**, *what distinguishes the customs union of simple free trade area where each member country retains its own customs tariff*[113].

Common Customs Tariff does not apply for a Community authority separated standing alone, but by national authorities of the Member States in whose territory the goods enter, acting on behalf of Communities/EU where they are framing the respective tariff classifications. But, according to Article 31 TFEU, the Common Customs Tariff duties are set by the Council on a Commission's proposal.[114]

Also, free movement of goods can be affected not only by imposing customs duties or charges having equivalent effect, but also *quantitative restrictions or other measures with equivalent effect or by controlling trade*. Expressly prohibited by Articles 34 and 35 TFEU quantitative restrictions on import and export, and also all measures having equivalent effect.

According to specialized literature[115], *measures having equivalent effect to quantitative restrictions* have been defined by the Commission as any regulations and administrative provisions constituting a barrier to the import or export to be achieved, including those provisions and practices that would be more expensive making the import or export more difficult compared with domestic sales on the domestic market, but discrimination provisions applicable to imports and local products not constituting measures as having equivalent effect to quantitative restrictions.

In this subject Article 36 TFEU establishes the following exception: "The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public order, public safety, protection of health and life of humans, animals or plants, the protection of national treasures possessing artistic, historic or archaeological value or the protection of industrial and commercial property. However, prohibitions or restrictions shall not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States".

Furthermore, the EU external trade relations can meet certain *unfair practices*[116], and among them are **dumping practices** and **subsidies (subsidies)**, and Regulation no.1225/2009[117], governing the protection against dumping imports from countries not members of the European Union and Regulation no.597/2009[118] on protection against subsidized imports from countries not members of the European Union are relevant in the matter.

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[111] OJ L 253, 11.10.1993, p.1.

[112] C. 126/94; Aprile Srl c. Amministrazione delle Finanze dello Stato, preliminary judgment from 5 Octomber 1995, par. 34-37, in ECR, 1995, 9/10 (I), 2950-1 *apud* Manolache, *Treaty*, p.228.

[113] In this regard, G. Druesne, op.cit., p.549 *apud* Manolache, *Treaty*, p.228.

[114] Manolache, *Treaty*, p.228-29.

[115] Doc. WQ 64, J. Of. C. 169/12/1967. Prohibition of quantitative restrictions and all measures having equivalent effect applies not only to national measures, but also to measures adopted by Community institutions – C. 114/96, Criminal proceedings against René Kieffer and Romain Thill, preliminary judgment from 25 June 1997, in ECR, 1997, 6 (I), 3630 *apud* Manolache, *Treaty*, p.237-38.

[116] See, in detail, Manolache, *Treaty*, 629 and next. Other unfair practices are obstacles to trade and counterfeiting.

[117] OJ L 343, 22.12.2009, p.51.

[118] OJ L 188, 18.7.2009, p.93.

Conclusions

The phenomenon of international double taxation erodes the development of international economic relations between states, representing a brake on the liberalization of the movement of goods, services, capital and persons.

This phenomenon is found only in cases of direct taxes, and in light of this, according to EU law, direct taxation is for the Member States, the latter must exercise that competence in accordance with EU law. This aspect is certified and resumed constantly by the jurisprudence. Often the best way to avoid this phenomenon is represented by double taxation conventions that eliminate or mitigate the resulting negative effects on the internal market resulting from the coexistence of national tax systems.

As for the relationship between double taxation conventions and European Union law, according the application priority of EU law in the EU, Member States may not convene, by bilateral tax conventions against Union rules. In consequence, European Union law prevails the provisions of the bilateral tax conventions.

However, the Court may not examine the report of a national measure and the provisions of an agreement to avoid double taxation, because the scope of a bilateral tax agreements concluded by Member States is limited to natural or legal persons specified therein.

Today there is no obligation for Member States to effectively eliminate double taxation, bilateral agreements sustain that the States are making sustained efforts to eliminate them. However elimination of double taxation in the European Union represented and represents one of the objectives of the Union.

Through the jurisprudence in the way of taxation, there is a "negative harmonization" manifestation. The Court of Justice of the European Union removes, by law, incompatible national legislation that cannot set up a tax system compatible with the common market; therefore this integration is a negative matter only by abolishing all incompatible systems, without proposing an acceptable alternative.

Nevertheless, the steps taken by now, for example, the directives issued on the basis of subsidiary principle in the field of direct taxation, establishing an arbitration procedure to avoid double taxation, are hailed, under the criticism of priority to safeguard the legal persons to the individuals' loss.

We also consider commendable the European Commission proposal to regulate a common system of calculating the tax base of companies operating in the EU - a common consolidated corporative tax base (CCCTB), which ultimately seeks significant reduction in administrative burden, the compliance costs and legal uncertainty currently faced by EU companies, offering companies a unique set of rules for calculating the tax base and the ability to transmit a single consolidated tax return of a single administration for all activities conducted within the EU. Of course, it remains to follow the implementation of this possible Directive.

Thus, in the contemporary context of liberalization of movement of goods, services, capital and persons, and economic diversification of international financial relations, moving from regional to a global plan of interdependence on the one hand, and in the context of the integration process intensifying the European Union, the European Community - Pillar I, on the other hand, we believe that the management of the double taxation phenomenon in the EU is in the early stages, although European construction has over 50 years since it was established.

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THE RIGHT TO A FAIR TRIAL

FLORICA BRASOVEANU[1]

Abstract

Among the general rights of the citizen on finds the free access to justice, the rights to defense and the right to legal security. The jurisprudence based on principles of law and on international treaties, caused the appearance, along the constitutional protection provided by default by a lawyer, of the need of fair and equitable procedures to ensure a balance in the rights of the parties.

Today the right to a fair trial is a fundamental right most frequently invoked in front of Romanian courts, as in complaints to the European Court of Human Rights.

This study is intended as a guide of the most important solutions that have been promoted to ensure the protection of the right to a fair trial with all the guarantees that are involved, starting with the right of access to justice and ending with the right to adversarial proceedings.

Keywords: *fundamental Rights, fair trial, access to justice, the European Court of Human Rights, the fundamental principle.*

Introduction

In modern law, the possibility for citizens to appeal to the court, in order to achieve their legitimate rights and interests is the establishment of rights - guarantees.

The present study deals with the fundamental principle of criminal law issues, namely the principle of fair trial rights.

Such reference is made to all persons involved in legal work: judges, who must ensure the rights of parties to proceedings; lawyers, which have to represent and defend their clients, the justice seekers, who must be aware of their rights of the in judicial proceedings.

This article is intended to represent a theoretical study of the fundamental human right to a fair trial, it is dotted with a number of examples of judicial practice - criminal of the European Court of Human Rights or of national courts.

To achieve the paper we analyzed a series of books and magazines appeared in the doctrine of specialists in our country and abroad, and will concur or not the views expressed within them.

With one subject exhaustively analyzed, in competence by renowned authors in treaties and magazines, trying to move something from what has been said so far or to add something to the already accumulated scientific heritage in the field, it might seem daring. It is no less an exciting scientific experience which we do not understand to evade from.

Procedural guarantees field is practically infinite, so that comprehensive coverage is a work far beyond the ambitions of this study,that, as I indicated from the beginning, proposed to present in a rather general way, the most important issues involved by the European Convention on human Rights in material procedural guarantees in criminal procedural law in our country.

In our opinion, despite the unanimous belief, the Roman legal system suffers, in terms of guaranteeing the right to a fair trial, a lack of regulation. There are many institutions in which those regulations are either nonexistent or insufficient, or set at a level too general, without involving specific provisions regarding the incidence of general provisions.

Such an issue we meet in the matter of the right to silence which is treated in such a manner by the legal text that is difficult to enforce the judicial bodies to give them due importance[2].

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[2] Damaschin, Mircea, *The right to a fair trial in criminal matters,* (Ed. Universul Juridic, 2009)

We must not forget that the presumption of innocence is hardly regulated, our law lacking any reference to the sanction for non-compliance or the need for the the respect of the presumption by all state bodies, especially in their relations with the press. Also essential principles of due process related to a person's right to attend his own trial, procedural equality of arms, etc.. benefit only by rules with absolute general nature, lacking any reference to the remedies against such conditions or warranties visible to ensure compliance of principles that seem thrown somewhere in the first articles of the constitution or procedure codes.

Also, taking advantage in a good measure of the lack of regulations, not even practical application, at the courts or the prosecution, of the existing rules of procedure doesn't seem to be, with the necessary exceptions, to required quality standards. I Remind you that we had several convictions at Strasbourg for lack of motivation of court orders or refusing to enforce court orders, situations that tend to become endemic in our judicial system. In addition, the feeling that I had many times on the solutions offered by the courts, including those rendered by appeals on points of law, is that the judges seem rather inclined to do anything possible to not judge a cause , looking incredibly excited when succeding to reject a case as inadmissible, forgetting that access to justice is an essential element of a democratic state.

The Universal Declaration of Human Rights is one of the sources of the current Romanian law and an important source of information for the Constitutional Court who must rule on the conformity of law with the Constitution, the Declaration, treaties, covenants and conventions Romania is part to.

The base of freedom, justice and peace in the world is recognizing the inherent dignity of all human family members and their equal and inalienable rights.

The principle of "equality of arms" means equal treatment of parties throughout the proceedings in the courts, without any of them to be advantaged relative to other party or parties in the process. This principle, in fact, is only one element of the broader concept of "fair", one of the guarantees relating to the proper conduct of the judicial process which aims to strike a balance between litigants.

Article 6 of the Convention does not require a specific form of how the accused must be informed of the nature and causes of the accusation against him.

Specialized legal literature emphasized that the right of defense has two meanings: one material, which comprises the whole complex of rights and procedural guarantees that ensure parties can defend their rights, and other formal providing parties with the right to benefit by a defender.

The Article 6, paragraph 3, letter. c of the Convention guarantees any "accused" can defend the charge they face in three ways: the accused can defend himself, may be assisted by a lawyer of his choice or may have the free assistance of a defender .

The right of the accused to defend himself should not be confused with his personal presence in court.[3] As underlined by the European Court, even if not expressly mentioned in art. 6 of the Convention, the right to take part personally in the proceedings of his trial results from the object of this text: right to a fair trial. Thus, if the defendant has the opportunity and the case is not part of the very serious cases that require a legal representative, they may represent themselves About the right of the accused to be assisted by a lawyer of his choice, the Court held that it is a key element of a fair trial.

According to the provisions of the Convention, the right of defendants to free legal assistance occurs when the accused can not defend themselves or is not entitled to pay a lawyer. Thus, the Convention recognizes the right to free legal assistance, assistance that will be provided by an appointed lawyer when the interests of good administration of justice requires the presence of counsel. Also, according to the European Convention, longer guarantees of a fair trial are the right

[3] Renucci Jean Francois, *Treaty of European human rights law*, (Ed. Hamangiu, Bucuresti, 2009)

not to be trialed or punished twice for the same offense, and the right not to be punished for an act that was not an offense when committed

Irregularities in the conduct and settlement of the case always must be punished and always who suffered should be entitled to compensation.

Article no. 6, paragraph 1 of European Convention on Human Rights established the elements of a fair trial which is "good guarantees justice". Thus the publicity is required as a separate provision of a fair trial, : every person is entitled to it publicly.

In this respect the European Convention on Human Rights is a guide for courts in Romania in their obligation to respect the principle of publicity that is found in the Code of Civil Procedure, art. 121 and the Code of Criminal Procedure Art. 290.

According to Article 121 of the Code of Civil Procedure, "the meetings are public, except for cases when the law provides otherwise. The court may order that discussions take place in camera, if public discussion could harm public order or morality or in parts. The parties may be accompanied, in addition to their defenders, by maximum two people designated by them. Judgment is always delivered in public. "Article no. 290 of the Criminal Procedure Code provides that "the hearing is public. Minors under 16 may not attend the hearing. If the judgement in open court could harm state interests, morals, dignity or private life of a person, the court, at the prosecutor's, the parties request or ex officio, declare the secret meeting for all or for a specific part of the trial case.

In open court after hearing the parties and the prosecutor, when it participates in court,the judge can declare that it is public session.

When the meeting is secret none other than the parties, their representatives, advocates and other persons called by the court in the interest of the case are allowed in the courtroom . "

According to The European Convention on Human Rights, the principle of public proceedings is not absolute, national authorities are allowed to take into account the imperatives of efficiency and economy.[4]

On court orders, the 6th article provides that they must be pronounced publicly. Judicial practice of the courts of Romania is firm in that the failure of this rule expressly contained in the Article 121, paragraph 3, C.proc.civ. art.310 and the Code of Criminal Procedure., is a violation of the principle of publicity and is punishable by revocation.

Article no. 290, para. 4 provides that "during the time the meeting is secret, none other are permitted in the courtroom but the parties, their representatives, advocates and other persons called by the court in the interest of the case."

According to art.328 Code of Criminal Procedure "when the secret meeting was arranged all throughout the process, each witness, after being heard, will be asked to leave the room, but remain near to the court room."

According to the article no. 6 of the Convention the courts have to motivate their decisions, but this obligation should not be understood as meaning that they must respond in detail to process each argument of the parties.

Analysing the provisions of Article 6 of European Convention on Human Rights, which envisage a fair trial, it is clear that they relate to certain requirements without which the process is not fair[5]. Thus, free access to an independent and impartial tribunal, both in the trial and settlement of criminal law and taking any coercive action on the rights and freedoms is required. The first requirement is provided during our criminal process, because only a court is entitled to jurisdiction, to apply the punishment to offenders. Also in Romania, there is a separation between the the prosecution function, exercised by a prosecutor who brings the suspect before the court and the office

[4] Galea R., *Regulation of remedies for excessive length of judicial proceedings - paper presented at the Conference of 10 years anniversary of the entry into force of the European Convention on Human Rights in Romania*, (Bucuresti, 2008);

[5] Chirita, Radu, *The right to a fair trial*, (Ed. Universul Juridic, 2008).

of jurisdiction exercised by the court, who judgez and finally resolves the conflict of criminal law, the punishment can be applied only by the court.

In connection with the requirements referred to in Article 6 paragraph 1 of the Convention, the European Court of Human Rights has a well crystallized and constant practice, which offers a full array of legal situations, which can be checked by the domestic courts in about each of the three elements that make up the structure of the Convention requirement expressed in this regard, namely: i) the tribunal established by law, ii) independent tribunal, iii) impartial tribunal.

Heads of claim of action have to be considered , but also the reasons formulated throughout remedies exercised by the parties, the differences between Contracting States concerning the sources of law, differences relating to the presentation and drafting judgments. Judges should always indicate with sufficient clarity the reasons underlying its decision because it is the only way, for example, a defendant may exercise remedies under domestic law.

The purpose of a Criminal trial is to help to defend the rule of law[6], the person, defending their rights and freedoms, but also to educate people in the spirit of compliance, it is necessary that the penalty imposed to offenders intervene as close to the date of the offense. It is how the general interest of society is satisfied - the immediate criminal repression as a means of general prevention, but also prevent criminals to continue criminal activity, on the other hand, the private interest of the victim and the defendants to know as soon as possible the outcome of the process; any extension of the process over a reasonable period, even if the correct solution would be adopted, and l loses its repressive educational role that it should have.

Conclusions

We started this study in the introductory part from the idea that the existence of procedural guarantees is the trunk the whole scaffolding that supports the rule of law institutions stands on. The good Function of the procedural guarantees such as the respect of the right to a fair trial, the existence of a real justice is what characterizes a state built on the model of Western democracy[7], as Romania is proclaimed by the very art. 1 of its Constitution. At the end of the study the question whether Romania is a state of law.

We present, therefore, in the lines below, in very general, the most important findings of our study mainly related to the current situation in Romanian law, followed by an opinion on the compliance of rules of a due process in Romania.

We believe that in light of all stated throughout this study, Romania is not a state of law, but the road there seems very long

Perhaps this conclusion may seem harsh, but it is the answer to several questions which, naturally, would not even be able to be made in early 2008, in a Romania which stands as a European country: why Romania the nation with the most complaints brought before the Court, after Russia? Why Romania is by far the state with the largest number of complaints per capita introduced in court? Why Romania is in select company of Russia, Ukraine and Moldova, among the States in which there is a constant denial of public institutions, established by the Court to enforce final judgment? Why Romania is the only state in Eastern Europe that has huge waves of complaints in relation to the issue of nationalized houses? Why Romania is, along with Turkey, Bulgaria and Russia, the State that begins to have increasingly more problems in court regarding the lack of effective investigation? Why Romania is a European Union country where confidence in justice is the lowest, according to reliable barometer made by the Community institutions in November 2007? Why is the Romanian state constantly threatened by the clause of safeguard on the problems of justice ? Why did the last flags of integration aim at independence of the judiciary? Why Roman judgments do not benefit from automatic recognition in other EU countries?

[6] G. Theodoru, *Criminal Procedure Law Treaty*, ediția a 2-a, (Ed. Hamangiu, București, 2008);

[7] Stanciu Roxana, *The enforcement and the right to a fair trial in ECHR jurisprudence*, Ed. (Hamangiu, 2011)

Questions are obviously rhetorical. In fact, in our opinion, despite the bombastic affirmation of the need to protect fundamental rights, neither state institutions nor the executive nor the legislative, nor the court, appear to put too much value on compliance. Beyond the fault represented by activity - rather, the lack of activity - the legislative and executive bodies, I think a lot of responsibility for this situation belongs to the Romanian judicial system, despite the lack of regulations that others would have had to provide the magistrate , the court system is that who, after all, refuses to grant the necessary protection rights and fundamental freedoms, respecting the procedural guarantees that accompany these rights.

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EUROPEAN POLICY CONCERNING THE PROTECTION OF THE QUALITY OF THE ENVIRONMENTAL FACTOR - WATER

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ALEXANDRU PETRU LISIEVICI BREZEANU[**]

Abstract
European Union environmental policy, as was established in the EC Treaty aims at ensuring environmental sustainability activities through its inclusion in EU sectoral policies, by developing measures to prevent by following the basic principles of sustainable development and by taking joint responsibilities.
Environmental legislation is one of those tools that combine management of natural resources with the prevention and control of the pollution. These laws attempt to prevent, or at least limit the effects of environmental degradation caused by the phenomenon of pollution. Environmental legislation should primarily be flexible in the sense to allow the fulfillment of current and the future goals in order to stimulate sustainable development concept and to base on general criteria for the purposes of allowing the extension to complex environmental problems. The environmental legislation is due to focus on integrating the source - effect policy , that is to focus on regulations for issuing permits for pollution, but also the responsibility of companies and citizens.
Despite the significant improvements that have occurred especially in reducing air and water pollution, European legislation should be developed further. It is true that there are still many points that require completion and perfection, but the path followed is the best. In the European Union the process of implementation and adoption of new regulations on environmental protection (regulations, directives, decisions,recommendations) to combat the causes of degradation of environmental quality and life quality time with them continues.

Keywords: *environmental protection, sustainable development, environmental policy, environmental law, pollution.*

Introduction

Among the many problems that people are going to face at the beginning of this century and millennium, there is that of degradation of environmental quality. Life needed resources worryingly decline and the direct consequences that any citizen feels is soon to come. Environmental degradation today affects safety tomorrow.

In recent decades it was found that most countries in transition are facing serious environmental problems caused by an economy based on excessive consumption of energy and natural resources, the use of polluting and obsolete technologies. For these reasons, the present study aims at presenting concepts, practices and solutions taken at Community level, to highlight the important role both in the European Union environmental policy and the way in which our country has complied with Community objectives.

Emphasis was placed on the environment factor water, because in my opinion, it is the most endangered, with an important impact on human health and beyond.

The role of this study is to show the public how European legislation in the pre-accession period was transposed, especially given the lack of information on national level, almost non-existent in pre-accession period. As a suggestion which I consider founded our country's citizens not only

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have the right but the obligation to know the regulations concerning environmental protection, but the absence of informative publications deepen the population in a deep ignorance.

Ensuring adequate quality of environment, protection of the necessity of survival and progressing, is a matter of interest. This calls for appropriate regulation of human activities to mitigate adverse environmental impacts. Without proper legislation, to establish clear obligations to do and not do, perhaps the world would be today a much higher state of degradation. The need to protect the environment calls for a set of rules by which to avoid the causes of environmental degradation and thus to eliminate the negative consequences of human activities.

The transposition of European directives in the field of environmental protection, Romania adopted new laws and standards for this sector. Although expensive and demanding, their implementation is a radical change in national policy and approach on environmental protection. Also, extensive restructuring in industry and agriculture, reduction and extraction activities and the use of solid materials, among others, have contributed to environmental improvement.

Content

Considering the fact that before 1990, in Romania environmental legislation was not taken into account, our country was seriously affected. As a result of industrialization and unsustainable agricultural development coupled with lack of interest in the political system on environmental issues, natural environment in Romania was characterized by a high level of emissions into air and the water, the degradation of land due to agricultural waste, industrial and municipal.

Consequently, after 1990, a rapid recovery from this point of view was impossible. Considering these circumstances, our country's effort to reduce environmental degradation is admirable. Merit goes to the large influence the European Union had, as Romania was forced to adopt European policies in this area.

After 1995, when new environmental legislation came into force, Romania has adopted a series of sectoral strategic documents and rules to take into account the principles of sustainable development. These strategies include conclusions and recommendations of the European strategies of sustainable development and of the 6th Environmental Action Programme, to ensure conservation, protection and improve the environment and human health.

Since the beginning Romania needed major investments in the sector and to strengthen the administrative capacity to transpose and implement environmental acquis for the environment. In the early years of European Union accession process, our country progress in the transposition of European legislation in this area was unsatisfactory. Approximation step up in 2001 was quite slow. Thus, in 2005 there were still problems regarding the administrative capacity of environmental authorities. Since 2002, the step of approximating European legislation has increased considerably, so that in 2006 considerable progress was made[1]

The new European dimension requires as a key condition the better quality of environment. Although during the accession process Romania has made considerable progress in terms of legislation in this sector many efforts and resources are still required to meet the standards imposed by the European Union.After negotiations of Chapter 22 - Environment, have been granted transition periods for some areas that require the compliance efforts, including water supply, rehabilitation or construction of wastewater treatment plants, which could not be implemented until the accession date.

After analyzing the main issues the European population is facing and the main directives regulating environmental protection of this factor, we presented not only the crucial importance that these legal instruments give, but also the risks that the world is imenaced by. Besides finding the importance of drinking water supply of population and wastewater treatment plants, the destructive

[1] Stefan Traca, *Treaty of environmental law*, (Ed. Lumina Lex , Bucharest, 2010).

effect of this environmental factor, an effect which is closely related to climate change is analyzed.

Environmental issues are one of the fundamental policies that concern the international community's quality of life in general and especially the European one.So lately two specific trends in terms of environmental protection and water quality were noticed.

First, international and internal law have seen a number of improvements (amend, repeal) corresponding to the evolution on multiple levels of economic factors and secondly, we can say that the last period was characterized by a laborious activity of development of organisms that can influence directly environmental factors, among which water.

What characterizes this whole set of measures adopted by the UN structures and other international organizations, hence the European community, is to increase the requirements for environmental protection by increasing the share of mandatory rules of creating an appropriate framework of environmental protection, current and future problem of humanity. Integral part of these measures, national and Community regulations on water environmental factor, play a crucial part, considering that this give-the resources of human existence.

It is obvious that EU environmental legislation on water quality protection sets high standards in terms of environmental factors, mainly due to its importance. The path taken is obviously the best, with European Directives protecting the water quality containing important regulations relating primarily to protect human health and integrity and then aquatic ecosystems. Evolution of European legislation in this area is truly appreciated, the only thing that requires some criticism being the some small gaps in the legislation that basically refer to examples and regulation of the use of certain dangerous substances. Since technology is constantly developing, this is obviously difficult to do, and the establishment of limit values of the substances can be achieved by numerous studies on individual substances.

Oceans and seas can not be managed without cooperation with third countries and not in multilateral forums. European Union policy on oceans must be developed in this international context.

If Europe is to face the challenge of finding a better relationship with the oceans, not only the industry will need to innovate, but also those policy makers. We should consider a new approach to the management of seas and oceans, not only focus on what people can draw from the oceans, nor one that looks at the oceans and seas in a purely sectoral but one which regards it as a whole. [2]

So far our policies on maritime transport, industry, coastal regions, offshore energy and other relevant areas have been developed separately. Of course, we tried to ensure that their impact on each other was taken into account. But no one looked for more links between them. No one examined in a systematic manner how these policies could be combined to reinforce each other. Fragmentation can result in the adoption of conflicting measures, which in turn could have negative consequences on the marine environment, or impose disproportionate restrictions on competing maritime activities.

Moreover, fragmentation of decision-making process makes it difficult to understand the potential impact of a set of activities upon another. It prevents us from exploring unused synergies between different sea sectors. Now is time to bring all these elements together and create a new vision for managing our relationship with the oceans. This will require new ways of designing and implementing policies at local, national and EU level and internationally, through the external dimension of our internal policies.

In this study we focused on the need for urban waste water collection and treatment, which appears in many data from the European Environment Agency and the national plan of the Ministry of Environment.

In developing this study we aimed primarily to highlight the importance of European Union's role in solving global environmental problems, and last but not least, as a personal opinion, I

[2] Jaann Carmine, Stacy D. VanDeveer, *EU enlargement and environmental protection.*

find it unacceptable, that evev now, our country's citizens are not sufficiently informed regarding the influence of European policy.

Also from personal experience, I believe the Government Decision no. 1076 of 2004 on the procedure for carrying out environmental assessment for plans and programs, provides too long terms, accounting for up to 6 months to obtain the environmental permit. The legislature probably had in mind when stating these terms that the interested subjects (population, institutions, NGOs, etc.), show their opinions and / or give suggestions to be considered subsequently by authorized bodies in the field[3], to what I totally agree. However, one should not ignore, that, because of these terms, many subjects wishing to access European funds, especially for projects in agriculture and animal husbandry have finally found out that they could not beat deadlines, thus losing the material support and must give up such projects. This was among the reasons for which Romania has been criticized as not having managed to access but a small part of European funds. For these reasons, I believe that it is important to change this decision by the Government in terms of shrinking the waiting periods.

Despite the small criticism that I think are quite objective, our country's progress in pre-accession period, I believe that Romania is on the right road in terms of environmental legislation. Although Romanian legislation in this sector requires many additions, I am keeping my optimism regarding the idea that we will achieve the objective required.

I think that all measures that I mentioned would be fully effective if supported by an extensive program to educate people at all levels to form an ecological consciousness.

Groundwater supplies about one third of world population. Unsustainable exploitation of water resources raises concerns. Groundwater extraction in quantities greater than nature's ability to renew reserves is widespread in some regions of the Arab peninsula, China, India, Mexico, former USSR and the USA. In some cases, surface waters decrease from 1 to 3 meters annually. In a world where 30-40% of agricultural production comes from irrigated land, this is a serious problem for food security. Already there is a fierce national competition in the water for irrigation and current production in some parts of the world, which will worsen with increasing population. Today, the Middle East and North Africa are most affected by the issue of water and sub-Sahara region of Africa will cleave these countries in half a century once its population increases by two or even three times.

Lack of drinking water is not the only problem. Use of fertilizers and chemical pollution threaten water quality and human health. Over a fifth of the fish in clean water are already in danger due to pollution or changing settlements.

The next serious problem is that over 1 billion people lack access to safe drinking water, while half of humanity lacks such sanitation systems. In many developing countries, rivers in cities are a bit cleaner than sewers. Health impact is devastating.

Dirty water and poor sewage systems cause 80% of all diseases in developing countries. Annual mortality is over 5 million, 10 times the average number of people killed during the war every year. Over half the victims are children. No other measure would do more to reduce disease and save lives in developing countries than providing clean water and proper sewage systems for all.

International waters have always been an important area for the life of human communities. In these conditions professional activities gradually developed, which were combined with, in a continuous ascent, scientific concerns, all having an important role in the establishment of habits, but also in the development of specific legal rules for professions that have their place of business in coastal land area, or even in river waters, seas and oceans[4].

The evolution of technology in the contemporary period does that the new conditions of use of marine areas (the complexity and diversity that have: fishing, aquaculture, shipping, oil resources) require international cooperation as the only guarantee of optimizing all activities.

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[3] Daniela Marinescu, *Environmental law treaty*, (Ed.Universe, Bucharest,2010).
[4] Constantin Anechitoae, *Elements of international law*, (Ed. Bren, Bucuresti, 2010).

Based on these realities, the EU related scientific and technological research of marine areas to its overall objectives of political, economic and social. We started from the thesis that oceans and marine environment in general guarantee the preservation and the continuity of life on earth and from the need for global management of these areas to ensure a sustainable balance between use and protection.

The tremendous amount of pollution, overpopulation and population movements to coastal areas, over-exploitation of fish resources, the dramatic decrease of marine resources necessary to life, progressive degradation of coastal areas and major climate change, represent a warning to justify more concerted action by all countries of the world.

Conclusions

Contrary to previous assertions, seas and oceans ability to absorb harmful substances, is really limited, so that residues of any kind, discharged even a single country, entering the global ocean circulation and sea space may end up being toxic and without life for all countries. There you have sufficient reasons for strong measures to counter the individual exploration of common resources, belonging to all mankind to be taken, thus justifying the development of this study.

Establishing a new legal, economic and moral order about the space marine, must contribute to promoting justice and equity in use of resources and the marine environment, with care and respect for the principle of solidarity with future generations in a sustainable development. At present European initiatives in maritime science and technology are scattered, so a European or even global coordination, the creation of an International Agency oceans and seas is required, which should dictate the direction of marine science and technology activity.

Scientific research faces a problem with extreme complexity so that multi-disciplinary approach and creating conditions for integrated management of oceans, seas and coastal areas, through the participation at acts of decision of all actors and particularly governments and civil society are fundamental.

The Ministerial Conference of the World Water Forum, which met in March 2000, recommended a series of real obligations on water and sanitation.

To stop the unsustainable exploitation of water resources, we need water management strategies at national and local levels. They must include structures that promote equity and efficiency. We need a "blue revolution" in agriculture, which aims to increase productivity per unit of water - "more crop per drop" - along with better water management and flood. But none of these campaigns will not take place without public awareness and outreach, to inform people about the extent and causes of the crisis of water. In conclusion, whatever the method adopted for maintaining water quality, act *pro aqua ... Pro Vita.*

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THE MANIFESTATION OF THE EUROPEAN CENTRAL BANK'S LEGAL PERSONALITY AT NATIONAL, EUROPEAN AND INTERNATIONAL LEVEL

MONICA ŞAGUNA*

Abstract
The European Central Bank is one of the world' s most important central banks, responsible for the monetary policy covering the 17 member States of the Eurozone. Established by the European Union in 1998, it was given the exclusive right to authorize the issue of banknotes within the European Union. The European Central Bank has legal personality under public international law. As article 282, paragraph 3 of the Treaty on functioning of the European Union and article 9, paragraph 1 of the Statute of the European System of Central Banks and of the European Central Bank states, the European Central Bank and the National Central Banks enjoy their own legal personality. The European Central Bank, given its important role in the economic integration, is the single institution of the European Union which has legal personality. This is a premise for it to fulfill its objectives. In this framework, the purpose of my paper is to analyze the effects of the European Central Bank's legal personality from a complete perspective: at national, European and international level. Therefore the objectives of my study are: an introspection in the concept of legal personality, the identification of the reason why it was entrusted to a single institution of the European Union and a detailed analyze of the effects of the European Central Bank' s legal personality.

Keywords: *legal personality, effects, national level, european level, international level.*

1. Introduction

My paper covers the concept of legal personality in relation with one of the most important institutions of the European Union, the European Central Bank. The concept will be analyzed from a complete point of view: at national, European and international level.

The importance of the study lays in the fact that The European Union is certainly the most prominent scheme of international economic integration and the European Central Bank was created as one of its essential institutions and, more than that, it is the single institution of the European Union which was entrusted with legal personality.

On January 1, 1999, the European Central Bank became one of the most powerful European Union Institutions, affecting the lives of all people living in the member states of the Euro-Zone, as the monetary policy in the euro area has been delegated to it.

Therefore, the reason for what it was entrusted with legal personality should be in close relation with its important functions, aspect which will be clarified among the pages of the study and appears as the main objective of my study. The other two objectives are: to fully understand the concept of legal personality and to analyze its manifestation at national, European and international level.

In order to answer at these objectives I will start by understanding what legal personality means at national and international level, having this understood I will try to reveal why it was entrusted to a single institution of the European Union – the European Central Bank, and afterwards, approaching step by step to the final objective, how it is manifested in practice.

Therefore, in order to answer to these objectives, I will divide my paper in four sections:

- The legal personality at national level;
- The legal personality at international level;

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- The European Central Bank as a European institution with legal personality;
- The manifestation of the European Central Bank's legal personality

The existent specialized literature has debated this subject, but this paper will present the concept of central bank legal personality from a complete point of view, starting from the concept, revealing why the European Central Bank was designed in this way and including the practical aspects, meaning the way central banking legal personality is manifested.

2.Paper content

The legal personality at national level

In 1928, about 80 years ago, Bryant Smith judged that "to be a legal person is to be the subject of rights and duties". A very short definition but concise and still available nowadays, if we consider the different legislations of the members of the European Union or even of the world's. To confer legal rights or to impose legal duties, therefore, is to confer legal personality.[1]

Whatever the controversies about the "essential nature" of legal personality, there seems to be a uniform concurrence in these as respectively the test of its existence in a given subject, and the manner in which is conferred, whether upon a natural person or upon an intimate thing.

Among definitions to be found in discussion of the subject, perhaps the most relevant and common is the capacity for legal relations.

The **legal personality** (also known as **artificial personality**, **juridical personality** and **juristic personality**) is the characteristic of a non-living entity regarded by law to have the status of personhood.

A **legal person** (Latin: ***persona ficta***) (also **artificial person**, **juridical person**, **juristic person**, and **body corporate**, also commonly called a **vehicle**) has a legal name and has rights, protections, privileges, responsibilities, and liabilities under law, just as natural persons (living beings) do. Natural persons are distinct from juridical persons. The concept of a legal person is a fundamental legal fiction. It is pertinent to the philosophy of law, as is essential to laws affecting a corporation (corporations law) (the law of business associations).

Legal personality allows one or more natural persons to act as a single entity (a composite person) for legal purposes. In many jurisdictions, legal personality allows such composite to be considered under law separately from its individual members or shareholders. They may sue and be sued, enter contracts, incur debt, and own property. Entities with legal personality may also be subjected to certain legal obligations, such as the payment of taxes. An entity with legal personality may shield its shareholders from personal liability[2].

The European Convention on Human Rights extends fundamental human rights also to legal persons, which can file applications with the European Court of Human Rights in Strasbourg in case of a violation by one of the 47 signatory states.

The legal personality at international level

From the international point of view, **International legal personality** refers to entities endowed with rights and obligations under public international law. The term includes both human and non-human entities. Generally, international legal entities are states, international organizations, nongovernmental organizations, and to a limited extent private individuals and corporations within a state.

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[1] Bryant Smith, Yale Law Journal, no. 3, January 1928

[2] The Juristic Person. I, George F. Deiser, University of Pennsylvania Law Review and American Law Register, Vol. 57, No. 3, Volume 48 New Series. (Dec., 1908), pp. 131-142.

According to the international laws, international legal personality is defined as "The capacity to bear legal rights and duties under international law"[3]

Therefore an "international legal person" can be said to an entity that is having powers to act independent on the international plane.

In right to this we can therefore see that international personality is therefore bench marked on the power that is given to the entity. If the entity does not have the power to force the power that has been granted under the international laws, therefore it cannot be said to be an international person.

This is the reason why the definition of an internal individual may not be the same as the normal definition since it will be referring to a specific entity rather those specific human beings.

This means that the international community is taken as a being made up of "persons" who posses powers to act on behalf of the international community.

This definition hence takes in the factors of power that is granted to the specific individual to implement the powers for the international community. While in our normal definition we may be referring to specific humans, the international community recognizes the states alone.

But the non-governmental organization has also been given the same power of recognition in the international community as states. While the international law clearly defines an international person as "an entity that has the capacity to bear legal rights and duties under the international law" non-governmental organizations have been able to bear the foresaid legal right and duties[4].

International organizations are also given legal entity in the internal community. While the aim of the international law is to bring together the world, it has been changing from time to time in order to accommodate other emerging influential entities like the sates. Originally the states which are political arrangement in a country have been given the sole membership to the body. However there has been other emerging center of power that also need to be recognized by the international law. There has been development of other organization like the non-governmental organization that needs to be recognized by the body.

With an aim of consolidating or bringing the world together, the international law must therefore seek to address the needs of various segments in the world. It must recognize that changing arrangement in the world. The emergence of trade blocs and non-governmental organization that need to be given the same legal entity to the international community has been well defined in the laws.

There is a further elaboration of the international legal personality in light of this. While the state has the totality of all the right that are granted under the international law or it has totally of international right duet as recognized by the international laws, the right and the duties of other entity like an international organization has to be defined in another way. There is a regulation that the entity of such an organization

"Must depend on its purposes and function as specified or implied in its constituent document and developed in practice"

Therefore we see that there is clear distinction between the personality of belonging to a nation and personality of belonging to the international community. Personality of individual to a nation is based on the rights of being born or staying for some time in a nation and therefore it does not depend on the capacity of the individual person.

However in the international arena, legal personality is based on the capacity of the individual personality as defined to have the legal right and capacity to carry out duties as per the international laws. Therefore there is a factor of capacity that brings the difference between the two entities.

Under the doctrine of the international law, therefore the capacity of the entity is more exemplified by the way in which the given entity is recognized. This means that the legal personality

[3] Ian Brownlie,*Public International Law; (*Oxford University Press, 6th Edition, 1990), p. 680-683

[4] DW Greig, International Law, (1996, Macmillan, London), p. 32

as defined must therefore have laws in itself that are in line with the provision of the international law. It must have domestic laws that are in line with the requirements of the international laws.[5]

There are usually incidence when the domestic law comes to conflict with the international law. In this regard there is usual a question of superiority of the laws. But as defined by the capacity description in the internal law, any entity that has ratified the internal law is also obliged to live to its ratification. Therefore in most instances when the domestic law conflict the international law, the personality will have to bear the capacity to implement the international laws and therefore it is the international law that will carry the day. The legal entity will have to live to its ratification and therefore carry out the internal laws as agreed.[6]

As a conclusion, it is evident here that the legal personality in the face of international law is quite different from the legal entity of the domestic law. While in the domestic law it may be based on some factors of residence, it is contrary to the international law. The legal personality in the international laws is based on the legal capacity of the entity to carry out duties as depicted in the internal laws. This means that legal personality here is defined by the capacity of in the "individual person" to carry out duties as required by the internal law.

The European Central Bank as a European institution with legal personality

The European Central Bank is the core of the European Union monetary policy.

The European Central Bank has legal personality under article 282 of the Treaty on functioning of the European Union and enjoys the most extensive legal capacity accorded to the legal persons under the respective national law of each member state under article 9.1. of the Statute of the European Central Banks and of the European System of Central Banks.

The strong point of the European Central Bank's meaningful position is its exclusive right to issue money and the responsibility over its value. According to article 106 from the Treaty on the functioning of the European Union, the European Central Bank shall have the exclusive right to authorize the issue of banknotes within the European Union.

The primary objective of the European Central Bank is to maintain price stability in the Euro area. The Treaty on the functioning of the European Union does not define the idea of „price stability", which gives the European Central Bank relatively free hands to both define and implement its objective. Not disregarding this objective, it shall also support the general economic policies and objectives of the European Union as laid down in Article 2 of the Stature of the European System of Central Banks and of the European Central Bank. On this line, article 2 above mentioned, establishes a clear hierarchy of objectives.

After the Lisbon Treaty, the European Central Bank was officially mentioned among the institutions of the European Union, as article 13 of the Treaty on the European Union states.

According to the mentioned article, each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedure, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation. The provisions relating to the European Central Bank were detailed and set in the Treaty on the functioning of the European Union.

We notice that legal personality is accorded to the European Central Bank, not to the European System of Central Banks. Under the Treaty on European Union, the European System of Central Banks is entrusted with carrying out central banking functions for the euro. However, as the European System of Central Banks has no legal personality of its own and because of differentiated levels of integrations in the European Monetary Union, the real actors are the European Central Bank

[5] G. Verdirame, *Personality, Statehood and Government*, (2004, Cambridge University).
[6] J. Klabber, *Presumptive Personality, International Law Aspects of the Europe Union*, (Kluwer, 1998).

and the national central banks of the euro area countries. They exercise the core functions of the European System of Central Banks under the name of "Eurosystem".

So, unlike the European Central Bank and the national central banks, the European System of Central Banks has no legal personality, no capacity to act and no decision-making bodies of its own. Instead, the components of the European System of Central Banks – the European Central Bank and the national central banks – are legal persons and actors. They to have the capacity to act, but when they perform tasks assigned to the European System of Central Banks, they act in line with its objectives, the rules of the Treaty and the Statute and the decisions taken by the decision-making bodies of the European Central Bank.

As an organisation created by the Treaty on the European Union, the European Central Bank enjoys genuine powers. These powers have not been delegated by the European Union institutions; they are genuine powers given to the European Central Bank by the Treaty on the European Union and in order for the European Central Bank to exercise them, it must have legal personality.

The legal personality is also a condition for the European Central Bank and of the national central banks to issue banknotes. Since 1 January 2002, the national central banks and the European Central Bank have issued euro banknotes. However, although the competence on issuing euro banknotes may be considered to represent an obligation of the Eurosystem as a whole, it is necessary for the central banks to act as legal issuers because the Eurosystem has no legal personality.

Also, the European Central Bank, which functions under the principle of independence and is known as the most independent central bank in the world, enjoys legal personality as a prerequisite for the independence of the members of the Eurosystem. For the European Central Bank, the legal independence includes the right to bring actions before the European Court of Justice in order to uphold its prerogatives if they are impaired by the European Union's institutions or by the member states.

As a conclusion, the legal personality is one crucial aspect of European Central Bank powers and a prerequisite in order for it to exercise its powers.

The manifestation of The European Central Bank's legal personality

The European Central Bank has legal personality under article 282 of the Treaty on the functioning of the European Union and enjoys the most extensive legal capacity accorded to the legal persons under the respective national law of each member state, under article 9.1. of the Statute of the European Central Banks and of the European System of Central Banks. In other words, the exact scope is determined by and it varies according to the law of the member state.

The Statute mentions two examples, which means that the powers of the European Central Bank to act are not necessarily restricted to them. Internally, the European Central Bank's legal capacity (to act) includes the following in every member state:

- the European Central Bank has the right to acquire and to dispose of property, both movable and immovable;
- the other important example is that the European Central Bank may be a party to legal proceedings.

So, as a consequence to its legal personality, the European Central Bank may, in particular acquire or dispose of movable and immovable property and may be a party to legal proceedings.

The European Central Bank shall ensure that the tasks conferred upon the European System of Central Banks under article 127 paragraph 2, 3 and 5 of the Treaty on functioning of the European Union are implemented either by its own activities pursuant to its Statute or through the national central banks pursuant to article 12.1 and 14 of the Treaty.

In addition to the possibility to acquire or dispose of movable and immovable property and to be a party to legal proceedings, other effect of the European Central Bank's legal personality it is that the European Central Bank enjoys those privileges and immunities that are necessary to the

performance of its tasks, under the conditions laid down in the Protocol on the privileges and immunities of the European Communities of 8 April 1965.

The Protocol also applies to the European Central Bank, to the members of its organs and to its staff, without prejudice to the provisions of the Protocol on the Statute of the European System of Central Banks and the European Central Bank.

According to the Protocol, the European Central Bank is, in addition, exempt from any form of taxation or imposition of a like nature on the occasion of any increase in its capital and from the various formalities which may be connected therewith in the State where the bank has its seat.

The activities of the Bank and of its organs carried on in accordance with the Statute of the European System of Central Banks and of the European Central Bank are not subject to any turnover tax.

The privileges and immunities granted to the European Communities and the European Central Bank are largely comparable with privileges and immunities customary in diplomatic relations, as codified under the aegis of the United Nations in the Vienna Convention on Diplomatic Relations (1961; in force since 1964).

Other manifestation of the European Central Bank's legal personality is that, as a legal person, under public international law, the European Central Bank is in a position to, among other things, conclude international agreements in matters relating to its field of competence and participate in the work of international organizations such as the International Monetary Fund, the Bank for International Settlements and the Organisation for Economic Co-operation and Development.

Article 23 of the European Central Banks' Statute authorises the European Central Bank to establish relations with central banks and international (monetary) organisations (first indent) and conduct all types of banking transactions with third countries and international organisations (fourth indent).

The International Court of Justice has given the following definition of the legal personality of an international organisation "That it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims"[7]

Undoubtedly, the European Central Bank has capacity to act internationally, but subject to limitations. Naturally, the scope of the European Central Bank's activities is defined by its tasks (functionally). In addition, the European Central Bank's powers are limited by the competences accorded to the European Union, and in particular the Council of the European Union.

In practice, in matters directly pertaining to its powers, the European Central Bank has concluded agreements with international organisations. The anti-counterfeiting agreements with Europol and Interpol can be mentioned as examples.

Another example is the Headquarters Agreement between the Government of the Federal Republic of Germany and the European Central Bank concerning the seat of the European Central Bank (29.12.1998).

As it concerns the liability, the principles regarding the European Union's non-contractual liability apply to damage caused by the European Central Bank or its servants in the performance of their duties as stated in article 240 Treaty on functioning of the European Union. Pursuant to Article 268 from the Treaty on the functioning of the European Union, the Court of Justice of the European Union has jurisdiction.

[7] Ian Brownlie, *Public International Law*; Oxford University Press, 6th Edition, 2003; p. 649

Conclusions

As a conclusion, by analyzing the concept of legal personality at national and international level, we understood how it is manifested in our studied case: the legal personality of the European Central Bank, a core institution of the European Union and the only institution of the European Union which has legal personality.

Also, from the paper resulted that the legal personality of the European Central Bank is a prerequisite for it to fulfil the task conferred by the European treaties and to manifest its independence.

The paper analyzed the European Central Bank's legal personality from a complete point of view, starting from the concept, revealing why the European Central Bank was designed in this way and including the practical aspects, meaning the way central banking legal personality is manifested.

As a suggestion for future researches, I believe that an interesting paper would consist into analyzing the acts issued by the European Central Bank and the control exercised by the European Court of Justice under article 265 of the Treaty on functioning of the European Union.

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ROMANIAN AERONAUTICAL METEOROLOGY APPLICABLE LEGAL FRAMEWORK –BRIEFING

CATALIN POPA[1]

Abstract

The purpose of this briefing is toprovide an overview of the aeronautical meteorology legal framework in Romania. In this context, the role and importance of aeronautical meteorology in international air traffic management will be underlined, with focus on the civil aviation activity in Romania. The international legal framework and modalities of implementing these rules at national level will constitute a significant part of the present study., Specific accent will be put on the national regulatory framework and structure, means of updating it, and how it responds to changing regulatory requirements.

Keywords: *aeronautical meteorology, international regulations, national regulations, implementation, SARPs.*

1. Introduction

The legal regime of the airspace of Romania and the civil aviation activity are being governed by a series of laws, both at national an d international level. The framework is established by the Civil Aviation Code [2], approved by Government Ordinance no. 29/1997, republished, modified and supplemented, by internal legal acts in the field. An important role in regulating civil aviation in the territory of Romania is the being played by the Community legislation in conjunction with the Convention on International Civil Aviation signed in Chicago on December 7, 1944 (hereinafter referred to as the Chicago Convention). Also,, conventions and international agreements to which Romania is a party are an influential factor in this sense.

In order to ensure a unitary, coherent and modern preparation and development of the Romanian national civil aviation regulations ,these are developed, issued or adopted in accordance with:

a. national legislation;
b. the Chicago Convention;
c. standards and recommended practices presented in the annexes to the Chicago Convention;
d. international conventions and agreements to which Romania is part to.

In accordance with the Civil Air Code and for the purpose of regulating civil aviation, the Ministry of Transport and Infrastructure has the status of state authority. In this capacity, designs or supervises directly the implementation and application of civil aviation regulations. The Ministry can also delegate its competences to specialized technical bodies, public institutions or, as appropriate, authorized companies. These regulations are binding for all participants to civil aviation and related activities.

According to Government Decision no. 405/1993 establishing the Romanian Civil Aeronautical Authority, as amended, and the Order of the Minister of Transport, Constructions and Tourism no. 1.185/2006, the Romanian Civil Aeronautical Authority (hereinafter referred to as RCAA):

- Acts as the national supervisory authority;
- Ensures the adoption and implementation of the national aviation regulations;

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[2] Civil Aviation Code sets the legal framework of the Romanian civil aviation and it has been, approved by the Romanian Government.

- Ensures compliance by legal and natural persons with the regulations in the field of civil aviation;
- Implements the provisions of international aviation agreements to which the Romanian State is party.

The category mentioned above includes aviation regulations and all provisions related to aeronautical meteorology. Therefore,they are subject to regulatory and supervisory activities of the RCAA too.

With regard to aeronautical meteorology, there is a process in Romania related to the issuence, implementation and supervision of the regulations. They must be in accordance with the laws in force.

For a better understanding of the concepts presented, the terms listed below shall have the following meaning:

- **AIP** = (Aeronautical Information Publication) A publication issued by or with the authority of a State and containing aeronautical information of a lasting character essential to air navigation
- **AIP Romania** = Aeronautical Information Publication Romania
- **ANS** = Aeronautical Navigation Services
- **EUROCONTROL** = European Organisation for the Safety of Air Navigation
- **EUR-ANP** = European Air NavigationPlan
- **ICAO** = International Civil Aviation Organisation
- **METEOROLOGICAL AUTHORITY** = Romanian CAA
- **PIAC** = Internal Procedures for Romanian Civil Aviation
- **RACR** = Regulation for Romanian Civil Aviation
- **RCAA** = Romanian Civil Aviation Authority
- **SARPs** = Standards and recommended practices
- **WMO** = World Meteorological Organisation

2.Content

Regulatory framework in aeronautical meteorology

A. International regulatory framework

The **International Civil Aviation Organization (ICAO)**[2]**,** a specialized agency of the United Nations Organization was created to promote the safe and orderly development of international civil aviation throughout the world. It sets standards and regulations necessary for aviation safety, security, efficiency and regularity, as well as for aviation environmental protection. The Organization serves as the forum for cooperation in all fields of civil aviation among its 191 Member States.

[2] Due to the failure of the 1919 Paris Convention, the 1929 Warsaw Convention and the International Commission for Air Navigation, governments met in Chicago in December 1944 in order to discuss and identify common rules in civil aviation. The States participating to this reunion, concluded that, in order to ensure the development of international civil aviation in a safe and orderly manner and that international air transport services can be based on an equal opportunity for all and to be operated in a healthy economical environment, the establishment of an international forum of cooperation was necessary. Article 43 of the Chicago Convention expresses the agreement of the Sates "to establish an organization to be named the International Civil Aviation Organization." The Convention on International Civil Aviation (also known as the Chicago Convention), to which each ICAO Contracting State are party, was signed on 7 December 1944 by 52 States. This Convention entered into force on April 4, 1947. Meanwhile, the termination of the International Air Navigation Comission was decided, as it was replaced by the International Civil Aviation Organization (ICAO). Romania ratified the Convention in 1965. In October 1947, ICAO became a specialized agency of the United Nations linked to the Economic and Social Council (ECOSOC). According to the terms of the Convention, the Organization is made up of an Assembly, a Council of limited membership with various subordinate bodies and a Secretariat. The chief officers are the President of the Council and the Secretary General.

ICAO works in close co-operation with other members of the United Nations family such as the World Meteorological Organization, the International Telecommunication Union, the Universal Postal Union, the World Health Organization and the International Maritime Organization. Non-governmental organizations also participate in ICAO's work, among which the International Air Transport Association, the Airports Council International, the International Federation of Air Line Pilots' Associations, and the International Council of Aircraft Owner and Pilot Associations.

As one of the two governing bodies of ICAO, the Council gives continuing direction to the work of ICAO. In this regard, one of its major duties is to adopt international Standards and Recommended Practices (SARPs) and to incorporate these as Annexes to the Chicago Convention. The Council may also amend existing Annexes as necessary.

Currently, there are 18 Annexes to the Chicago Convention, each constituting itself as a standard in the field of civil aviation regulator.

ANNEX 3 to Chicago Convention entitled "Meteorological services for international air navigation" is the governing provision of aeronautical meteorological services in civil aviation. The object of the meteorological service outlined in Annex 3 is to contribute to the safety, efficiency and regularity of air navigation. This is achieved by providing necessary meteorological information to operators, flight crew members, air traffic services units, search and rescue units, airport management and others concerned with aviation. Close liaison is essential between those supplying meteorological information and those using it.

Commission Regulation (EC) no. 1035/2011 establishes requirements for the provision of aeronautical meteorological services. To ensure consistent responses to international regulatory framework, that regulation will follow the procedure for amending implemented by Community rules, meaning updating its provisions, including references to be made ICAO Annex 3.

Standards and recommended practices in ICAO Annex 3 apply to those portions of air space under the jurisdiction of a State signatory of the Convention on International Civil Aviation. They also apply to those States that provide aeronautical meteorological services in those air spaces where the state accepts responsibility for providing air navigation services over the high seas or in air space of undetermined sovereignty.

Any differences[3] from the standards and recommended practices in ICAO Annexes., or termination of these differences (Annex 3 as well) must be notified to ICAO under Article 38 of the Chicago Convention. These differences are published in the aeronautical information service, in AIP Romania.

According to art.1, para.(3) of the European Parliament and Council Regulation (EC) no.549/2004 as amended, establishing a framework for creating the Single European Sky, provides that its application shall be without prejudice to the rights and obligations of Member States established under the Chicago Convention.

B. National regulatory framework

Romanian civil aviation regulation RACR-ASMET is the national transposition of standards and recommended practices set out in Annex3 to the Chicago Convention - "Meteorological Services for International Air Navigation" (hereinafter referred to as ICAO Annex 3). ICAO Annex 3, together with the European Air Navigation Plan (EUR-ANP) governing international civil aviation meteorological services in Europe, are applied in order to establish in the territories and airspace of Romania a regulatory framework to be applied by the providers of meteorological services in their activity related to air navigation as appropriate:

- meteorological support services to civil aviation activities

[3] According to ICAO, even a different level of implementation of the provision ,in the sense that if a recommendation of international regulation is implemented as a national standard- which happens in all cases in terms of regulations weather-it is assumed to be difference and be highlighted as such by the ICAO.

- services necessary to ensure safe conduct of air navigation, in an orderly and expeditious manner
- units of the services necessary to ensure safe conduct of air navigation, in an orderly and expeditious manner.

Rules and other provisions contained in the Romanian civil aviation regulation RACR-ASMET were developed with due consideration to grant meaning to the standards and recommended practices adopted by the ICAO in accordances with the general principles of law developed by the Chicago Convention and its Annexes.

For the purposes of the foregoing, the provisions RACR-ASMET were developed so that:

- ICAO standards specified in Appendix 3 are fully transposed into RACR-ASMET as rules, in accordance with ICAO provisions, while making, where appropriate, the customizations needed in order to facilitate understanding and correct application (eg there is an ICAO standard which provides a state responsibility (for?), the appropriate rule RACR-ASMET specify the institutional context of the Romanian Civil Aviation, which functions / institutions - state authority, delegated authority, government or businesses providing services, etc. - shall be responsible for not fulfilling the specified obligations).
- recommended practices set out in ICAO Annex 3 are and accurately translated in the RACR -ASMET provisions. The same observation applies with regard to the additional details that have been entered in the text;
- Appendices ('Appendices') and supplements ('Attachments') in Annex 3 have been or will be fully implemented in the specific procedures for the application of RACR-ASMET
- Tables and figures in ICAO Annex 3 have been or will be also implemented faithfully in the application of specific procedures RACR-ASMET, keeping the text in line.
- Transpose the preamble of ICAO Annex 3, entirely or in part, in the regulation of civil aviation Romanian RACR-ASMET .
- Notes from the original text were translated, entirely or in part, where it was considered that these details are necessary or useful in applying the rules.
- Have been translated into Romanian civil aviation regulation RACR-ASMET and those standards and recommended practices of ICAO Annex 3 to the aeronautical meteorological services in Romania had not yet on a certain editions, technical and operational support necessary, but considering that implementation of these standards and practices that national rules is necessary for further development, aviation weather services and the national ANS system.
- Develop RACR-ASMET in line,as much as possible, with the structure of ICAO Annex 3, except that the provisions contained in Part II were added to the appropriate chapters and paragraphs of Part I ,without differentiating between them. This was considered necessary because both contain equally appropriate standards and recommended practices to be implemented as rules at national level,. Correlation between them is essential.

Compliance with the rules and recommendations set out in RACR-ASMET have been carried out together with the procedures and guidelines for civil aviation, associated with this regulation. They are developed and issued by the aeronautical meteorological authority. Such documents embrace the form of PIAC(underRACR-11[4]) at national level There are also other institutions of civil aviation that develop standards and procedures, along with the national aeronautical meteorological, which is RCAA.Any air navigation service provider subject to the rules RACR-ASMET must seek to achieve those requirements specific to applying the means of compliance provided in procedural manuals, circulars, etc .issued by ICAO, and using materials for guidance and directions established by the WMO and EUROCONTROL. Other means of compliance may be allowed only if the air navigation service provider shall justify and argue unequivocally in front of the aeronautical

[4] RACR-11isa Romanian Civil Aviationregulation for develop and issue Romanian civil aviation regulations and procedures for their application .

meteorological authority, , that using these other means of compliance, the same level of safety will be achieved.

At 18 November 2010 Amendment75 to ICAO Annex 3 entered into force. Its provisions have been fully adopted and implemented nationwide in the regulation RACR-ASMET, edition4/2008, Amd. 1/2012.

The procedures and instructions related to the Regulation RACR-ASMET, edition4/2008, were developed nationwide and entered in force in the form of PIAC-CMA[2]"Aeronautical Meteorological Codes" ed. 1/2006, which transposes the provisions on the making of a true, encoding and transmission of weather observations, contained in ICAO Annex 3.

Provisions for aeronautical meteorological activities aimed at aeronautical meteorological personnel are included in Annex 1 " Personnel Licensing " to the Chicago Convention. In terms of civil aviation in Romania, the provision of aeronautical meteorology are translated into RACR-LMET "Romanian civil aviation regulation on licensing of aeronautical meteorological personnel", edition 2/2009, and the internal procedure at the PIAC-LMET, ed . 1/2006, in both regulations taking into account the Doc. WMO no. 49 "Technical Regulations", vol. 1, developed and approved by the Commission for Aeronautical Meteorology of WMO.

By presenting the international and national regulatory framework in aeronautical meteorology, we believe that the most important materials were presented. Also, the basic recommended standards and procedures applicable in the field were developed in the above study. It is worth mentioning in this context that at this time Romania has a a level of implementation of 100%, as can be inferred from the graph shown in Fig. 1 below (according to the information presented by ICAO on the ICAO website, EFOD-Romania section).

Moreover, considering the specific requirements of all stakeholders in civil aviation, there are many other norrme and applicable provisions issued by other ICAO or non-ICAO bodies closely with ICAO requirements given inAnnex 3[3].

3. Conclusions

In conclusion, ICAO Annex 3 is the main document providing standards and recommended practices of aeronautical meteorology, which are implemented nationwide by the RCAA through the Romanian Civil Aeronautic Regulation RACR-ASMET and the PIAC-CMA.

What it is important to mention is that the other Annexes to the Chicago Convention include references regarding aeronautical meteorology too, implemented nationally in appropriate internal regulations (RACR-LMET, RACR-AIS, etc).

[2] PIAC – CMA is a Romanian Civil Aviation internal procedure that regarding the issuance of meteorological message using the international meteorological codes.

[3] In accordance with the requirement of ICAO Annex 3, para. 2.1.5 : "Each Contracting State shall ensure that the designated meteorological authority meets the requirements of WMO regarding qualifications and training of meteorological personnel providing air navigation services", the WMO Executive Council approved the inclusion standard of competence for staff weather aircraft technician and forecasters in theDoc. WMOno.49 "Technical Regulations", vol1,developed and approved by the Commission for Aeronautical Meteorology of WMO. The requirements of this document can be found in ICAO Annex 1and, respectively, in the provisions of RACR-LMET and PIAC-LMET.

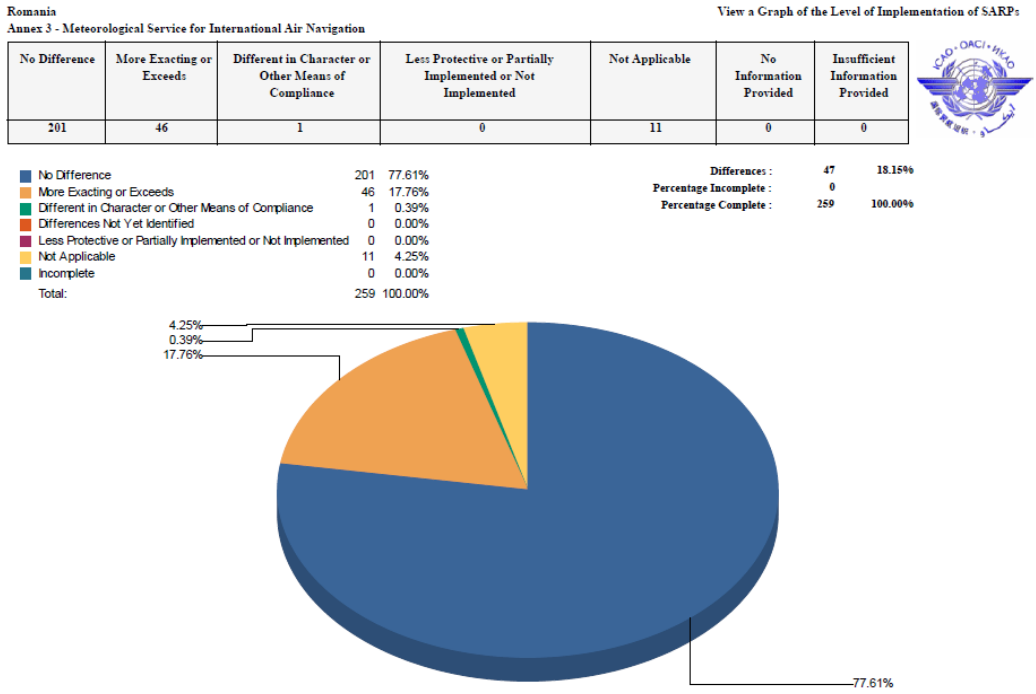

Fig. 1 - Level of implementation of SARPs

European civil aviation bodies emit a series of requirements and regulations in the field of aeronautical meteorology as well. These need to comply with ICAO Annex 3, and are transposed into national regulations, too.

In this sense we suggest that it could be a very good idea to continue the future development of this briefing in aeronautical meteorology, by a detailed approach to these regulations.

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THE OBJECT OF THE PRELIMINARY QUESTION

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Abstract
The study intends to explain what may be the object of a preliminary question sent by a national court or tribunal of a member state to the Court of Justice of the European Union (CJEU), analyzing the first paragraph of article 267 of the Treaty on the Functioning of the European Union, with references to the CJEU's relevant case law.

Keywords: *national court, member state, Court of Justice of the European Union, preliminary question, article 267 of the Treaty on the Functioning of the European Union.*

I. Introductory considerations

The preliminary ruling procedure is an instrument at the disposal of national courts or tribunals[1], which have the possibility and, sometimes, the obligation, to ask the Court of Justice of the European Union (CJEU) to give a ruling on the interpretation of the Treaties, on the validity and interpretation of acts of the institutions, bodies, offices or agencies of the European Union (EU).

Its purpose is to enable the national judicial body to receive the Luxembourg Court's opinion on a question on the interpretation or validity of European Union law, opinion necessary in order to give a ruling in the case it has been vested with. It is a means of cooperation between the national judge and the European Union Court, meant to help the national judge in his/her mission to apply and interpret European Union law.[2]

Article 267 of the Treaty on the Functioning of the European Union provides that:

"The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

a) the interpretation of the Treaties;

b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

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[1] An autonomous notion in European Union law. In the interpretation of the European Court of Justice (ECJ), the meaning of "national court or tribunal" is not restricted to the judicial system *stricto sensu*, but includes, also, bodies authorised to give rulings of a judicial nature. The characteristics of such a body were defined by the ECJ in case 246/80 *Broekmeulen, judgment of 6 October 1981 (http://curia.europa.eu/en/content/juris/c1_juris.htm).*

[2] See also **Petersen, John; Shackleton, Michael;** *The Institutions of the European Union*, Second Edition, (Oxford University Press, 2006) p.132.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay."[3]

The goal of this study is to explain what may be the object of a preliminary question sent by the national court of a member state, with references to the CJEU's relevant case law on the interpretation of the first paragraph of article 267 of the TFEU.

II. Questions on the interpretation of the Treaties

The interpretation of Treaties includes the interpretation of the founding treaties, of the treaties that have modified and amended the founding treaties and of the treaties of accession of the member states. As they have the same legal force as Treaties, the protocols and declarations annexed to Treaties, such as the Charter of Fundamental Rights of the European Union, can also be interpreted by the Court of Justice (CJ).

The Treaties cannot be the object of a question about their validity, as they are, first of all, international covenants, concluded under public international law, with a series of inherent characteristics deriving from their judicial nature[4]. Once ratified, they express the will of the party states.

The judicial institutions created on the basis of these international covenants, in order to ensure the functioning of the international organisation established by the parties, do not have jurisdiction to rule on the validity of the agreement of the states.

For the same reason, national courts cannot ask preliminary questions on the validity of the Treaties. The Court of Justice has never received such a question.

However, in the EU literature it has been pointed out that "one cannot exclude entirely the annulment by the Court, in exceptional circumstances, of a provision of the Treaty as being null and void, for example, because it is in obvious contradiction to a fundamental principle of EU law or it has been introduced by an amendment to the Treaty that has been adopted without following the procedure set forth by the Treaty."[5]

In our opinion, this possibility can only be received with certain reserve, since article 267 of TFEU establishes expressly the limits of the Court's jurisdiction.

III. Questions on the interpretation of acts of the institutions, bodies, offices or agencies of the Union

The interpretation of acts of the institutions, bodies, offices or agencies of the European Union covers binding acts, such as Regulations, Decisions, Directives, as well as Recommendations and Opinions, "if the use of such instruments is necessary to aid the interpretation of national law adopted to implement Community law"[6].

This conclusion is derived from the principle of interpretation according to which where the law does not distinguish, nor should the interpreter (*ubi lex non distinguit, nec nos distinguere debemus*) and has been confirmed by the Court of Justice of the European Communities[7] in case

[3] See, in Romanian, **Tudorel Ştefan, Beatrice Andreşan-Grigoriu,** *Tratatele Uniunii Europene. Versiune consolidată.*, (Hamangiu Publishing, Bucharest, 2010), p. 163.

[4] See also **Raluca Miga-Beşteliu,** *Drept internaţional public*, Second Edition, Volume I, (C.H. Beck Publishing, Bucharest, 2010), p. 89-112 and Volume II, (C.H. Beck Publishing, Bucharest, 2008), p. 57-106.

[5] **Morten Broberg, Niels Fenger,** *Procedura trimiterii preliminare la Curtea Europeană de Justiţie*, translated in Romanian by Constantin Mihai Banu, (Wolters Kluwer Publishing, Romania, 2010), p. 102 (our translation).

[6] **Margot Horspool, Matthew Humphreys, Siri Harris, Rosalind Malcolm,** *European Union Law*, Fourth Edition, (Oxford University Press, 2006), p.110.

[7] Today, the Court of Justice, after the coming into force of the Lisbon Treaty, on the 1 of December, 2009.

322/88 *Grimaldi*[8], which concerned a Recommendation issued by the Commission. The Court stated that it has jurisdiction to give a preliminary ruling on the validity and interpretation of all acts of the institutions of the Community without exception. It therefore has jurisdiction to rule on the interpretation of Recommendations adopted on the basis of the Treaty.

The Court observed that Recommendations are generally adopted by the institutions of the Community[9] when they do not have the power under the Treaty to adopt binding measures or when they consider that it is not appropriate to adopt more mandatory rules. Since they are measures which, even as regards the persons to whom they are addressed, are not intended to produce binding effects, they cannot create rights upon which individuals may rely before a national court. However, since Recommendations cannot be regarded as having no legal effect at all, the national courts are bound to take them into consideration in order to decide disputes submitted to them, in particular where they cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding Community provisions.

Most frequently, preliminary questions concern the interpretation of Regulations, Decisions and Directives. The main provisions on these types of acts are found in Article 288 of TFEU. This text sets forth their features. In a nutshell, the Regulation has general application; it is binding in its entirety and directly applicable in all member states (it does not require transposition in national law).

The Decision is binding in its entirety and, if it specifies those to whom it is addressed, it is binding only on them.

The Directive is binding, as to the result to be achieved, upon each member state to which it is addressed, but, leaves to the national authorities the choice of form and methods. The Directive is not directly applicable, as it requires transposition in national law[10]. The consequence is that the national judge shall apply the national provision and not the Directive, as such[11].

The Court of Justice stated that it is not necessary that the acts of the institutions should be directly applicable in order to be the object of a preliminary question. For example, in case 111/75 *Mazzalai* [12] the Court was asked to interpret a provision from a Directive. It stated that it has jurisdiction to give preliminary rulings concerning the interpretation of acts of the institutions, regardless of whether they are directly applicable.

In its jurisprudence, the Court of Justice has accepted jurisdiction for the interpretation of international treaties which the European Union has concluded, on the basis that they also constitute acts of the institutions. Consequently, their interpretation can be the object of a preliminary question.

In the *Kupferberg*[13] ruling, the preliminary question asked by the German court was on the interpretation of a free trade agreement concluded by the European Community (EC)[14] with Portugal, before Portugal aceeded to the European Coomunities. The Court held that the agreement was equally binding for the member states and for the EC institutions, empowered to conclude it and that they fulfil, in ensuring respect for commitments arising from an agreement, an obligation not only in relation to the non-member country concerned but also and above all in relation to the Community which has assumed responsibility for the due performance of the agreement. That is why the provisions of such an agreement form an integral part of the Community legal system.

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[8] *Judgment of 13 December 1989, Grimaldi (*http://curia.europa.eu/en/content/juris/c1_juris.htm*).*

[9] Today's European Union, after the coming into force of the Lisbon Treaty, on the 1 of December, 2009.

[10] See **Augustin Fuerea**, *Manualul Uniunii Europene*, Fifth Edition, (Universul juridic Publishing, Bucharest), 2011.

[11] See **Marcela Comşa,** *Caracteristicile dreptului comunitar european şi rolul judecătorului naţional*, Dreptul, number 10, 2007, p.104-105.

[12] *Judgment of 20 May 1976, Mazzalai / Ferrovia del Renon (*http://curia.europa.eu/en/content/juris/c1_juris.htm*).*

[13] *Judgment of 26 October 1982, Hauptzollamt Mainz / Kupferberg & Cie.,* 104/81 (http://curia.europa.eu/en/content/juris/c1_juris.htm).

[14] Today, the European Union.

In a series of cases, the Court stated that there can be the object of preliminary questions provisions of EU law that apply to strictly internal situations, due to the fact that national law extended their application to purely internal matters. For example, in case 166/84 *Thomasdünger*[15], the Court said that, with the exception of cases in which it is clear that the provision of Community law which it is asked to interpret does not apply to the facts of the dispute in the main proceedings, ECJ leaves it to the national court to determine whether a preliminary ruling is necessary in order to decide the dispute pending before it.

III. Questions on the validity of acts of the institutions, bodies, offices or agencies of the Union

The Court has jurisdiction to rule on the validity of the acts issued on the basis of and for the application of the Treaties (primary sources of EU law[16]), in the context of the annulment proceedings, instituted by article 263 TFEU (a direct action) or of the preliminary ruling proceedings, an indirect means for exercising legal control over the acts issued by the EU institutions.

The jurisdiction belongs solely to the Court of Justice and national courts do not have the power to declare acts of the EU institutions invalid. To this end, in case C-344/04 *IATA and ELFAA*[17], the Court said that it is necessary to ensure that Community law[18] is applied uniformly by national courts. Differences between courts of the member states as to the validity of Community acts would be liable to jeopardise the very unity of the Community legal order and undermine the fundamental requirement of legal certainty.

The Court emphasized that the preliminary ruling procedure does not constitute a means of redress available to the parties to a case pending before a national court and therefore the mere fact that a party contends that the dispute gives rise to a question concerning the validity of Community law does not mean that the court concerned is compelled to consider that a preliminary question has been raised.

The Court held that courts against whose decisions there is a judicial remedy under national law may examine the validity of a Community act and, if they consider that the arguments put forward before them by the parties in support of invalidity are unfounded, they may reject them, concluding that the act is completely valid. On the other hand, where such a court considers that one or more arguments for invalidity, put forward by the parties or, as the case may be, raised by it of its own motion, are well founded, it is incumbent upon it to stay proceedings and to make a reference to the Court for a preliminary ruling on the act's validity.

The substance of the judgement gives rise to the idea that if the national court has reasonable doubts regarding the validity of the EU act applicable to its case, it is under the obligation to ask the preliminary question, regardless of the fact that it is or not a court against whose decisions there is a judicial remedy under national law.

However, in other cases, the Court in Luxemburg stated that, if the EU norm could have been the object of a direct annulment action, provided by article 263 of TFEU, introduced by the person who asked for the preliminary question to be sent, but it was not or the action was dismissed because the 2 month term expired, the national court shall reject the request to send a preliminary question, without having to analyze the righteousness of the reasons offered by the parties in claiming invalidity.[19]

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[15] *Judgment of 26 September 1985, Thomasdünger / Oberfinanzdirektion Frankfurt am Main (*http://curia.europa.eu/en/content/juris/c1_juris.htm).

[16] See **Augustin Fuerea**, *Drept comunitar european. Partea generală.,* (All Beck Publishing, Bucharest, 2003), p. 49-105.

[17] *Judgment of 10 January 2006, IATA and ELFAA (*http://curia.europa.eu/en/content/juris/c2_juris.htm).

[18] Today, EU law.

[19] See cases C-188/92 *TWD*, C-119/05 *Lucchini*.

IV. Questions outside CJEU's jurisdiction

The object of the preliminary question is limited by article 267, paragraph 1 of TFEU to the three situations above. Thus, a first exception is the questions regarding the validity of the Treaties, the primary sources of European Union law.

Also, national courts cannot ask questions about international agreements that have not been concluded on the basis of TEU or TFEU. In case 44/84 *Hurd/Jones*[20] the Court was asked a series of preliminary questions about article 3 of the Act concerning the conditions of accession and the adjustments to the Treaties, annexed to the Treaty concerning the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the European Economic Community and to the European Atomic Energy Community, with regard to the levying of domestic taxation on the salaries paid by the European school at Culham in the United Kingdom to the British members of its teaching staff.

The Court established it has jurisdiction to interpret article 3 of the Accession Act. However, the Court observed that the European schools were not set up on the basis of the Treaties establishing the European Communities or on the basis of measures adopted by the Community institutions, but on the basis of international agreements concluded by the member states, namely the Statute of the European school and the Protocol on the setting-up of European schools. Those agreements together with the instruments, measures and decisions of organs of the European schools adopted on that basis do not fall within any of the categories of measures that may be the object of a preliminary question.

However, the Court held that, in order to determine the scope of article 3 of the Act of Accession with regard to such instruments, it may be necessary to define their legal status and, consequently, to subject them to such scrutiny as is necessary for that purpose. In performing that task the Court does not acquire, on the basis of article 3 of the Act of Accession, full and complete jurisdiction to interpret the instruments in question.

Often national courts ask if provisions of internal law are contrary to European Union law, because the parties to the legal dispute are trying to determine the national court not to apply internal laws that are not favourable to their interests.

European Union law authors have emphasized that „such a question involves the application of Community law rather than its interpretation, but the Court will usually confine its ruling to the issue of interpretation, leaving it to the national court to draw the conclusion (which may then be readily apparent), whether in the light of that interpretation the national provisions should be applied.[21]

In case 13/61 *Bosch*[22] the jurisdiction of the Court was challenged on the ground that, among others, the question was not on the interpretation of the Treaty, but its application. The Court held that the Treaty does not prescribe, either expressly or by implication, a definite form in which the national court must put its request for a preliminary ruling. The national court is free to put its request in a simple and direct form, leaving it to the Court of Justice to rule on that request only within the limits of its jurisdiction that is insofar as it involves questions of interpretation of the Treaty. The Court concluded that the direct form of the question allows it to extract without difficulty the questions on interpretation.

In another case, 16/65 *Scwarze*[23], the national judge asked the Court to interpret a Community measure, whereas a ruling on the measure's validity was clearly required. The Court answered, stating that the real purpose of the question submitted by the national court is concerned rather with

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[20] *Judgment of 15 January 1986, Hurd / Jones (* http://curia.europa.eu/en/content/juris/c1_juris.htm)

[21] **Neville Brown, Tom Kennedy,** *The Court of Justice of the European Communities*, Fourth Edition, (Sweet&Maxwell Publishing, London, 1994), p. 205.

[22] *Judgment of 6 April 1962, De Geus en Uitdenbogerd / Bosch and others (*http://curia.europa.eu/en/content/juris/c1_juris.htm*)*

[23] *Judgment of 1 December 1965, Schwarze / Einfuhr- und Vorratsstelle für Getreide und Futtermittel (*http://curia.europa.eu/en/content/juris/c1_juris.htm*)*

the validity of Community measures than with their interpretation. The Court found it is appropriate to inform the national court at once of its view without compelling the national court to comply with purely formal requirements which would uselessly prolong the procedure of the preliminary ruling and would be contrary to its very nature.

Thus, even in the situation of an imperfect question, the Court shall try to offer the national court a useful answer, without exceeding its own jurisdiction. Still, as the number of cases registered by the Court increased, it has adopted a more strict position. „Now, therefore, not only are hypothetical questions refused, as we saw above, but also the national judge is expected to describe the factual and legal background of the national proceedings in sufficient detail to enable the Court to reply usefully to the questions submitted: this is particularly necessary in the field of competition law. If this is not done, the Court may refuse to answer the question submitted as manifestly inadmissible."[24]

The Court of Justice cannot rule that an internal law is contrary to an EU law, but it can offer the national court all the elements necessary to draw its own conclusions on that matter.[25]

Within the framework of the preliminary ruling procedure, the Court shall, in principle, only interpret EU law and not advise a national court on the application of EU law, not will it order a national court to declare its national law invalid.[26]

The Court does not only reject, as inadmissible, those questions ouside its jurisdiction *ratione materiae,* but also the questions ouside its jurisdiction *ratione temporis*. For example, in case C-302/04 *Ynos*[27], the Court was sent a question on the interpretation of a provision from a Directive, that had been transposed in national Hungarian law before Hungary's accession to the European Union. The Court noted that the facts of the main case had happened before Hungary became a member of the EU and concluded that it did not have jurisdiction to interpret the Directive.[28]

V. CONCLUSION

The preliminary ruling procedure is an instrument at the disposal of national courts, a means of cooperation between national courts and the CJEU, that enables the national court to ask the Court of Justice to give a ruling on the interpretation of the Treaties, on the validity and interpretation of acts of the institutions, bodies, offices or agencies of the European Union.

The object of the preliminary question is limited to the three situations enumerated in paragraph 1 of article 267 of TFEU. The Court of Justice does not have jurisdiction to answer questions about the validity or the application of the Treaties or about international agreements that have not been concluded on the basis of EU law.

The Court of Justice cannot rule that an internal law is contrary to an EU law, nor will it order a national court to declare its national law invalid, but it can offer the national court all the elements necessary to draw its own conclusions on those matters.

Even in the situation of an imperfect question, the Court shall try to offer the national court a useful answer, without exceeding its own jurisdiction. Still, as the number of cases registered by the Court increased, it has adopted a more strict position[29]. It is settled case-law that a reference from a

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[24] **Neville Brown, Tom Kennedy,** *The Court of Justice of the European Communities*, Fourth Edition, (Sweet&Maxwell Publishing, London, 1994), p. 206.

[25] *Judgment of 12 December 1990, SARPP (*http://curia.europa.eu/en/content/juris/c2_juris.htm)

[26] **Margot Horspool, Matthew Humphreys. Siri Harris, Rosalind Malcolm,** *European Union Law*, Fourth Edition, (Oxford University Press, 2006), p.111.

[27] *Judgment of 10 January 2006, Ynos*, C-302/04 (http://curia.europa.eu/en/content/juris/c2_juris.htm).

[28] For other examples, see **Laurențiu Brînzoiu,** *Examen de jurisprudență a Curții de Justiție a Comunităților Europene în materia admisibilității trimiterilor preliminare*, Revista Română de Drept Comunitar, number 6, 2007, pages 83-85.

[29] See also **James Hanlon,** *European Community Law*, Second Edition, (Sweet&Maxwell Publishing, London, 2000), p.140.

national court may be refused if it is quite obvious that the interpretation of EU law sought bears no relation to the actual facts of the main action or to its purpose, or where the problem is hypothetical or the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. Save for such cases, the Court is, in principle, bound to give a preliminary ruling on questions concerning the interpretation of EU law.

If a matter of invalidity of EU legislation is raised, the national judge cannot declare the European Union act invalid. If a decision of the Court of Justice is necessary to enable the court to give judgement and if the point is not as clear as to simply declare the legislation to be valid, the domestic court is under the obligation to send the question to the CJ.

The Court shall reject, as inadmissible, all those questions ouside its jurisdiction *ratione materiae* or *ratione temporis*.

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ATTRIBUTION OF CONDUCT TO A STATE-THE SUBJECTIVE ELEMENT OF THE INTERNATIONAL RESPONSIBILITY OT THE STATE FOR INTERNATIONALLY WRONGFUL ACTS

FELICIA MAXIM[*]

Abstract

*In order to establish responsibility of states for internationally wrongful act**,** two elements are identified. First, the conduct in question must be attributable to the State under international law. Secondly, for responsibility to attach to the act of the State, the conduct must constitute a breach of an international legal obligation in force for that State at that time. For particular conduct to be characterized as an internationally wrongful act, it must first be attributable to the State. The State is a real organized entity, a legal person with full authority to act under international law. But to recognize this is not to deny the elementary fact that the State cannot act of itself. States can act only by and through their agents and representatives. In determining what constitutes an organ of a State for the purposes of responsibility, the internal law and practice of each State are of prime importance. The structure of the State and the functions of its organs are not, in general, governed by international law. It is a matter for each State to decide how its administration is to be structured and which functions are to be assumed by government. But while the State remains free to determine its internal structure and functions through its own law and practice, international law has a distinct role. Conduct is thereby attributed to the State as a subject of international law and not as a subject of internal law. The State as a subject of international law is held responsible for the conduct of all the organs, instrumentalities and officials which form part of its organization and act in that capacity, whether or not they have separate legal personality under its internal law.*

Keywords*: international responsibility, internationally wrongful acts, state, attribution of conduct to a state, the subjective element.*

1. Introductory aspects

Responsibility in international law is an old topic that has been the subject matter of the study of various entities, but it is also current. The studies conducted by experts with a view to codification have led to the identification of several directions of action. Thus it has been considered a responsibility of the states for internationally wrongful acts, but also a responsibility for prejudices triggered by activities allowed by international law, and also the intention has been to codify the responsibility of the international organizations. Each type of responsibility has raised various problems, which have led to long periods of time taken for conducting the works of the International Law Commission (I.L.C.) of UNO.[1] The completion of the works has been achieved by adopting various draft articles, which are subject to the works of the UNO General Assembly in order to establish the form that these articles should take. The same as the other types, the responsibility of the states for internationally wrongful acts has brought into discussion various aspects identified in the practice of the states and international case law. Establishing the elements necessary to triggering the responsibility for internationally wrongful acts and the identification of the concrete cases brings into discussion the chargeability of the internationally wrongful acts and the breach of the international obligation of the state. The chargeability (attribution) of the internationally wrongful act to the state – the subjective element of the responsibility of the states for internationally wrongful acts – involves

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[1] Dumitra Popescu, Felicia Maxim**,** *Drept internațional public-curs pentru învățământul la distanță (Public International Law – course of lectures for distance learning)*, Editura Renaissance **(**Renaissance Publishing), (Bucharest 2010), p.329.

the research of a big number of cases that will be analysed below with a view to the identification of the cases where a state can be held liable at international level.

The study of the chargeability of the internationally wrongful acts has led to various controversies which the ILC experts have tried to resolve also considering the guidelines of the international practice in the field by preparing a draft that reflects the position of the governments of the UNO member states.[2] It is known that the subjective element consists in the conduct of a person or group of persons, which due to certain characteristics needs to be attributed to the state as a subject of international law, and not to the person or group of persons that have initiated it. In attributing the wrongful act to the state, there shall be taken into account firstly the identification of the legal connection existent between the persons that engage the conduct and the state; secondly, we will consider the state as subject of international law; and thirdly, the attribution of the wrongful conduct shall be done in accordance with the international law norms.

The state is an organized entity that acts in the international field by means of certain bodies and persons that has governmental authority, that is why, the state is charged with the acts of those who represent it and that have been committed in their official capacity.[3] It is thus necessary to determine the individual behaviours that can be considered acts of the state and those that, on the contrary, need to be considered actions or omissions of the private entities.

Thus, the state will be responsible for the wrongful act of a body of the state power or of another entity that has the capacity to exert the prerogatives of public power. It is also attributed to the state the conduct of a person or of an entity that is not a body of the state power, but that is enabled by it to exert prerogatives of public power, or act under its management or control, even if this conduct is in breach of the instructions received, as well as the conduct of a body made available to a state by another state and that exerts public power on the behalf of the latter, the conduct of a person or group of persons that exerts in fact the prerogatives of public power in case of an absence of the official authorities, as well as the conduct of an insurrectional movement that becomes the new government of a state or that creates a new state.[4]

In respect of the wrongful acts conducted by private persons, the specialized literature claims that there is a generally applicable principle, according to which the state is not responsible for the acts of the private persons as such are not committed on the behalf of the state.[5] The facts of private persons trigger the responsibility of the state if they have been committed as a result of actions or omissions arising from bodies of state power, cases that may occur in the event of facts that affect the representative offices of foreign states or citizens of such foreign states. In such cases, the state has the responsibility for its own omissions, such as the failure of taking measures to prevent the respective acts, measures which the international law obligates the state to take or measures of repression conformant with the execution of its international obligations.[6]

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[2] Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001,*Yearbook of the International Law Commission, 2001*, vol. II, Part Two.; Felicia Maxim, *Dreptul răspunderii statelor pentru fapte internaţional ilicite (Responsibility of the States for Intrnationally Wrongful Acts)*, (Editura Renaissance, 2011),p.79-126.

[3] I.Anghel,V.Anghel, *Răspunderea în dreptul internaţional (Responsibility in International Law)*, (Editura Lumina Lex, Bucureşti, 1998), p.31.

[4] I.Diaconu, *Tratat de drept internaţional public (Treatise on Public International Law)*, vol. III, (Editura Lumina Lex, Bucureşti, 2005), p.340.

[5] Patrick Daillier, Mathias Forteau, Nguyen Quoc Dinh, Alains Pellet, *Droit international public*, 8 edition, (LGDJ, 2010), p.869; Cazul *Tellini*- League of Nations, Official Journal, 4th Year, No.11(November 1923), p.1349.

[6] D.Popescu, A.Năstase, *Drept internaţional public (Public International Law)*, Ediţie revăzută şi adăugită, (Casa de editură şi presă „Şansa" S.R.L., 1997), p.311; Raluca Miga Beşteliu, *Drept internaţional public-curs universitar (Public International Law- university course)*, vol.II, (Editura C.H.Beck, 2008), p.34;Felicia Maxim, op. cit.,p.123.

The process of charging the wrongful act is conducted mandatorily by observing two important rules, namely: the attribution of the wrongful act to the state as subject to international law and classification of the wrongful act in accordance with the norms of international law.

2. State Authorities

First, mention must be made of the fact that it is not relevant the position of the state body within the internal organizational structure and neither does the internal hierarchy.[7] This mention is important as in specialized literature there have been expressed opinion according to which the responsibility of the state can be triggered only in case of wrongful conduct of state bodies. Thus, it is well known the theory that claimed that only an act or omission of the body responsible for the foreign affairs of the state (head of state, minister of foreign affairs, diplomatic) can represent a wrongful act of the state. Thus it has been claimed that the state is responsible for the acts of the of the internal bodies, for instance, bodies that exert legislative power, administrative of judicial bodies, only indirectly, if the acts of the internal bodies had affected or prevented the acts of the bodies with foreign responsibilities.[8]The theory starts from the confusion between the acts of the state bodies in international realm, which are perfectly valid acts, and the wrongful acts that trigger the responsibility of the state, which are, in fact, breaches of the international obligations. Case law and international practice have constantly proven that the relevant difference cannot be supported. The issue that has dominated the specialized literature has been whether the responsibility of the state can be determined by a wrongful act engaged by any of the state bodies or organs that can be excluded from this category. The differences have been eliminated by an analysis made per each category of body. In fact, so far there have not been identified any arbitral or judicial decision to establish whether the state will not be responsible for instance for the wrongful acts engaged by the legislative of judicial bodies, on the contrary, there are decisions confirming the responsibility of the state or the wrongful acts engaged by the state bodies, irrespective of their position in the state organizational structure.

In conclusion, the international responsibility of the state is triggered in case of charging a state with an act of bodies belonging to the internal organizational structure. Further to analysing the existent doctrine and case law, it can be said that the notion of "state body" is used *lato sensu*, so that the preparation of a regulation in general terms would not lead to controversies. It is of no interest the internal organization of the state, what is of interest is only the capacity of state body. Still, the specialists in international law and international bodies with attributions regarding the codification of international law have deemed it necessary to mention each category of bodies, in order not to give way to interpretations. As a result, the conduct of each body of the state shall be considered that an act of the state, irrespective of the fact that that body belongs to the legislative, executive, judicial power or have other capacities, irrespective of the position held in the organizational structure of the state and independent of whether it is part of the central governmental bodies of the state or of the local units of the state. A body includes any person or entity that has this capacity in agreement with the internal law of the state.[9]

The law making authority is the vital organizational structure of a state, the problem under scrutiny regards the case where the body that exerts the legislative power can breach international obligations, thus triggering the international responsibility of the states.

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[7] T. Hillier, *Sourcebook on public International law*, (London, 1998), p.340.

[8] Yearbook of the International Law Commission, vol.II, Part One, 1971, p.243; C. Eagleton, *The Responsibility of States in International Law, (*New York University Press, 1928), p.54-55.

[9] See in this respect art. 4 of the Draft regarding the responsibility of the states for internationally wrongful acts; The *Salvador Commercial Company Case* -United Nations, Reports of International Arbitral Awards, vol. XV, 1902, p.477;W.T.O. Panel Report, United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services,WT/DS285/R, 2004, para.6.128.

In the international legal practice it has been considered that a state is responsible internationally both when the legislative bodies adopt a normative act that infringes an international obligation, and when it does not adopt such an act necessary for the execution of this obligation.[10]

The bodies that exert the executive power present certain particularities within the state organizational structure, bringing into discussion aspects related to the way of distributing the attribution, the position of the public servants, as well as aspects related to the local collectivities determined by the administrative-territorial of the state.

The predominant opinion, which is also currently valid, claims that no distinction is made between the acts of the official superiors and subordinates, if they act based on their official capacity, it is no doubt that the official at an inferior level may have a reduced activity, not being in a position to make the final decision.

The theory has been also taken over by the International Law Commission, being introduced in the regulation at article 4 under the phrasing "irrespective of the position held in the organizational structure of the state".

Being faithful to the opinion expressed in the specialized literature, as well as the ones formulated in the codification works, it is normal to assert that in case of the executive bodies it is of no importance the position held by the state representative or the level of the respective bodies, local or central.[11] Irrespective of whether it is a minister involved or a mere public servant with the local administration, the responsibility of the state is triggered when such persons commit wrongful acts based on their official capacity. The state is responsible for the wrongful act of a public servant when the government has been informed of the public servant's intention and has not acted in due course or in the event where the wrongful act has been committed and the government does no punish the respective public servant.

The state is responsible for the wrongful acts attributed to the central bodies, but also for the wrongful acts committed by the local communities[12]. In this case, it will be considered the way of administrative-territorial division of a unitary state, but also federative states part of a federation.

The principle starts from the concept of unitary state regarded as a subject of international law. As subject of international law the state appears as an entity "equipped" with a complex system of bodies that act under the its control and authority. In respect of the federal state, the internal organizational structure which is different from of a unitary state does not affect in any way the principle of the responsibility of the state for internationally wrongful acts.[13] The component states of the federation, although they have a certain domestic autonomy according to the constitutional provisions, do not have legal personality of international law, do not have the capacity of signing treaties and cannot be held responsible internationally. In the cases where the component units can sign treaties in own name[14], the other party needs agree to limit its recourse to the component unit that has assumed commitments, in the event of infringing an obligation. In such a case, the responsibility of the federal state cannot be invoked as we are not under the scope of the rules regarding the responsibility of the states for wrongful acts. Another possibility provides for the responsibility of the federal state according to the provisions of a treaty, a responsibility which is however limited by a federal clause inserted in the treaty[15]. The cases mentioned above are considered exceptions to the general rules regarding the application of the treaties between the states that are parties to them.

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[10] G.Geamănu, *Drept internațional public (Public International Law)*, vol.I, (Didactic and Pedagogical Publishing House, Bucharest,1981), p.333.

[11] *Moses Case* -International Arbitrations, vol.III, 1871, p.3127.

[12] James Crawford, *The international Law Commission's Articles on States Responsibility, Introduction, text and Commentaries,* (Cambridge University Press 2002), p.97.

[13] Germany v.Unites States of America, I.C.J.Reports, 1999,p.9.

[14] art 56(3),172(3) Swiss Constitution of April 18, 1999.

[15] art. 34 of the Convention on the protection of world cultural and natural heritage in Paris from 1971.

Consequently, the legal provisions focus on the responsibility of the states for wrongful acts engaged by communes, provinces, regions, cantons or component states of a federal state, entities which from a linguistic point of view can be called former bodies of the states.

Judicial authority is independent from the law making and executive power, according to the principle of separation of the state powers; however, it is a state authority that acts on the behalf of such state. From this point of view, the case of a court, which would infringe the norms of international law, could trigger the responsibility of the state. The responsibility of the state for acts of judicial bodies can be triggered when court decisions are adopted that run counter the norms of international law (solutions that ignore the immunity of jurisdiction of a diplomat or the right to be protected of a citizen, or disregarding an extradition treaty) and when the behaviour of the court can be referred to as a denial of justice (refusal to allow access to the court, denying foreign citizens the protection of their rights, delay in the administration of justice, the expedite conducting of judicial procedures, refusal to execute a court decision that is favourable to a foreigner).

3. Persons or entities that act on the behalf of the state

The organizational structure of the states is different and complex, thus beside the category of the state.

It is attributed to the state the behaviour of a person or entity that is not a state body, but that is enabled to exert prerogatives of public power, even if this behaviour infringes the instructions received, or acts under its management or control, as well as the behaviour of a person or group of persons that exert in fact prerogatives of public power in case of an absence of the official authorities.

It has been asserted that the principle of the responsibility of the state for wrongful acts engaged by its state bodies is not necessarily absolute or exclusive.[16] On the contrary, the analyse of the principle would include in the category of the acts attributed to the state, also the acts of persons or groups of persons that do not fall under the category of state bodies. In order to understand more correctly the concept of an entity authorized to exert services of public character or governmental authority, we will analyse the category of the para-state bodies, which can include public corporations, semi-public entities, all types of public agents and even in special cases private companies, on condition that in each case the entity should be empowered to exert public functions, which normally should have been exerted by the state bodies. For instance, in some states, private security companies can be contracted to operate as prison guards and in such case can exert public powers, such as maintaining the state of detention, discipline and tasks regarding the compliance with the prison regulation. The state or private air services can be delegated to exert undoubtedly functions regarding the immigration control or imposing quarantine.

When an entity is attributed powers in order to exert elements of governmental authority, its nature is not taken into account, in the sense that it is disregarded whether the entity is public or private, or it is disregarded the state's participation in the equity or the type of ownership over the goods.

Such entities are empowered by exerting the elements of governmental authority according to domestic law. Against this background, mention must be made that there are taken into account only the activities performed that are not related to state functions and no other private or commercial activities in which such entities can be engaged. Thus, for instance, the management of a railway company involving the ensuring of safety activities is regarded as an activity of the state according to international law, other activities, such as the distribution of tickets, do not fall under the category of the activities analysed.

To international law, it is relevant the connection established between entities and the state in order to be able to analyse the chargeability of the wrongful acts committed on the behalf of the state.

[16] Yearbook of the International Law Commission,1971,vol.II, Part One, p.254.

Considering the claims by the practice and doctrine of international law, I.L.C. has instated the rule mentioned in art.5, thus: the conduct of a person or entity that is not a body of the state according to art.4, but that is empowered according to domestic law to exert elements of governmental authority, can be considered an act of the state according to international law, specifying that the person or entity acts in a specific case.

The legal provision regulates the position of the entities analysed above, the category mentioned not being provided for in art.4 that refers only to the entities that act as state bodies, irrespective of the position held in the organizational structure of the state. The wording is general and the state entities and activities that can be exerted are to be determined by the way of internal organization of the state, by the tradition instated and last but not least by the historic evolution of the concepts.

We have pointed out that the wrongful act can be charged to the state due to the wrongful conducts engaged by the state bodies or by the wrongful conducts engaged by entities that exert elements of governmental authority. Further on, we will focus on the cases where the wrongful acts are engaged by persons or groups of persons that do not have a well-defined position within the organizational structure of the state, but that can determined, by their wrongful acts, the international responsibility of the state.

There is a considerable number of cases, where a person or even a group of persons that, although they do not hold an official position according to the internal order can find themselves in a position to exert certain functions, which are normally exerted by state bodies. As we know, the conduct of private persons is not attributed to the state, thus the wrongful acts engaged by private persons cannot trigger the international responsibility of the state unless under special conditions. It is worth mentioning the role played by the principle of effectiveness in international law, which focuses on the real relation established between an individual or group of individuals and the mechanisms of the state. According to the domestic law, the state often assumes responsibility for the acts committed by private persons that exceptionally exert public functions in the stead of lawful public servants, who omit to exert such functions or are faced with an impossibility to do that. Similarly, the state is considered responsible for the acts of the persons authorized to perform especially public services, or for the acts of individuals or groups of individuals that have been authorized to carry out missions for the state.

The state, in its capacity of subject of international law, could be responsible for the wrongful acts committed by various categories of persons that are not authorized to perform activities, directed, controlled missions or missions according to the instructions of the state. The performance of the specified missions in an improper manner leading to infringing the international obligations assumed triggers the international responsibility of the state. The effectiveness principle, asserted strongly in the analysis made, requires the setting of clear cut criteria showing in a certain manner the relation between the mechanisms of the state and the conduct of the respective person. An act by a person empowered with legal capacity is not necessarily an act of the state, if the respective person acts in private capacity. Similarly, it is but logical that the acts of a private person who in one way or another conducts activities or missions under the coordination of the state can be considered acts of the state and can trigger the international responsibility.

Charging the states with the authorized conduct of persons or groups of persons is recognized by international practice usually in the cases where persons or groups of persons are used as forces ancillary to the armed forces or sent as volunteers to the neighbouring countries, but also in the cases where the persons are charged with certain missions in foreign territories.[17]

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[17] United Nations,Reports of Interational Arbitral Awards,vol VI,1925, p.160- cazul *Zafiro;* United Nations, Reports of International Arbitral Awards, vol.IV, 1927, p.267- *Stephens* case *;* American Journal of International Law, Washington, vol.25, No.1, 1931,p.147; UNRIAA, vol.VIII, 1930, p.84 şi UNRIAA,vol.VIII, 1939, p.225- *Black Tom şi Kingsland* cases.

In respect of the aspect presented above, in some cases there has been developed the concept of the *de facto* official, and, in order to justify the concept mentioned above, it has sometimes been invoked the theory of appearance, some other times, the theory of necessity or *negotiorum gestio*[18]. However, there are of no interest the various justifications of the validity of the acts performed according to the internal law of the state, as this has to do with international legal order. Considering the acts committed as acts of the state according to international law is independent from the attribution of the acts according to the domestic law, even is common aspects might exist. As an example of a *de facto* official, we may refer to a person that assumes public offices without being expressly appointed to a position; they might have been appointed occasionally or although they conducted a regular activity, they have been suspended for a certain period of time. In such cases, it has been asserted that the respective person only apparently exert this position in a regular manner, these acts are not of the officials', but can exceed official capacities or may be unlawful, as the person that acts is not a person with an official capacity. According to the facts above this is a private person that exerts public offices. Nevertheless, the acts and decisions are perfectly valid, according to domestic law, as against a third person. That is why it is normal that such acts should be considered acts of the state according to international law. Such a conduct is attributed to the state only if it is directly controlled, directed, a specific operation, and the challenged conduct has been an integral part of the operation conducted.

The principle does not extend to a conduct that has been only incidental or to a certain extent associated with the operation or when the operation has broken loose from the direction or control of the state. Thus, establishing the degree of control that can be exerted by the state so that the conduct should be attributed to it has been the key of resolving the case *Military and Paramilitary Activities in Nicaragua*.[19]

The above clearly show that the responsibility of the state for the acts of the persons or groups of persons is triggered only when such persons or groups of persons act according to the instructions or under the guidance or control of the state to meet the conditions of the conduct.

Closely following the principles derived from the international practice, I.L.C. has aimed, throughout its activity of codifying the responsibility of the state for internationally wrongful acts, at regulating the principle stating that a conduct charged against a person or group of persons can be considered an act of the state, if such persons or groups of persons act according to the instructions or guidance or control of the state.[20]There are considered three variants, namely – instruction, guidance, control -, being enough to establish one single variant in order to have a wrongful act attributed to the state.

4.*Ultra vires* Acts

The problem is whether it is possible to attribute to the state the conduct of its bodies, which act in their official capacity, but exerting in excess the competencies attributed according to the domestic law has been a matter of interest for the specialists in international law for a rather long period of time. The difficulties have been determined first of all by the concept supported by older theoreticians, who based on the premise that state organization is determined exclusively by the domestic law of the state have been wrong to say that it is impossible to attribute to the state the action of entities that are not state bodies or that although they have this capacity do not act according to the provisions of the domestic law. The analysis regarding the conditions under which an action or

[18] Administrarea afacerilor altuia (Other business administration).

[19] Martin Dixon, Robert McCorquodale,*Cases and Materials on International law*,fourth edition, (Oxford University Press, 2003),p.415.

[20] The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct-Article 8- Conduct directed or controlled by a State

omission by a body of the state that acts in excess authority or contrary to the instructions received triggers the responsibility of the state, will be made by a diligent research of the practise of the states, judicial decisions and specialized literature.[21] The rule invoked involves the need for clarity and security of the international relations.

The practise of the states' existent in the second half of XIX century seems to be in agreement, on both sides of the Atlantic, to assert the idea that the states need to accept the responsibility for the facts of their bodies, even if the acts committed are manifested outside the attributed competencies or run counter to the legal provisions. Although in principle the states on the European continent had a rather similar position to that of the United States, there still existed differences on the basis of triggering responsibility. It was claimed that the responsibility of the states for the *ultra vires* acts of the officials is determined by the position of the body in the hierarchical structure of the state, the European States being against such a distinction.

In XX century, it was noted a recognition of the rule, as being a principle of international law.[22] During the preparing works for the Hague Conference, the government of the member states were questioned with regard to the principle according to which the responsibility of the state is triggered in case of committing wrongful acts by the state bodies that act contrary to the legal provisions or in excess of authority. The participants in the Conference adopted an article that established that the international responsibility is chargeable to the states if the damage incurred by a foreigner are the result of unauthorized acts of the officials acting officially, if the actions run counter to the international obligations of the states.

The criteria that prevailed in the Codification Conference in Hague did not suffer big changes, the practice of the states from 1930 to date has proven the recognition of this principle.[23] Constantly, it has been established that the responsibility of the states is engaged for the acts of the military, if force had resulted from an official duty and the military acted under the command of an officer. It has been proven in numerous cases that what is chargeable to the state is the negligence of the officer that exerts control over the soldiers under their command.[24]

As a result, it is recognized the theory according to which it is chargeable to the state internationally its responsibility for the wrongful acts committed by its officials or bodies that act contrary to the orders received or in excess of authority.[25] Wrongful acts committed by the bodies or agencies of the state trigger responsibility, even if there has been no specific authorization. The type of responsibility under scrutiny cannot find its basis in the general principles and we refer here to the principles that govern the internal organization of the state (an allegation supported by the older theoreticians of international law). An action performed by the bodies or agencies of the state is considered an action of the state only if it is performed according to the legal provisions and it remains within the limits of the regulated competency. Thus, an action performed outside the competency, is not an action of the state and will not trigger the responsibility of the state. International life is, however, much more complex and uncertain and accepting the exclusion of the responsibility of the state for the wrongful acts of the state bodies that exceed the attributed competency or run counter the instruction received would make difficult the conducting of international rapports. That is why it has been considered correct to establish the responsibility of the state for the wrongful acts committed by its bodies or agents or organisms that exert public offices, establishing the objective character in order to guarantee the international security. In order to allow the triggering of the objective responsibility, the actions taken by the bodies that act outside the

[21] Fourth report on State responsibility, by Mr. Roberto Ago, A/CN.4/264 And Add.1,p. 4.
[22] Digest of International Law, vol.V, p.570-571.
[23] Cazul *Youmans*-Reports of International Arbitral Awards, vol.IV, (1926), p.115-116; Cazul *Caire*- Reports of International Arbitral Awards, vol.V, 1929, p.531.
[24] John O'Brien, *International Law*, (Cavendish Publishing Limited, London, 2001), p.368.
[25] M.Shaw, *International Law,* 4th Edition, (Cambridge, University Press, 1999), p.549.

competency need to be actions that create the appearance that those bodies act in official capacity or have used methods and powers outside the official competency.[26]This theory was at the basis of the arbitral decision ruled in the Caire case.

This rule was reaffirmed in the *Mosse* case*,* which states: even if it had been noted that the officials acted outside the legally established competency, it could not be admitted that the request is ungrounded. It would be necessary to establish whether in international order the state could be considered responsible for the actions taken by the officials apparently within the limit of their positions, according to a conduct that was not fully contrary to the instructions received.[27]

The responsibility of the state for the internationally wrongful acts committed by state bodies outside the competency attributed or contrary to the instructions received has been recognized also by the International Courts and Tribunals of Human Rights.[28] For instance, the Inter-American Court of Human Rights established in the *Valesquez Rodriquez* case that the breaching of the Convention was independent of whether the official had acted contrary to the provisions of the domestic law or above the limits of the authority conferred, in international law the states being considered responsible for the actions or omissions of the agents that acted according to their official capacity, even if the agents acted outside the attributed authority or breached the norms of the domestic law, as they acted under the appearance of the official capacity.[29]

At first sight, further to analysing the theories mentioned above, winning position seems to be held by the traditional theory according to which the state is not responsible for the actions of the bodies or entities that exert elements of government authority, actions that have been taken contrary to the instructions received or in excess of authority, as this would be contrary to the principle that establishes the way of internal organization of a state. However, the reference is international order and not domestic order and in international realm the state is considered responsible for the acts committed by its bodies or agents, as the state has failed to take all the necessary measures to eliminate such cases. It is important to clarify whether the officials have acted based on the state authority or whether the action does not correspond to the set of functions held and then another case comes into attention, namely the status of the private actions that are not attributed to the state. The distinction between the acts not authorized but performed under an official capacity and the private conduct is difficult to make and involves a careful analysis of each case.

The opinions expressed in the specialized literature, the practise of the states and rich case law have helped ILC in its efforts of codification to form a grounded opinion and to assert that the rule is worth introducing in the draft regarding the responsibility of the states and thus it refers to the conduct of a body of the state or of a person or entity empowered to exert elements of governmental authority and mentions that this conduct can be considered an action of the state according to the international law, even if the body, person or entity acts in excess of authority or contrary to the instructions received.

We note that an essential condition is the legal relation between the entities that act and the state, this relation determining essentially the responsibility. Entities are state bodies, irrespective of their place in the organizational structure, or persons or entities empowered with elements of the governmental authority. It therefore results that several conditions are met: a set of attributions, a competency established according to the legal provisions and entities that act exceeding their legal competencies or contrary to the instructions received without, however, having any authorization in this respect. It can thus be considered that the theory of appearance supported by the United States from the very beginning finds its applicability in the cases where the provisions of art. 7 are

[26] R. McCorquodale, M. Dixon, op.cit., p.413.

[27] M. Shaw, op.cit., p.549.

[28] European Court of Human Rights, Grand Chamber, Ilaşcu and others v. Moldova and Russia, 2004, para.319.

[29] Yearbook of the International Law Commission, vol.II, Part Two, 2001, p.102.

applicable. We point out that if the appearance of official position did not exist, then it would be obvious that the entities mentioned above would act in a private capacity. It is obvious that the aim is not to formulate justifications to avoid the cases of responsibility of the states, but neither should we exaggerate in considering all the wrongful acts committed as acts of the state.

5.Conduct manifested in the absence or lack of official authorities

This principle is manifested as legitimate in art.4, paragraph A(6) of the Geneva Convention of 12 August 1949 regarding the treatment of the war prisoners, as well as other legal international instrument. The recognition of this principle does nothing else than bring back to the attention of the specialized literature the existence of the rule *levee en masse,* which can be identified with the cases of legitimate defence of the citizens in the absence of the regular forces, it is a form of "agency of necessity". Practice has proven that there can be identified such cases, thus raising the problem of assuming responsibility. In the *Yeager v. The Islamic Republic of Iran* case*,* the position of the Revolutionary Guards or the "Komitehs" immediately after the revolution in Iran was treated based on the rule analysed by the Court set up upon that occasion. The Court granted compensations for the acts of expelling, but in this case the acts were performed by the Revolutionary Guards after the success of the revolution. Although the Revolutionary Guards did not have at the time the capacity of official bodies of the Iranian state, it was established that they exerted the governmental authority, this aspect being known and approved, thus triggering Iran's responsibility for the actions of the Guards.[30] In a different development, in the *Rankin v. The Islamic Republic of Iran* case, the Court noted that the claimant failed to prove that he had left Iran after the revolution as a result of the actions of the Iranian government or of the Revolutionary Guards or that he had simply left Iran due to the difficult life conditions existent during the revolution. As such, the responsibility of the Iranian state could not be engaged.[31]

As it can be seen, the setting up of the respective entities is determined by special circumstances arisen in case of revolutions, armed conflicts, foreign occupations, when the legal authorities are dissolved or suppressed becoming non operative. The circumstances need to be such as to generate the necessity of exerting the elements of government authority by private persons. The exerting of elements of government authority can be determined by the absence or actual lack of the official authorities legally constituted, which leads to a complete collapse of the state apparatus or partial collapse by losing the authority over a part of the territory.[32]

In this respect, we welcome the rule instated by the draft articles, meant to cover a wide range of cases identified in practice, according to which the conduct of a person or group of persons can be considered an act of the state, according to international law if the person or group of persons exert in fact elements of governmental authority in the absence or lack of official authority in circumstances that require the exercise of such elements of authority.[33]

From the analysis of the provisions presented above we consider that there can be identified three conditions that need to be met in order to engage the responsibility of the state: the conduct should actually reflect the exerting of the elements of governmental authority; the conduct should be exerted in the absence or lack of official authority; the existing circumstances should require the exertion of governmental authority.

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[30] M.Shaw, op.cit.,p.552.

[31] Idem.

[32] Such a case should not be mistaken for the situation of the *de facto* governments, the latter being part of the state structure and replace the governments that existed before them.

[33] Art.9 of the Draft articles regarding the responsibility of the state for internationally wrongful acts.

6. Insurectional movements or other internal unrest

The possibility of the responsibility of the state for wrongful acts committed by bodies of insurrectional movement is analysed generally in relation to the problem of the responsibility of the state for the acts committed by private persons during the internal unrest, the violent rallies. The movement is in essence a "temporary" topic, the length of its existence coincides with the length of the fight against the state, thus, if the fight is suppressed, its existence is finalized and its organizational structure is dissolved. If the movement is victorious, two cases may arise: the insurrectional movement may take over the control over the organizational structure of the old state or a new state may appear.[34]

The first case elaborates on the annihilated insurrectional movement, a case where the specialized literature has identified certain particularities. As a general principle, the acts of some insurgents that violate international law (harming representatives of foreign states, diplomatic missions, foreign citizens and their properties) cannot be charged to the states, as this case resembles, from this point of view, the acts of private persons. Still, the state is responsible also in such cases for the lack of "*due diligence"* in adopting – if possible – adequate measures of protection or repression.[35] A wide scope support of the principle is included in arbitral case law.[36] Although the case of exoneration from responsibility might constitute a principle, the doctrine claims that it could not be applied to cases where the state has the obligation of due diligence.[37]

We mention that there is no difference between the case where negligence of the state occurs before the insurrectional movement should have an active existence and the subsequent case, where, for instance, the internal restoration took place and the state authority has omitted to punish the authors of the acts committed during the insurrectional movements.

The elimination of the international responsibility for the wrongful acts of the state can be justified in case where it acts with a view to annihilating the insurrectional movement, the case of the internal conflict might constitute an event of force majeure. The rule is easy to support with arguments, but difficult to apply in the context of the general rules under scrutiny.

In conclusion we can say that the annihilated insurrectional movement does not trigger the responsibility of the state for the wrongful acts committed by the agents of the insurrection during the rebellion, apart from the case where it can be invoked the fact that the state had the obligation of due diligence and failed to meet this obligation.[38] On the other hand, the state is not responsible for the actions committed during the military operations conducted in order to annihilate the movement, only if it has caused damage which is not justified in the given circumstances. Thus the defeated insurrection does not engage the responsibility of the state for the acts of the rebels, but the state is, however, responsible for the acts of its agents.[39] The elimination of responsibility can be achieved by invoking the existence of internal unrest, which may constitute an event of force majeure. This conclusion is also shared by the International Law Commission which states that the acts of the insurrectional movement cannot be attributed to the state, they can be charged only if they are classified as acts of the state (as per art. 4 to 9[40]).

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[34] Gerhard von Glahn, James Larry Taulbee, Law among Nations, 8th Edition, (New York, San Francisco, Boston, 2007), p.328;(Yearbook of the International Law Commission, 1972), vol.II, p.129.

[35] Gerhard von Glahn, James Larry Taulbee, op.cit., 2007, p.328; I.Brownlie, *Principles of Public International Law*, (Oxford, 1998), p.162.

[36]Report of International Law Commission, 2001,p.112; M.Shaw, op.cit.,p.551; caz *Sambaggio*- United Nations, Reports of International Arbitral Awards, vol. X, 1903, p.512-513.

[37] J.O'Brien, op.cit., p.371.

[38] I.Anghel,V.Anghel, op.cit.,p.35.

[39] R. Miga-Beşteliu,op.cit., 2008, p. 34;Patrick Daillier, Mathias Forteau, Nguyen Quoc Dinh, Alains **Pellet**, op.cit,p.869.

[40] Yearbook of International Law Commission, vol.II, Part Two,2001,p.112.

The success of the insurrectional movement can lead to radical changes to the state against which is has fought, the result being the affecting of the continuity of the state and major changes to its identity. The organizational structure of the pre-existent state ceases to exist, forming a new state on the same territory, with an international personality different from the one of the state that has disappeared. On the other hand, the victory of the insurrectional movement can lead to the apparition of a new state on a part of the territory of the pre-existent state or within the territory under the administration of the state.

The basic principle regarding the attribution of the conduct of the victorious movement or of another movement to the state, according to the international law, is determined by the relation between the movement and the governmental bodies. We mention that the word "conduct" regards the conduct of the insurrectional movement and not the conduct of the members of the movement that can act in own interest.

In case where the insurrectional movement, as new form of government replaces the prior form, the organizational rules of the insurrection become organizational rules of the new state. The continuity existent between the newly established state and the victorious insurrectional movement constitutes a thorough justification to be able to attribute to the new state the acts committed by the insurrection during the fight. In such a case, the state does not cease to exist as subject of international law, it remains the same entity, in spite of the changes occurred, being reorganized and adapted from an institutional point of view. We point out that the acts attributed to the new state are acts committed by the insurrection with a view to winning the fight and forming the new government.

Another form of continuity considers the case where the bodies of the insurrectional movement become bodies of the new state established further to decolonization on a part of the territory of the predecessor state or on the territory under the administration of the predecessor state. The notion of territory needs to be understood as being a part of the territory of the predecessor state over which the movement has obtained sovereignty as a result of the fight conducted or any territory that was under a regime of dependence.

The practice of the states, the arbitral decisions and the specialized literature have confirmed the two cases.[41]

The decisions of the international courts and recent practice undoubtedly confirm the application of the principle of the responsibility of the state for the wrongful acts committed by the victorious insurrectional movement. The *Short vs. Iran case*, settled by The Iran-United States Claims Tribunal with decision of 1987, proves the possibility of applying the rule under scrutiny only when all the specific circumstances are identified in the case. Thus, the plaintiff, Mr. Short, claimed damages for losing the benefits of the workplace and personal property caused by his forced expulsion from Iran further to the Islamic Revolution of 1978-1979. The plaintiff invoked the acts committed by the revolutionaries trying to attribute the responsibility for these acts to the government that was instated further to the success of the revolution. Still, there were not identified the persons that acted as agents of the revolutionary movement and that forced him to leave the Iranian territory. The acts of the supporters of a revolution cannot be attributed to the government instated further to the success of the revolution, the same as the acts of the supporters of the previous government cannot be attributed to the new government[42], which can also be found expressed in the ILC draft[43]-art.10.

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[41] United Nations, Reports of International Arbitral Awards, vol IX, 1903, p.453.

[42] Iran-United States Claims Tribunal, (1987-III) 16 Iran-US CTR 76; B. Onica-Jarka,C. Brumar, D.A.Deteşean, *Drept internaţional public (Public International Law),* Caiet de seminar, (Editura C.H.Beck,Bucureşti, 2006), p.180.

[43] Article 10. Conduct of an insurrectional or other movement:1. The conduct of an insurrectional movement which becomes the new Government of a State shall be considered an act of that State under international

The term of insurrectional movement used by the ILC in para.1,art.10 does not cover all the categories of manifestations in practice of these movements. That is why, under para. 2, it is attempted an extension of the concept, and art.10, para. 1 covers the case where the victorious movement substitutes the organizational structure of the predecessor state, by the phrase "which becomes the new government", by designating the consequences.

However, the provisions mentioned above do not cover the case where the conflict ends by a national reconciliation between the authorities of the state and the leaders of the insurrectional movement. We consider that this case can be classified legally, according to the terms of the national reconciliation, if the reconciliation regarding the maintaining of the governmental authorities of the predecessor state or the takeover of power by the leaders of the movement, this leaving room for joint liability. If the power is taken over by the leaders of the movement, the case can be classified under the scope of the provisions of art. 10, whereas in case of the continuity of the predecessor state, the problem is more difficult to deal with, that is why another separate legal provision would have been necessary in this respect.

There is no distinction between the categories of movements, considering the legitimacy of the acts undertaken in order to form the new government.

The analysis of the text of art. 10 shows that the responsibility of the insurrectional movements or of other similar manifestations does not fall under the scope of the purpose pursued by the Draft regarding the international responsibility of the states for wrongful acts. However, the existence of the responsibility of the defeated insurrectional movement cannot be denied, although it is not regulated. For instance, such an entity could be considered responsible for the violation of the rules of the international humanitarian law by its forces.

7. Responsibility of the states for wrongful acts engaged by bodies of other states.

The development of the international society, by adaptation to various historical periods has led to the apparition of a big number of subjects of international law, resulting in the diversification and intensification of the rapports between them. The most numerous rapports are recorded between the states, thus a state can make available to another state a certain category of bodies or can participate in conducting activities of common interest with other states. The rapport created have international consequences, in this respect, considering the topic under scrutiny, we will deal with the consequences vis-a-vis the international responsibility.

The first case that we will subject to analysis is that in which a state makes available to another state certain bodies, be them individual or collective, so that the respective state can use them in order to perform certain activities or public functions. In practice, such cases may for instance take one of the following shapes: a state makes available to another state a police contingent or a contingent of armed forces so that together with the forces of the beneficiary state it can resist the insurrectional movements or foreign aggression; a state may send to another state a detachment that ensures the medical services, a hospital or bodies that ensure other types of services in order to give assistance in case of an epidemic or a natural disaster; the authorization of the officials of a state to ensure on the territory of a third state services for another state whose officials cannot provide for various reasons.

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law;2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an

act of the new State under international law; 3. This article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles 4 to 9.

A different case is when the bodies of the sending state travel on the territory of the beneficiary state in order to give aid or assistance, but the directions, control or instructions are still given by the state to which the bodies belong.[44]

The cases presented above underscore the fact that the delimitation of the activities needs to be carefully made also according to the circumstances existent on case by case basis. This should not be mistaken for the cases of the states which given the situation they were in – dependence, protectorate, under mandate, military occupation – had to accept the presence of the bodies of another state on their territory or had to make available their own state bodies to the state to which they were subordinated.

The authors of public international law have supported the principle, as it has been justified by the international practice and case law. Brownlie and Durante have been the only ones that have paid a greater attention to explaining the principle of the responsibility of the states for the wrongful acts committed by the bodies made available to another state. Without pointing out the existing particularities, Brownlie claimed that the beneficiary state was responsible,[45] on the contrary, Durante underscored the importance of proving the subject that coordinated and controlled the activity of the engaged bodies. It is important to note that the international practice and case law have left a defining mark. Thus, the principle was applied by the arbitral decision dated 9 July 1931 in the C*hevreau* de by Judge Beichmann, who rules his decision on the basis of the compromise signed in London on 4 March 1930 by France and Great Britain.[46]

The phrase "made available to another state" expresses the essential condition that needs to be proven so that the wrongful act engaged by the respective body should be attributed to the beneficiary state and not to the state to which it normally belongs. Performing various activities under the control or directions of another state involves unequivocally the determination of the activities performed, namely their type and the time span in which it is acted in order to fulfil the functions entrusted by the requesting state, exclusively under the direction and control of the beneficiary state. The bodies in question need to have the capacity of bodies of the sending state, on the one hand, and on the other hand the conduct engaged should involve elements of the governmental authority of the beneficiary state. As a result, private entities and individuals cannot have the capacity of state bodies. For instance, the experts made available to another state according to a program of technical assistance do not have the capacity of state bodies.

The deriving conclusions is the following: in case of wrongful conduct engaged by the bodies of a state, the beneficiary state will be responsible, if the respective bodies had the capacity of bodies of the sending state and if they exerted elements of governmental authority in the beneficiary state, being an integral part of its internal organizational structure.

The analysis cannot be concluded here, as the practice and case law of international law have also identified the case of the states that act jointly triggering the responsibility of a state with regard to the act of another state. It has been claimed that the existence of a wrongful conduct is often determined by the joint action of several states, the cases where a state acts alone being less frequent.[47] There are also cases where several states act independently, but with a view to achieving a common goal or cases where the states acted by means of a common body. The wrongful act may be generated in cases where a state acts on the behalf of another state in fulfilling the respective tasks. There are also circumstances where the wrongful conduct of a state depends on the independent action of another state. A state can engage a conduct together with another state already involved,

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[44] Xand Z v. Switzerland, (Yearbook E.C.H.R.,372, 1977), p.402-406.

[45] I.Brownlie, *Principles of public international law*, (Oxford University Press, 1998), p.376.

[46] United Nations Reports of International Arbitral Awards, vol II, (1931), p.1115-1116.; I.Brownlie,op.cit., 1998, p.458.

[47] I.Brownlie, *System of the Law of Nations: State Responsability (Part I),* (Oxford, Clarendon Press, 1983),p.189-192.

thus the conduct engaged by the intervenient state can be relevant or even decisive in determining the existence of infringing the international obligation by the first state. We mention that it is considered the responsibility triggered by the wrongful conducts committed within the international organizations.

There can be brought into discussion also the responsibility of a state that deliberately forced another state to commit an wrongful act. In such cases, the responsibility of the forcing state towards the third state derives from the acts of forcing, the responsibility being determined by the wrongful conduct committed by the action of the forcing state. There can be identified two different rapports: the first rapport arises between the state that commits the acts of forcing and the forced state and the second rapport arises between the forced state and the state victim as a result of the wrongful act committed by the forced state.

With regard to these aspects, the comments on the draft articles regarding the responsibility of the states say that the cases of forcing can equal the invoking of an event of force majeure. Forcing that equals force majeure can determine a cases of absence of the wrongful act of the forced state. As a result, the act of the forced state cannot be considered wrongful act, however, it can be considered an act committed under the control of directions of another state. As a result, by invoking the directions or control exerted by another state, the responsibility of the forcing state could be triggered. On the contrary, if the forcing state was not found guilty, the victim state would be disadvantaged as it would not be able to cover the damage caused. In practice, the forcing is manifest under various forms starting from the use of force, the intervention in the internal affairs of another state or serious economic pressure, forms that can unequivocally lead to committing wrongful acts.

In such a case, where it is invoked the forcing by another state, Romania was also subject to. In the dispute between Romania and the United States, the request of the American government regarding the destruction of the oil storage facilities that belonged to an American company at the request of the Romanian government during World War II was initially formulated against the British government. The prejudice was effected when Romania was at war with Germany, which was preparing to invade Romania. Thus, the United States asked the Romanian authorities to cooperate with Great Britain in order to take the necessary measures. The British government denied responsibility saying that its influence exerted on the Romanian authorities had not exceeded the limits of good counselling between the governments of the states associated in such cases. The central point of the dispute was not represented in fact by determining the responsibility of a state for the wrongful acts committed under the pressure of another state, but rather the existence of forcing.[48]

In this field, the ILC draft includes norms of international law that generate controversies even today. For instance, the case of a body made available to a state by another state has been introduced in Chapter II, which has aimed at codification[49]special circumstances determined by the subjective element of responsibility. With regard to the responsibility of the state in respect of the act of another state, a lengthy analysis has led to the preparation of a separate chapter. Chapter IV thus includes in four articles rules regarding: the responsibility of the state in case of giving aid or assistance to another state; the responsibility of the states when they have exerted directions and control with a view to committing a wrongful act by another state; the case of engaging a wrongful conduct by a state forced by another state, as well as the effects of the respective norms.

The research of the practice of states, international case law and doctrine has led to many divergent opinions even if we are talking about a 50-year long experience.

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[48]Hackworth Green Haywood, *Digest of Internațional Law*, vol V, (U.S.Government Printing Office, Washington,1943),p.702 .

[49] Article 6. Conduct of organs placed at the disposal of a State by another State-The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.

A part of the authors of international law has criticized rather harshly the approach of ILC. Thus, it is claimed that articles 4-11 approach these matters by the term "attribution", which indicates when an act should be considered an act of the state. These rules are generally traditional and reflect mainly a codification of the existent customary law, rather than a significant development of law. In spite of the apparent concrete character, the standards established under some rules lead to important ambiguities and their application will often require finding significant facts and rationales. For instance, the phrases "government authorities" or persons "under the guidance and control of the state" have been explained by resorting to the decisions ruled by international tribunals that have approached these matters in rather different manners. The state authorities are defined as being all the categories of bodies that are part of the internal organizational structure of a state according to the internal law. But internal law may be an imperfect or incomplete guide or may not include any relevant provisions, so that particular circumstances will be determined outside the national law. The extent to which states should be held responsible for the behaviour that involves private actors is a contemporary topic with an increased significance. Still, the attribution rules as established represent only the tip of the iceberg in respect of the cases where private acts may trigger the responsibility of the state. Thus, the compliance by the state with the environmental agreements depend in most cases not only on the action of the state, but also on the action of private parties whose incapacity of reducing pollution to the levels required by an agreement may lead to the violation of the obligation by the state.[50]

Conclusions

The analysis of the subjective element of the wrongful act makes us adopt a rather uncertain position expressed by the phrase "too much or too little". The purpose is to identify general elements that should determine the preparation of a convention or document of a general character. The identification of particular cases, from our point of view, and their introduction in the content of a general approach cannot be considered as correct. Subsequently, a point may be reached where there may be identified other cases of a special character leading to the possibility of invoking the fact that the state is not responsible. Mention must be made that the aim is to prepare a set of rules regarding the responsibility of the state, irrespective of whether it is about an action or omission, irrespective of whether it is a victorious revolutionary movement or a defeated one, etc. If the intention is to identify other entities that should be responsible for improper international conduct, then it should firstly be established whether these entities can have or not the capacity of subject of international law or in what capacity they are responsible internationally.

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THE PRINCIPLE OF SUBSIDIARITY – THE LEGAL BASIS FOR THE PARTICIPATION OF NATIONAL PARLIAMENTS AT THE EUROPEAN UNION'S LEGISLATIVE ACTIVITY

GABRIEL ANDRONACHE*

Abstract
The communication aims to emphasize the context in which the principle of subsidiarity was adopted, clarifying the dilemma about its purpose: is it a legal instrument to protect national sovereignty of the European Union's Member States or is it a legal instrument which accelerates their federal integration. The document also approaches the problem of the Romanian Parliament in adapting procedures to the Lisbon Treaty, Protocol no. 2 on applying principles of subsidiarity and proportionality. In the described context it shall be discussed the controversial subject regarding the sovereignty transfer whenever the national parliament performs a subsidiarity check on an EU draft legislative act.

Keywords: *subsidiarity, Lisbon Treaty, Protocol no. 2, national level, the European Union's Member States.*

1. Introduction

Subsidiarity is the legal instrument through which the states affirm their legal sovereign willpower (and determination) in the legislative process of theEuropean Union. Is this affirmation true? Most opinions in European law doctrine confirm this idea.

The doctrinally arguments supporting that the states manifest their sovereignty in the legal european area by applying the sovereignty principle are multiple. Their detail must start from the historical perspective over the start and later over the strengthening of this principle.

"In the doctrine it was sustained[1] that the principle of subsidiarity, a principle that is considered constitutionally fundamental in European law, comes from the Roman-Catholic mentation of 1930`s, according to whom the social, politic and human problems must find their solution as close as possible to the individual, inside his community: family, school, working place; the political echelon (superior) must be requested only ultimately, as the first one is outdated"[2]. It was also pointed in the doctrine that "the idea of subsidiarity is specific to the federal/federate ratio, or German law generally"[3].

"The presence of the principle of subsidiarity inside European Union is old. Its associated purpose does not miss a moment from this system. This way, it can be appreciated that the communitary structure appeared as consequence to the implementation of subsidiarity, while the competence assignment operated to its benefit was, incontestably, generated by the experienced need of Member States of regrouping to deal together with some problems that they could not individually solve any longer, or could not satisfying solve. In this spirit were amended institutive treaties, meaning that new competences were assigned the Communities new competences when trough the European Single Act and Treaty on the European Union"[4].

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[1] N.W.Barber, *The limited modesty of subsidiarity, European Law Journal,* vol. 11, (2005), p.308; A. Follesdal, Subsidiarity, Journal of Political Philosophy, 1998, p.231-259.

[2] Raluca Bercea, *European Law. Basics*, (C.H.Beck, Bucharest, 2007), p. 327.

[3] V. Constantinesco, *Who`s Afraid of Subsidiarity, in A. Barraw*, D.A. Wyat and J. Wyat (ed.) Yearbook of European Law 11 , (Clarendon, Oxford,1991), p.3.

[4] Raluca Bercea – *c.w.* , p. 327-328.

"The constitutionalisation of the principle due the Maastricht Treaty, in which preamble the European Member States declare themselves decided to continue the creating process of a tighter and tighter union between european nations where the decisions will be taken as close as possible to the citizen, according to the principle of subsidiarity. The second Article of the Treaty, which defines European Union`s Purposes, contains also a reference to the principle of subsidiarity, which will be imposed, generally, to all Union`s institutions"[5]. In this direction article 5 of the Treaty, establishing the European Community (inserted by the Treaty regarding European Union) disposes: "The community acts in its competences limits and its established objectives through this treaty. In the fields that are not related to its exclusive competence the community does not interfere, according to the principle of subsidiarity, only if and as far as the objectives and purposes are better realized at communitary level"[6] .

The principle of subsidiarity was taken and extended in the treaty regarding the instauration of a Constitution for Europe, not active. Currently, this principle is settled, in the European Union Function Treaty where it has two protocols consacrated, The Protocol number 2 regarding the application of the principle of subsidiarity and proportionality and the Protocol number 1 regarding the role that national Parliaments are having in European Union, which devote the legal mechanism through which the principle of subsidiarity finds its relevance.

We observe, inside the legal evolution that the principle of subsidiarity became an indispensable mechanism to maintaining and affirming the states sovereignty, in the ample elaboration process of legal documents at european level.

"Joel Rideau notices that if initially the states became aware of the necessity to assign some competences to European Union to be able to deal with some common duties"[7], then "the development of communitary competences and their wield had gathered fear reactions received from some states restless to see their sovereignty limited. The national Parliaments felt often voided of their prerogatives in behalf of a system characterized by an incontestable democratic deficiency. The component states often felt frustrated and restless towards the communitary power. The German Lands reactions had a true catalyst role in the establishment of this principle"[8].

Another doctrinaire, Jean-Paul Jaque notices, regarding the principle of subsidiarity that it "governs the exercise of competences". Although the statement used in the Maastricht Treaty is negative ("Community does not interfere") the principle of subsidiarity presents two aspects: one way it limits the communitary intervention when a problem that can be solved by the Member States; on the other way, however, it involves a communitary action when it appears necessary due the problem`s magnitude and due the incapacity of the Member States in treating it effectively"[9].

In practice and also in doctrine the principle of subsidiarity generates arguments and controversies. The principle is identified as an instrument through which the states can manifest their national sovereignty inside the political union or as an instrument through which the overstatal character of European Union confirms itself and this way it reduces the manifest for sovereign willpower of European Union`s Member States. Our demarche intends to clarify this controversy.

[5] Raluca Bercea – *c. w.* , p. 331.

[6] European Union Traty, Maastricht, 1992.

[7] Constanţa Călinoiu, Victor Duculescu, *Constitutional European Law*, (Lumina Lex publishing, 2008), p.178

[8] Joel Rideau, *Droit institutionnel de l`Union et des Comunnautes europeenne*, II, (Librairire Generale de Droit et de Jurisprudence, Paris, 1999), p. 907 .

[9] Constanţa Călinoiu, Victor Duculescu, *idem 7*

2. Content

The principle of subsidiarity - legal instrument of strengthening the legal power of European Union

The doctrine delivers extremely diversified points of view regarding the role and exercise of principle of subsidiarity. Many of the opinions are expressed in supporting the assumption that the principle of subsidiarity was instituted to protect the national sovereignty compared to the tendency to gain all the settlement fields at union level, such as J. Steiner`s opinion: " The European Union was not preoccupied with the distribution of competencies between community and Member States, but with the distribution of duties/responsibilities from a very large activities area, with the purpose touching some common objectives and mutual conveniences. Although it was obvious that in some contents the possibility of an action from the Member States was reduced, still, to be able to gather the wanted purpose- the custom community was an indispensable premise to the unique market- in most areas the competency was convergent. This did not mean that the states and the Union could govern the same thing in the same time, or that there were not required any kind of restrictions to the competency of the states in this areas (when they had to follow the rules included in the treaties-institutive and modifying), but that their action had to have a complementary or an additional character. Obviously, once the Union wielded its attributions, gained through the treaty, to govern a certain aspect inside an activity field, the states have no longer the liberty to develop measures that could overcome those rules. The states attributions decrease in the same time with the increase of the volume and area of inclusion of communitary law. But the contents of activity in which the Member States did not held a certain level of competency are few"[10]

An opposite opinion was expressed by A.G.Toth. He affirms that "repeatedly" (...) the Court confirmed (...) that in all contents transferred to the Union by the Member States, the Union`s competency is practically exclusive and does not keep a corner to some competencies from the Member States. So, where the competency of the Union starts, the one of Member States ends. Consequently, where the Union`s competency starts, the competency that the Member States have ends. Beyond this point the Member States have no longer the prerogative to elaborate one sided law. They can operate in the limits of their strictly defined attributions in management/implementation, delegated backward toward the national authorities by the Union`s institution. As the Court of justice of European Union decided "the existence of Union`s Competencies excludes the possibility of some concurrent responsibilities from the Member States. "Not even the fact that, for a certain period of time, the Union does not exercise the competency that has been conveyed to, does not create a concurrent competency in favor of Member States during that period of time. This principle results from the doctrin (and jurisprudence- a.n.) of supremacy of Europe Union`s law, which, of course, is a basic principle of European Law"[11] Based on the jurisprudence created regarding European Union`s law supremacy compared to national laws "the European Court of Justice is considered often the <<negative character>>"[12] because, some national voices say, this defeats through the decrees the national powerwill of Member States. In this context, „the application of subsidiarity principle had create, as expected, important problems in interpreting, specially inside European Union`s Court of Justice. One of them is the question if the action of Member States, that the art. 5 (ex 3B) of TCE reports must be related to the activity developed by the states individually or/and collectively. This involves examining if a collective action of the states can or cannot go under the incidence of subsidiarity principle and in what measure"[13].

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[10] J. Steiner, *Subsidiarity under the Maastricht Treaty*, O`Keefee şi Twomey, Legal Issues of Maastricht Treaty (Chancery,1994), p.57-58

[11] A.G. Toth, A *Legal Analysis of Subsidiarity, O`Keefee şi Twomey, Legal Issues of Maastricht Treaty* (Chancery,1994), p.39-40

[12] Paul Craig, Grainne de Burca, *European Law*, IV (ed.), (Hamangiu publishing, Bucharest, 20090, p. 133

[13] Constanţa Călinoiu, Victor Duculescu, *c.w.*, p.179

The Court of Justice, in 1996, in test case the Board versus Belgium, expressed its point of view, meaning it "excluded the possibility that the principle of subsidiarity would justify the taking, culturally contented, of a state from the obligations resulting from the Directive 89/552/CEE from October 3,1989 regarding the redistribution of cable emission"[14].

It is interesting to analyze if the principle of subsidiarity is a warranty-instrument to protect the national sovereignty or is an instrument wherethrough it`s guaranteed to the european institutions the "won right" in the way of legal competence.

At first view we could be temped to consider the principle of subsidiarity a favoring instrument to sovereign powerwill of the states, but the institutive and improvement treaty`s evolution, starting with the Maastricht Treaty and ending with Lisbon Treaty, contravenes this hypothesis. The principle of subsidiarity has become the legal instrument that guarantees the application of Supremacy Principle of European Law! We argue this affirmation through the fact that the sent settlement fields, by sovereignty transfer to communitary level, exit the settlement area of the states and enter in the exclusive Union`s settlement competency, using the reason that at communitary level the settlement is more effective. Consequently, by applying the subsidiarity principle at communitary and national level fulfills the process of sovereignty renouncement. When an european institution applies the subsidiarity control to a law-making project and claims that it is in its competency to govern, practically it invests itself with the sovereign force of states, and when the states, following the same procedure find out that is respected the principle of subsidiarity, they proceed to a sovereignty renouncement, that they transfer, through every favorable notice, to the european institutions.

It is also interesting the procedure that the national parliaments accomplish this transfer. The common disposals are found in the Protocol 2 regarding the application of the principle of subsidiarity, Treaty regarding European Union Function. In this protocol it`s showed through the disposals of article 6 and 7 that "in term of eight weeks from the date of sending a law-making project in official languages of Union, any national parliament or any chamber can address to the President of European Parliament, to the President of the Commission and to the President of the Council, with a motivated notice that expose the reasons why they consider that the project is not in accordance with the principle of subsidiarity."

Every national parliament or every chamber of a national parliament has the assignment to consult the regional parliaments with legal competences. Every national parliament has two votes, allocated according to the national parliamentary system. If the parliamentary system is a two-chambered system, every chamber has a vote. If the motivated notices regarding non-compliance with the principle of subsidiarity by a law-making project represent at least the third part of all votes adjudicated to national parliaments, according to indent (1), second paragraph, the project needs to be reevaluated. This bar is the fourth part in case of a law-making project presented in validity of the article 76 from the Treaty regarding the action of European Union, concerning liberty space, security and justice."

The member states apply different procedures to assay the concordance of a law-making project with the principle of subsidiarity.

In Austria the article 23(d) from the Constitution gives Lands the possibility to influence Austria`s position inside the process of adopting decisions in European Union, through the presentation of their point of view. Therefore, the article 23 letter (d) establishes:

„(1) The Federation must inform the Laender without delay regarding all projects within the framework of the European Union which affect the Laender's autonomous sphere of competence or could otherwise be of interest to them and it must allow them opportunity to present their views within a reasonable interval to be fixed by the Federation. Such comments shall be addressed to the

[14] Constanța Călinoiu, Victor Duculescu, *c.w.*, p.180

Federal Chancellery. The same holds good for the municipalities in so far as their own sphere of competence or other important interests of the municipalities are affected. Representation of the municipalities is in these matters incumbent on the Austrian Association of Cities and Towns (Austrian Municipal Federation) and the Austrian Association of municipalities (Austrian Communal Federation) (Art. 115 paragraph. 3).

(2) Is the Federation in possession of a uniform comment by the Laender on a project within the framework of European Union where legislation is Land business, the Federation is bound thereby in negotiations with and voting in the European Union. It may deviate therefore only for compelling foreign

and integration policy reasons. The Federation must advise the Laender of these reasons without delay.

(3) In so far as a project within the framework of the European Union affects also matters whose legislation is Land business, the Federal Government can assign to a representative nominated by the Laender participation in the Council's formation of its objective. The exercise of this authority will be

effected in co-operation with the competent member of the Federal Goverment and in co-ordination with the latter. Para. 2 above applies to such a Land representative. In matters pertaining to Federal legislation the Laender representative is responsible to the National Council, in matters pertaining to Land legislation to the Land legislatures in accordance in respect with Art. 142.

The article 23 (e) establishes the participation of the National Council and Federal Council to prepare Austria`s position that needs to be defended inside the decisional process in European Union:

(1) The competent member of the Federal Government shall without delay inform the National Council and the Federal Council about all projects within the framework of the European Union and afford them opportunity to vent their opinion.

(2) Is the competent member of the Federal Government in possession of an opinion by the National Council about a project within the framework of the European Union which shall be passed into Federal law or which bears upon the issue of a directly applicable juridical act concerning matters which would

need to be settled by Federal legislation, then the member is bound by this opinion during European Union negotiations and voting. Deviation is only admissible for imperative foreign and integrative policy reasons.

(3) If the competent member of the Federal Government wishes to deviate from an opinion by the National Council pursuant to paragraph 2 above, then the National Council shall again be approached. In so far as the juridical act under preparation by the European Union would signify an amendment to existing Federal constitutional law, a deviation is at all events only admissible if the National Council does not controvert it within an appropriate time.

(4) If the National Council has pursuant to paragraph 2 above delivered an opinion, then the competent member of the Federal Government shall report to the National Council after the vote in the European Union. In particular the competent member of the Federal Government shall, if deviation from an opinion by the National Council has occurred, without delay inform the National Council of the reasons therefore"[15].

The national dispositions of Belgium, through the article 168 dispose "the information of Parliament`s Chambers when the negotiations regarding a review of European Union Treaties start. They have to be informed about the new treaty before it has been signed." The Constitution of Belgium anticipates (article 105 paragraph 3) the obligation that the Council of Ministers has to

[15] Chamber of Deputies, Department of legal studies, Study Constituional, 2010, p.2

inform the National Congregation regarding Belgium`s obligations that come from its quality of member of European Union:

Article 105 paragraph (4) mentions expressly the Council`s duty to inform detailed and in advance the National Congregation regarding its actions in the context of participating to the adopting process of law-making projects of European Union. "If participating at elaboration and adoption of law-making projects inside European Union, the Council of Ministers informs the National Congregation in advance and in detail regarding its actions. Up to now it was not adopted any special law that details the procedure Belgium would exercise its vote concerning the conformation for the principle of subsidiarity in elaborating and adopting legislative european acts"[16].

Regarding Czech Republic, "according to article 10(b) from the Constitution, the Government has the duty to inform the Parliament repeatedly and in advance about the aspects referring to the obligations resulted from Czech Republic`s quality as member to an international organization. The Parliament`s Chambers express their notice about the decisions of such an international organization or institution accurately through the standing orders. Also, the article decides that the competences can be assigned through a law concerning the principles in those reports area of common organ of the Chambers"[17].

"According to the paragraph 20 from the Constitution, the prerogatives that authorities of Denmark have can be transferred to the international authority invested through a mutual agreement with other states, the purpose being promoting the international law and co-operative rules. To adopt a law-making project a majority of 5/6 of all Parliament`s members is needed (Folketing). If this majority is not obtained, but there is the majority needed to adopt an ordinary law, and if the Government continues to defend the law project, it will be subjected to the poll, respecting the rules regarding organizing the referendum"[18]

The article 93 from Finland`s Constitution mentions "The Government is responsible for the national preparation of the decisions to be made in the European Union, and decides on the concomitant Finnish measures, unless the decision requires the approval of the Parliament. The Parliament participates in the national preparation of decisions to be made in the European Union, as provided in this Constitution."

„The Parliament participates in the national preparation of decisions to be made in the European Union, as provided in this Constitution. Concerning establishing Parliament`s position, the Government is obligated to communicate immediately the motions mentioned previously. The motions are to be debated in the Great Commission and in one or more special commissions that are obligated to show reports to the Great Commission.

The Foreign Affairs Commission debates motions that have as goal foreign policy and security. When needed the Great Commission or Foreign Affairs Commission can emit a report on the motion to the Government. Plus, the President`s Conference can decide if the motion is debated in plenum, when no decisions will be made by the Parliament.

The Government is forced to deliver to permanent commissions all the information needed for the debates concerning formulated motions inside European Union. Also, the Great Commission and the Foreign Affairs Commission must be updated regarding the Government`s position about the analyzed issues.

According to article 97, the Great Commission must receive reports from the Government concerning the problems debated inside European Union. The president`s conference decides if any of those reports must be debated in plenum, but those debates do not end with Parliament taking any decision.

[16] Chamber of Deputies, *c.w.*, p.3
[17] Chamber of Deputies, *c.w.,* p.3-4
[18] Idem

The Prime-Minister is obligated to deliver to the Parliament or to any parliamentary commission information about problems that will be debated inside European Council. The competent commission emits a report addressed to the Government, based on reports and information previously mentioned"[19].

In France "Title XV of the Constitution, titled-About the European Union, was amended by Constitutional Law no. 2008-103 of February 4th 2008 in order to allow the ratification of the Lisbon Treaty and establish a constitutional basis for new prerogatives recognized in national parliaments. Two new articles were introduced, 88-6 and 88-7.

According to Article 88-1, "The Republic that participates in the EU consists of countries that have freely chosen to exercise certain powers of their common pursuant to the Treaty on European Union and the Treaty on the Operation of the European Union, as reflected in the Treaty signed in Lisbon on December 13th 2007 ".

According to Article 88-4, "The Government presents the National Assembly and the Senate the draft European legislative acts and other projects or proposals of EU acts, after being received from the EU council. According to the manner prescribed by the regulations of each Assembly (Chambers of Parliament), European resolutions can be voted, outside the sessions if necessary, on projects or proposals referred to, as well as any documents coming from an EU institution. It states that "within each parliamentary Assembly, a committee responsible for European affairs will be established".

Article 88-5 states that any bill authorizing the ratification of a treaty on the EU accession of a State should be subject to referendum by the President of the Republic. However, by vote of a resolution adopted in an identical form by each of the Assemblies by a majority of three fifths, the Parliament can authorize the adoption of a Bill in accordance with the procedure referred to in Article 89, Paragraph 3 of Constitution17.

According to Article 88-6, "The National Assembly and the Senate may issue a reasoned opinion on the conformity of a draft legislative act with the principle of subsidiarity; the opinion is addressed by the President of the Assembly concerned to the Presidents of the European Parliament, the Council and the European Commission; also, the Government is informed. Each Assembly may appeal to the Court of Justice of the European Union against a European legislative act for violating the principle of subsidiarity; this action is transmitted to the ECJ by the Government. To this end, resolutions may be adopted, according to the initiative and the discussions set by the regulation of each Assembly. A ."Legal action is initiated at the request of sixty deputies or sixty senators 18 ".

Article 88-7 states that the Senate and the National Assembly (the Parliament) may oppose, by voting a motion adopted in identical terms by the Chambers, to the changing of the rules for the adoption of the EU acts - regarding the simplified revision of treaties and judicial cooperation in civil matters through the TEU and the TOEU "[20].

As for Germany, "as primary disposition regarding the participation of this EU State Member, Article 23 of the Fundamental Law (Constitution) states that, in order to establish a united Europe, Germany shall participate in the development of the European Union which is committed to the democratic, social and federal principles of the state of law and to the principle of subsidiarity and which ensures a level of protection of fundamental rights essentially comparable to that granted by the Basic Law. To this end, the Federation may transfer the powers of sovereignty, by law, with the consent of the Bundesrat. The Establishment of the European Union, as well as the changes of its

[19] Constitution of Finland, art. 96
[20] Chamber of Deputies, *c.w.*, p.5

treaties and of the comparable regulations, changes that either complete the German Fundamental Law or allow such changes and additions, are subject to the rules of Article 79, paragraphs (2) and (3) [amending the Constitution].
Bundestag and the Länder, through the Bundesrat, may participate in EU affairs. The federal government has an obligation to inform the Bundestag and the Bundesrat, comprehensively and as early as possible.

Before participating in the adoption of the EU legislation, the federal government is obliged to give the Bundestag the opportunity to express its position. During negotiations, the federal government shall take into consideration the position of the Bundestag; the details will be established by law.

Bundesrat participates in the federal decision-making process as long as it is competent to participate in the appropriate business internally or to the extent in which the matter falls within the internal competence of the Länder.

To the extent that, in a matter within the exclusive competence of the Federation, Länder interests are affected, as well as in other matters, as long as the Federation has legislative power, the federal government is obliged to take into account the position of the Bundesrat. As far as the powers of the Land, the structure of Land authorities or their administrative procedures are being affected, the position of the Bundesrat must be taken into account to the highest extent possible, under the federal responsibility for the nation as a whole. In matters which can increase costs or reduce revenues for the federation, the consent of the federal government is needed.

When the exclusive legislative powers of the Lands in matters of education, culture or broadcasting are affected, the exercise of the rights belonging to the Federal Republic of Germany, as an EU Member State, will be delegated by the federation to a Land representative designated by the Bundesrat.

These rights shall be exercised with the participation and coordination of federal government, their performance must comply with the federal responsibility for the nation as a whole.

The details of the above provisions are regulated by law, requiring the consent of the Bundesrat.

Article 24 of the Fundamental Law brings under regulation the transfer of the prerogatives of sovereignty. The Federation may transfer, through a law, such prerogatives of sovereignty to international organizations.

To the extent to which provinces are empowered to exercise state powers and perform state functions, they can transfer, with the federal government's agreement, the sovereign prerogatives to the transboundary institutions of the neighbouring regions.

In order to maintain peace, the Federation may join a system of mutual collective security; in doing so, she will consent to limitations of the prerogatives of sovereignty needed in order to lead to and ensure a lasting peace in Europe and among the peoples of the world. To settle disputes between states, the federation adheres to agreements that establish the general international arbitration, comprehensively and mandatory.

Article 45 of the Fundamental Law states about the EU Affairs Committee. The Bundestag shall appoint an Affairs Committee of the European Union and authorize the commission to exercise its rights specified in Article 23 of the Fundamental Law in its relations with the federal government.

Article 50 establishes the participation of the Lands, through the Bundesrat, in the legislative and administrative procedures of the federation in matter regarding the European Union. In matters on the European Union, the Bundesrat will establish a Chamber for European Affairs, whose decision shall be deemed to be decisions of the Bundesrat "[21].

The Greek Constitution, revised on May 27th, 2008, states in Article 70 about "the obligation to bring under regulation, in the Statute of organisation and functioning of the Parliament,

[21] Chamber of Deputies, *c.w.*, p.6-7

of the procedure by which the Parliament is informed by the Government on matters covered by the legislative proposals of the EU institutions and on their debates."

In the Republic of Ireland, "the law on the 28th Amendment of the Constitution in 2009, promoted (by referendum) in order to ratify the Lisbon Treaty, has a number of important provisions regarding the participation of this State Member in the European Union, stating that<< Ireland reaffirms its commitment to the European Union in which member states of this Union work together to promote peace, common values and welfare of their peoples>>.

The State may exercise the following options and powers specified in the Treaty of Lisbon provided a prior approval by both Houses of Parliament (Oireachtas) of that decision, regulation or law was given:

- Enhanced cooperation, referred to in Article 20 TEU;
- Protocol. 19 on integrating the Schengen acquis in the EU;
- Protocol. 21 on the position of the United Kingdom and Ireland regarding the area of freedom, security and justice, including the option of applying this protocol to cease, in whole or in part, on Ireland.

Also, the state can agree on decisions, regulations or other laws:

- Under the TEU and TOEU, which authorizes the EU Council to decide differently than unanimously;
- Under these treaties, which authorizes the adoption of the ordinary legislative procedure;
- Under Article 82 (2) (d) TOEU, Article 83 (1) paragraph (3) TOEU and Article 86 (1) and (4) TOEU, for space of freedom, security and justice.

The State can not adopt a decision already adopted by the European Council in order to establish a common defense under Article 42 TEU, situation in which the common defense would include Ireland"[22].

"The Constitutional Law on the status of Lithuania as member of the EU IX-2343, to which Article 150 of the Constitution refers to, establishes rules of constitutional powers in relation to EU matters. The Government informs the Parliament (Seimas) on proposals for the adoption of Community acts. The Government is obliged to consult with Seimas on matters of its competencies. The Parliament may recommend a certain position of the Lithuanian Government on those proposals. According to the Seimas Regulation, the Committee on European Affairs of the Seimas Committee on Foreign Affairs may present to the Government the Seimas opinion on the proposals for the adoption of Community acts. The Government will consider the recommendations or opinions presented by the Seimas or by the committees and will inform the Seimas about their execution, according to the established procedure"[23]

In the case of Malta, "according to Article 65 of the Constitution, the Parliament may legislate for peace, order and good governance in accordance with full respect for human rights, generally accepted principles of international law and regional and international obligations of Malta, especially the obligations under the Treaty of Accession to the European Union (signed in Athens on April 16,2003)"[24].

Also in Article 7 of the Constitution of Portugal "a provision is found for the participation in the EU of this member state, meaning that Portugal shall take every effort to strengthen European identity and strengthen the actions of European states to democracy, peace, economic progress and justice in the relations between peoples.

In terms of reciprocity and respect for fundamental principles of a democratic state based on rule of law and the principle of subsidiarity and in order to achieve economic, social and territorial

[22] Chamber of Deputies, *c.w.*, p.7
[23] Chamber of Deputies, *c.w.*, p.8
[24] Chamber of Deputies, *c.w.*, p.9

cohesion in an area of freedom, security and justice and the definition and implementation of foreign policy, security and defense policy, Portugal may enter into agreements in order to exercise jointly or in cooperation with EU institutions, the powers needed to build and deepen the European Union.

Article 8 [International law] states that the treaties governing the European Union and the rules adopted by its institutions in discharging their responsibilities apply to the internal national law in accordance with the Portuguese law and the fundamental principles of a democratic state based on rule of law.

Article 33 regulates the expulsion, extradition and asylum, a provision which states the application on matters of extradition of the rules regarding the judicial cooperation in criminal matters adopted by the European Union.

According to Article 112, the transposition of EU legislation and other legislations in national legal system may take the form of a law, a decree or order of a regional legislative decree.

Article 161 specifies the responsibility of the Assembly of the Republic to rule, within the law, on matters that are being debated by EU bodies, matters which are under the exclusive legislative competence of the Assembly.

Also, according to Article 163, the Assembly is responsible for supervising and examining Portugal's participation in building the European Union.

In his political performance, the Government shall respond, in relation to articles 161 and 163 of the Constitution, by providing information to the Assembly on the construction of the EU (Article 197).

Article 227 establishes the powers of the autonomous regions, including from the point of view of European businesses "[25].

The Constitution of the Republic of Slovenia "in Article 3a states that during the taking of legal norms and decisions of international bodies to which Slovenia has transferred part of its sovereign rights, the Government is obliged to inform the National Assembly on proposals for such acts and decisions as well as on their work. The National Assembly may adopt positions thereon, and the Government is obliged to take account of these positions in their activities "[26].

Slovakia "may transfer the practice of a part of its rights to the European Communities and the European Union under Article 7 of the Constitution, through an international treaty ratified and promulgated in accordance with the procedure regulated by law, or under such treaty. Legally binding acts of the European Communities and European Union laws have priority over Slovakia. Legally binding documents that require the implementation will be adopted by law or by emergency decree under Article 120 (2) of the Constitution"[27].

In Sweden "Article 6 of the Instrument of government has required the Government to continuously inform the Parliament (Riksdag) and consult with the bodies appointed by the Riksdag on developments on the European Union.The Parliament Act establishes detailed rules on the obligation of informing and consulting"[28].

In Romania, the constitutional provisions on the procedure for cooperation with European Union laws are general, art. 148 decides that:

"(1) Romania's accession to the Constitutive Treaties of the European Union, in order to transfer certain powers to Community institutions and to exercise jointly with other member states the abilities stipulated in such treaties, is achieved by adopted law in the joint session of the Chamber of Deputies and Senate, by a majority of two thirds of deputies and senators.

[25] *Idem*
[26] Chamber of Deputies, *c.w.*, p.10
[27] *Idem*
[28] *Ibidem*

(2) Following the accession, the provisions of the Constitutive Treaties of the European Union and other mandatory community regulations, have precedence over the provisions of the national laws, in compliance with the Act of Accession.

(3) The provisions of paragraphs (1) and (2) shall apply accordingly to the accession of the acts of revision of the Constitutive treaties of the European Union.

(4) The Parliament, the President of Romania, the government and the judicial authority shall guarantee the obligations resulting from the accession act and the provisions of paragraph (2).

(5) The Government shall send the two Chambers of Parliament the draft mandatory acts before they are subject to approval by EU institutions".

According to Art. 148 of the Constitution, the Romanian Parliament adopted, for verification of European law through the principle of subsidiarity, Decision no. 11/2011. The procedure for the determination of the compliance of the legislative act with the principle of subsidiarity works as follows: the "following documents are subject to parliamentary review of the European Union:

a) draft laws eligible for subsidiarity test under Protocol. 2 of the Lisbon Treaty in order to establish the compliance with or the breach of the principle of subsidiarity;

b) draft legislation of the European Commission, EU Council and European Parliament and the European Commission's consultation documents, selected by the Chamber of Deputies in accordance with their political, economical, social, financial or legal relevance.

c) projects of EU legislation for which the Government of Romania draw general terms"[29]"Parliamentary scrutiny is completed by developing one or more documents or acts of the Chamber of Deputies, as follows:

a) reasoned opinion when identifying a failure to comply with the principle of subsidiarity by a legislative proposal of the European Union;

b) opinion, in the case of fund reviewing of the legislative proposals and consultation papers, which express the views of the Chamber of Deputies;

c) information report on the documents examined, at the initiative of the European Affairs Committee of the Chamber of Deputies, to which it appoints a rapporteur or a group of reporters;

d) minutes of debate or hearings organized by the concerned committees in joint or separate meetings"[30].

"The Chamber of Deputies receives the referral letter that initiates the 8-week procedure that assesses whether the proposed legislation of the principle of subsidiarity is complied with. The Letter of complaint is registered at the Department of Community law.

The Department of Community law shall notify the Permanent Bureau, (...). The Standing Bureau shall forward the proposal of the permanent legislative to the committee or committees as proposed by the Department of Community Law and by the European Affairs Committee of the Chamber of Deputies, within 7 days of receipt of written advice from the Department of Community law. The Permanent Bureau may decide to transfer the legislative proposal to other standing committees than those proposed by the Department of Community law. The transmission of documents is performed simultaneously to all standing committees involved as well as to the European Affairs Committee of the Chamber of Deputies. If the Standing Bureau is not met within seven days of receipt of the legislative proposals from the Department of Community law or a decision has not been reached, within this period, regarding the transmission of documents and European legislative proposals, the transmission is made by the Chairman of the Chamber of Deputies, with subsequent notification of the Standing Bureau.

The Standing Committees shall observe, in their examination, the compliance with the principles of subsidiarity and proportionality. The examination is completed as follows:

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[29] Chamber of Deputies, Decision no. 11/2011,art. 3

[30] Chamber of Deputies, Decision no. 11/2011,art. 4

a) in case of compliance with the principle of subsidiarity, the Standing Committee shall prepare a report containing the main elements of the debate, the vote expressed, if any, and finding the presence of the principle of subsidiarity. The minutes are provided for information to the Chamber of Deputies Standing Bureau and to the Department of Community law;

b) in case of non-compliance with the principle of subsidiarity, the Standing Committee shall prepare a draft of the reasoned opinion.

In case of detection of non-compliance to the principle of subsidiarity by a legislative proposal of the European Union, subject to the subsidiarity test, the Standing legislative committee and the European Affairs Committee of the Chamber of Deputies immediately shall warn the Department of Community law to convey the information to the Standing Representative of the Chamber of Deputies within the European Parliament and to convey this information to the national parliaments through its communication platform IPEX, mentioning that the reasoned opinion is in draft form and it does not represent an official view of the Chamber of Deputies.

The Standing Commission shall send the draft for the reasoned opinion or the report to the Committee on European Affairs of the Chamber of Deputies no later than the 40th day following receipt of notification from the European Union institutions.

The European Affairs Committee of the Chamber of Deputies shall debate and draft, as appropriate, the following documents:

a) final draft reasoned opinion, integrating the views expressed by the standing committees, when detecting the non-compliance with principle of subsidiarity;

b) an information note that is attached to the minutes of the standing committees and the minutes of the debate of the European Affairs Committee of the Chamber of Deputies, when detecting the compliance with the principle of subsidiarity.

The European Affairs Committee of the Chamber of Deputies shall submit the final reasoned opinion draft or the information note from the Standing Bureau of the Chamber of Deputies no later than the 47th day following receipt of notification of the EU institutions. The final reasoned opinion draft or the information note shall be sent to the Department of Community law for registration.

In the case of reasoned opinion draft for infringement of the principle of subsidiarity, the Standing Bureau:

a) may propose the addition to the agenda of the Chamber of Deputies for debate and approval of a final reasoned opinion draft. The Chamber of Deputies shall vote on the final reasoned opinion draft in their first meeting of its inclusion on the agenda, but no later than 56 calendar days following the receipt of notification from the EU institutions. Reasoned opinion shall be considered adopted by vote of the present majority. The Decision of the Chamber of Deputies of the approval of the reasoned opinion is published in the Official Gazette of Romania, Part I.

The Chairman of the Chamber of Deputies shall sign the reasoned opinion and shall send it to the EU institutions and the Government of Romania;

b) decides to convey the reasoned opinion, as drafted by the Commission for European Affairs, to the Romanian Government and the European Union institutions. The Chairman of the Chamber of Deputies shall sign the reasoned opinion and shall send it to the EU institutions and the Romanian Government.

The reasoned opinion on subsidiarity infringement is transmitted immediately by the Department of Community law, to the Standing Representative of the Chamber of Deputies in the European Parliament and are loaded to the IPEX platform.

If the compliance to the principle of subsidiarity is met, the Department of Community law shall communicate through the IPEX platform the completion of the review and the compliance with the principle of subsidiarity "[31].

[31] Chamber of Deputies, Decision no. 11/2011, art. 14-27.

Currently, there is a bill in the legislative circle on the cooperation between the Parliament and the Government regarding European affairs (PLx no. 3/2012) establishing a complex procedure of cooperation between the legislative and the executive power on matters of adoption and submission to the European institutions of views, opinions or notes on the draft European legislation, by applying protocols no. 1 and No. 2 of the Treaty of Lisbon.

3. Conclusion

(...) The doctrine has supported the thesis that the subsidiarity, as established by the Maastricht Treaty, further enhanced by modifying treaties, is unable to meet its objective: the problems that subsidiarity wishes to solve are not really the ones that the European Union is actually facing. First, in its present formulation, subsidiarity stipulates that the European institutions have to refrain from taking action if the objectives pursued by it can be achieved by the Member States. However, that was not the stake that Member States had in mind when forcing the entrance of this principle in the primary treaties. Instead of providing a method likely to weigh the interests of the States and Union's, this regulation takes on the Union's objectives, favors their absolute accomplishment and it merely shows who will be entrusted with the execution effectively. (...) As long as the Member States consider analyzing a measure to be adopted in terms of the effects it will produce in any field, effects that realize the extent to which the measure will limit its powers, the European institutions assess the extent to which it will contribute to achieving common goals.

(...)The pre-legislative examination, which must decide whether the measure to be adopted satisfies the requirements of the principle is, however, ineffective as the principle itself. On one hand, the problem to be solved (by the contemplated action) is determined before starting the actual control of subsidiarity. On the other hand, it is obvious that the possibility for Member States to solve sufficiently the problem at hand is considered exclusively from the perspective of the problem itself and the community purpose. Also, the impact of the measure on the national system is taken into consideration fairly marginal, out of the whole process, lacking any explicit considerations related to national autonomy and any measurements of the Union's goals, and of the national ones respectively.

Currently, the European system evolution has come to affect the most sensitive areas of traditional national competence.

In this context the core developments of European law is to restore the limit "in which, legitimately, the Union may legislate, namely those in which the autonomy of Member States must imperatively be respected"[32].

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ASPECTS RELATED TO THE PRODUCING OF EVIDENCES IN TRADEMARK COUNTERFEITING CASES IN ROMANIA

ALEXANDRU LUCIAN ARJOCA*

Abstract
The study contains a presentation of evidences and meanings of evidence used in civil and penal trademark counterfeiting cases in Romania. The study analyses the evidences (concept, object, importance, the burden of evidence), means of evidence used in trademark counterfeiting cases, the estimating of the value of the evidence by instance or by prosecutors, new aspects related to the burden of evidences in penal trademark counterfeiting cases in Romania.

Keywords: *evidences, means of evidences, civil and penal trademark counterfeiting cases*

Introduction

The paper covers aspects regarding Intellectual Property Law (trademarks), Penal Law, Penal Procedure Law, Civil Law and Civil Procedure Law.

The importance of study is given by:

- the newness in intellectual property doctrine;
- the experience of Romanian authorities (instances and prosecutors) for combating the trademark counterfeiting;
- jurisprudence of Romanian civil and penal courts in this domain;
- the development of this phenomenon in Romania in the last five years;
- The signed by 22 EU member states, including Romania of a new treaty, ACTA (Anti-counterfeiting Trade Agreement) in 26th January at Tokyo.

For answering to these problems I will try to share my experience in combating the trademark counterfeiting offences (I am chief prosecutor of Bureau for combating IPR crimes – General Prosecutor Office attached to High Court of Cassation and Justice), to analyze the jurisprudence and legal framework regarding the burden of evidences.

PAPER CONTENT

1.Evidence concept and the importance of evidences

In usual language, **evidence** meaning fact who served to the confirmation of the truth, proof, testimony and to prove means to demonstrate, to put in evidence[1].

In penal procedure the evidences are defined like informative relevant elements of all aspects of penal case[2] and are facts who served for the establishing of existence or inexistence of offence, for identification of the person who committed an offence, for knowledge of necessary circumstances for fair solution of the case (article 63 paragraph 1 of The Penal Procedure Code).

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[1] Academia Română – Institutul de Linvistică „Iorgu Iordan", *DEX – Dicționar explicativ al limbii române, Ediția a II-a* (*Romanian Language Explanatory Dictionary* - Second Edition), Editura Univers Enciclopedic , Bucuresti, 1998, p. 852.

[2] Vintilă Dongoroz, Siegfried Kahane, George Antoniu, Constantin Bulai, Nicoleta Iliescu, Rodica Stănoiu, *Explicații teoretice ale Codului de procedură penală român, Partea generală, vol.I, (Teoretical Explanations of Romanian Penal Procedure Code, General Part, volume I)* Ed.Academiei , Bucureşti, 1975, p. 168.

The achievement of penal justice mainly depends by the evidences system[3], Romanian legislator has adopted liberty appreciation of the evidences (article 63 paragraph 2 of The Penal Procedure Code).

In civil procedure, evidence meaning, lato sensu, either the action for establishing of existence or inexistence of legal position, or the mean that permitted to establish the legal position that must be proofed, or the result obtained by using the means of evidence[4].

From this definition results that the evidences are indispensable for the establishing the fact situation, and represent means used by instance to take cognizance of material law rapports who are the object of the process[5].

2. The object of evidence

In penal procedure, **object of evidence** (thema probantum)[6] means the assembly of facts or circumstances who must be proofed for solving penal case (facts regarding prosecution, facts regarding aggravation or attenuation of penal responsibility, facts regarding consequences of offence, fact and circumstances that must be proofed only in specific penal case)[7].

In civil procedure, **object of evidence** means juridical facts, lato sensu, (juridical facts and acts) from that are arise rights and obligations of the litigation parties[8].

For identification of object of evidence in civil and penal counterfeiting cases, it is necessary to see the provisions that regulate the counterfeiting of trademark from Law no.84/1998, republish, regarding trademarks and geographical indications (Trademarks Law).

According to the article 36 paragraph 2 who regulate the trademark counterfeiting lawsuit "The owner of the trademark may request the competent judicial body to prohibit third parties not having his consent from using in the course of trade:

(a) any sign which is identical with the trademark, in respect of goods or services which are identical with those for which the trademark is registered;

(b) any sign where, because of its identity with or similarity to the trademark and because of the identity or similarity of the goods or services on which the sign is affixed, there exists a likelihood of confusion on the part of the public, including the likelihood of association between the sign and the trademark;

(c) any sign which is identical with or similar to the trademark, in respect of goods or services which are not similar to those for which the trademark is registered, where the latter has a reputation in Romania and where use of that sign without due cause could take unfair advantage of the distinctive character or the reputation of the trademark."

In fact, in trademark counterfeiting lawsuit matter, the plaintiff (the right holder of registered trademark or the applicant of trademark registration request, published in Official Industrial Property Bulletin) must proofed that the using by third parties in the course of trade, without his consent, of identical sign with the trademark, in respect of goods or services which are identical with those for which the trademark is registered.

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[3]Ion Neagu, *Tratat de procedură penală. Partea generală (Penal Procedure Teatry. General Part)*, Ed. Universul Juridic, Bucureşti 2008, p.429

[4] Viorel Mihai Ciobanu, Gabriel Boroi, *Drept procesul civil. Curs selectiv. Teste grilă, Ediția 4(Civil Procedure, Selective Course, Tests, 4 Edition)*, Ed. C.H. Beck, Bucureşti, 2009, p.229

[5] Viorel Mihai Ciobanu, Gabriel Boroi, quated work, p.230

[6] Ion Doltu, *Unele aspecte ale probațiunii penale (Some aspects regarding penal burden of evidences)*, în R.D.P. nr.2/1999, p.97-105

[7] Nicolae Volonciu, *Drept procesual penal (Penal Procedure)*, Ed. Didactică şi Pedagogică, Bucureşti 1972, p.158-159

[8] Viorel Mihai Ciobanu, Gabriel Boroi, quated work, p.230

The using of identical sign with the trademark, in respect of goods or services which are identical with those for which the trademark is registered can be done by promoting goods or services via internet or mass media channels, by using of commercial name that is identical or similar with registered trademark, by importing, exporting or conveying in transit there under, stocking, EU acquisitions, offering, putting on the market of products who have applied an identical or similar sign with a registered trademark, application of identical or similar sign with registered trademark on products or packages of products and using of such sign in commercial documents.

For the situation regulated by article 36 paragraph 2 b), it is necessary to prove the likelihood of confusion on the part of the public, including the likelihood of association between the sign and the trademark, and for the situation regulated by article 36 paragraph 2 c), it is necessary to prove that the trademark has a reputation in Romania and that the use of that sign without due cause could take unfair advantage of the distinctive character or the reputation of the trademark

According to the article 37 paragraph 2 from Trademarks Law when the plaintiff claim damages for the acts referred to article 36 paragraph 2, he must burden of evidences regarding suffered prejudice.

Trademark counterfeiting criminal offence is regulated by article 90 from Trademarks Law.

Paragraph 1 incriminate the infringement of the trademark who means carrying out or using a sign, identical or similar with a registered trademark, by third parties in their commercial activity, without the consent of the owner of the registered trademark.

For the proving of such offence it is necessary to prove the existence of premise situation (the existing of national registered trademark, published in National Register of Trademarks, or the existing of international registered trademark or the existing community registered trademark), the existence of material object (carrying out or using a sign, identical or similar with a registered trademark, by third parties in their commercial activity, without the consent of the owner of the registered trademark) and to prove the existence of the subjective side (the offence can be committed only with intention, guilt form of the culpa being excluded).

For the situation regulated by article 90 paragraph 1 a) related to article 90 paragraph 1 b) from Trademarks Law (identical signs for similar products/services or similar signs for identical products/services) it is necessary to prove the existence of likelihood of confusion including the likelihood of association between the sign and the trademark, and for the situation regulated by article 90 paragraph 1 a) related to article 90 paragraph 1 c) from Trademarks Law (notorious trademark) it is necessary to prove the existence of trademark reputation in Romania, the existence of the profit of unfair advantage of the distinctive character or the reputation of the trademark and the existence of the prejudice for the trademark holder.

Paragraph 2 of article 90 from Trademarks Law regulated the marketing of counterfeited products. For the proving of this offence it is necessary to prove the existence of premise situation (the existing of national registered trademark, published in National Register of Trademarks, or the existing of international registered trademark or the existing community registered trademark), the existence of material object (marketing of counterfeited goods - offering the goods, putting them on the market or stocking them for such purposes, or providing services there under, as well as importing, exporting or conveying them in transit there under), the existence of the prejudice for the trademark holder and the existence of the subjective side (the offence can be committed only with intention, guilt form of the culpa being excluded).

For the situation regulated by article 90 paragraph 3 it is necessary to prove the existence of organized criminal group defined by article 2 a) related article 2 c) from Law no.39/2003, amended and supplemented, and the counterfeited products threaten consumers' safety or health.

3. Admissibility, burden and estimating of evidences

For being admissible, the evidence must achieve the next general conditions:

a)*The evidence must be legal*, provided by material or procedure law;

b) *The evidence must be relevant*, in relation with the object of civil or penal case;

c)*The evidence must be conclusive*, to contribute to solving the case.

Civil procedure doctrine includes in general conditions for evidence admissibility *the credibility condition* of evidence, who means that the evidence do not infringe the nature laws or to aspire to proving impossible facts[9], and the Penal Procedure Code (article 67 paragraph 2) and penal procedure doctrine includes in general conditions for evidence admissibility, the *useful condition* of evidence, who means that the evidence must identify the facts that are relevant for solving the case[10].

Regarding trademark counterfeiting, we appreciate that the evidences that will be produce in civil or penal case, must achieve these general conditions, with some differences.

The burden of evidences presumes the proposal of evidences, the grant of evidences and properly burden of evidences.

In trademark counterfeiting lawsuits, the proposal of evidences must be done in initial phase of the case, in following modalities:

a) by plaintiff in the complaint in the court, in the request for whole or amending the initial complaint, or in the welcome to the counterclaim (article 112, article 132 paragraph 2 and last paragraph from Civil Procedure Code);

b) by defendant in the welcome to the initial complaint, in welcome to the request for whole or amending the initial complaint or in counterclaim (article 115 3), article 132 paragraph 1) and article 119 paragraph 2 related to article 112 5) from Civil Procedure Code).

In principle, *the parts in the counterfeiting lawsuits have the obligation to propose the evidences* in the same time and the evidence proposal must be done before the first day of appearance, under the sanction of loss the right to propose evidences (article 138 paragraphs 1 from Civil Procedure Code), the exceptions been regulated by the law (article 138 2), 3), 4) from Civil Procedure Code).

The grant of evidences is made by instance within motivated closing of rejection or admission of the evidences, under discussion of parties and the properly burden of evidences is done before first instance if the law otherwise provides (article 169 paragraph 1 from Civil Procedure Code) in the constancy of the court order (article 168 paragraph 2 from Civil Procedure Code) and before the beginning debate regarding counterfeiting lawsuit.

The burden of evidences in counterfeiting lawsuits is the one who makes a statement, plaintiff in the complaint (*onus probandi incumbit actori*) or defendant in welcome to the complaint or in counterclaim (*in excipendo reus fit actor*).

One exception from this rule is regulated by article 16 paragraph 1 from TRIPS (Agreement on Trade-Related Aspects of Intellectual Property Rights) ratified by Romania by Law no.133/1994, who establishes a legal presumption of likelihood of confusion, and is applicable in the situation of using by third parties of an identical sign with a registered trademark, for the same products.

In the same situation, article 36 paragraph 2 a) from Trademarks Law set up a legal presumption of prejudice suffered by owner of trademark, the existing of identical signs been sufficient to find trademark counterfeiting act, in fraud imitation form, without the consent of the owner of the registered trademark[11].

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[9] Viorel Mihai Ciobanu, Gabriel Boroi, quated work., p.234

[10] Ion Neagu, quated work, p.440.

[11] Bucharest Court of Appeal, 9th Civil and Intellectual Property Section, civil decision no.212/A from 9th June 2005 published în Octavia Spineanu-Matei, *Proprietate intelectuală, Mărci/Brevete de invenţie. Desene şi modele*

Another exception from the rule is given by the impossibility of proving negative facts. Civil jurisprudence regarding trademark counterfeiting stated that the burden of the consent of the owner of the registered trademark for using and marketing of similar sign with a registered trademark is reversed, returning to the defendant[12].

Articles 5-7 of the Emergency Ordinance of the Government no.100/2005 concerning the protection of the intellectual property rights, who transpose EU Directive no. 2004/48/CE of European Parliament and Council, from 29th Aprilie 2004, set up a special burden of evidences by courts (the judicial authorities may order that avaible evidence sufficient to support the plaintif claim be presented by the opposing party, if the evidence lies in the control of the opposing party, subject to the protection of confidential information; the judicial authorities may order the comunication of documents under the control of the opposing party, subject to the protection of confidential information; the judicial authorities can order prompt and effective provisional measures for preserving evidence).

For investigating the trademark counterfeting offence, the burden of evidences is made by criminal investigators, prosecutors and parties in prosecution phase, and by court and parties in judiciary phase.

The grant of evidences is made by prosecutor within motivated ordinance or resolution of rejection or admission of the samples (article 203 related to article 67 paragraph 3 from Penal Procedure Code), or by court within motivated closing, after the reading of prosecution act, according to article 322 and the next related to article 67 paragraph 3 from Penal Procedure Code.

According to article 65 paragraph 1 from Penal Procedure Code *the burden of evidences* is made by the prosecutor or the court.

For the burden of evidences article 68 from Penal Procedure Code set up a specific procedure who forbidden violences, threatens or others means of coercion, promises or impulses to obtain evidences (paragraph 1) or determination of one person to comit or to continue to comit a crime for evidences obtained purpose (paragraph 2).

The prohibition regulated by article 68 paragraph 2 from Penal Procedure Code has some legal exceptions. We consider that it is possible to use cover investigators or surveillance acquisitions of counterfeited goods according to article 224^1 related to article 2 b) 8), 14), 16) and 18) from Law no.39/2003, amended and supplemented, when smuggling offence is in competition with trademark counterfeting offence, when unfair competion offence is in competition with trademark counterfeting offence, when fiscal fraud is in competition with trademark counterfeting offence or when crimes comitted via Internet are in competition with trademark counterfeting offence.

When trademark counterfeting offence is comitted in versions regulated by article 90 paragraphs 1 letter a related to article 90 paragraph 3 a) and by article 90 paragraph 1 b) from Trademarks Law, the legal presumtion of likelihood of confusion regulated by 16 paragraph 1 from TRIPS is applicable. This situation is an exception from principle statutes by article 65 paragraph 1 from Penal Procedure Code (the burden of evidences is made by the prosecutor or the court*)*.

The estimating of evidence is a mental operation made by court, criminal investigators or prosecutors, to determine the value of evidence and evidences assembly burden in trademark counterfeiting case, knowing some restrictions regulated by law.

As far in civil procedure, far in penal procedure and also in trademark counterfeited cases, operate the free estimating evidences principle, evidences have not a pre-establish value, aspect sanctioned by article 63 paragraph 2 from Penal Procedure Code.

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[12] Bucharest Court of Appeal, 9th Civil and Intellectual Property Section, civil decision no.341/A from 6th October 2005 published în Octavia Spineanu-Matei, *quated work,* Ed.Hamangiu , Bucuresti, 2006, p.94-100

4. Main sets of evidence for trademark counterfeiting lawsuits

The main sets of evidence are documentary evidence, material evidence like web pages screen shots, samples of counterfeited products, witness hearings, cross-examination of defendant, legal presumptions and expert reports.

Next section is dedicated to documentary evidence and expert reports as means evidence used in the analyzed field and their associated legal requirements.

The trademark registration certificate plays a very important role. As many of the European national jurisdictions, in 1967, Romania adopted the system of priority of registration (the attributive system) which confers to the trademark owner an exclusive right to use the registered sign for the goods and services for which protection was granted, with the exclusion of well-known marks, signs prior used in trading activities, prior rights related to names and images, copyrights, which all together enjoy unconditioned protection free of registration pursuant to article 6 paragraphs 3 and 4 of the Trademarks Law[13].

The plaintiff brings to Court as evidence of counterfeiting action a license agreement signed with the defendant who's obligations were breached by the latest (article 43 paragraph 2 of the Trademarks Law), documents evidencing the post-license commercialization of plaintiff products where an alteration or modification of their aspect occurred after their putting in circulation by the plaintiff (article 38 paragraph 2 of the Trademarks Law).

Others documentary evidences presented by the plaintiff to the court can be a cease and desist letter sent to the defendant and the evidence of an attempt to reach a settlement of agreement by mediation of the conflict, fiscal, commercial and banking documents able to prove the commercialization of counterfeited products, samples of counterfeited products and packaging.

Others documentary evidences attached to initial complaint can be an evidence of prior legal use – even if the trademark has not been registered in Romania, documents providing names and addresses of manufactures, distributors, suppliers, wholesale agents and retailers of the counterfeited goods, documents indicating quantities of illegal goods manufactured, delivered or even ordered and the amounts gathered form selling of counterfeited goods, customs documents evidencing imports, royalties rates in the specific market in Romania.

In addition, according to article 5 of the Emergency Ordinance of the Government no. 100/2005 concerning the protection of the intellectual property rights, the plaintiff can promote a court motion to oblige the defendant to provide samples of counterfeited goods and documents (bank, financial and commercial) under its possession under the confidentiality protection.

According to article 6 of the same piece of legislation, at the plaintiff's motion the court may decide preservation of evidence by way of a presidential ordinance ruling a distrait of counterfeited goods, materials and instruments used for manufacturing and distribution of such goods and linked relevant documents.

In respect of market research studies aimed to prove the likelihood of confusion and the conditions of existence of trademark counterfeiting, we are of opinion that a valid reference to the national jurisprudence of cases of annulment of trademark registration can be done. There the courts ruled "the appreciation of the risk of confusion based on a market study made at plaintiff's request should not be a relevant evidence, that being an exclusive appreciation of the court by analyzing the trademarks in conflict and specific criterion[14]".

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[13] Viorel Roş, Octavia Spineanu-Matei, Dragoş Bogdan – *Dreptul proprietăţii intelectuale. Dreptul proprietăţii industriale. Mărcile şi indicaţiile geografice (Intellectual Property. Trademarks and geographical indications)*, Ed. All Beck, Bucureşti 2003, p.19-20.

[14] High Court of Cassation and Justice, Civil and Intellectual Property Section, decision no.1543 from 13th February 2009, published în Octavia Spineanu-Matei, *Proprietate intelectuală(4). Practică judiciară 2009 (Intellectual Property, Jurisprudence (4))* Ed. Hamangiu, Bucureşti, 2010, p.34-84.

The defendant may choose to use for its defense strategy evidence as: an application for trademark registration done before date of application for registration of plaintiff's trademark, a valid registration of a community mark older than plaintiff's registration, an older national registration certificate of a trademark, certification mark or collective mark by making use of the provisions of article 6 paragraph 4 d) and e) of the Trademarks Law, a trademark used in foreign territory at the date of plaintiff's application for registration, the written consent of the plaintiff allowing registration of the defendant's trademark, documents (invoices, publicity/advertising, accounting books) all to bring the prove of plaintiff's getting over attitude for a period of 5 years, according to article 70 paragraph 1 of the law, documents indicating the trading of products wearing the plaintiff's trademark in UE and the EEA by the owner himself or under his consent (article 38 paragraph 1).

We are of opinion that in the practice area under scrutiny the expert report has no as meaningful relevance as in other areas of industrial property (patents, designs, topographies and integrated circuits).

The expert may render the most its opinion in respect of resemblances and differences between original product and the counterfeited goods. In the trademark-counterfeiting field the courts hold the exclusive power to appreciate the risk of confusion irrespectively the evaluation of similarities by using criterion rendered by national and community jurisprudence (Sabel v. Puma AG, Canon v. Cannon).

A different kind of expert report assumed in this area is the expert report underlining the damages suffered by the owner of the trademark as consequence of the counterfeiting activities. It is true that the Emergency Ordinance of the Government no. 100/2005 provides in article 14, paragraph 2, for legal criterion to be taken into consideration by the courts when appreciating the damage level (negative economic consequences, especially loss of earnings by the damaged party, unlawful benefits of the counterfeiter, the moral damage, the royalties rates or consideration corresponding to infringed rights due by the infringer in case of him choosing the steps to legal use of the trademark) still with all that the court may order a judicial expert accounting report meant to check all those aspects.

Furthermore the courts can take into account as an evaluation criterion of damages the degree of distinction of the registered trademark, the seniority of the trademark being a possible element of appreciation of distinctively or even trademark' notoriety in relation with other evidence proving degree of familiarity with the trademark of the relevant public.

It should be noted courts appreciations that "determination of the elements of calculation of compensations can be requested alternatively, but they have to be indicated in the court motion not revealed in the hearing for evidence".

It should be here mentioned the provisions of Section II (article 7 to 12) of ACTA (Anti-Counterfeiting Trade Agreement) signed by Australia, New Zeeland, USA, Singapore, and EU (22 countries including Romania) in respect of means of evidence of counterfeiting activities.

Its true ACTA is not yet applicable as the adoption procedure will be long but its afore-mentioned provisions give shape to the way of administration of evidence and subject of proof in counterfeiting actions which shall be uniform at international level.

Those are pretty similar with provisions of EU Enforcement on Intellectual Property Rights Directive and its national transposition by the Emergency Ordinance of the Government no. 100/2005 concerning the protection of the intellectual property rights.

I would like to bring under consideration the provisions of article 8 paragraph 1 which give to courts the possibility to issue an order against a party to desist from an infringement, to prevent the entrance of counterfeited goods in the commercial channels, the provisions of article 9 that establishes legal criterion for courts when came about compensations for counterfeiting and article 11 which rules the way of gathering evidence at the motion of the owner of the trademarks when they are under adverse party control.

Article 12 paragraph 4 obliges the owner of the mark to provide the court with evidence of trademark counterfeiting when seeking provisionary measure under a bond payment, while paragraph 5 give the defendant the possibility to seek for damages in case of provisionary measures ordered without prove of counterfeiting.

5. Main sets of evidence for trademark counterfeiting offence

According to the provisions of Penal Procedure Code related to the provisions of article 90-94 from Trademark Law the main sets of evidence are charged person statement, defendant statement, civil part statement, injured part statement, witness statement, documentary evidences, interceptions, audio-video recordings, lifting of objects and documentary evidences, domicile search, computer search, technical-scientific establishment and expert report.

Provisional measures for preserving evidence and burned of evidences when a trademark counterfeiting offence was committed are regulated by provisions of article 91-94 from Trademark Law completed with provisions from Penal Procedure Code. The significant fact is that these provisions are identical with articles 5 and 6 from the Emergency Ordinance of the Government no. 100/2005 concerning the protection of the intellectual property rights, but they referees only to the trademark counterfeiting offence.

Regarding this aspect, we consider that the provision of Emergency Ordinance of the Government no. 100/2005 concerning the protection of the intellectual property rights are applicable only for trademark counterfeiting lawsuits completed with the provisions of Civil Procedure Code and the provisions of article 91-94 from Trademark Law, completed with provisions from Penal Procedure Code are applicable only for trademark counterfeiting offence.

In this section we will insist on sets of evidences who are relevant and who are mostly burned by investigators and courts when trademark counterfeited offence was committed.

Useful sets of evidence are interceptions and audio-video recordings, mostly when trademark counterfeited offence was committed via Internet.

In practice, these sets of evidence combined with documentary evidence permit to identify the infringer of trademark counterfeited offence committed via Internet.

Penal courts from Romania approved in the last few years (2010-2011) many interception warrants in this domain, and on the other hand, take into consideration the private investigators identification of the infringers of trademark counterfeited offence, private investigators hired by the owner of the trademark[15].

Other set of evidence is domicile search, done in according with articles 110-111 from Penal Procedure Code. If we are in situation of lifting of counterfeited products detained in companies' storehouses, we appreciate that it is necessary to have domicile search warrant and started prosecution against juridical person. When trademark counterfeited offence is committed via Internet, the investigators who made the domicile search must take measures to identify all memory stocking devices such memory stick, CD, DVD, portable hard-disk, who can contain relevant information.

Regarding computer search, this set of evidence can be relevant when the offence regulated by article 90 1) b) is committed via Internet, and will be done according to the provisions of article 56-58 from Law no.163/2001, modified and completed.

Regarding the lifting of documentary evidences from workstations of companies who marketing counterfeited goods and to avoid obtain of search warrant, we recommended mixed controls made by investigators and commissars from Financial Guard, according to provisions of article 7 from of Emergency Ordinance of the Government no. 91/2003 regarding Financial Guard

[15] To see the evidences burned in case no. 42529/3/2007 of Bucharest Tribunal.

(the prosecutor had the power to delegate Financial Guards commissars to investigate such crimes, according to article 4 of the same law).

The documentary evidences have relevance to prove subjective element (intention) of trademark counterfeited offence. So, the intention can be proofed by fiscal documents of acquisition of original products from authorized company by trademark owner, before offence was committed, by suspending the release of suspect goods by custom authorities, by criminal records of the infringers or by interrogation of Intellectual Property Rights Common Data Base.

The jurisprudence of prosecutor offices from Romania revealed the fact that in many trademark counterfeiting cases, the prosecutor propose an expert report, for the reason that the prosecutors didn't want to assume exclusive power to appreciate the risk of confusion irrespectively the evaluation of similarities by using criterion rendered by national and community jurisprudence (Sabel v. Puma AG, Canon v. Cannon).

Our opinion is that the prosecutors and penal courts must assume this exclusive power, and the expert may render the most its opinion in respect of resemblances and differences between original product and the counterfeited goods.

Very useful for solving big trademark counterfeiting cases were technical-scientific establishment released by the experts of trademark owners, experts who were later interrogated by court[16].

For proving the committed of aggravate trademark counterfeited offence, regulated by article 90 paragraph 2 from Trademark Law, it is necessary an expert report from Criminology Expertise National Institute, an expert report from National Medicine Agency or an expert report from Consumer Protection National Agency.

The investigations regarding trademark counterfeited offence revealed that Romania isn't a producer of counterfeited goods but its import and transit country via EU for such goods and the marketing of counterfeited goods implicated both national and international juridical or physical persons. So, we recommended to investigators to use procedure provisions regarding burned of evidences according articles 50, 170-203 from Law no.302/2004 regarding international judiciary cooperation in penal matters.

Conclusions

Romanian legislation regulated many evidences for trademark counterfeiting offence and for trademark counterfeiting lawsuit and it is a scope of parts, investigators and courts how manage these evidences, how used it, how burned it and how evaluate it, according to procedure laws.

The new Trademark Law (Law no.84/1998, republished) represents a forward step, in Romanian anti-counterfeiting legislation exists some legal presume (exceptions from principles settled by procedure laws) and the Romanian legislation regarding set of evidences is according with Anti-counterfeiting EU Directive and ACTA.

Investigators and courts must have the initiative to applied all the regulations regarding burned of evidences for solve a trademark counterfeiting case and the prosecutors and penal courts must assume exclusive power to appreciate the risk of confusion irrespectively the evaluation of similarities by using criterion rendered by national and community jurisprudence

[16] Bucharest Tribunal – First Section admitted the hearing of pharmaceutical company expert who made a technical-scientific report in prosecution phase in case no.2041/2009

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PATTERNS AND DESIGN PROTECTION SYSTEMS IN ROMANIAN LAW

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Abstract

Because of the significant differences among the laws of member states in the field of design and patterns, by Council Directive No. 98/71/EC of 13 October 1998 on the legal protection of patterns and designs, the European Parliament has implemented a patterns and design protection system adapted to the needs of any domestic market.Based on Directive No. 98/71/EC, the Council Regulation (EU) No. 6/2002 of 12 December 2001 on community designs and patterns has been issued, being compulsory in all its elements and applying directly to all member states. Thus, a special legal protection has been provided, which is meant to encourage individual creators to bring forward innovation, the development of new products and investments in their manufacturing. In order to implement the provisions of Regulation (EU) No. 6/2002, the Commission Regulation (EU) No. 2245/2002 of 21 October 2002 has been adopted. All these regulations are intended to provide protection of designs and patterns, and for this purpose two forms of protection are deemed necessary, i.e. a long-term one, corresponding to unregistered designs or patterns, and a short-term one, corresponding to registered designs and patters.

In this paper we shall present in detail these forms of protection, as well as the substantive and formal conditions necessary to be fulfilled for the registration of designs and patterns. The presentation shall be founded on the legal regulations mentioned above that are enforceable and binding also on the Romanian territory, a legal protection of design and patterns being thus provided not only inland but also intra-community. The purpose of this paper is to also highlight the necessity of design and patterns protection, a sine-qua-non condition for the development of new products and investments.

Keywords: *design and patterns legal protection, innovation, formal conditions, unregistered design or patterns , registered design and patterns*

Introduction

The field covered by the theme of the proposed study pertains to intellectual property law, specifically protection matters (in the case at hand, design and patterns protection).

The importance of this study and its objectives results from the contemplated aims hereof, *i.e.* the identification of the design and patterns protection system applicable to Roman law, as regulated by Directive No. 98/71/EC, and subsequently by Commission Regulation (EC) No. 6/2002 of 12 December 2001 (enforced based on Commission Regulation No. 2245/2002 of 21 October 2002) on community industrial design and patterns, which is mandatory in its entirety and applies directly to all member states of the European Union.

The manner in which this study envisages to identify such matters consists in the presentation of all forms of protection, namely, a short-term one corresponding to unregistered design and patterns, and a long-term one corresponding to registered design and patterns, of the conditions related to both content and form that must be met in view of registering patterns and designs, as well as of the stages that must be gone through, or any other relevant procedures.

The research is essential for gaining significant knowledge of the applicability of international regulations in this respect, *i.e.* Directive No. 98/71/EC and Council Regulation (EC) No. 6/2002 of 12 December 2001, which represent the foundation of the field of design and patterns protection, applicable also to community law, as well as for the identification in principle of existing protection systems and their application (effects) at community level. Since all previous studies on this theme

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are quite technical, this review is aimed to be, besides technical, novel (paying attention to matters such as domestic implementation and applicability), mentioning that, at such internal level there are several studies/publications/books on the same subject matter, any references thereto being made both in footnotes, and the body of this paper.

Content

As domestic doctrine states "the intellectual property cannot be constrained easily to territorial boundaries, as it naturally has a much rather international scope. Products of the human spirit and genius defy any barrier placed before their free circulation, and modern information and communication media favor such movement. (...) Products of the human spirit must also be protected outside the national borders of the territory where their author resides, when being utilized, according to their intended purpose, in the territory of other states (...)"[1].

As regards the notions of design and pattern, it is worth mentioning that, globally, two concepts are being used in this field, with one and the same meaning, respectively: English-speaking "common low" countries use the term "design", while French-speaking countries use the notions "design or pattern", case applicable also to community Roman law.

Because of the significant differences between the laws of member states in the field of design and patterns, by Council Directive No. 98/71/EC of 13 October 1998 on the legal protection of patterns and design, the European Parliament has implemented a patterns and design protection system adapted to the needs of any domestic market. Based on said directive, the Council Regulation (EU) No. 6/2002 of 12 December 2001 on community designs and patterns has been issued, being compulsory in its entirety and applying directly to all member states (community Roman law inclusively).

Ensuring the protection of designs and patterns can be done in two ways, namely a short-term protection corresponding to unregistered design and patterns, and a long-term protection for registered design and patterns.

The two Regulations contain the necessary provisions for the development of the procedure for registration of a community design or pattern, the administration of registered community design and patterns, the proceedings for challenging the decision of the Office, and the procedure for cancelling a community design or pattern, such provisions having to be known since they are the foundation of the registration process relating to any community design and pattern.

The Directive mentions that the community design or pattern should meet, inasmuch as possible, the needs of all Community economic sectors[2].

Some of these sectors produce huge quantities of designs or patterns of products that oftentimes have a brief economic life cycle, their protection thus becoming necessary and efficient, yet without undergoing each and every registration stage, or, on the contrary, there are economic sectors where registration is advantageous and which require protection of their designs or patterns for longer periods of time, according to their foreseeable life duration on the market.

At the same time, it is deemed that, in order to be considered valid, a community design or pattern should be new and individual – differentiating itself from other designs or patterns[3]. By new it is thus understood that no other identical design or pattern should have been made public before the date of submitting the registration request, in the country and abroad, for the same category of

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[1] Viorel Roş, Dragoş Bogdan, and Octavia Spineanu Matei, *Copyright and Other Related Rights Treatise (Dreptul de autor şi drepturile conexe Tratat),* (Bucharest: All Beck Publishing House, 2005), 24.

[2] Council Regulation (EC) No. 6/2002 of 12 December 2001, item 15 "*The community design or pattern should meet, inasmuch as possible, the needs of all Community economic sectors."*

[3] Council Regulation (EC) No. 6/2002 of 12 December 2001, item 19 "*In order to be considered valid, a community design or pattern should be new and individual, differentiating itself from other designs or patterns."*

products; as regards designs and patterns, identity refers to the fact that their essential features differ only in terms of insignificant details.

Thus, it is considered that the individual character of the design or pattern results from the effects it has on the user, respectively if such effect is different from the one any other previously publicized design or pattern has had on the same user, that is, before the submission of the registration application.

In this case it is deemed that two forms of protection are necessary, *i.e.* a short-term one corresponding to *unregistered design or patterns*, and a long-term protection related to *registered design or patterns.*

According to the Regulation, the designs and patterns meeting the aforementioned conditions are called "community designs and patterns", as follows:

A community design or pattern is protected:

a) as an "*unregistered design or pattern*", if it is made public as per the procedures provided for in the regulation. One may conclude that the protection of an unregistered community design or pattern is automatically acquired further to disclosing to the public the products that incorporate the respective designs or patterns, by means of publishing, exhibiting, marketing, making public by any other means of advertising, in order to be made widely known in the activity media from the sector concerned, on condition that the disclosure is carried out within the territory of the European Union. If the disclosure is performed outside the above-mentioned territory, no protection can be enjoyed.

b) as a "*registered design or pattern*", if registered as per the procedures provided for in the regulation.

Also, the regulation defines the main relevant terms:

– "*design or pattern*": the external aspect of a product or a part thereof, resulting from the combination of its main features, especially lines, contours, colors, shapes, textures and/or materials and/or the decorations of the product itself;

– "*product*": any industrial or crafted product, including, *inter alia*, pieces designed to be assembled into a more complex product, packaging, presentation, graphical symbols and typographical fonts, excluding computer software;

– "*complex products*": a product made up of several replaceable pieces that allow disassembly and reassembly of such product.

Situated "at the crossroads between art and industry"[4], designs and patterns are known both in Romanian law and in the law of other countries, as "applied art" or "decorative creations"[5], the protection being possibly given for all the products included in the Locarno Classification.

Apart from the aforementioned clarifications, the Regulation identifies in detail all procedures and stages that must be undergone so as that a community design or pattern that is subjected to intellectual property rights may benefit from protection; it also comprises information on how to draft the application, the format conditions needed for the registration of designs and patterns, the capacity of the person submitting the application, how the application is submitted, priority rights, application examination, certificate issuance, payment of certain charges, and the duration of the granted protection.

The Regulation sets forth both the items that can be registered and protected as community designs and patterns, and the ones that cannot be registered and protected as community designs and patterns, as follows:

– a community design or patterns does not give rights over the aspectual features of a product, which are imposed exclusively by the product's technical functionality;

[4] Y. Eminescu, *The Protection of Industrial Designs and Patterns,* (Bucharest: Lumina Lex Publishing House, 1993).

[5] J. Schmidt – Szalewski, *Droit de la propriete industrielle,* (Paris: Dalloz, 1997).

– a community design or pattern does not give rights over the aspectual features of a product, which must be mandatorily reproduced in their exact form and dimensions so as that the product in which they are integrated, or which the design or pattern is applied to, can be mechanically connected to another product, or so as that it can be placed inside or around another product, or put in contact with another product, in such a way that allows each of them to achieve their own functionality;

– by derogation from the provisions of para. (2) above, a community design or pattern gives rights over another design or pattern that observes the conditions established in the Regulation at Art. 5 and 6, and which aim at allowing the multiple assembly or connection of certain interchangeable products within a modular system.

- a community design or pattern does not confer any rights at all if that particular design or pattern infringes public order or good morals principles (and, during the process of national registration of a design or pattern, consideration should be given to the fact that the concepts of "public order" and "good morals" may differ from one member state to another); it is possible at times to identify cases in which a design or pattern registered with a national office from one member state be denied in another country on account that it infringes public order or good morals principles.

The rights on community designs or patterns are set forth in Art. 14 of the Regulation, which stipulates that "the right on a community design or pattern belongs to their author or their successors in rights"[6]; furthermore, it is stated that, if several persons have created a design or pattern together, the rights on such community design or pattern are jointly held by all of them; also, the rights on the so-called "professional" designs or patterns, if they have been conceived by employees of a company at the express request of their employers, belong to the latter, save for the cases regulated under any other contrary provisions governing such matters as set forth in conventions concluded between employers and employees, or in the text of the relevant national legislation in force.

The importance of registering patterns and designs resides in the fact that, further to registration, the titleholders will have the right to use such intellectual property items and to prohibit any third party from using the same, without their express consent in relation thereto, being also able to set forth the conditions of such use (pecuniary inclusively, as the case may be). Unregistered community designs or patterns do not give their titleholders the right to prohibit the performance of any activities in relation thereto unless the challenged use thereof results from copying such protected designs or patterns.

De facto, practice showed that all products, especially the ones with a particular design or pattern and with a greater commercial success, are actually being counterfeited, which causes immense financial troubles and losses to the entitled owners, and confuses consumers, who can thus purchase products of a quality that is inferior to the original products they think they are actually buying, and who pay the same price for the fake products as they would for the originals. The registration of designs and patterns is thus a guarantee given to the holder of such registration certificate, whereby he/she can prohibit third parties, without his/her consent, to reproduce, manufacture, market, offer for sale, or use the design or pattern of the product within which they are incorporated, throughout the European Union.

"Titleholders may choose among the various manners of national and international protection, and the designs or patterns registered and administered by The Office of Harmonization for the Internal Market (OHIM), which, starting from 2003, are available, and which can cover all 27 member states of the European Union in one application[7]."

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[6] Council Regulation (EC) No. 6/2002 of 12 December 2001, Art. 14 "*the right on a community design or pattern belongs to their author or their successor in rights".*

[7] Constantin Duvac, and Ciprian Raul Romitan, *The Legal and Penal Protection of Designs and Patterns (Protecţia juridico – penală a desenelor şi modelelor)*, (Bucharest: Universul Juridic Publishing House, 2009), 103.

The Regulation stipulates that the contested use is not considered to result from the copying of the protected designs or patterns if it originates in the independent creative work of an author who can affirm, in a grounded manner, that he/she had no knowledge whatsoever about the existence of the design or pattern disclosed by the titleholder.

This study now continues to discuss the Regulation provisions regarding the rights transmitted to the titleholder, the limitation of such rights, the duration of the granted protection, as well as the termination of such rights.

Rights conferred to the titleholder

The rights conferred to the titleholder are different function of whether the design or pattern is registered or not, as follows:

Registered community designs or patterns give their titleholders the exclusive right to use them and to prohibit any third party from using them without the agreement of the titleholder. By use it is understood, in the sense of the Regulation, especially the manufacturing, inclusion in an offer, marketing, export or the use as such of a product in which the concerned design or pattern has been integrated or applied to, as well as the storage of the respective product in order to be used for the purposes mentioned above.

Unregistered community designs or patterns do not give their titleholders the right to prohibit the activities specified at para. (1), unless the contested use results from the copying of the protected design or pattern.

The Regulation mentions, in Art. 19, that the contested use is not deemed as resulting from the copying of the protected design or pattern if it originates in the independent creative work of an author who can affirm, in a grounded manner, that he/she was not cognizant of the design or pattern disclosed by the titleholder.

Limitation of rights

Art. 20 of the Regulation specifies the cases in which the rights conferred by a community design or pattern cannot be enforced, as follows:

- activities developed for private non-commercial purposes;
- activities developed for experimental purposes;
- activities related to multiplication for didactical or bibliographical purposes, provided that such activities are compatible with fair trade practices, do not infringe the normal use of the design or pattern concerned, and also indicate the source.

Moreover, the rights conferred by a community design or pattern cannot be enforced in the case of:

- the equipment used onboard ships or aircrafts registered in a third party country and which temporarily cross Community territory;
- the imports in the Community of parts and accessories dismantled from vehicles in view of being used for the repair of the same vehicles;
- the performance of repairs onto such vehicles.

Also, Art. 23 of the Regulation mentions one more situation in which the right of the titleholder cannot be enforced: when the community design or pattern is used by the government of a member state for security and defense purposes.

Protection Duration

The duration of the protection is different for registered and unregistered designs and patterns, as set forth at Art. 11and 12 of the Regulation.

A design or pattern meeting the conditions stipulated in the Regulation at Section 1 is protected as *unregistered community design or pattern* for *a period of three years* as of the date when the design or pattern was disclosed to the public for the first time at Community level.

In the sense of para. (1), it is considered that a design or pattern was disclosed to the public at Community level if it has been published, exposed, marketed or made public in any other way, such that, in the course of normal business operations, it can be presumed that the respective action would

have become known to specialized groups from the concerned economic sector at Community level. Nevertheless, it is not deemed that a design or pattern is disclosed to the public if divulged only to one third party, with the explicit or implicit condition of preserving their secrecy.

By the registration with the Office, a design or pattern that meets the conditions of Section 1 of the Regulation is protected as *registered design or pattern* for *a period of five years* starting from the date when the application was submitted. The titleholder of the right may extend the duration by several five-year terms, *up to a maximum of twenty five years* as of the date when the application was submitted.

Termination of Rights

Art. 21 of the Regulation mentions that the rights conferred by the community design or pattern are not enforced in the case of a product into which it has been incorporated or onto which the protected community design or pattern is applied, if such product was placed on the market on the territory of the Community by or with the agreement of the titleholder of the respective community design or pattern.

PROTECTION SYSTEMS

Designs and patterns find protection as regards intellectual property rights in many various ways, such variety being explained both through the particular features of such type of intellectual creations, and, as already mentioned above, through the fact that they are at the crossroads between industrial property and copyrights, and also by the constant existence of certain disputes regarding the legal nature of the rights on industrial designs and patterns, the up-to-date character of the field and the diversity of the legislative solutions adopted[8].

Depending on the particular features of such creations, there are three main systems for the protection of designs and patterns:

- the system of integrated cumulation of protection,
- the system of partial cumulation of protection,
- the system of specific protection.

Each of these systems is dealt with in various national legislations.

Thus, **the system of integrated cumulation of protection**, both in doctrine and in specialized literature, is known as "the system of cumulated protection". In my opinion, the concept of system of integrated cumulation of protections is more relevant and recommendable for use, since, by doing so, the distinction between the other systems is being strengthened, and especially the one in which similar criteria are being used, namely the system of partial cumulation of protection as regards designs and patterns.

This system has been consecrated in French law. Designs and patterns are regulated both in the Special Law of 14 March 1909, and the Law of 11 March 1957 on literary and artistic property.

The solution of the cumulation of protection is explained by the theory of the unity of art. Due to the impossibility of finding a single objective criterion to appreciate it, art in itself cannot be separated from applied arts. French jurisprudence stated that designs or patterns must be new and not a result of hazard; apart from this fundamental condition, there is another formal condition related to storage, which consists in the fact that the latter should be prior to the sale of the product, and which has the capacity to confer rights.

The most significant advantages of the cumulation of protection are: in the absence of storage, which conditions the acquiring of protection, the creator's rights can be capitalized as copyrights; the protection of copyrights lasts longer; the action against counterfeiting involves simple proceedings in the case of copyrights, and the sanctions are more serious.

[8] Nathalie Dreyfus, and Beatrice Thomas, *Marques, dessins & modeles – Protection, defense, valorization,* Second Edition, (Paris: Dalmas Publishing House, 2006).

The author of a design or pattern may choose a cumulative protection or another alternative. The granted protection is not conditional upon the artistic value of the design or pattern in question.

This principle of cumulative protection of designs and patterns has known a more recent recognition in Art. 17. of EC Directive 98/71. We can notice, therefore, that, at community level this principle has been recognized after many years from the operation, in the Romanian system, of the protection of intellectual property rights applicable to designs and patterns, which leads us to believe that the Romanian legislative system is a modern one, able to anticipate a complex protection for such works, and offering, at the same time, titleholders the possibility of getting increased protection for their creations.

The system of partial cumulation of protection

The system of partial cumulation of protection is traditional to German law. The German system is based on the distinction being made, depending on the predominant features of the artistic elements, between applied artwork, susceptible for copyright protection, and the designs and patterns themselves. In order to benefit from copyright protection, designs and patterns should be original. According to this system, the theory of art unity is rejected, while the distinction between designs and patterns and applied artwork is being made based on the criterion of artistry of the respective creation. Consequently, this system stipulates that originality is an essential condition for granting protection. Should the originality condition not be met, the design or pattern will only benefit from the specific protection given to industrial design and patterns. A similar system exists in Benelux as the Uniform Law of 1 January 1975, which also sets forth originality as criterion for the granting of double protection.

The system of specific protection

The system of specific protection is used in Italian law. The Italian system excludes any cumulation of protection; designs and patterns can only be the subject of protection in specific terms. Industrial designs and patterns are protected by specific regulations only, as established under Royal Decree No. 1411 of 25 August 1940, amended by Law No. 60/14 February 1987, as subsequently completed. By totally excluding cumulation, designs and patterns benefit from a unique protection system. Designs and patterns are referred to as decorative creations. Their legal status is the same as in the case of utility patterns.

In Romanian law, industrial designs and patterns enjoy a specific protection under Law No. 129 of 1992, which does not exclude the protection conferred by other legal provisions on intellectual property rights. To date, industrial designs and patterns have been subject to copyright protection.

The importance of this theme is also given by the fact that, for a while, the Romanian (and other) lawmakers have avoided providing a definition of designs and patterns, preferring instead to establish the fundamental conditions that they should meet in order to be protected, but, in the light of the new regulations, such definition has been enunciated in concrete terms and therefore, there is no shadow of a doubt as regards such topic – which this study attempted to focus on and clarify.

Regulation No. 6/2002 does not exclude the enforcement, in the case of designs and patterns, of protected community designs and patterns, regulations on industrial property or other relevant regulations pertaining to the member states, as well as the ones referring to the protection acquired by registration, or the ones concerning unregistered designs or patterns, onto commercial trademarks, patents and other utility patterns, or onto the ones regarding unfair competition and tort liability.

The rights on designs and patterns are property rights, as defined under civil law, which allows their creators to receive benefits from capitalizing their output. These rights are real, exclusive and absolute. Moral and patrimonial rights are recognized to the creators of designs and patterns.

Moreover, in the absence of a complete harmonization of the legislation on copyright matters, the Regulation imposes the principle of cumulating specific protection for community

designs and patterns with the protection offered by copyrights, at the same time giving member states unrestricted freedom in establishing the degree of protection provided by copyright and the conditions for the granting of such protection.

Conclusions

The main directions approached by this study refer to the identification of a protection system applicable to designs and patterns valid in community law, as regulated by Directive No. 98/71/EC, and Council Regulation (EC) No. 6/2002 of 12.12.2001; it has briefly presented the aforementioned enactments, and discussed the various steps that must be followed in pursuing the procedure for obtaining protection and which, in my opinion, deserved such attention and analysis. Another focus of this study was the identification of available protection systems, and the review thereof, in order to better understand the applicability of said enactments and their importance in practice.

The expected impact of this study is to increase awareness on the importance of the legislative enactments applicable at European level on the subject matters discussed herein, and to understand the achievements in the field of intellectual property protection of designs and patterns. This aspect has known a growing importance in domestic and worldwide economy.

On a last note, I suggest expanding the analysis of this theme so as to include casuistry, as well as copyrights, trademarks and other components of intellectual property rights.

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DECISIONS OF ROMANIAN LAW COURTS IN CASES CONCERNING THE INTERPRETATION OF ARTICLE 3 (D) OF REGULATION (EC) NO 469/2009 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 6 MAY 2009, CONCERNING THE SUPPLEMENTARY PROTECTION CERTIFICATE FOR MEDICINAL PRODUCTS

BUCURA IONESCU[*]

Abstract

The supplementary protection certificate is currently considered to represent an accessory of a national or European patent granted in order to extend the duration of the rights that said patent confers on its owner in respect of an active substance or a combination of active substances. Based on the above-mentioned patent and on the certificate, the owner shall have the exclusive right of manufacturing and commercializing the patented product, as well as the right to oppose to any form of counterfeiting of the patented product. The grant of this protection title for medicaments is regulated on the territory of the European Union by the Regulation (EC) No 469/2009 of the European Parliament and of the Council of 6 May 2009 concerning the supplementary protection certificate for medicinal products (Codified version). The conditions for obtaining the certificate are stipulated under Art. 3. The paper is intended to present the decisions made by the Romanian courts in the cases concerning the controversial interpretation of Art. 3 letter d) of the Regulation, which provides that the valid authorization to place the medicament on the market in accordance with Directive 2001/83/EC or Directive 2001/82/EC, as the case may be, should be the first authorization to place the product on the market as a medicament. At the same time, the paper presents the differences in the approach and the judgment of such cases by OSIM (State Office for Inventions and Trademarks) and by the national courts. The paper aims at analyzing said decisions as compared to the European practice, with a view to identifying solutions for a uniform interpretation of Community legislation at the level of the Romanian courts.

Keywords*: patent right, supplementary protection certificate, medicinal products, EU Regulation, court decisions*

Introduction

The supplementary protection certificate is currently seen rather as a patent sub-domain, than as an independent industrial property title. It is an accessory of a previously granted national or European patent, intended to extend the duration of the rights that said patent confers on its owner in respect of an active substance or a combination of active substances. Based on the above-mentioned patent, the owner shall have the exclusive right of manufacturing and commercializing the patented product, as well as the right to oppose to any form of counterfeiting of the patented product.

In a field so dynamic as the field of medicaments and the industrial property rights of patent owners in medicaments within the EU, the Council Regulation (EEC) No. 1768/1992 on the creation of a supplementary protection certificate for medicaments[1], hereinafter referred to as Regulation, created the legal framework for the settlement of cases in which a pharmaceutical company that owns a patent for a medicament and is also authorized to place said medicament on the market, can enjoy the extension of duration of its exclusive rights by the grant of a *supplementary protection certificate*.

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[1] Council Regulation (EEC) of 18 June 1992 concerning the creation of a supplementary protection certificate for medicinal products (OJ L 182, p.1, Special edition 13, volume 11, p.130)

The Regulation entered into force on 2 January 1993 and, in 2009, as a consequence of the evolution of exigencies in the pharmaceutical field, on the one hand, and of the changes occurred in the geopolitical area of the Community, on the other hand, the codified version thereof was adopted as the Regulation (EC) No 469/2009[2]. In the following pages, reference will be made especially to the Regulation of 1992 and, where appropriate, the Regulation of 2009 will be called by the phrase "*codified version"*.

Although the supplementary protection certificate was established in the Community almost 20 years ago, specialized literature in this field can scarcely be found in Europe, Romania not even having judicial practice.

The paper presents five decisions made by Romanian courts in disputes related to the controversial interpretation of Article 3 (d)[3] of the Regulation which provides that the valid authorization for placing a medicament on the market in accordance with the Directive 65/65/EEC should be the first authorization to place the product on the market as a medicinal product. The paper points out the different approaches and ruling of these five identically similar cases by the national protection granting authority - OSIM[4], and by the national courts. The paper aims at analyzing said decisions in the context of the European practice, with a view to identifying solutions for the uniform interpretation of Community legislation in Romanian courts.

Content

1. Case Insulin lispro (the medicament named "Humalog"). File No. 42590/3/2009, Law Court of Bucharest, Fifth Civil Section

The supplementary protection certificate application no. c2007-061 of the applicant Eli Lilly and Company, for the product having the chemical name Human insulin [Lys(B28), Pro(B29)] and the ICD Insulin lispro, was filed with OSIM on 20.06.2007, within the 6-month legal time limit of Romania's accession to the European Union, under the transitional provisions stipulated in Article 19a (l) of the Regulation[5].

With a view to granting the SPC applied for, the Examination Board of OSIM analyzed the compliance with the conditions stipulated under Article 3 of the Regulation, as follows:

The product named Insulin lispro is protected by the basic patent in force RO 2.192T, having the title *Insulin Analog Compound and Pharmaceutical Compositions Containing the Same,* as identified in Claims 1 and 2 and the examples in the description of the basic patent. The condition

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[2] Regulation (EC) 469/2009 of the European Parliament and of the Council of 6 May 2009 concerning the supplementary protection certificate for medicinal products (Codified version) (OJ L 152/1)

[3] Under the title *Conditions for obtaining a supplementary protection certificate,* (hereinafter referred to as SPC), Article 3 of the said Regulation provides as follows:

"A certificate shall be granted if, in the Member State in which the application referred to in Article 7 is submitted and at the date of that application:

(a) the product is protected by a basic patent in force;

(b) a valid authorization to place the product on the market as a medicinal product has been granted in accordance with Directive 65/65/EEC or Directive 81/851/EEC, as appropriate;

(c) the product has not already been the subject of a certificate;

(d) the authorization referred to in (b) is the first authorization to place the product on the market as a medicinal product."

[4] State Office for Inventions and Trademarks, Romania, hereinafter OSIM.

[5] Article 19: "Additional provisions relating to the enlargement of the Community

Without prejudice to the other provisions of this Regulation, the following provisions shall apply:

[…] (j) any medicinal product protected by a valid basic patent and for which the first authorisation to place it on the market as a medicinal product was obtained after 1 January 2000 may be granted a certificate in Romania. In cases where the period provided for in Article 7(1) has expired, the possibility of applying for a certificate shall be open for a period of six months starting no later than 1 January 2007;"

provided under letter a) of Article 3 is complied with. No SPC has been granted in Romania in respect of said product, the condition provided under letter c) of the same article being also met thereby. From the SPC application filed with OSIM, it results that the product Insulin lispro is retrieved as an active substance in the medicament named **Humalog**, authorized for the first time to be placed on the market in Romania as a medicinal product through the Registration Certificates no. 5256/96, 5257/96 and 6764/98 and reauthorized to be placed on the market through the authorization no. 3149/2003. Said later authorization obtained by the product as a medicament is an authorization granted in accordance with *Directive 65/65/EEC of the Council of 26 January 1965 on the approximation of provisions laid down by law, regulation or administrative action relating to proprietary medicinal products*, so that the condition provided under letter b) of Article 3 is met, as well. For the cumulative compliance with the four conditions stipulated by Article 3 of the Regulation, the authorization no.3149/2003, granted in accordance with Directive 65/65/EEC, needs to be the first authorization for placing the product Insulin lispro on the market as a medicinal product (Article 3 (d)). It is worth mentioning that the first authorization for placing the product on the market, in the Community, was issued on 30.04.1996, as the applicant indicates in the SPC application.

The registration certificates for the medicament Humalog having Insulin Lispro as an active substance have been issued by the National Medicines Agency, based on Romanian Government Ordinance No. 31/1995 (Official Gazette No.201 of 30.08.1995) and the Order of the Minister of Health No.949/1991, which approved the Directives concerning the authorization, registration and monitoring of medicaments and other products for human use. These certificates were issued in the period of time when the above-mentioned national acts in force had provisions as to the harmonization with the Directive 65/65/EEC, with which they were already harmonized to a large extent. Based on said certificates, the medicament Humalog could be commercialized in Romania before the date of 01.01.2000. Taking into account the meaning of the date of 01.01.2000, i.e. in Romania, the first authorizations for placing the medicaments on the market were granted by virtue of procedures harmonized with the Directive 65/65 EEC, starting from this date, based on the Emergency Ordinance No.152/1999[6], OSIM interpreted the phrase *"the first authorization to place a product on the market as a medicinal product"*, in the Article 19 a (l), as referring to the first authorization for placing the product on the market in Romania, not in the Community. It results that the right to be granted an SPC in Romania is explicitly limited to those products that cumulatively comply with the provisions of Article 3 (b) and (d), and of Article 19 a (l) of the Regulation, in this case it being relevant that the product had not been placed on the market in Romania before 01.01.2000.

Consequently, as the conditions for the grant of the SPC for the product Insulin lispro were not cumulatively complied with, the application was refused by the Examination Board, through the Decision No.3/29 of 28.12.2008.

On 17.04.2009, the company Eli Lilly and Company, represented by SCA Turcu & Turcu, lodged an appeal against the decision of the Examination Board, with the OSIM Board of Appeal, asking for *"the annulment of the decision no. 3/29 of 28.12.2008 and, consequently, for the granting of a supplementary protection certificate for the medicinal product Humalog – Insulin lispro"*.

The grounds, as claimed in the appeal, related to the fact that Article 19 a (l) of the Regulation does not explicitly limit the right to be granted an SPC to the products commercialized on the Romanian market, for the first time after the date of 01.01.2000, *"but rather relates to the products whose first market authorization (as defined in the Regulation) was granted after 01.01 2000. With a view to obtaining an SPC in Romania, it is not relevant whether the product was placed on the*

[6] GEO No. 152/1999 of 14 October 1999 on medicinal products for human use, published in the O.G. No. 508 of 20 October 1999 and entered into force on 01.01.2000

market in Romania before the date of 01.01.2000, as long as those products were not authorized in Romania in accordance with a procedure similar to the procedure provided by the Council Directive 65/65/EEC". The appellant also showed that a contrary interpretation could lead to an erroneous conclusion, namely that, in Romania, an SPC can only be obtained for those products for which the first market authorization was obtained in a Community Member State, after the date of 01.01.2000, which would limit the purpose of application of the Regulation on the territory of our country. In the appellant's opinion, because Article 19 a (l) relates to Article 3 (b) and (d), the phrase "*first authorization*" used in Article 19 a (l) shall represent the first authorization in Romania. Invoking the uniform application of Community legislation, based on the fact that the same product has been granted an SPC in the majority of the other EU Member States, the appellant also points out that the product Humalog – Insulin Lys Pro obtained the first EMEA market authorization on 30.04.1996, which allows the granting of an SPC. The invoked legal grounds are Article 3, Article 17 and Article 19 a (l) of the Regulation, Article 7(1) of the Law No.93/1998 on the pipeline protection of patents[7], Article 51[8] of the Patent Law 64/1991, as republished.

Subsequently, the appellant also filed written conclusions to prove the unlawful character of the appealed against decision to refuse the application for the grant of an SPC. Essentially, the appellant considers that the decision appealed against was made as a consequence of the unlawful interpretation of the concept of "*first authorization to place the product on the market as a medicinal product."* With a view to explaining the meaning of the phrase "*first authorization to place the product on the market",* the appellant applied the reference decision of ECJ – Hässle vs Ratiopharm[9] to the case: "The first authorization for placing the product on the market in the Community", mentioned under Article 19 (l) in the Regulation No. 1768/92 must be, the same as "the first authorization for placing the product on the market " mentioned under Article 3 of the said Regulation, an authorization issued in accordance with the Directive 65/65/EEC."

The ruling of the OSIM Board of Appeal as to reject the appeal is pronounced with majority of votes through the Decision No. 64/16.07.2009. The Chairman of the Board formulated a separate opinion thereto, as to allow the appeal. The grounds of the Board judgment consisted in that the first authorizations for placing the product on the market as a medicament were issued as the Registration Certificates of 1996 and 1997, granted by the Ministry of Health, based on the Government Ordinance No.31/1995 (Official Gazette No. 201/30.08.1995) and the Order of the Minister of Health No.949/1991 approving the *Directives concerning the authorization, registration and monitoring of medicaments and other products for human use*. Said Certificates were granted by virtue of a procedure following to a great extent the structure and content of the Directive 65/65/EEC, still not being fully harmonized therewith, but based on a complete authorization file which contained a chemical-pharmaceutical and biological documentation, a pharmaco-toxicological documentation and a clinical documentation, as well, being elaborated in accordance with the European Communities good practice rules on pharmaceuticals. The said acts have permitted the circulation and use of the medicament Humalog (Insulin lispro) on the territory of Romania, since 1996. The legal grounds invoked are Article 18 of the Regulation (codified version) and Article 53 of the Patent Law 64/1991, as republished.

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[7] Law No. 93/1998 on the pipeline protection of patents of 13 May 1998, published in the O.G. No. 186 of 20 May 1998. By virtue thereof, the pipeline protection starts on the date of filing the patent application with OSIM and lasts until the date of expiry of the patent.

[8] Article 51 of the Patent Law 64/1991 republished in the Official Gazette of Romania, Part I, No.541 of 08.08.2007: *Any decision made by the Examination Board may be appealed against with OSIM within 3 months from communication."*

[9] C-127/00 – The court held with no doubt that there is no reason for different interpretation of the phrase „authorization for placing the product on the market", depending on the provision of the Regulation it is comprised in, and that the phrase cannot have different meanings when mentioned under Article 3 or under Article 19.

In his dissenting opinion, the Chairman of the Board argued that the allowability of the appeal was imposed by the reason that said Registration Certificates cannot represent first authorizations to place a medicament on the market, as they can be ignored in the meaning of Article 20 of the codified version of the Regulation.[10]

The above–mentioned Decision No. 64/16.07.2009 of the OSIM Board of Appeal was appealed against by the appellant Eli Lilly and Company, represented by SCA Turcu & Turcu, before the Law Court of Bucharest – Civil and Intellectual Property Section, on 28.10.2009, registered under the number 42590/3/2009.

In opposition with the respondent State Office for Inventions and Trademarks (OSIM), and pursuant to the provisions of Article 57 (1) of the Patent Law 64/1991 and Article 282 and the following of the Civil Procedure Code, the appellant asks for :

"the delivery of a decision as to allowing the appeal and consequently:

i) changing the decision appealed against in whole;

ii) accepting the application for the grant of a supplementary protection certificate for the medicament Humalog (Human Insulin Lys Pro);[...]"

In the statement of reasons of the attack, the appellant indicates the legal ground for its SPC application, i.e. Article 19 a (I) of the Regulation (EEC) 1768/92, and shows that *"the condition set out under this article is that the medicament had not been given a market authorization before the date of 1 January 2000."* And, despite the substantiation *in extenso* of the fact that the authorization referred to under Article 19 (I) is an authorization issued in accordance with the Directive 65/65/EEC and, consequently, the Certificates issued in 1996, allowing commercialization in Romania of the medicament Humalog, were not issued according to a procedure pursuant to the Directive, these essential arguments were not analyzed by OSIM and the Board of Appeal *"was content with assuming the examiner's opinion."* Thus, one of the pleas raised by the appellant in support of the appeal is the unsubstantiation: the attacked decision has not been substantiated.

Another plea in support of the appeal is the violation of the principle of equality of arms and fair trial[11], as OSIM gave the value of presumption *iuris et de iure* to a communication from the National Medicines Agency setting out that *"the certificates of registration issued before the date of 01.01.2000, although not fully harmonized with the Directive 65/65/EEC, are based on an extensive chemical-pharmaceutical, biological, pharmaco-toxic and clinical documentation"* thereby preventing the appellant from effectively appealing against its acts. This represented an obvious violation of the right to a fair trial.

Finally, the appellant also invokes the groundlessness of the judgment, as the respondent OSIM states that Romanian norms in 1996 were "*to a great extent"* in accordance with the Directive 65/65/EEC, even if the procedure was "*not fully harmonized";* however, *"to a great extent*" does not mean completely and *"not fully harmonized"* does not mean identical.

OSIM filed a statement of defence claiming that the Court should reject the appeal as unfounded and, subsidiarily, reject the head of claim concerning the payment of Court costs. In brief, the respondent OSIM shows that in Romania the right to obtain an SPC is limited to the products – active substances – which cumulatively satisfy the requirements of Article 3 (b) and (d) and Article 19 (l) of the Regulation, where it is relevant that the product was not placed on the market before the date of 01.01.2000, even if it had been already commercialized in the Community.

The Court ascertains that the decision appealed against was made based on a misinterpretation of the applicable legal provisions and allows the appeal. We quote from the statement of reasons of the Court:

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[10] Article 20 is the former Article 19 a (I) of the Regulation No.1768/92 – Additional provisions relating to the enlargement of the Community

[11] Principle of equality of arms and the fair trial is applicable in civil matters in the meaning of Art. 6 of ECHR

"The Court retained that the problem submitted for trial is to establish whether the Registration Certificates no. 5256/1996, 5257/96, 5258/96 and 6764/98, 5488/97, granted by the Ministry of Health, represent or not the first authorizations to place the product on the market, referred to under Article 3 (d) of the Regulation, as related to Article 3 (b) of the same Regulation and the harmonization of the Romanian legislation with the Directive 65/65/EEC.

These certificates cannot represent a valid authorization for placing the product on the market as a medicinal product, in accordance with the Directive 65/65/EEC, and do not comply with the requirements of Article 3 (b) and (d) of the Regulation. In support of this interpretation, the Court also considered the provisions of Article 8, (1) (b) of the Regulation, stipulating that: "The application for a certificate shall contain: […] a copy of the authorization to place the product on the market, as referred to in Article 3 (b), in which the product is identified, containing in particular the number and date of the authorization and the summary of the product characteristics listed in Article 4a of Directive 65/65/EEC". For the same purpose, the Court retains the case-law of the ECJ referring to the rulings in the case C-127/00 Hässle AB vs Ratiopharm. It also judges that a medicament that has not been authorized pursuant to the Community law cannot be introduced onto the market of a Member State. And there are no provisions in the Directive 65/65/EEC to stipulate the possibility of such derogations or to allow one to consider that the mere introduction onto the market, even during several years, of a medicament which was not the subject of a market authorization issued in accordance with the Community law, could replace such an authorization."[12]

In conclusion, the Court considered that the appellant's application for the grant of an SPC cumulatively satisfies the requirements of Article 3 of the Regulation, as follows:

a) The product is protected by a basic patent in force, i.e. patent RO 2192T, granted under the Law No.93/1998;

b) A valid authorization for placing the product on the market as a medicinal product was granted in accordance with the Directive 65/65/EEC – Market authorization no. 3149/2003/01 issued on 21.02.2003;

c) The product has not already been the subject of a certificate;

d) The authorization referred to under letter b) is the first authorization for placing the product on the market as a medicinal product.

Based on these reasons, ascertaining that the decision appealed against was given with the misinterpretation of the incidental legal provisions, through the Civil Matters Decision No. 593 pronounced in open session on 27.05.2009, the Court allowed the appeal lodged by the appellant Eli Lilly and Company against the Decision No. 64/16.05.2009 made by the respondent OSIM and ordered the same to grant the SPC for the product Humalog (Human Insulin Lys Pro). The decision remained final and irrevocable by lack of appeal.

Consequently, OSIM granted the Supplementary Protection Certificate for the product Humalog (Human Insulin Lys-Pro) valid from the date of 07.02.2010 until 30.04.2011.

2. <u>Case Anastrozole (the medicament named "Arimidex"). File No. 42583/3/2009, Law Court of Bucharest, Fifth Civil Section</u>

The supplementary protection certificate application no. c2007-080 of the applicant AstraZeneka UK Limited for the product of the ICD Anastrozole (active substance having the chemical name 2,2'-[5-(1H-1,2,4-triazole-1-methyl)-1,3-phenylene]di(2-methylproiononitrile),

[12] Decision No. 593 of the Law Court of Bucharest, Fifth Civil Section, pronounced in open session on 27.05.2010

possibly as a pharmaceutically acceptable addition salt, was filed with OSIM on 29.06.2007, within the 6-month legal time limit of Romania's accession to the European Union, under the transitional provisions stipulated in Article 19a (I) of the Regulation.

With a view to granting the SPC applied for, the Examination Board of OSIM analyzed the compliance with the conditions stipulated under Article 3 of the Regulation, as follows:

The product named Anastrozole, optionally as a pharmaceutically acceptable addition salt, is protected by the basic patent in force, RO 2.189T having the title "*Aralkyl-Substituted Heterocyclic Compounds and Pharmaceutical or Veterinary Composition Containing the Same",* as identified in Claims 1 and 7 (first compound) and first example in the description of the basic patent. The condition provided under letter a) of Article 3 is complied with. No SPC has been granted in Romania in respect of said product, the condition provided under letter c) of the same article being also met thereby. From the SPC application filed with OSIM it results that the product Anastrozole is retrieved as an active substance in the medicament Arimidex, authorized for the first time to be placed on the market in Romania as a medicinal product through the authorization (Registration Certificate) no. 92/1999/01 of 27.05.1999 and reauthorized to be placed on the market through the market authorization no. 6459/2006/01 of 31.05.2006. The first authorization for placing the product on the market in EEA is the authorization no. PL12619/0106 granted on 11.08.1995, in the United Kingdom. For the cumulative compliance with the four conditions stipulated by Article 3 of the Regulation, the market authorization no. 6459/2006/01 of 31.05.2006, granted in accordance with the Directive 65/65/EEC, needs to be the first authorization to place the product Anastrozole on the market, as a medicinal product (Article 3 d).

OSIM ascertained that, based on the authorization no. 92/1999/01 of 27.05.1999, the medicament Arimidex could be commercialized in Romania before the date of 01.01.2000.

In a similar way with the Humalog cas, as the conditions for the grant of the SPC for the product Anastrozole have not been cumulatively complied with, the application was refused by the Examination Board, through the Decision No. 3/20 of 30.10.2008[13].

On 26.02.2009, the applicant AstraZeneka UK Limited, represented by SC Rominvent SA, lodged an appeal against the decision of the Examination Board, with the OSIM Board of Appeal, asking for the annulment of the decision of the Examination Board and admission of the SPC application c2007-080. The legal ground invoked: Article 17 of the Regulation, Article 51 (1) of the Patent Law 64/1991, as republished.

As an argument in favour of granting the SPC, the appellant invokes Article 2 of the Regulation, mentioning that*: "Article 2 in the Regulation No.1768/1992 provides that the medicinal product in respect of which the SPC is applied for should be the subject of a valid authorization for placing the product on the market, issued in accordance with the Directive 65/65/EEC (applicable to medicinal products for human use) abrogated by Directive 2001/83/EC, or the Directive 81/851/EEC (in case of medicinal products for veterinary use) abrogated by Directive 2001/82/EC on the Community code relating to veterinary medicinal products".*[14]

[13] From the whole number of SPC applications filed with OSIM under Article 19 (I) of the Regulation, for products contained in medicaments commercialized on the territory of Romania before the date of 01.01.2000, based on certificates or authorizations which were not fully harmonized with the Directive 65/65/EEC, the first decision to refuse the application was made in respect of Anastrozole. The chronology of the decisions is only relevant in the light of the evolution of the grounds invoked by the representatives of patent owners upon attacking OSIM decisions.

[14] Text of Article 2 of the Regulation No. 1768/1992: *Scope*

"Any product protected by a patent in the territory of a Member State and subject, prior to being placed on the market as a medicinal product, to an administrative authorization procedure as laid down in Council

Directive 65/65/EEC… may, under the terms and conditions provided for in this Regulation, be the subject of a certificate."

It also relies on the above-mentioned case Hassle vs Ratiopharm in order to substantiate the identity between the authorization referred to under Article 3 and the authorization under Article 19 of the Regulation, which must be in accordance with the Directive 65/65/EEC.

The ruling of the OSIM Board of Appeal as to reject the appeal is pronounced with majority of votes through the Decision No. 67/25.05.2009. The Chairman of the Board expressed a separate opinion thereto, as to allow the appeal. The ground of the Board judgment is similar with the Humalog case. The legal grounds invoked in support thereof are Article 20 of the Regulation (EC) No.469/2009 concerning the SPC for medicaments and Article 53 of the Patent Law 64/1991, as republished.

In his dissenting opinion, the Chairman of the Board argued that the allowability of the appeal was imposed by the reason that said Registration Certificates cannot represent first authorizations to place a medicament on the market, as they can be ignored in the meaning of Article 20 of SPC Regulation No.469/2009 (EC). He also referred to the case no. HC 08 C 02210 Synthon B.V. vs Merz Pharma of 02.04.2009, where the judge Justice Floyd presented a judgment of Bundespatentgericht of 11.12.2007 (pages 7-8) and stated that old authorizations, granted in accordance with the unharmonized legislation, are not taken into account by the Federal Patent Court of Germany.

The above-mentioned Decision No. 67/25.05.2009 of the OSIM Board of Appeal was appealed against by the appellant AstraZeneka UK Limited, represented by SCA David and Baias, before the Law Court of Bucharest – Civil and Intellectual Property Section, on 28.10.2009, under the number 42583/3/2009. In opposition with the respondent OSIM and pursuant to the provisions of Article 57 (1) of the Patent Law No. 64/1991 and Article 282 and the following of the Civil Procedure Code, the appellant claims that the Court should:

i) invalidate the Decision appealed against in whole;

ii) order OSIM to issue an SPC for the product Arimidex, with the active substance Anastrozole; […].

In the statement of reasons of the attack, the appellant indicates first that, although the Decision of the OSIM Board of Appeal is related to the Regulation (EC) No. 469/2009, which is the codified version of the SPC Regulation No. 1768/1992, reference will be made to the consolidated text of the Regulation, prior to the codification of 2009. The appeal is based on the unlawfulness and groundlessness of the Decision made by the Board of Appeal, the appellant putting forward its arguments to prove that:

1.The first authorization for placing the product on the market, within the meaning of Article 3 (d) of the Regulation must be a market authorization harmonized with the Directive 65/65/EEC.

In order to support the uniform application, at the Community level, of the Regulation, and thus, of the national procedures for medicaments authorization, which must be in compliance with the Directive 65/65/EC, the appellant relies on the cases Hassle AB vs Ratiopharm GmbH and Pharmacia Italia SpA. Because almost 30 years elapsed from the adoption of the Directive, in 1965, to the issuance of the Regulation, in 1992, it *is "impossible to retain that Article 3 (d) would relate to a market authorization unharmonized with the Directive."*

2.The market authorization-1999 (in fact the Registration Certificate of 1999) was not issued by virtue of a procedure harmonized with the Directive 65/65/EEC.

Starting from the assertion of the respondent OSIM itself, that the Certificate of 1999 was not harmonized with the Directive, the appellant points out the meaning of the date of 01.01.2000, and states:

"Thus, from the viewpoint of the Regulation purpose, the market authorizations issued after the date of 01.01.2000, under the GEO No. 152/1999, comply with the Directive 65/65/EEC and can

give the right to the grant of an SPC, while the market authorizations issued prior to this date, under the GO 31/1995 do not comply with the Directive 65/65/EEC and, by consequence, cannot be relied upon for the grant of an SPC. In other words, the date of 01.01.2000 is mentioned by this text only because the grant of any authorization in accordance with the Directive would not have been possible prior to this date. Consequently, the conclusion of the OSIM "analysis" alleging that the presence of the product on the Romanian market before the date of 01.01.2000 would represent a reason of non-compliance with the Regulation requirements for the grant of an SPC is obviously erroneous and lacks any legal support."[15]

The statement of reasons of the Court findings is identical with the statement in the Humalog-Insulin lispro. It is found that the first authorization to place the product on the market is not the Registration Certificate No. 92/1991/01, but the market authorization no. 6459/2006/01 issued on 31.05.2006 under the GEO No. 152/1999 harmonizing the national legislation with the Directive 65/65/EEC, coming to the conclusion that the decision appealed against was given with the misinterpretation of the legal provisions. OSIM was ordered to grant the SPC for the product Arimidex.

The Decision No. 523/13.05.2010 of the Law Court of Bucharest was further appealed against by OSIM.

This further appeal was based on the consideration that, in ruling the appeal brought against the OSIM Board of Appeal, the Court misinterpreted the provisions of Article 3 and Article 19 a (I) of the Regulation. As, under Article 267 of the Treaty on the Functioning of the European Union (former Article 234 EC), the mission of ensuring application, interpretation and enforcement of Community law throughout the territory of the EU is incumbent on the European Court of Justice, OSIM found necessary that the following question should be referred to the ECJ for preliminary ruling[16]:

"Does an authorization granted in Romania, which is in accordance with the Council Directive 65/65/EEC, represent for a product "the first authorization for placing the product on the Romanian market as a medicinal product", provided that this authorization was obtained following to a request for reauthorization based on a prior authorization issued under certain normative acts harmonized "to a great extent" with the Directive 65/65/EEC?"

Through a statement of defence, AstraZeneka UK Limited, represented by SCA Baias and Baias, asks the Court of Appeal to reject the appeal entered by the respondent OSIM, as unfounded, invoking, on the one hand, that there is no need of a preliminary ruling of the ECJ concerning the interpretation of Article 3 of the Regulation, and, on the other hand, that the Law Court of Bucharest considered correctly that the market authorization of 2006 was the first authorization for placing the product Arimidex on the market, within the meaning of Article 3 (d) read in conjunction with Article 3 (b) of the Regulation. The preliminary ruling of ECJ is considered unnecessary for the following reason: *"the concept of "first authorization for placing a product on the market" was settled by the ECJ in the case C-127/00 Hassle vs Ratiopharm GmbH, the court being not obliged de plano to refer*

[15] Decision No. 523 of the Law Court of Bucharest, Fifth Civil Section, pronounced in open session on 13.05.2010, pages 13-14.

[16] In accordance with the provisions of Article 267 of the Treaty on the Functioning of the European Union (TFEU), Article 2 (1) of the Law 340/2009 on a declaration made by Romania under the provisions of Art 35 (2) of TFEU, as well as in accordance with the Information Note on references from national courts for a preliminary ruling, published in the JO No.297 of 5 December 2009 and Article 23 in the Statutes of the European Court of Justice, where an instance has doubts on the interpretation of an act issued by a European institution, it may refer the case to the ECJ for preliminary ruling.

the case to the ECJ considering that a question within the meaning of Article 267 TFEU was raised.[17]"

The company Teva Pharmaceuticals SRL, represented by SCA Nestor Nestor Diculescu Kingston Petersen, entered, based on Article 49 (1) and (3) read in conjunction with Article 51, 54, 55 and 56 of CCP, an application for intervention in the interest of OSIM and in opposition with AstraZeneka UK Limited, claiming, among other things, that the Court should allow the appeal entered by OSIM and change the decision made by the Law Court of Bucharest[18]. Teva Pharmaceuticals SRL justified its interest in the case Anastrozole by its being the owner of the authorization for placing on the Romanian market the generic medicament Anastrozole TEVA, having the anastrozole as an active principle. Because the patent RO 2189T has expired since 14.06.2008, the company which manufactures generic medicaments is interested in the commercialization, on the Romanian market, of the generic medicament containing the active substance/principle Anastrozole, for which it already obtained the market authorization. The extension of the SPC duration may thereby affect the rights of the company to commercialize its products, rights obtained upon issuance of the market authorization. The arguments brought by the intervener in order to support the lack of legal grounds of the decision made by the Law Court of Bucharest concerning Article 3 and Article 19 a (I) of the Regulation are the following:

A. Arguments based on the interpretation of legal texts

Article 19 a (l) is an amendment brought to Article 19 a as a consequence of the Act of Accession of Bulgaria and Romania to the EU[19]. This article originates in Article 32 of the Law No 581/2004 on the supplementary protection certificate for medicaments and plant-protection products"[20] which has the following content:

"a certificate may be granted for any product which, on the date of entering into force of this law, is protected by a basic patent in force or by a pipeline protection certificate in force and for which ***a first authorization to be placed on the Romanian market as a medicament or plant protection product was obtained starting from 1 January 2000,*** *provided that the application for the grant of the certificate is filed within a time limit of 6 months of the date of Romania's accession to the European Union."*

Hence, as regards Romania, an SPC cannot be granted if the first authorization for placing a medicament on the market was issued before the date of 1 January 2000.

B. Arguments based on the interpretation of similar legal texts by other Member States

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[17] Paul Craig, Greinee de Burca – Dreptul Uniunii Europene, Fourth Edition, Ed. Hamangiu, Bucharest 2009, p. 585

[18] From the Application for accessory intervention entered by NNDKP, only the aspects relating to the appeal lodged by OSIM shall be hereinafter referred to.

[19] The Act of Accession of Romania and Bulgaria to the EU was published in the Official Journal of the European Union No. L 157/11 of 21.06.2005. In Annex III to the Protocol setting the conditions and arrangements for accession, the chapter concerning the company law contains the Industrial Property Rights section with the sub-section Supplementary Protection Certificates.

[20] Law No.581/2004 on the supplementary protection certificate for medicaments and plant protection products was published in the Official Gazette of Romania No. 1233 of 21 December 2004. The law never produced effects and was expressly abrogated by the Law No. 107/2007, because, on the date of Romania's accession to the European Union, the Community Regulations became directly applicable and prevailing over the conflicting provisions of national legislation.

It is the case of Hungary and Poland. For the transitional (pipeline) protection in the two said Member States, there are applicable the provisions of Article 19 a (f) and (h), respectively. In this two Member States, the same as in Romania, the transitional provisions of Article 19 a do not expressly refer to a first market authorization obtained in the respective Member State, as is the case in Cyprus, Estonia, Latvia, Lithuania, Malta, Slovenia and Slovakia. In its position of additional negotiation in the view of its accession to the EU, the government of Hungary upheld the **applicability of the SPC regime only for those medicaments whose first authorization to be placed on the Community or Hungarian market (or the market of other countries in course of accession) was obtained after 1 January 2000**, position which was accepted by the EU.

The interpretation presented above is also applicable to Poland, where an SPC cannot be granted for a product whose market authorization was obtained before the date of 1 January 2000, in Poland or in any Member State, as mentioned in the specialized literature[21].

C. Arguments based on the interpretation of the European Court of Justice

In the case C-66/09: Kirin Amgen. Inc. vs Lietuvos Respublikos valstybinis patent biuras, the ECJ concludes: *"the objective pursued by Regulation No 1768/92 of according uniform protection for a medicinal product throughout the European Union does not preclude transitional provisions, resulting from the accession negotiations, which may mean that it is not possible to apply for an SPC for certain medicinal products in certain Member States. This outcome, which may impede, even if only temporarily, that objective and the functioning of the internal market, is justified by the legitimate objectives concerning health policies, including, as the case may be, the financial stability of the health systems of the Member States".*

D. Arguments based on an interpretation *per a contrario*

Having in view that from the transitional provisions concerning states as Malta or Slovenia, from the wording of sub-paragraphs (g) and (i), it explicitly results that the first authorization for placing a product on the market relates to Malta or Slovenia, respectively, while the wording of sub-paragraph (I) concerning Romania is comparable with the situation of Hungary and Poland, it obviously outcomes that the interpretation of the provisions of the Regulation cannot lead with certainty to the conclusion that, in Romania, an SPC may be granted for a product for which an authorization for placing it on the market was obtained before the date of 1 January 2000 in any Member State, as interpreted by the Romanian Law Court of Bucharest.

The intervener further invokes the provisions of Article 2 of the Regulation.

The two requirements of this article provide that the product should be protected by a basic patent and should be subjected to authorization, pursuant to the Directive, prior to its being placed on the market. The provisions of Article 2 differ from those of Article 3 (a) and (b) in that Article 2 excludes from its scope the products placed on the market in the absence of an authorization pursuant to the Directive 65/65. Moreover, if the grant of an SPC based on other authorizations than those pursuant to the Directive were possible, the period of exclusivity would exceed, in certain cases, the total limit of 15 years from the date of the first authorization in Community, mentioned within the eighth recital of the preamble of the Regulation.

Finally, the arguments relating to the logic of the Regulation could be summarized by the following deduction: if the authorizations legally obtained before the date of 1 January 2000 could not be deemed to be the first authorizations for placing a medicament on the market, for lack of

[21] Rafal Witek, The *First Yyear of SPC in Poland: A Tentative Summary,* http: www.wtspatent.pl/files/en5.pdf

compliance with the Directive, the reference date mentioned under Article 19 a (l) (i.e. 1 January 2000) would be completely useless, as all the products having market authorization received after this date would be automatically eligible for the grant of an SPC (no market authorization in compliance with the said Directive was obtained before this date).

The intervener claimed that six questions should be referred to the European Court of Justice for preliminary ruling. Of these questions, we will mention the following:

1. In the meaning of Article 20 (j) (former Article 19 a (l)), may an SPC be granted in Romania for a product whose first market authorization, pursuant to the Directive 65/65/EEC, was obtained before the date of 1 January 2000 in any Member State?

2. Should the answer in the first question be in the affirmative, is a product firstly authorized to be placed on the market in Romania, before the date of 1 January 2000, without the administrative procedure provided for by the Directive 65/65, eligible to be granted an SPC in accordance with the Regulation?

3. Within the meaning of Article 3 (d) of the Regulation, is an authorization issued in accordance with the legislation in force in Romania before the year 2000, and which was not in compliance with the Directive 65/65 but allowed the product to be legally placed on the market, deemed to be the first authorization for placing a product on the market as a medicinal product?

The application to intervene is dismissed by the Court of Appeal of Bucharest – Ninth Civil Section for cases concerning intellectual property, based on the grounds invoked in the Statement of defence filed by AstraZeneka UK Limited, represented by SCA David and Baias. There was invoked the objection of inadmissibility of the legal strategy proposed by the intervener, namely the fact that the product Anastrozole is not within the scope of the Regulation, i.e. Article 2. Firstly, a new legal argument was invoked, i.e. Article 2, despite the fact that OSIM did not invoke or contest this article in its decisions; secondly, by invoking Article 2, the principle of availability was violated. Thus, OSIM entered its further appeal relying on the ground referred to under Article 304 (9) of the CPC, i.e. "wrongful application of law", in relation with Article 3 and Article 19 a (I) of the Regulation, which are the only legal norms under assessment by the Examination Board, Board of Appeal and Law Court of Bucharest. Whereas Article 2 was not the subject of a dispute between the parties, the arguments brought in support of the appeal entered by OSIM cannot be allowed. Thirdly, the fact of invoking Article 2 violates the principle of double jurisdiction, since the intervener Teva may not invoke criticism on applicability and interpretation of legal texts which were not discussed before the Law Court of Bucharest, but are brought, for the first time, before the Court of Appeal.

Although, in the Written Conclusions sent to the Court of Appeal on 08.02.2011, OSIM reiterates the need to refer the questions on the interpretation of Article 19 a of the Regulation for preliminary ruling by the ECJ, provided that, in SPC matters, after Romania's accession to the EU there is no corresponding case-law, the Court of Appeal is a court whose decisions cannot be subject of internal attack, and *" the preliminary ruling system is a fundamental mechanism of European Union law aimed at enabling national courts to ensure uniform interpretation and application of that law in all the Member States"*[22], this request is rejected by the Court.

The Court of Appeal dismisses the appeal entered by OSIM before the Court of Appeal of Bucharest against the Decision No. 523/13.05.2010 of the Law Court of Bucharest as unfounded and,

[22] Information Note on references from national courts for a preliminary ruling, 12, OJ No. C 297/1 of 5 december 2009.

at the same time, it rejects as groundless the application to intervene filed by Teva Pharmaceuticals SRL in the interest of OSIM. The Decision of the Law Court of Bucharest is thereby irrevocable.

As a consequence, OSIM granted the Supplementary Protection Certificate for the product Anastrozole, possibly as a pharmaceutically-acceptable addition salt, valid from 15.06.2008 until 11.08.2010.

3.Case Olanzapine (the medicament named Zyprexa). File No. 42589/3/2009, Law Court of Bucharest, Fifth Civil Section

The supplementary protection certificate application no. c2007-058 of the applicant Eli Lilly and Company, for the product having the ICD Olanzapine (the active substance with the chemical name 2-methyl-10-(4-methyl-1-piperazinyl)-4H-thieno[2,3-b][1,5]benzodiazepine), was filed with OSIM on 14.06.2007, within the 6-month legal time limit of Romania's accession to the European Union, under the transitional provisions stipulated in Article 19a (l) of the Regulation.

With a view to granting the SPC applied for, the Examination Board of OSIM analyzed the compliance with the conditions stipulated under Article 3 of the Regulation, as follows:

The product named Olanzapine is protected by the basic patent in force, RO 2.168T having the title *Pharmaceutical Compounds and Pharmaceutical Compositions* as identified by Claims 1 and 7 of the basic patent. The condition provided under letter a) of Article 3 is complied with. No SPC has been granted in Romania in respect of said product, the condition provided under letter c) of the same article being also met thereby. From the SPC application filed with OSIM it results that the product Olanzapine is retrieved as an active substance in the medicament named Zyprexa, authorized for the first time to be placed on the market in Romania as a medicinal product through the Registration Certificates no. 5920/1997, 5970/1997 and 5931/1997 by the Ministry of Health, based on the Government Ordinance No 31/1995 and the Order of the Minister of Health No. 949/1991 mentioned above. The authorization for placing the product on the market on which the SPC application is based is the market authorization no. 1806/2001/01 of 23.03.2001. The first authorization for placing the product on the market in EEA is in fact a series of authorizations issued by EMEA on 27.09.1996. For the cumulative compliance with the four conditions stipulated by Article 3 of the Regulation, the market authorization of 2001, granted in accordance with the Directive 65/65/EEC, needs to be the first authorization to place the product Olanzapine on the market, as a medicinal product (Article 3 d).

The case is identically similar with the first two cases presented above, i.e. Insulin lispro and Anastrozole, hence we will not analyze it in detail. The SPC application was refused by the Examination Board through the Decision No.3/21 of 30.10.2008.

On 25.02.2009, the company Eli Lilly and Company, represented by SCA Turcu & Turcu, lodged an appeal against the decision of the Examination Board, with the OSIM Board of Appeal, asking for *"the appeal to be allowed, the Decision no. 3/21 of 30.10.2008 to be annulled and a supplementary protection certificate to be granted for the medicinal product Zyprexa (Olanzepine)"*.

The statement of reasons of the appeal is similar to the Insulin lispro case-file and, following to the analysis of the reasons and documents enclosed with the case-file, the OSIM Board of Appeal decided to reject the appeal by virtue of the same *de facto* and *de jure* considerations referred to in the Insulin lispro case-file.

The Decision No. 62/16.07.2009 of the OSIM Board of Appeal as to reject the appeal, was appealed against by the appellant Eli Lilly and Company, represented by SCA Turcu & Turcu, in opposition with the respondent State Office for Inventions and Trademarks (OSIM). It was ruled through the Civil Decision No. 875A pronounced in open session on 07.07.2010 by the Law Court of Bucharest, Fifth Civil Section. The grounds and arguments as to accept the application for the grant of an SPC for Olazepine are the same as those referred to in the previously presented case Humalog

(Insulin lis pro). Also, the statement of reasons of the Civil Decision No. 875A is identical with the Civil Decision No. 593 pronounced in open session on 27.05.2009 in respect of the Humalog case.

But this time, the Civil Decision No. 875A is further appealed against by OSIM which asks the Court of Appeal of Bucharest for preliminary ruling by the European Court of Justice. The procedural steps and arguments brought by the parties are further on carried out in a way similar with the Anastrozole file. Teva Pharmaceuticals Europe BV also applies for accessory intervention. In the session of 23.12.2010, the Court adjourns the case with the following ruling: it unanimously dismisses the Teva application for accessory intervention as inadmissible and ascertains, with majority, the admissibility of principle of the intervention application, with the dissenting opinion of judge Stanciu as to the inadmissibility of the intervention application.[23] Through the Civil Decision No. 84/01.03.2011 it dismisses the appeal as unfounded and dismisses the application to intervene. The Court Decision is irrevocable.

Consequently, OSIM grants the Supplementary Protection certificate for the product Olanzapine, valid from 25.04.2011 until 27.09.2011.

4. Case Candesartan Cilexetil (Atacand). File No. 35794/3/2011, Law Court of Bucharest

The supplementary protection certificate application no. c2007-079 was filed with OSIM by Takeda Pharmaceutical Company Limited (hereinafter Takeda), based on the pipeline protection patent RO 2005T, granted on 31.08.1999, protecting the active substance Candesartan cilexetil and having the expiry date on 19.04.2011. The first authorization for placing the product on the market in the European Economic Area (EEA) under the number PL 15661/0001/0002/0003/0004, obtained by Takeda in UK, on 29.04.1997, for the medicament Atacand containing the patented product, is mentioned in the application form.

On 23.09.1998, the Ministry of National Health authorized the medicament Atacand, having Candesartan cilexetil as an active substance, to be placed on the Romanian market by issuing the Registration Certificates no. 7480/23.09.1998, 7481/23.09.1998 and 7479/23.09.1998. On 02.04.2003, Takeda applied with the National Medicines Agency for the reauthorization of the medicament Atacand and obtained the market authorizations no. 6959/2006/01 and 6960/2006/01 of 17.12.2006, granted through a procedure in accordance with the provisions of the Directive 65/65/EEC. The SPC application mentioned the market authorization of 2006 as the first authorization for placing the medicament on the market, in Romania, and asked for the extension of protection for the product 1-(cyclohexyloxycarbonyloxy)ethyl- 2-ethoxy-1-[[2'-(1H-tetrazol-5-yl)biphenyl-4-yl]methyl]benzimidazole-7-carboxylate - Candesartan cilexetil in the basic patent.

Following to the analysis of the application documents, the SPC application was refused through the Decision No. 3/16 of 30.10.2008 of the Examination Board of OSIM, on the ground of not cumulatively complying with the conditions for the grant of an SPC, stipulated under Article 3 (b) and (d), and Article 19a (I) of the Regulation. In fact, the Board considered that the market authorization of 2006 was not the first market authorization of the product, as said product had been commercialized in Romania since 23.09.1998, based on the Registration Certificates. Moreover, said market authorization represents a reauthorization. The Decision No. 3/16 of 30.10.2008 was attacked by appeal lodged with OSIM.

Through the Decision No. 66/25.09.2009, the OSIM Board of Appeal rejected the appeal entered by Takeda, maintaining the decision to refuse the application.

The above-mentioned decision 66/25.09.2009 of the Board of Appeal was appealed against by the applicant Takeda, before the Law Court of Bucharest, the subject of the case-file no. 42584/3/2009. The reasons invoked were the same as in the previous cases and we will not insist

[23] http://noulportal.just.ro/InstantaDosar.aspx?idinstitutie

thereupon, as the cases are identical. The appeal brought by Takeda was allowed by the Law Court of Bucharest in an open session, on 11.05.2010, the Court changed the Decision 66/25.09.2009 of the Board of Appeal in whole and ordered OSIM to grant an SPC for the product Candesartan cilexetil. The Civil Decision No.626A/11.05.2010 remained final and irrevocable by lack of appeal and OSIM granted the SPC applied for, valid from 20.04.2011 to 29.04.2012.

The case differs from the other cases presented before in that a Romanian medicaments company, Teva Pharmaceuticals SRL, filed with OSIM, on 29.03.2011, a request for revocation of SPC Atacand, invoking the violation of the provisions of Article 2 and Article 19a (I) of the Regulation.

As regards Article2, Teva takes the view that: *"a product authorized to be placed on the market as a medicinal product for the first time in Romania, without being subjected to the administrative procedure provided for by the Directive 65/65/EEC (such as Candesartan cilexetil), should not be eligible for protection by SPC, in accordance with the provisions of the SPC Regulations and, consequently, does not enter within the scope of Article 2"*[24]. As regards the violation of the provisions of Article 19a (l) of the Regulation, within the same Request for revocation, Teva mentions that: *"the wording of Article 19a (l) is the direct result of negotiations carried out by Romania in the process of its accession to the European Union"* and from the historical interpretation of legal texts, it results that the said article *"sets out an exception from the general rule, currently applicable at the Community level, and this is why the said article should have, in its turn, a restrictive interpretation which must be supported by the case-law and the doctrine based on the interpretation of other identically similar legal texts adopted by other Member States of the European Union, as well as the interpretation of the European Court of Justice"*. The request for revocation does not expressly refer to the unlawfulness of application of Article 3 of the Regulation.

On 19.05.2011, Teva also brought before the Court an Action for Invalidation of SPC, in opposition with Takeda and with OSIM as issuing authority, based on Article 54 (1) of the Patent Law, as republished, read in conjunction with the provisions of Article 2, Article 3 (b) and (d), Article 15, Article 17, Article 18 and Article 19a (I) of the Regulation, read in conjunction with the provisions of Article 109 (1) and Article 112 of the Civil Procedure Code. The action is the subject of the case-file no.35794/3/2011 pending in the Law Court of Bucharest. In supporting the plea of violation of said Community provisions, Teva relied on the same arguments, as well as on an identical reasoning as in the Request for Revocation. Takeda, represented by D&B David and Baias SCA, filed with OSIM, based on Article 58 (5) and Article 59 (6) of the Implementing Regulations to the Patent Law No.64/1991, as republished, a request to suspend the proceedings concerning the Request for Revocation of SPC until a final and irrevocable decision is made in the case of the Action in Annulment pending before the Law Court of Bucharest.

We find that the request to suspend the proceedings, filed by Takeda with OSIM, is well founded, taking into account that the lawfulness of the SPC Atacand in relation with Article 2, Article 19a (I) and Article 3 are concomitantly assessed by OSIM, by means of the request to suspend the proceedings, and by the Law Court of Bucharest, by means of the Action in Annulment, in the case-file no. 35794/3/2011. The judgment to be given thereupon by the Law Court of Bucharest shall be enforceable judgment for OSIM, given its opposable and mandatory characteristics, hence, it shall play a decisive role as regards the ruling to be made by OSIM. In order to prevent contradictory rulings to be made with regard to the same case, with undesirable effects upon the stability of the legal relationship between the parties, it would be desirable that OSIM orders the proceedings concerning the Request for Revocation of SPC c2007-07912 to be suspended.

[24] Request for revocation filed with OSIM by Teva on 29.03.2011, page 6, point 5 (a).

At the same time, we assume the argument of Takeda according to which the grant of the SPC Atacand by OSIM does not represent the finality of a procedure carried out within OSIM, but *"the exclusive result of enforcing the Decision No 626A made by the Law Court of Bucharest on 11.05.2010, judgment by which the lawfulness and groundedness of the application for the grant of the SPC Atacand has been finally and irrevocably decided by the law courts […]. In this context, as OSIM is the administrative authority which observed the imperative provisions of a judicial decision, […] only the law courts could decide upon the lawfulness of the grant of the SPC Atacand, and not OSIM, to which the decisions of the law courts are mandatory and enforceable."* (page 7 of the Request to suspend the procedure filed with OSIM on 16.12.2011)

5. Case Donepezil and the Pharmaceutically Acceptable Salts Thereof (Aricept). File No.19925/3/2010 – Court of Appeal of Bucharest

The supplementary protection certificate application no. c2007-073 was filed with OSIM, on 27.06.2007, by the applicant Eisai Co. Ltd. of Japan (hereinafter Eisai), through the professional representative Cabinet Margareta Oproiu, based on the pipeline protection patent RO 2004T, protecting the active substance Donepezil hydrochloride. The first authorization for placing the product on the market in the European Economic Area (EEA), under the numbers 10555/0006 and 10555/0007, obtained by Eisai in UK, on 14.02.1997 for the medicament Aricept, containing the product Donepezil protected by the above-mentioned patent, is mentioned in the application form.

On 14.01.1998, the Ministry of National Health authorized the medicament Aricept, having Donepezil as an active substance, to be placed on the Romanian market by issuing the Registration Certificates no. 6662/1998 and 6663/1998. On 29.04.2005, Eisai applied with the National Medicines Agency for the reauthorization of the medicament Aricept and obtained the market authorizations no. 5307/2005/01 and 5308/2005/01, granted through an administrative procedure in accordance with the provisions of the Directive 65/65/EEC.

The SPC application mentioned the market authorization of 2005 as the first authorization for placing the medicament on the market, in Romania, and asked for the extension of protection for the product 2-[(1-Benzyl-4-piperidyl(methyl)]-5,6-dimethoxy-2,3-dihydroinden-1-one and the pharmaceutically acceptable salts thereof, according to Claims 1 – 3 and 5 and Example 4 of the basic patent.

Following to the analysis of the application documents, the SPC application was refused through the Decision No. 3/15 of 30.10.2008 of the Examination Board of OSIM, on the ground of not cumulatively complying with the conditions for the grant of an SPC, stipulated under Article 3 (b) and (d) and Article 19a (I) of the Regulation.

Through the Decision No. 12/25.02.2010, the OSIM Board of Appeal rejected the appeal entered by Eisai, maintaining the decision to refuse the application.

The said Decision 12/25.02.2010 of the Board of Appeal was appealed against by the applicant Eisai before the Law Court of Bucharest, said appeal being the subject of the case-file no. 19925/3/2010. The reasons invoked were the same as in the previous cases, and we will not insist thereupon, as the cases are identical. The matter pending before the Court was to establish whether the Registration Certificates of 1998 are or are not the first authorizations for placing the medicament Aricept on the Romanian market, referred to under Article 3 (d), as related to Article 3 (b) of the Regulation and the harmonization of Romanian legislation with the Directive 65/65/EEC.

The Law Court of Bucharest allowed, in the open session of 19.10.2010, the appeal brought by Eisai and decided to change the attacked decision in whole as to allow the request in the application c2007-073 for the grant of an SPC for Donepezil and the pharmaceutically acceptable salts thereof, particularly the hydrochloride.

The Civil Decision No. 1087A/19.10.2010, given by the Law Court of Bucharest in respect of the case-file no. 19925/3/2010, was further appealed against by OSIM before the Court of Appeal of

Bucharest. The appeal relies on the ground that the attacked Decision was given with wrong application and interpretation of the law, as provided under Article 304 (9) of the Code of Civil Procedure. Thus, in this Decision, it was found that the Registration Certificates of 1998 were not the first authorizations to place the medicament Aricept on the Romanian market, because it was found that the first market authorization obtained by virtue of a procedure harmonized with the Directive 65/65/EEC was the market authorization no. 5307/2005, finally coming to the obviously unlawful and groundless conclusion that this authorization is, at the same time, the first authorization for placing the product on the market, in Romania. However, the condition set forth by Article 3 (d) of the Regulation provides that the authorization obtained in accordance with the Directive should be the first authorization for placing the product on the market as a medicinal product, and said provisions cannot be interpreted within the meaning that the first authorization obtained in accordance with the Directive is implicitly the first authorization for placing the product on the market, taking into account that the product has been commercialized in Romania since 1998 and the authorization was renewed in 2005.

The Court of Appeal of Bucharest allowed the appeal entered by OSIM against the Civil Decision no. 1087/A/19.10.2010 given by the Law Court of Bucharest, changed the attacked decision in whole as to the rejection of the appeal brought before the Law Court of Bucharest as unfounded. It consequently maintained the Decision of the OSIM Board of Appeal No. 12/25.02.2010 to refuse the SPC application c2007-073. The decision is irrevocable. Up to now, said decision has not been drafted yet.

Conclusions (Author's opinion)

The cases presented above represent, in our opinion, five identically similar cases having as a subject-matter the application for the grant, in Romania, of SPCs in the transitional six month-period counting from the date of 1 January 2007, the date of Romania's accession to the European Union. The legal ground invoked therefore is represented by Article 3 and Article 19 a (I) of the Regulation. In each of said cases, the product (the active substance) is protected in Romania by a patent in force, it has not already been the subject of a certificate, and the medicament containing the respective active substance was granted, after the date of 1 January 2000, a valid market authorization in accordance with the Directive 65/65/EEC. However, each of said medicaments had been authorized to be placed on the market, in Romania, before the date of 1 January 2000, by registration certificates which, on the date of their issuance, represented the legal way to place a medicament on the market. All said medicaments had a first authorization to be placed on the Community market, which was therefore obtained in accordance with the administrative procedure provided for by the Directive 65/65/EEC, the date of which was earlier than the date on which the Registration Certificates were obtained in Romania.

A synoptic summary of the market authorizations for the five cases is shown below:

Medicament	Date of first authorization to place it on the market in the Community	Date of the first Registration Certificate in Romania	Date of the market authorization in Romania, in accordance with the Directive 65/65/EEC
Humalog (Insulin Lispro)	30.04.1996 (EMEA)	1996, 1997, 1998	2003
Arimidex (Anastrozole)	11.08.1995	27.05.1999	2006

Zyprexa (Olanzapine)	27.09.1996	1997	2001
Atacand (Candesartan cilexetil)	29.04.1997 (GB)	1998	2006
Aricept (Donepezil)	14.02.1997 (GB)	14.01.1998	2005

All said SPC applications were refused by the Examination Board of OSIM, as well as, following the applicant's appeal, by the Board of Appeal, on the ground that the market authorizations granted in Romania according to the administrative procedures provided for by the Directive 65/65/EEC were not the first authorizations to place the products on the market, relying on the legal ground of their failure to cumulatively comply with the provisions of Article 3 (b) and (d) and Article 19 a (I) of the Regulation, and Article 20 (j) of the codified version of the Regulation, respectively. In each of said cases, the Chairman of the OSIM Board of Appeal expressed a dissenting opinion, arguing *that "the phrase "first authorization to place a product on the market as a medicinal product" should be interpreted as the authorization granted in accordance with the Directive 65/65/EEC. In order to obtain the authorization, the patent owner had to comply with the entire procedure provided for by the Directive, in the case of a previously granted certificate the reauthorization being more than a simple renewal."*

All the decisions of the OSIM Board of Appeal, as to reject the appeal, were appealed against by the applicant, and the Law Court of Bucharest allowed the appeals, the statements of reasons in all said cases being very similar. In brief, the Court retains that the problem submitted for trial is to establish if the Registration Certificates granted by the Ministry of Health before the date of 1 January 2000, represent or not the first authorizations to place the product on the market, referred to under Article 3 (d) of the Regulation, as related to Article 3 (b) of the same Regulation and the harmonization of the Romanian legislation with the Directive 65/65/EEC. Because these certificates were not granted following a procedure pursuant to the Directive 65/65/EEC and do not comply with the conditions of Article 3 (b) and (d) of the Regulation, they cannot represent a valid authorization for placing the product on the market as a medicinal product and, thus, they are not deemed to be the first authorizations for placing the product on the market. The Court also finds that a medicament that has not been authorized pursuant to the Community law cannot be introduced onto the market of a Member State, and there are no provisions in the Directive 65/65/EEC to stipulate the possibility of such derogations to allow that the mere introduction onto the market, even during several years, of a medicament which was not the subject of a market authorization issued in accordance with the Community law, could replace such an authorization.

In conclusion, the Court finds that the decision appealed against was made with the misinterpretation of the legal provisions and OSIM is ordered to grant the SPC.

Whilst in the case Humalog, the decision of the Court remained final and irrevocable by lack of appeal, in the other cases the Civil Decisions of the Law Court of Bucharest were further appealed against by OSIM before the Court of Appeal of Bucharest.

The further appeal relied on the consideration that, in ruling the appeal brought against the OSIM Board of Appeal, the Court misinterpreted the provisions of Article 3 and Article 19 a (I) of the Regulation. Having in view that, under Article 267 of the Treaty on the Functioning of the European Union (former Article 234 EC), the mission of ensuring application, interpretation and enforcement of Community law throughout the EU is incumbent on the European Court of Justice, OSIM found necessary that reference should be made to the ECJ for preliminary ruling.

Although in two cases, i.e. Anastrozole and Olanzapine, there were applications for intervention in favour of the respondent OSIM, which claimed that the Court of Appeal should refer certain questions to the ECJ for preliminary ruling, the Court of Appeal did not find necessary to

suspend the trial and refer for preliminary ruling and dismissed the OSIM appeal as unfounded. The legal provisions discussed were Article 2, Article 3 and Article 19 (I) of the Regulation.

Court of Appeal and, consequently, the Decision No. 12/25.02.2010 of the Board of Appeal as to refuse the SPC application c2007-073 was maintained. This decision is irrevocable.

Before upholding our opinion concerning the five cases, it is worth mentioning that the wrongful application of Article 3 (b) and (d) and Article 19 a (l) represents the legal ground of the decision to refuse the applications, and of the appeals and further appeals, as well.

We will analyze in the first place the provisions of Article 3 of the Regulation: *Conditions for obtaining a supplementary protection certificate.*

In our opinion, the reasoning of the interpretation of this article, reasoning on which the arguments leading to the decisions to grant four SPC of the five presented cases are based, is wrong. In fact, it represents a "reversal of premise"; in other words, if an authorization for placing a medicament on the market does not comply with the Directive 65/65/EEC, it cannot be deemed to be the first market authorization referred to under Article 3 (d) of the Regulation. Consequently, in all the five cases, the arguments are based on evidence proving that the Registration Certificates issued before the year 2000 do not comply with the requirements imposed to the market authorizations issued in accordance with the Directive, hence, they cannot be considered to be first authorizations to place the medicaments on the market, in Romania. It cannot be denied that the Registration Certificates were not based on the entire procedure provided for by the Directive, however, they represented the legal acts authorizing the presence of medicaments on the market, under the legislation in force in Romania. In some cases, the argument invoked in order not to take into account the Registration Certificates was that, for being granted a market authorization after the date of 1 January 2000, i.e. in accordance with the Directive, the patent owner had to follow additional authorization procedures, not required on the date of the issuance of the Registration Certificates. This incurred important financial efforts for research, so that, if the Registration Certificates are deemed to be the first authorizations for placing the product on the market, the recital 4 of the preamble of the Regulation is not complied with. The recital 4 provides as follows: *"Whereas at the moment the period that elapses between the filing of an application for a patent for a new medicinal product and authorization to place the medicinal product on the market makes the period of effective protection under the patent insufficient to cover the investment put into the research"*. In other words, the investment made with a view to obtaining authorization in accordance with the Directive 65/65/EEC is not covered and this is why the grant of the SPCs is justified. Obviously, all these arguments are worthless, and so is any piece of evidence brought before the Court for proving that the Registration Certificates were not in accordance with the Directive. The synoptic table presented above shows clearly that all these Registration Certificates were issued in Romania subsequently to the market authorizations obtained in the Community. Hence, on the date on which the Certificates were applied for in Romania, the patent owners had already passed the exigency tests imposed by the Directive, the research necessary for completing the authorization file was already done, so that no further investment and effort were necessary for obtaining the market authorizations after the year 2000. At the same time, one purpose of the Regulation was to compensate the time needed for making the tests imposed by the Directive, which diminishes the actual duration of the protection given by the patent. If all the tests required by the Directive had already been performed in order to obtain the first market authorizations in the Community, prior to the issuance of the Registration Certificates, is the compensation given through the SPC for having obtained the authorizations for placing the product on the market in Romania still justifiable? Of course not.

Moreover, in the majority of the presented cases, the market authorizations obtained after the year 2000 are in fact re-authorizations of the Registration Certificates. In a literal interpretation, the meaning of the word re-authorization leads to the idea of successive authorizations: an authorization existing at a certain moment is subsequently authorized again. In other words, the Registration Certificates may not be ignored. Moreover, they may not be ignored even when certain medicaments,

e.g. Zyprexa, existed on the market within the period 2000-2001, based on the Registration Certificates, without any obligation to withdraw the same. As a matter of fact, in the above mentioned period of time, the authorization regime based on Registration Certificates co-existed, in Romania, with the regime based on market authorizations in accordance with the Directive.

Our interpretation of Article 3 (b) and (d) of the Regulation is that the authorization obtained in accordance with the Directive 65/65/EEC should be understood as the first authorization having made possible for the product to be placed on the market as a medicinal product, and not that only the first authorization obtained in accordance with the Directive is the first authorization for placing the product on the market, as the applicants argued in all the presented cases. In other words, the concept of "market authorization" does not automatically include the conformity with the Directive, but, on the contrary, within the meaning of the Regulation, the conformity with the Directive is the condition that the first authorization must comply with for an SPC to be granted.

As far as the case C-127/00 Hassle AB vs Ratiopharm GmbH, invoked by the SPC applicants, is concerned, we concur with the opinion expressed each time by OSIM on the erroneous decision of the Court as to admit said case-law. The subject of this case and the legal issue settled by the ECJ are different from the cases in Romania, because the problem raised by the case C-127/00 is whether an authorization concerning the price of a medicament can be considered to be a first authorization to place a product on the market within the meaning of the Regulation[25]. In support of our assertion, we further quote: "In this context, the Community Court admitted that the phrase "first authorization for placing a product on the market" refers to the "first authorization applied for in accordance with the provisions concerning the medicinal products, within the meaning of the Directive 65/65/EEC of 26 January 1965". In other words, it is the first authorization having the same nature as the authorization provided by the Directive 65/65/EEC, namely an authorization required, according to the legislation on medicinal products, for placing the product on the market (Note: The authorization provides for tests to be carried out with a view to completing pharmaceutical, pre-clinical pharmacological, pre-clinical toxicological and clinical files), which is different from other authorizations concerning pricing or price reimbursement in medicaments.[26]

Regarding Article 19 a (l), it is noticeable that the wording of this article referring to Romania is different in comparison with the provisions referring to the other Member States accessed after 2004, whereas the second sentence thereof refers to Article 7 (1) which, in its turn, refers to the market authorization obtained in accordance with the Directive 65/65/EEC. Consequently, the interpretation given invariably by the applicant for an SPC was that only the authorization obtained in Romania after 1 January 2000, as the only one granted in accordance with the Directive, represented in fact the first authorization for placing the product on the market, in Romania, as a medicinal product.

As regards the interpretation of Article 19 of the Regulation, we consider that, in both its letter and spirit, the Regulation does not aim to remove or annul the effects produced by the authorizations issued before the date of 1 January 2000 (referred to under Article 19 a (l) of the Regulation) or to deny the obvious fact that the medicaments have been placed on the market, even authorized in accordance with the national legislation in force on that date, which was not fully harmonized with the Directive. The purpose of the Regulation was to provide for uniform solutions at the Community

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[25] The relevant paragraph of the case C-127/00 reads as follows:

"*So far as concerns medicinal products for human use, the concept of 'first authorisation to place ... on the market ... in the Community' in Article 19(1) of Regulation No 1768/92 refers solely to the first authorisation required under provisions on medicinal products [...] granted in any of the*

Member States, and does not therefore refer to authorizations required under legislation on pricing of or reimbursement for medicinal products."

[26] Document drafted by the law firm Stoica & Asociații and filed with OSIM on 9 June 2011, in support of the further appeal lodged by OSIM against the Decision No. 1087A of 19.10.2010 of the Law Court of Bucharest in the case Donepezil, for SC Labormed Pharma SA, page 4.

level, in order to prevent the risk of displacement of the research centres in Member States offering better protection, and this has been related to Romania since 1 January 2000. If the authorizations legally granted in Romania prior to 1 January 2000 could not be considered to be the first authorizations to place certain products on the market, because they are not in accordance with the Directive, the reference date mentioned in Article 19 a (l) (i.e. 1 January 2000) would be completely useless, as all the products authorized to be placed on the market after this date would automatically be eligible for the grant of an SPC, provided that market authorizations in accordance with the Directive were only obtained after this date, and the provision would become redundant.

Special attention has been given throughout this paper to the case Anastrozole (medicament Arimidex) and the application for accessory intervention filed by Teva, because we completely agree with the arguments brought by the intervener in support of the opinion that a product authorized to be placed on the market for the first time in Romania before the date of 1 January 2000, without having previously been subject to the administrative procedure provided for by the Directive 65/65/EEC, is not eligible for the grant of an SPC under the provisions of the Regulation, as it does not comply with the scope of Article 2. It is only on the occasion of the applications for intervention that this article of great importance for the correct application of the Regulation is invoked for the first time. Unfortunately, OSIM has never had in view this article, its attention being exclusively focused on the legal ground invoked by the applicant in the applications for the grant of an SPC: Article3 and Article 19 a (I). And, as we have argued above, regarding the products eligible for the grant of an SPC, Article 2 sets out two conditions to be complied with: the product should be protected by a basic patent and subject to authorization procedure in accordance with the Directive before its being placed on the market. The difference between the provisions of Article 2 and of Article 3 (a) and (b) consists in that the scope of Article 2 excludes those products placed on the market without an authorization in accordance with the Directive 65/65/EEC. However, we cannot disagree with the fact that invoking Article 2 for the first time before the Court of Appeal contravenes the principle of double jurisdiction. Moreover, if the grant of SCP were possible for products placed on the market based on other authorizations than those granted in accordance with the Directive, in certain cases the exclusivity period would exceed the total limit of 15 years from the date of the first authorization in the Community, referred to in the eighth recital of the preamble of the Regulation (it is, for example, the case of the product Donepezil): *"The duration of the protection granted by the certificate should be such as to provide adequate effective protection; for this purpose, the holder of both a patent and a certificate should be able to enjoy an overall maximum of fifteen years of exclusivity from the time the medicinal product in question first obtains authorization to be placed on the market in the Community"*

In support of this argument we also rely on the case C-195/09 Synthon BV vs Merz Pharma GmbH & Co KG in which the European Court of Justice ruled, on 28 July 2011[27], on the referrals concerning the interpretation of Article 2, 13 and 19 of the Regulation. The case is worth being briefly presented since, in our opinion, this case-law is also applicable to the previously presented cases and could lead, for the cases still pending before the Law Court of Bucharest and the Court of Appeal[28], to be ruled differently than the previous cases. Besides, it was also invoked in the case Anastrozole. It results from the case file that the active substance named memantine has been commercialized on the German market as the medicament Akatinol of the pharmaceutical company Merz before the date of 1 September 1976, based on a German regulation of 1961 which obviously did not comply with the provisions of the subsequent Directive 65/65/EEC. On 13 November 2002, the company filed in UK an application for the grant of an SPC for memantine, where an authorization granted in the UK in 2002 was mentioned as the first authorization for placing the

[27] http://eur-lex.europa.eu, OJ of 08.10.2011

[28] On the date of drafting this paper, the ruling of the Court of Appeal on the appeal entered by OSIM in the case Sildenafil is still pending pronouncement.

product on the market, without mentioning the market authorization obtained in Germany. The SPC was granted by the UK Patent Office. By the action brought before the High Court of Justice (Patent Court), the generic medicaments company Synthon claimed that the said SPC should be declared invalid or the duration of its protection should be fixed at zero. Having doubts relating to the scope of the Regulation and to the interpretation to be given to the concept of "first authorization to be placed on the market in the Community", the High Court of Justice specialized in the field of patents decided to suspend the judgment of the case to refer a series of question to the ECJ for preliminary ruling. The third of these questions is, in our opinion, relevant for the cases of Romania.

"Is a product which is authorised to be placed on the market for the first time in the EEC without going through the administrative procedure laid down in [Directive 65/65] within the scope of [Regulation No 1768/92] as defined by Article 2?"

The Court interpretation to the scope of the Regulation was that *" for the purposes of obtaining an SPC, the product concerned must be protected by a valid patent in the national territory and it must have been subject, prior to being placed on the market as a medicinal product, to an administrative authorisation procedure as laid down in Directive 65/65."*

This interpretation is confirmed by the purpose of the Regulation. As it is apparent from the first to fourth recitals in the preamble to Regulation No. 1768/92, in order to ensure sufficient protection to encourage pharmaceutical research, that regulation seeks, through the creation of an SPC for medicinal products that were granted marketing authorisation, to make up for the fact that the period of effective protection under the patent is insufficient to cover the investment put into the research, given the period that elapses between the filing of an application for a patent for a new medicinal product and the authorisation to place that product on the market. It would be contrary to that objective of offsetting the time taken to obtain a marketing authorisation – which requires long and demanding testing of the safety and efficacy of the medicinal product concerned – if an SPC, which amounts to an extension of exclusivity, could be granted for a product which has already been sold on the Community market as a medicinal product before being subject to an administrative authorisation procedure as laid down in Directive 65/65.

The conclusion of the Court was that such a medicinal product is not within the scope of Regulation No 1768/92 and may not, therefore, be the subject of an SPC.

We find that this case is similar with the previously presented cases and it must be noticed that a court having such a prodigious experience in the field of patents and SPC like the High Court of Justice (Patent Court) in the UK referred for preliminary ruling by the ECJ, in 2009, questions concerning the interpretation of the Regulation in force in the Community since 1992, in order for it to meet the essential condition for the Community legislative acts, namely to provide for uniform solutions at the Community level. That is why we cannot agree with the fact that, although in Romania there is no case-law in the SPC field and, for the discussed cases, various diverging interpretations were given to the Regulation, the Romanian courts refused the referral for preliminary ruling by the ECJ and contradictorily ruled in identically similar cases.

We hereby express our hope that this paper could contribute, to a certain extent, to create an overview of SPC cases which raised special problems of interpretation of a Community regulation, as well as to deliver judgments based, on the one hand, on the Community case-law, and, on the other hand, to ensure the observance of the constitutional principle of the free trade for those medicaments producers whose right to the free exploitation of the patented technical solution could be abusively restricted.

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SHORT CONSIDERATIONS ON THE USE OF TRADE INDICATORS AS TRADEMARKS

PAUL-GEORGE BUTA*

Abstract
In today's global marketplace products and services are exchanged internationally not only by large companies wielding a large portfolio of internationally protected trademarks but also by small enterprises and even individuals who have neither the resources nor an interest in the building of such a portfolio. Since they are nonetheless economic agents using either their own or others' trade indicators to indicate the origin and quality of the products and services they provide or simply to advertise them, the present paper addresses some of the issues arising out of that use which is akin to trademark use in what regards said products and services. Special attention is paid to the change in purpose of the trade indicators when used as trademarks and the effects said change causes in the legal protection conferred to those trade indicators. Moreover the possible conflicts between such rights are shortly analyzed and the means for resolution of such conflicts briefly reviewed. Far from being an exhaustive study of the issues raised the present paper aims at identifying these issues and pointing to contentious points to be addressed by future research.

Keywords: *Trademarks, use as trademark, business identifiers, trade name, corporate name*

Introduction

The present short study is aimed at providing some insight into the differences between trade indicators (a sub-category of business identifiers including the corporate name, the trade name and, in some jurisdictions, the emblem) and trademarks as regards their intended purpose. The study tries to find the criteria for determining these differences starting from the definition and purpose of the different rights granted in what those signs are concerned.

Since trademarks are generally considered to be very similar in nature, purpose and protection to such business identifiers, as can be seen in the literature[1], most strikingly in "Trade-Marks and Trade Names--An Analysis and Synthesis"[2], there are cases in both the literature and jurisprudence in which the two categories of signs and their corresponding rights are confounded. This has led to the point where little difference is made between the two and, in practice, they seem to have been overlapped in both their use and their protection.

The study therefore aims to restate the differences that have caused the legislator (both national and international) to differentiate between the two categories (albeit at times not in express terms) and, as a result, create two different protection regimes for these signs. Moreover the study tries to point to the effects these differences produce in respect of the protection granted to trade indicators when they are used outside the limit intended by the purpose envisaged by the legislator upon their creation.

In order to properly determine the purpose trade indicators have in opposition to trademarks and to identify how their use as trademarks represents a departure from their intended use the present study tries to first define trade indicators by means of defining the component signs and then trying

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[1] Yves Reboul, „Le nom commercial et la marque" in *Mélanges offerts à Albert Chavanne*, Litec (Paris – 1990), p. 283

[2] Milton Handler and Charles Pickett, „Trade-Marks and Trade Names--An Analysis and Synthesis: I" in *Columbia Law Review*, Vol. 30, No. 2 (February 1930), pp. 168-201 and Milton Handler and Charles Pickett, „Trade-Marks and Trade Names--An Analysis and Synthesis: II" in *Columbia Law Review*, Vol. 30, No. 6 (June 1930), pp. 759-788

to identify the common purpose that seems to justify their belonging to a single category. Subsequently the purpose so determined is compared to the purpose of trademarks defined from the starting point of the justification of trademarks from an economic perspective. The economic justification thus determined will then be opposed to the purpose of trade indicators in order to ascertain what using each sign is meant to achieve in the marketplace.

Finally the study looks at how use of trade indicators as trademarks differs from their use as trade indicators and what might be the protection such use can enjoy when in conflict with a trademark.

There is very little literature dealing exclusively with trade indicators, most of it analyzing the subject under the framework for unfair competition, which, following the decision of WTO Appellate Body in *Havana Club*[3], appears to be at least incomplete. However there are some studies looking at the economics of trade names[4] as well as some contributions analyzing, among others, the conflicts between trade names and trademarks[5]. In what the economics of trademarks are concerned the main body of work consists of the contributions of Landes and Posner[6] as well as the classic contribution of Akerloff[7] regarding the functioning of trade markets operating under information asymmetry.

Content

1. Trade indicators defined

The expression "trade indicators" is not an established one in legal jargon, it normally being used in economics to summarize the means of measuring trade. For the purposes of the present study the expression has been chosen as an 'umbrella' term to encompass the various types of sign used to indicate trade. Although, at least in France and Belgium, the expression "distinctive signs used in commerce"[8] is used to collectively designate most of the types of sign we place under the umbrella of "trade indicators", we have chosen not to use the same expression in the present study since, in our view, it unduly puts too much emphasis on the need for these signs to differentiate between rather than indicate trade. We wish however to make clear that the term here used was chosen only because it appears to suit better this particular argument and is not to be considered as having an importance beyond that.

Thus for the purposes of the present study we will assume trade indicators to encompass the name of the trader (be it called firm, raison or designation sociale, corporate name or business name), the name of the trader as used in his commerce (trade name, nom commercial, assumed name), his emblem and his Internet domain name (which we will not analyze in the context of the present study).

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[3] *Havana Club*, Report of the Appellate Body, WT/DS176/AB/R (WTO 2002)

[4] Steven Tadelis, "What's in a name? Reputation as a tradable asset" in *The American Economic Review*, vol. 89, No. 3 (June 1999), pp. 548-563

[5] Yves Reboul, „Le nom commercial et la marque" in *Mélanges offerts à Albert Chavanne*, Litec (Paris – 1990), pp. 283-296; Milton Handler and Charles Pickett, „Trade-Marks and Trade Names--An Analysis and Synthesis: I" in *Columbia Law Review*, Vol. 30, No. 2 (February 1930), pp. 168-201; Milton Handler and Charles Pickett, „Trade-Marks and Trade Names--An Analysis and Synthesis: II" in *Columbia Law Review*, Vol. 30, No. 6 (June 1930), pp. 759-788; Thierry van Innis, *Les signes distinctifs. La propriété industrielle*, Larcier (Bruxelles – 1997); Gail E. Evans, "Recent Developments in the Protection of Trade Names in the European Union" in Hugh C. Hansen (ed.) *Intellectual Property Law and Policy*, vol. 10, Hart (Oxford, Portland – 2008), pp. 478-501

[6] William M. Landes and Richard A. Posner, *The economic structure of intellectual property law*, The Belknap Press of Harvard University Press (Cambridge, London - 2003)

[7] George Akerloff, "The Market for Lemons: Quality Uncertainty and the Market Mechanism" in *The Quarterly Journal of Economics*, Vol. 84, No. 3 (Aug., 1970), pp. 488-500

[8] Jacques Azéma and Jean-Cristophe Galloux, *Droit de la propriété industrielle*, 7eme ed., Dalloz (Paris - 2012), p. 941; Thierry van Innis, *Les signes distinctifs. La propriété industrielle*, Larcier (Bruxelles – 1997), p. 23

Since reference was made above to "distinctive signs used in commerce" we must point out that the French and Belgian authors using the expression have also included in the category trademarks (individual and collective), indications of origin and controlled denominations of origin[9].

Given the purpose of this study these were all excluded from the category called "trade indicators" since they normally do not indicate trade (or the trader) but rather origin of the products or services to which they are attached.

Since the types of sign constituting 'trade indicators' vary across jurisdictions it is necessary to briefly review the definitions of these terms.

In the United States a corporate name is defined as being "The registered name under which a corporation conducts legal affairs such as suing, being sued, and paying taxes; the name that a corporation files with a state authority (usually the Secretary of State) as the name under which the corporation will conduct its affairs . • A corporate name usually includes, and in many states is required to include, the word "corporation", "incorporated" or "company" or an abbreviation of one of those words"[10].

The correspondent of the corporate name in France is the "dénomination sociale" which represents the name that individualizes the moral person[11]. It is a mandatory element of identification of the moral person and it needs to be followed by the acronym indicating the form of incorporation.[12]

In Romania the law concerning corporations indicates that a mandatory element of the statutes of a new corporation is its denomination[13] but, further on, the same law makes reference to the registration of the "firm"[14]. Although most authors[15] seem to consider that the lawmaker has intended to use the terms denomination and firm interchangeably, the fact that both acts contain references to both denomination and firm[16], each used, usually[17], in reference to different situations, determines us to put forth an argument for the existence of a delineation between the two in the sense that each gives rise to a different right, one registered by the mere registration of the statutes and the other after a prior verification of availability. This argument is further strengthened by the fact that both the firm and denomination are protected by means of a claim of unfair competition grounded in

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[9] Jacques Azéma and Jean-Cristophe Galloux, *Droit de la propriété industrielle*, 7eme ed., Dalloz (Paris - 2012), p. 941; Thierry van Innis, *Les signes distinctifs. La propriété industrielle*, Larcier (Bruxelles – 1997), p. 23

[10] Brian A. Garner (ed.), *Black's Law Dictionary*, 9th ed., West (St. Paul - 2009),p. 1147

[11] Jacques Azéma and Jean-Cristophe Galloux, *Droit de la propriété industrielle*, 7eme ed., Dalloz (Paris - 2012), p. 956

[12] Jacques Azéma and Jean-Cristophe Galloux, *Droit de la propriété industrielle*, 7eme ed., Dalloz (Paris - 2012), p. 956

[13] Arts. 7 b) and 8 b) of Law nr. 31/1990 concerning corporations. The English word 'denomination' is used instead of 'name' in order to avoid any confusion with the 'corporate' or 'trade' or 'business' name.

[14] When the law requires that for the registration of the corporation the Registry of Commerce be presented with, among others, proof of the firm's availability – art. 36 (2) c) of Law nr. 31/1990 concerning corporations and especially in the detailed provisions contained in Law nr. 26/1990 concerning the Registry of Commerce.

[15] Ion Băcanu, *Firma şi emblema comercială*, Lumina Lex (Bucureşti - 1998), p.9, Vasile Nemeş, *Drept commercial*, Universul Juridic (Bucureşti – 2011), p. 113

[16] Law nr. 31/1990 concerning corporations contains references to denomination wherever it refers to the name of the moral person and firm when it refers to its registration (even when the registration is not operated by the Registry of Commerce but by an independent registry – art. 181 (4)). In exchange, Law nr. 26/1990 concerning the Registry of Commerce uses the term 'firm' when dealing with the "name or denomination under which a trader exercises his trade and underneath which he signs" – art. 30 (1) – and the term 'denomination' when referring to the mandatory identifier of the person seeking the registration or to whom the registration would refer to.

[17] Art. 74 (1) of Law nr. 31/1990 concerning corporations provides that "In every invoice, offer, order, tariff, prospectus and any other document used in commerce, emanating from a corporation there must be mention of [the company's] denomination, form of incorporation, headquarters, registry number in the Registry of Commerce and VAT code." – this would appear to, at least in part, cover so-called 'use in the exercise of trade', thereby overlapping the denomination and firm over the firm's definition – see note 9 above.

the provisions of art. 5 of Law nr. 11/1991 concerning unfair competition, said provisions indicating that "It is a criminal offence […] a) the use of a firm […] likely to create confusion as to those used legitimately by another trader. […] g) the manufacture in any way, importation, exportation, storage, offer for sale or sale of products/services bearing false indications regarding […] the denomination of the manufacturer or trader, with the intent of deceiving the other traders or the customers". Thus it would appear that the company has a right in its denomination, albeit weaker than the one it gains by registering its firm, with only the latter being an exclusive right (therefore protected against possible confusion and not just against purposefully deceitful use.

The trade name is defined in the United States as being: "1. A name, style, or symbol used to distinguish a company, partnership, or business (as opposed to a product or service); the name under which a business operates. • A trade name is a means of identifying a business – or its products or services – to establish goodwill. It symbolizes the business's reputation. 2. A trademark that was not originally susceptible to exclusive appropriation but has acquired secondary meaning."[18]

Still in the United States the assumed name (alias or fictitious name) is defined as being "The name under which a business operates or by which it is commonly known"[19]. The assumed name is usually preceded by the acronym D/B/A or Doing business as which "signals that the business may be licensed or incorporated under a different name."[20]

In France the "nom commercial" is defined as being "the name under which a natural or moral person trades; it distinguishes the goodwill of a trader from the goodwill of similar traders"[21]. In Belgium it is defined as being "the verbal distinctive sign of the enterprise […] the sign of rallying the clientele, the name under which the enterprise operates"[22] which also covers the "denomination sociale" – which is "the distinctive sign of the moral person participating in the business life"[23].

As mentioned above in Romania the firm is usually taken to mean one and the same thing with the denomination of the corporation, which we believe not to be the case. However we do need to indicate that both seem to be mandatory (each deriving this character from a different provision of the law) and both need to be registered with the Registry of Commerce (unlike in the other jurisdictions where the trade name and nom commercial do not need to be registered but rather gain their protection by use).

While in the United States the symbol "used to distinguish a company, partnership, or business"[24] is considered to be a trade name, in France, Belgium and Romania the "nom commercial" and "firm" can only be comprised of verbal signs, such symbol being protectable only as an emblem or "enseigne". Defined as being "a visible sign indentifying a commercial establishment at its location"[25] it is defined in Romania by art. 30 (2) of Law nr. 26/1990 concerning the Registry of Commerce and "the sign or name distinguishing between two traders practicing a similar trade". The Romanian definition has been widely criticized[26] and was considered in the literature as pertaining more to the identification of the location a commercial establishment of the trader[27].

2. What use are trademarks?

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[18] Brian A. Garner (ed.), *Black's Law Dictionary*, 9th ed., West (St. Paul - 2009),p. 1633

[19] Brian A. Garner (ed.), *Black's Law Dictionary*, 9th ed., West (St. Paul - 2009),p. 142

[20] Brian A. Garner (ed.), *Black's Law Dictionary*, 9th ed., West (St. Paul - 2009),p. 455

[21] Jacques Azéma and Jean-Cristophe Galloux, *Droit de la propriété industrielle*, 7eme ed., Dalloz (Paris - 2012), p. 943

[22] Thierry van Innis, *Les signes distinctifs. La propriété industrielle*, Larcier (Bruxelles – 1997), p. 33

[23] Thierry van Innis, *Les signes distinctifs. La propriété industrielle*, Larcier (Bruxelles – 1997), p. 33

[24] Brian A. Garner (ed.), *Black's Law Dictionary*, 9th ed., West (St. Paul - 2009),p. 1633

[25] Jacques Azéma and Jean-Cristophe Galloux, *Droit de la propriété industrielle*, 7eme ed., Dalloz (Paris - 2012), p. 954

[26] Ion Băcanu, *Firma şi emblema comercială*, Lumina Lex (Bucureşti - 1998), p. 26

[27] Ion Băcanu, *Firma şi emblema comercială*, Lumina Lex (Bucureşti - 1998), p. 29

Trademarks on the other hand are in all analyzed jurisdictions defined as being signs of any kind capable of being represented graphically and capable of distinguishing goods and services of one undertaking from those of another.

A key difference between the trade indicators and trademarks is apparent: while trade indicators indentify the trader, trademarks distinguish between products and services belonging to different traders. In simpler terms if trade indicators tell us who one is trademarks tell us to whom a product or service belongs.

Although the answer to both questions might sometimes be the same that does not mean that the rights serve the same purpose.

To better illustrate the statement above we draw on the classic economic model identified by Landes and Posner[28] where after indicating that the economic function of trademarks is to lower consumer search costs (akin to transaction costs) they postulate that in the equation

$$\pi = P + H(T, \gamma, W)$$

where π is the full price of good X, P is the money price and H the search costs he incurs in learning about the relevant characteristics of X[29], H depends in part on the information provided by the firm to the buyer by means of its trademark T. The higher the T (the stronger the trademark) the lower H will be. The authors then go on to indicate that T generates two types of information:

1. "The first is information that enables the consumer to identify the source of the good; for example, knowing that Crest toothpaste comes from a single source even if one does not know that Procter and Gamble is that source. Information about source economizes on search costs by lowering the cost of selecting goods on the basis of past experience or the recommendation of other consumers.

2. The second kind of information is information about the product itself. For example, a "descriptive" mark […] may, in addition to identifying source, describe some properties of the brand; this information also lowers search costs."[30]

Without delving further into the economic analysis we need to point at the fact that the economic function of the trademark are indelibly linked to providing information relating to the good in question and not to the trader. The information mentioned first above, usually qualified as the essential function of trademarks (to indicate origin of the goods) does not mean indication of the actual source but merely the possibility of identifying that source as being the single source for the good in question.

Advocate-General Jacobs has indicated in his Opinion in HAG II[31] that "The function of a trade mark is to signify to the consumer that all goods sold under that mark have been produced by, or under the control of, the same person and will, in all probability, be of uniform quality".

Therefore information as to origin provided by trademarks is not information of identification of the trader but only as to the existence and uniqueness of said trader.

We need to note though that in more recent times both the literature and the courts have tended to approach trademarks from a more "proprietarian" standpoint[32] and put more emphasis on

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[28] William M. Landes and Richard A. Posner, *The economic structure of intellectual property law*, The Belknap Press of Harvard University Press (Cambridge, London - 2003), p. 174

[29] γ represents the other factors that can strengthen the trademark and W the index of the availability of words and other symbols that the firm can use as its trademark.

[30] William M. Landes and Richard A. Posner, *The economic structure of intellectual property law*, The Belknap Press of Harvard University Press (Cambridge, London - 2003), p. 174

[31] *SA CNL-SUCAL NV v Hag GF AG* (C-10/89) [1990] ECR I-3711 par. 24

[32] For a critique of proprietarianism as guiding principle in intellectual property policy-making see Peter Drahos, A Philosophy of Intellectual Property, Dartmouth (Aldershot- 1996), pp. 205-213

the reputational function of trademarks[33] which would seem to fit well with the second type of information Landes and Posner indicate is generated by the trademark – i.e. information about the product itself, - in the sense that information regarding the reputation of the trader which would, in turn, spillover into the presumed quality of the good.

Two important points should be noted here:

1. Even in this case the association made by the customer is in direct relation to the good and not the trader (he assesses the quality of the good by means of implying it from the reputation of the trader); and

2. The reputation of the trader is, although possibly implied by the information the trademark conveys, built in tandem with his past performance in the market, i.e. based on the linking of the identity of the trader with his performance in trading the goods in question (or other goods). This point is further supported by the model proposed by Tadelis[34] indicating that in order for a name with a reputation to be traded the reputation it has built needs to result out of its readily-observable past performance. Thus information regarding the identity of the trader, while necessary for the building of a reputation around that identity, is not to be confused with reputation since that reputation only occurs in time, depends on the performance of the trader and, should it be a bad reputation it can be easily discarded and thus become irrelevant form the analytical point of view[35].

Although the majority of the literature indicates that trademarks have more functions than merely that of indicating origin (usually reference is made to the function of guarantee of quality, consumer protection and advertising) we will not lengthen the present study so as to include those as well into our analysis since all these functions are, we believe, manifestations of the essential function of the mark, itself a legal coding of the economic function of the trademark.

Without disputing the alternative justifications for the existence of intellectual property rights in general and trademark rights in particular we will assume, in the present study, that the "orthodox" argument grounding the existence of intellectual property rights in the economic justification built around the "market failure" theory is valid[36].

As a first conclusion we propose that trade indicators are different from trademarks in their purpose insomuch as they merely indicate the trader and the locations of his trade while trademarks, by distinguishing between goods, indicate the commercial origin of those goods. While both have a reputational possibility attached to them, for each reputation is built in time by the historical association consumers create between the identity of the trader and the identity of the goods (as per their unique origin) respectively and the performance or quality of the trader and goods respectively.

3. Trademark use

Though there is debate surrounding the exact definition the general view in the literature is that use of a sign as a trademark means using it to indicate origin[37]. That is any use of a sign to indicate the commercial origin of goods is use of that sign as a trademark.

Retrospectively this use can turn an otherwise unprotectable sign into a registrable trademark[38] and, if the sign used is identical or similar to a registered trademark, it can constitute infringement of the rights in that trademark if, as the European Court of Justice indicated in

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[33] *L'Oréal SA, Lancôme parfums et beauté & Cie SNC, Laboratoire Garnier & Cie v. Bellure NV, Malaika Investments Ltd., Starion International Ltd* (C-487/07) [2009] ECR I-05185

[34] Steven Tadelis, "What's in a name? Reputation as a tradable asset" in *The American Economic Review*, vol. 89, No. 3 (June 1999), pp. 548-563

[35] Tadelis, quoted above, proves that the only names that can be assets are names with a good reputation, there being no market for names with bad reputation, assuming of course, an infinite supply of names.

[36] Michael Spence, *Intellectual Property*, Oxford University Press (Oxford – 2007), pp. 63-67

[37] Lionel Bently and Brad Sherman, *Intellectual Property Law*, 3rd ed., Oxford University Press (Oxford – 2009), p. 923

[38] Jeremy Phillips, Ilanah Simon, „Conclusion: What use is use?" in Jeremy Phillips, Ilanah Simon (ed.) *Trade Mark Use*, Oxford University Press (Oxford – 2005), p. 344

Arsenal[39], the use affects or can affect the functions of the trademark, particularly the function of guaranteeing to consumers the origin of the goods.

As shown above trade indicators are not meant to be used as trademarks *per se* since their role is to identify the trader or locations of his trade. However, in *Céline*[40], the European Court of Justice has indicated that (citations omitted):

"The purpose of a company, trade or shop name is not, of itself, to distinguish goods or services. The purpose of a company name is to identify a company, whereas the purpose of a trade name or a shop name is to designate a business which is being carried on. Accordingly, where the use of a company name, trade name or shop name is limited to identifying a company or designating a business which is being carried on, such use cannot be considered as being 'in relation to goods or services' within the meaning of Article 5(1) of the Directive.

Conversely, there is use 'in relation to goods' within the meaning of Article 5(1) of the Directive where a third party affixes the sign constituting his company name, trade name or shop name to the goods which he markets.

In addition, even where the sign is not affixed, there is use 'in relation to goods or services' within the meaning of that provision where the third party uses that sign in such a way that a link is established between the sign which constitutes the company, trade or shop name of the third party and the goods marketed or the services provided by the third party."[41]

In conclusion, drawing from the above, a trade indicator is used as a trademark only when diverted from the purpose it was designed for, i.e. to identify a company or designate a business which is being carried on.

The question then arises: What rights can such use give rise to? And what liabilities?

4. Trade indicators used as trademarks

In order to answer this question we must turn into the title under which such use takes place. In order to properly qualify it we can only look at three possibilities: it could be a use of a trade indicator, it could be use of a trademark (albeit not registered) or it could be use covered by no right whatsoever.

It is clear that the owner of a trade indicator is entitled to make use of it. But the exercise of a right must always be carried on within the limits of that right, both internal and external.

In the situation described at par. 23 of the *Céline*[42] judgment the use made of a trade indicator might be within the external limits of the right to the trade indicator but it is clearly outside the internal limit of the right at it diverts the purpose of the right from the one envisaged by the law to a new purpose for which the law envisaged a different type of right i.e. a right to a trademark.

Given the above it is that much clear that use of the kind described at paragraph 22 of the *Céline*[43] judgment is outside both the internal and external limits of the right to a trade indicator.

If it is now obvious that usage of the trade indicator outside the external limits of the right can't be thought of as use as a trade indicator the solution must be the same for using the trade indicator outside the internal limits of the right since that would amount to an abuse of right and such abuse of right cannot, by definition, have a legal title to it.

Using the trade indicator as a trademark can lead, as shown above, to the acquirement of distinctiveness sufficient for the registration of the sign the trade indicator is comprised of. But such possibility is recognized for any sign, be it a trade indicator or not so this would appear to be, at least until the registration of the sign as a trademark, to be in fact a use under no title at all, defendable

[39] *Arsenal v Reed*, C-206/01 [2002] ECR I-10273
[40] *Céline SARL v Céline SA* C-17/06 [2007] ECR I-07041
[41] *Céline SARL v Céline SA* C-17/06 [2007] ECR I-07041, par. 21-23
[42] *Céline SARL v Céline SA* C-17/06 [2007] ECR I-07041
[43] *Céline SARL v Céline SA* C-17/06 [2007] ECR I-07041

only by means of a claim of unfair competition under the higher standard requiring intentional deceit of the traders and customers (in Romania).

If on the other hand, the trade indicator, when used as a trademark, has gained recognition in the relevant public sufficient to warrant said sign being a well-known or famous mark such use would be made under the title of trademark but only because the right itself to trademark would exist, in parallel to the right to the trade indicator.

The conclusion here would be that use of a trade indicator as a trademark, with no trademark right existing, is done with no legal title whatsoever and should therefore not allow the user to benefit from a protection extended out of his right to the trade indicator in order to protect such use.

5. Conflicts

Given the above we now move on to consider what would the outcome be in conflicts between trade indicators and trademarks where the use is likely to create confusion in the mind of the relevant public.

a. Trademarks used as trade indicators

When trademarks are used as trade indicators i.e. to identify the company or its place of doing business and the trademark right is anterior to the right in the trade indicator difference should be made between the jurisdictions protecting trade indicators without the need for prior registration and the ones requiring such prior registration. Where no requirement of registration exists the use itself is deemed to give rise to the right is such trade indicator and thus the owner of the trademark may oppose the use of the later trade indicator (since the trademark owner himself has a right in a trade indicator). This is also the case where the conflict occurs between two traders belonging to different countries members of the Paris Union by virtue of direct application of article 8 of the Paris Convention for the Protection of Industrial Property.

In the case of jurisdictions requiring registration of the trade indicator for it to be protected and where the two owners are both nationals of that jurisdiction the later trade indicator would prevail since use of the trademark as a trade indicator would amount to an abuse of right and thus could not gain legal recognition.

b. Trade indicators used as trademarks

Leaving aside the case of trade indicators amounting through use to well-known or famous marks (which do not need to be registered in order to be protected) we believe that no matter the anteriority of the trade indicator or the trademark the trademark owner should prevail unless use of the trade name would be an honest commercial practice as defined by the European Court of Justice in Anheuser-Busch[44], Inc., Bayerische Motorenwerke (BMW)[45], Gerolsteiner Brunner GmbH[46] and in Gillette[47].

Conclusion

The present study has determined the nature of trade indicators in opposition to trademarks and has proposed that the differences existing between them justifies their regulation as different rights granted for different purposes. Although each can be used for the purpose of the other doing so would appear to bring no benefit in terms of legal protection, situations where protection under the other regime being granted by use left aside.

We believe future research should further delineate these differing signs based on an instrumental approach to policy-making in intellectual property as a whole and industrial property especially so as to clarify the benefits and liabilities of gaining protection under each of these differing regimes and to clearly set out the points of interference and possible outcomes.

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[44] *Anheuser-Busch Inc. v. Budejovický Budvar, Národní Podnik*, C-245/02 [2004]

[45] *Bayerische Motorenwerke AG (BMW) and BMW Nederland BV v. Ronald Karel Deenik*, C-63/97 [1999]

[46] *Gerolsteiner Brunnen GmbH & Co. v. Putsch GmbH*, C-100/02 [2004]

[47] *The Gillette Co. and Gillette Group Finland Oy v. LA-Laboratories Ltd. Oy*, C-228/03 [2005]

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ECONOMIC RIGHTS OF THE NEIGHBORING RIGHTS OWNERS PERFORMERS' RIGHTS MANAGEMENT

MARIANA SAVU*

Abstract

The scientific research theme aims to deepen a topical issue, i.e. to examine the legal requirements of performers' rights from Romania, by collective management, to do a critical analysis of the regulation in our country and to contribute thereby to the correction of the law, to its harmonization with the EU countries. Intellectual creation has some amazing features: it is invisible, it can be passed across borders, it can be multiplied to infinity and its value increases steadily over time. Any country that cares about its traditions and seeks to make progress in the field of culture, of science and education, must recognize, encourage and protect intellectual creation. The copyright neighboring rights or "les droits voisins" as they were called in doctrine and jurisprudence, have been regulated for the first time in the Romanian law by the Law no.8 /1996 on copyright and neighboring rights. The neighboring rights are intellectual property rights, other than the copyright, granted to performers for their own performances or executions, to sound recordings producers and audiovisual recordings producers for their own recordings, and to broadcasting organizations (radio and television) for their own transmissions and program services. Performers' rights can be managed mandatory or optionally by the collective management societies. The collective management of copyright and neighboring rights is a necessary step for implementation of certain rights in comparison with various ways of exploitation. Since the beginning, some of performers' economic rights proved difficult to assess individually. The technical progress and widespread mass exploitation have made individual control virtually impossible. Collective management primarily involves the collection of remuneration payable by users/importers and its distribution to those entitled to it, proportional to the actual use of each repertory, within 6 months from collection date.

Keywords: *performers; economic rights; compulsory collective management; optional collective management; performers' rights management organization.*

Introduction

Intellectual creation occupies a prominent place within economic, social and cultural development of each nation, and well-being of a country is also appreciated by its capacity to create, introduce, manage and exploit intellectual assets beyond its natural resources, its labor or capital. Creativity, said Dr. Kamil Idris[1] – General Manager of World Intellectual Property Organization - „is an inexhaustible resource characteristic of all nations, as it is manifested at all times and in any culture"[1]. Moreover, on the OMPI Dome in Geneva is a Latin inscription which has the following content: „the human spirit gives birth to works of art and inventions. Such creations provide a dignified life to the people and it is states' duty to protect arts and inventions".

Protection of intellectual property rights is of particular importance, because the essence, the goal and purpose is to protect the product of human intelligence and at the same time, to guarantee for the benefit of consumers the use of such product.

Ensuring a fair/compensating remuneration to authors and performers fosters creativity and urges publishers or producers of sound and audiovisual recordings to invest in new products and services.

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[1] Kamil Idris, *OMPI General Manager's Message, for the World Day of Intellectual Property,* in the „Romanian Magazine of Industrial Property", no. 2/2003, p. 7.

At the same time, it can be said that, if we consider the provisions of art. 27 paragraph 2) of the Universal Declaration of Human Rights[2], according to which „everyone is entitled to the protection of his/her moral and material interests resulting from any scientific, literary or artistic creation which author he/she is", we can place the right to the protection of intellectual property among the fundamental human rights.

We can say that respect for intellectual property is nowadays one of the landmarks that determine the degree of civilization of a country. Cultural act, in order to be made at its true value, should be funded, and in a society where the state's financial contribution is reduced, the only real support to the cultural act is the implementation of legal provisions of intellectual property rights which immediately reflect into the patrimonial perception of holders' rights.

In the Internet era, within the planetary context, respect for intellectual property is one of the criteria which defines the degree of civilization of a country, because, as the author states, the respect for intellectual property cannot be achieved where poverty, corruption, abuse, ignoring of the law are all day-to-day realities[3].

Given the above, we may say that promotion and legal protection of intellectual property is absolutely necessary because the progress and welfare of a nation depend on people's ability to create in the areas of art, technology and culture. Furthermore, the promotion and protection of intellectual property stimulate economic growth, provide a significant number of new jobs and industries, improve the quality of life and, not at last, represent a mean to create a favorable image of the state in front of the international community.

This study aims to address the collective management of performers' rights, regarding: the beneficiaries of collective management, ways to use artists' performances, what are the collective management organizations and what is their role, the mandate granted by the artist to the collective management organization, the content of the mandate granted by the holder, the negotiation of remuneration/fees due by the users to the performers, categories of payers, methods of remuneration collection and distribution and, not at least, transparency of collecting organizations to the general public, to their own members and to ORDA[4].

ACTUAL CONTENT

1. NEIGHBORING RIGHTS TO THE COPYRIGHT

The rights related to copyright, or „neighboring rights" as they were called in French doctrine and jurisprudence, have been regulated for the first time in the Romanian law by adopting Law no. 8/1996 regarding copyright and neighboring rights[5]. Romanian Legislator was inspired by the provisions of the International Convention for the Protection of Performers, Producers of

[2] It has been adopted and proclaimed by the Resolution of the United Nations General Assembly no. 217A (iii) dated December 10th, 1948.

[3] Ştefan Gheorghiu, *Intellectual Property – creativity reward or just a business?,* in „Info CREDIDAM", no.4/2005, pp.2-3.

[4] The Romanian Office for Copyright is a specialized body under the jurisdiction of the Government, acting as unique regulation authority for keeping records by national registry, for surveillance, licensing, arbitration and technical and scientific observance in the field of copyright and neighboring rights.

[5] Published in the „Official Gazette of Romania", Part I, no. 60 dated March 26th, 1996, as amended and supplemented by Law no. 285/2004, as published in the „Official Gazette of Romania" , Part I, no. 587 dated June 30th, 2004, as amended and supplemented by Government's Emergency Ordinance no. 123/2005, as published in the „Official Gazette of Romania", Part I, no. 843 dated September 19th, 2005, as amended and supplemented by Law no. 329/2006 regarding the approval of Government's Emergency Ordinance no. 123/2005 for the amendment and supplementation of Law no. 8/1996 regarding copyright and neighboring rights, as published in the „Official Gazette of Romania", Part I ,no. 657 dated July 31st, 2006. (Moreover all specifications regarding Law no. 8/1996 refer to the form amended and supplemented by Law no.329/2006).

Phonograms and Broadcasting Organizations, concluded at Rome on October 26th, 1961[6] and of the Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms, concluded at Geneva on October 29th, 1971[7].

The neighboring rights to the copyright are intellectual property rights, other than copyrights of which performers enjoy for their own interpretations or executions, producers of audio recordings and producers of audiovisual recordings, for their own recordings and the broadcasting and television organizations, for their own shows and program services.

1.1 Performers enjoying collective management.

In the legal sense of the Law no. 8/1996, we understand by performers: actors, singers, musicians, dancers and other persons who present, sing, dance, recite, declaim, play, interpret, direct, conduct or perform in any other way a literary or artistic play, any kind of show, including folk, variety, circus or puppet shows (art.95).

In practice there was raised the question whether the „figurants" can be considered as performers and can take advantage of neighboring rights as a result of exploiting their performance, although, as seen in the definition given by law to performers, „figurants" are not mentioned.

The extra artist (the figurant) is neither mentioned as being part of the category of performers by the French legal system. Thus, art. L 212-1 of the French Intellectual Property Code excludes the extra artist from the category of persons who may enjoy neighboring rights as a result of their performance in a play[8]. However, in France „special extra performance" is paid. If the figurant, by his/her performance, contributes to the creation, implementation, interpretation of a collective play/work, he/she gains the clear status of beneficiary and holder of rights related to copyright, even if the said performer ('figurant') has only one line, being treated as an episodic part.

According to the DEX (Romanian Explanatory Dictionary) we understand by 'figurant'/'extra' „a person participating in the action of a play, an opera or a movie only by his/her physical presence or by his/her gestures, attitudes etc., without saying any line"[9]. The AFTRA 10 Code defines the 'figurant' as „the person playing mute parts, but he/she can make himself/herself understood individually or as a whole, in groups or in a crowd"; and according to the „Urban Dictionary" the 'figurant' is „a performer who does not perform solo; a performer with no speaking part/line; a person with no status higher than that of simple group member"[11].

In a study referring to agreements and practices relating to remuneration for performers of audiovisual works, presented to the Informal Ad-hoc Meeting on Audiovisual Interpretations and Performances that took place in Geneva on November 6th - 7th, 2003, they mention that none of the union agreements provides remuneration to 'figurants' for secondary uses[12].

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[6] Romania acceded to the Rome Convention regarding the protection of performers, producers of phonograms and broadcasting organizations by Law no. 76 dated April 8th, 1998 published in the „Official Gazette of Romania", Part I, no. 148 dated April 14th, 1998.

[7] Romania acceded to the Geneva Convention for the protection of producers of phonograms against unauthorized duplication of their phonograms by Law no. 78 dated April 8th, 1998, published in the „Official Gazette of Romania", Part I, no. 156 dated April 17th, 1998.

[8] „À l'exclusion de l'artiste de complément". For details, please see *Code de la propriété intellectuelle*, Édition 2002, Litec, Paris, pp.177-178.

[9] Romanian Academy, „Iorgu Iordan" Institute of Linguistics, The *Explanatory Dictionary of Romanian Language, DEX,* Universul Enciclopedic Printing House, Bucharest, p. 378.

[10] The American Federation of Television and Radio Artists.

[11] See location: www.urbandictionary.com/define.php?term?=figurant

[12] Katherine M. Sand*, Study on Agreements and Remuneration Practices regarding Performers of Audiovisual Works in the United States of America, Mexico and the United Kingdom*, presented within „**Informal Ad-hoc Meeting on Audiovisual Interpretations and Performances**", Geneva, November 6th-7th, 2003.

Likewise, Professor Viorel Roş explains that „'figurants', either for theatre or for cinema, are not considered as holders of neighboring rights, the limit between the 'figurant' and the performer being determined by the professional practices"[13].

Given the above, we consider that not having the freedom movement, the 'figurant' acts like a „machine" running some of the director's instructions. For this reason, the 'figurant' is not able neither to express his/her own personality while performing the act of an intellectual creation, nor to enjoy the neighboring rights as a result of exploiting such work.

In another opinion[14], Professor Ligia Dănilă believes that „you can include between those who enjoy neighboring rights, without any doubt, also those who are 'extras'/'figurants' in a show, provided that their part and position in the general framework of the show to be essential for transmitting the message and to be an unequivocal condition for its transmission". This eminent author considers that „such an analysis can be done, in case of dispute, based on studying the directing book of the show, on the text of the notes made as directing indications, or on other specific evidence". In order to strengthen these considerations, the author shows that her interpretation „ is also subsumed to the general definition of the author as given by the legislator in the 1st article of the law, which says that the author is the person or entity who created the work. However, this interpretation does not conflict with the provisions of article 3 of the Rome Convention". At the same time, the author proposes that the interpretation of the said article of the law should be made subsequently to a „nuanced analysis, varied from one case to another, from one show to another, of the role and contribution of the 'figurant' in the creation of the show and, as a consequence, to distinctly establish, according to each case, if the 'figurant' may or may not have the quality of holder of neighboring rights"[15].

1.2. Use of performers' artistic performances

Performer wants everyone to know that HE is the „father" of his/her interpretations and, at the same time, everyone respects him. He also wants to control the use of his performances, both at national and international level, and, at the same time, to be protected against any illegal use of his performances in order to enjoy and benefit from the fruits of his intellectual effort.

Any use of his performance, by any means, can be achieved only with the consent of the artist. This is the general rule which supports, however, some explicit and restrictive exceptions provided by most copyright laws.

As Paula Schepens[16] shows, „copyright (in the generic sense) should allow to establish a fair balance between the interests of the community, the public, who is entitled to information, training, education in order to reach full intellectual development and personal interests of the creator. The author needs his public, he needs to be understood and heard. The public, in turn, requires those who were destined by nature, and have that extra little thing called talent, which allows them the creation of a work, able to enthuse, to captivate the spirit, to broaden the worldview. The author cannot be isolated from the world. He must live in the community where he draws inspiration. He grew up in a certain culture that ancestors have left as legacy. He will bring to light what has been bequeathed, adding his own imprint of personality. We speak here about an interaction. Therefore there are limits against his absolute power".

For further creative and artistic work, in order to be able to fund this activity, performers and producers of phonograms or of audiovisual recordings should receive fair remuneration, proportional

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[13] Viorel Roş, Dragoş Bogdan, Octavia Spineanu – Matei, op.cit., p. 466.

[14] Ligia Dănilă, *Figurants – subject for neighboring rights or just ornaments?,* in „ Romanian Magazine of Intellectual Property Right", no.4/2007, pp. 20-25; Ligia Dănilă, *Intellectual Property Right*, C.H. Beck Printing House, Bucharest, 2008, pp.33-35.

[15] Idem

[16] Paula Schepens, *Guide sur la gestion collective des droits d'auteur* (La Societe de Gestion au Service de l'Auteur et de l'Usager), UNESCO, 2000, p.6

to the use of their work. To ensure the availability of such remuneration and to enable satisfactory obtaining of benefits from the investment, adequate legal protection of copyright and neighboring rights is needed.

In this respect, since 1990, the European Commission stressed the need to establish at Community level, a general and flexible legal framework in this field.

Harmonization of legislation on copyright and on neighboring rights to copyright shall help, as shown in the preamble to Directive 2001/29/EC on the harmonization of certain aspects of copyright and neighboring rights in the information society, the implementation of the four freedoms of the internal market and regards complying with the fundamental principles of law, in particular the principle of property, including intellectual property, free speech and public interest.

It is also shown in the preamble to said directive, by enhancing the legal certainty and providing a high level of protection of the intellectual property, a harmonized legal framework regarding copyright and neighboring rights will foster substantial investments in creativity and innovation, including network infrastructure, and will lead to growth and greater competitiveness of European industry, both in content delivery and information technology, and generally in a wide range of industrial and cultural sectors. This provides jobs preserving and encourages job creation.

In conclusion, we appreciate that without harmonization at community level, legislative activities at national level which have already been initiated in several Member States in order to meet the technological challenges can create significant differences in protection and therefore restrictions on the free movement of services and products incorporation or based on intellectual property, leading to refragmentation of internal market and to legislative inconsistency.

2. SHORT HISTORY REGARDING COLLECTIVE MANAGEMENT OF RIGHTS

Collective management of copyright arose when the first national laws on copyright began to be adopted, a practice that has developed over the centuries, with the evolution of scientific progress. Thus, one can say that copyright is collectively managed at the end of the eighteenth century.

Authors' first organizations were established in France. At first, the functions of professional associations – to fight, inter alia, for the full recognition and respect o copyrights – have been combined with elements of collective management of rights.

Establishment of the first organization of this kind is closely linked to the name of Beaumarchais. It was he who led the legal „battles" against theatres which had some delays in the recognition and respect for moral and economic rights of authors.

Honoré de Balzac, Alexandre Dumas, Victor Hugo and other French authors continued efforts of Beaumarchais, so on April 28th, 1908 they founded the Society of French Writers (Société des gens des lettres – SGDL) which held its first general meeting upon the end of 1837 (this organization currently operates). Those organizations were not collective management organizations in the sense such type of organizations work today.

In 1847, the composers Paul Henrion and Victor Parizot, the writer Ernest Bourget, supported by their editor, filed a lawsuit against the „Ambassadeurs" (a „café-concert" located in Avenue des Champs-Elysées, Paris). They were unhappy that they had to pay for seats and food consumed at „Ambassadeurs", while they receive no remuneration for their works which were interpreted by that local orchestra, which is considered by them as a blatant contradiction. So they took the courageous – and logical – decision to no longer pay the meals as long as neither of themselves is paid for their works. The authors of the works interpreted in that local won the lawsuit and the owner of „Ambassadeurs" premises was obliged to pay them a considerable amount. This Court decision has created new opportunities for composers and lyricists of non-dramatic musical works, although it was obvious that they will not be able to control and enforce these new rights individually. Court decision led, in 1850, to the establishment of a collective agency which was

replaced by the Society of Music Authors, Composers and Editors (Société des auteurs, compositeurs et éditeurs de musique – SACEM), an organization that is successful even nowadays[17].

In the late nineteenth and early twentieth century, in almost all European countries, as well as in other countries, have established similar author bodies (the so-called interpretation rights organizations). Given that these bodies have worked very well through bilateral reciprocal representation contracts of repertoire, it became necessary to have an international body to coordinate their activities and to contribute to the more effective protection of authors' rights worldwide. Thus, in June 1926, delegates from 18 organizations have set up the International Confederation of Societies of Authors and Composers – CISAC.

In conclusion, we can say that copyright and technology have evolved in parallel: first in print, then the sound recording, film, broadcasting, photocopying, transmission by satellite and cable, video recording and more recently, the Internet. Today, this practice became current, in the world collecting societies operating in over 100 countries[18].

In Romania, the collective management of neighboring rights was regulated for the first time by the Law no. 8/1996, which by the amendments brought in July 2004 by Law no. 285/2004, n September 2005 by Government's Emergency Ordinance no. 123/2005 and in 2006 by the Law no. 329/2006 has undergone major amendments and supplements.

Following the adoption of such legislation, in Romania were created more bodies for the management of copyright and related rights, currently operating a number of 12 collective management organizations.

3. INTRODUCTORY NOTIONS REGARDING THE COLLECTIVE MANAGEMENT OF RIGHTS

The Collective Management Societies (organizations) are entities established by free association, having as main activity collection and distribution of rights which management is entrusted to them by the holders. The collective management organizations are subject to regulations on non-profit associations and may acquire legal personality by ORDA authorization. The collective management organizations are created directly by the holders of copyright or neighboring rights, natural or legal persons, and acting within the granted mandate and on the basis of statues adopted according to the procedure provided by law. These can be set separately for different categories of right management, corresponding to different fields of creation, as well as management of rights belonging to different categories of holders[19].

Collective management means: managing for the benefit of authors community. The amounts thus collected shall go to their final recipient, meaning the author himself. In the „Guidelines on the collective management of copyright", Paula Schepens says: „Everyone gets as he/she deserves! Rights should not serve collective goals. It's not about a fee but about the author's wages. So, collectively gathered, but individually assigned/distributed. Collective management is the only way that guarantees the legitimate interests when the author has before him/her a multitude of users"[20].

Collective management of copyright is generally used to facilitate the effective exercise of these rights to authors and to promote the lawful exploitation of works and cultural benefits. As Salah Abada, Director of the Section Creativity and Copyright of the UNESCO, shows, „in modern

[17] Mihaly Ficsor, *Collective management of copyright and related rights*, WIPO, 2002, pp.18-19.

[18] Tarja Koskinen-Olsson, the *Collective Management of Reproduction.* This study was developed under the cooperation agreement between WIPO and IFFRO in 2003.

[19] See Rodica Pârvu, Ciprian Raul Romițan, *op.cit*., pp.77-78.

[20] Paula Schepens, *Guide sur la gestion collective des droits d'auteur* (La Societe de Gestion au Service de l'Auteur et de l'Usager), UNESCO, 2000.

society, collective management is one of the best means to ensure respect for exploited works and fair remuneration of the creative effort to cultural enrich, facilitating quick access to the public in a lively and constant enrichment culture".

According to art.4 paragraph 3) of Council Directive 92/100/CEE dated November 19th, 1992 regarding rental right and lending right, and certain rights related to copyright in the field of intellectual property, „Managing the right to obtain a fair remuneration may be entrusted to some collective management organizations representing authors or performers".

4. NECESSITY TO ENSURE THE COLLECTIVE MANAGEMENT OF COPYRIGHT AND NEIGHBOURING RIGHTS

Over the past 15 years, the issue of the collective management of copyright and neighbouring rights was debated on a European level. For this purpose, the European Commission has made an analysis in order to establish whether the "current rights management methods do not hamper in any way the functioning of an internal market, especially considering the increased strength of the information society".

Thus, the European Commission underlined in its communication dated the 19th of April 2004, the need to set up a European legislation on the collective management and the good functioning of the collective management organizations[21].

Moreover, the Commission highlighted the issue of the digital rights management and spoke about the emergence of DRM (Digital Rights Management) systems, "which could be used for authorizing rights, for monitoring behaviours and for applying rights". This new type of system was considered by the Commission as being the most important instrument in the field of digital rights management, in the context of the internal Market. However, the Commission stated that the inoperability of the DRM systems' infrastructure is a necessary prior condition which ensures the access of right holders and of users.

As shown before, the collective management bodies represent an important link between the authors and users of works protected by copyright, because they guarantee to their authors, as holders of such rights, remuneration for the use of their works. In a wider sense, collective management means the exercising of the copyright and neighbouring rights by a body which acts for the interest of and on behalf of right holders.

The members of a collective management organization can be all the holders of copyright or of rights related to copyright, such as: authors, composers, publishers, writers, photographs, musicians, performers or players, etc. The radio broadcasting bodies cannot become members of a collective management organization, because they are considered as belonging to users, even though they hold certain rights on their own shows.

Once they subscribe to a collective management organization, the members provide to it a series of personal information and declare the works they created. All the supplied information is an integral part of the collective management organization's documentation and allows it to establish the connection between the use of works and the remuneration for such use, as well as to make it possible for conveying the due amounts to the right holders. The works declared by the members of the collective management body represent the "national" or the "local" repertoire (versus the "international repertoire", which is made of the foreign works managed by the international collective management bodies).

[21] http://europa.eu.int/comm/internal_market/copyright/management/management_fr.htm

The declaring of the repertoire by artists actually represents the contents of the mandate given to the collective management organization.

Subsequent to the performed survey and to the documents provided by the CREDIDAM collective management organization, the repertoire is declared on standard forms or online, following ISO accredited procedures.

Such procedures contain punctual explanations, so that the artist is able to easily identify how the form should be filled in.

For example:

A) Definitions and abbreviations:

- CREDIDAM® **Member** – performer or player, respectively actor, stunt, singer (vocal performer), instrument player, conductor, dancer, ballet dancer, director (radio theatre), circus artist;
- CREDIDAM® **Repertoire** – the totality of performances or plays, previously fixed or radio-broadcast, respectively the totality of performances in the audio field (phonograms) and of the artistic performances in the audiovisual field (performances made during TV shows, TV theatre, feature film/TV series, previously radio broadcast concerts);
- **Repertoire statement** – affidavit, under private signature, according to the dispositions of art. 292 from the Criminal Code (forgery and use of forgery);
- The audiovisual field will hereinafter be called "**AV**";
- The artistic performance in the audio field will be called: "**Music phonogram/Radio phonogram**";
- The field on the standard forms will be called "**R-Columns**";

B) Process description

I. Manner of declaring:

a) By filling in the standard forms found at the CREDIDAM® headquarters or by downloading from the www.credidam.ro website;

b) Online, by accessing the personal account, using the username and the password;

The permanent and timely declaration of the repertoire by the CREDIDAM® members, in complete and accurate form, in compliance with the provisions concerning this procedure, is the fundamental/mandatory conditions for benefiting from the distribution of remunerations related to the neighbouring rights.

II. Repertoire declaring:

CREDIDAM® records/enters in its data base the performances from the audio field (phonograms) and the artistic performances from the audiovisual field, bearing neighbouring rights, in relation to which the CREDIDAM® member must prove his/her participation, by submitting certified copies of the original and signed copies of contracts, certificates, copies of album covers, etc.

The format of such repertoire statement will be filled in horizontally, complying with the guidelines and with the legend on the right side of the form. This form will be filled in only by the holders of neighbouring rights falling in the category of actors/stunts/dancers/ballet dancers/singers/instrument players, who attended the recording/fixing of a performance such as a feature film/documentary film/commercial/video clip. The repertoire statement must be accompanied by the contract attesting the artistic performance or the certificate according to which the CREDIDAM® member transferred his/her neighbouring rights or not.

Rules for filling in:

- R1- "Film name" – is an mandatory column; the name of the film/commercial/video clip will be inserted, with capital letters, perfectly legible; no additional observations will be inserted; no abbreviations will be used;

- R2- ”Name of the director”- only the name of the film/commercial/video clip director will be filled in, with capital letters, without any additional observations, without abbreviations;
- R3- ”Sub-gender” – depending on the type of the declared artistic performance, the sub-gender will be filled in based on the legend on the right side of the form, i.e. FA-for feature film, FD-for documentary film, RE- for commercial/advertising spot and CP-for music clip/video clip;
- R4- ”Function”- is an mandatory column, which will be filled in according to the legend on the right side of the standard form, and to the proposed abbreviations;
- R5- ”Lead artist”- is an mandatory column; the name of the lead artist will be filled in, without any additional observations, or abbreviations;
- R6- ”Total number of participants”- the number of participants to the recording/fixation of the declared performance;
- R7- ”Character name”- only the name of the performed character will be filled in, without any additional observations;
- R8- ”Producer”- is an mandatory column; the television channel which radio broadcasts the declared artistic performance will be inserted;
- R9- ”Year of recording”- is an mandatory column; the date when the performance was radio broadcast by the television channel will be filled in;
- R10-”Duration”- the duration in minutes and seconds, of the declared artistic performance, will be filled in.

Each repertoire statement/standard form must include the legible name of the holder, the CREDIDAM® ID Card number, the signature and the date.

In case the repertoire statements are incomplete and illegible, and the operator ascertains that the artistic performances cannot be entered in the data base due to the lack of information or to incorrect information, the CREDIDAM® member will be notified by a written notification sent by mail/e-mail or facsimile, regarding the determined incongruities and a 10 days deadline since the notification date will be given for clarification/settlement.

In case the above deadline is not complied with by the performer and the issues concerning the declared repertoire are not solved due to the holder’s fault, CREDIDAM® will be exonerated from any responsibility regarding possible impairments of the neighbouring rights connected to the respective repertoire.

Online statement/updating: the CREDIDAM® member will access his/her personal account/box from the CREDIDAM® website, using his/her username and password and will follow every step indicated for filling in all fields.

Any update of the repertoire, performed on the CREDIDAM® website must be validated by the holder of neighbouring rights either by an electronic signature, or by the submission at the CREDIDAM® headquarters, of a copy printed and signed by the holder. Otherwise, the repertoire declared on the website will not be validated and will not be entered in the CREDIDAM® data base, in order to generate remunerations.

By the repertoire updating it is understood the declaring of fixed artistic plays/performances, in the interval between the last repertoire statement and the current repertoire statement.

The repertoire update is made monthly and it is a statutory obligation of the CREDIDAM® members, the same as that of submitting the contracts related to the repertoire statements in the audiovisual field, so as to determine whether the patrimonial rights were transferred or not. Considering that in the audiovisual field the collective management is optional, we state that during the periods when the holder of neighbouring rights fails to declare his/her repertoire, he/she does not mandate CREDIDAM® to manage his/her repertoire and it is presumed that he/she opted for the individual management of the repertoire fixed during the respective period.

Capacity of mandate of the collective management bodies.

The collective management mandate represents a (contractual) power of attorney given by the holders of patrimonial copyright or neighbouring rights, to certain collective management bodies, in order to act in the performers' name and to manage their rights related to their repertoire[22].

The mandate concerning the collective management of patrimonial rights, copyright or neighbouring rights, is granted directly, by a written contract, by right holders.

Each right holder who granted a mandate to the collective management organization is entitled to one vote within the General Assembly. The performers or players who attended a collective performance or play of a work are entitled to a single vote at the General Assembly, by the representative appointed according to the procedure stipulated in art. 99 paragraph 2)[23].

As per art.129 paragraph 3) from the law, the mandate concerning the collective management of patrimonial rights, copyright or neighbouring rights may also be granted indirectly, by holders, by written contracts, concluded between collective management bodies in Romania and foreign bodies, which manage similar rights, based on the repertoires of the members thereof. The indirect mandate does not grant a voting right to the right holders.

Any holder of copyright or neighbouring rights may entrust through a mandate, the management of his/her rights over his/her own repertoire, to a collective management organization. The respective body must accept the management of such rights based on collective management, to the extent of its object or domain of activity. *Per a contrario,* if the rights, for whose management the collective management organization is empowered, do not fall under the scope of its object of activity, it may reject the request.

The collective management bodies may not have as object of activity the use of the protected repertoire for which they received a collective management mandate.

In the case of the mandatory collective management, if a holder is not associated to any organization, the organization in this field with the greatest number of members will have competence. The claim, by the unrepresented right holders, of the amounts they are entitled to, can be lodged within 3 years from the notification date. After such term, the undistributed or unclaimed amounts will be used according to the Resolution of the General Assembly, except for the management expenses.

For exerting their mandate, according to Law no. 8/1996 on copyright and neighbouring rights, the collective management bodies are not transferred or assigned copyright and neighbouring rights or the use thereof.

The quality of CREDIDAM member is obtained starting from the moment when the holder of neighbouring rights mandates this collective management organization, in writing (by filling in the management mandate), in order to manage his/her rights.

This entitles the associate to take part in the social life of the association and to enjoy equality of treatment.

In the application for registering with CREDIDAM, each right holder undertakes the obligation to mandate this association exclusively for managing his/her patrimonial rights coming from the exploitation of the previously fixed or broadcast artistic performances, whose right holder he/she is, according to the law or to the association's Memorandum of Incorporation.

The management mandate given to the collective management organization by each member, in his/her own name is subject to the dispositions of Law no. 8/1996 on copyright and neighbouring rights, as well as to the dispositions of the common law in this field.

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[22] Rodica Pârvu, Ciprian Raul Romițan, *op.cit.* p.67.

[23] According to art. 99 paragraph 2) of Law no. 8/1996, performers who are collectively involved in the same interpretation or execution, such as members of a musical group, of a chorus, of an orchestra, of a ballet or of a theatre troupe, should mandate in writing a representative among them, with the consent of members' majority. The director, conductor and soloists are exempted from these provisions (paragraph 3).

The management mandate (act of adhesion) includes the member's commitment to comply with the dispositions from the Memorandum of Incorporation and not to perform any act or fact that might prejudice the association or the members thereof, as well as the option regarding the collective management of the rights susceptible of being collectively managed.

Each member of the collective management organization undertakes to pay, upon signing the management mandate (act of adhesion) the fee for joining the association.

Such joining tax is established annually by the Board of Directors. The quality of member is not transmissible.

The documents issued by the association for its underage member are issued on the underage member's name, and the management mandate will be countersigned by one of his/her parents or legal representatives (custodian, curator, etc.).

The quality of CREDIDAM member is lost in the following cases:

a) Upon request (renunciation):

- the renunciation application will be made in writing, with at least 6 month prior to the end of the calendar year, will be motivated and becomes effective on the 1st of January of the following year;

- the failure to comply with the 6 months term leads to the automatic extension of the mandate by another year.

The statutory disposition represents the particular application of the legal rules solely in relation to the time interval when the calculations between the principal and the mandate, according to the provisions of art. 1541 from the Code of Civil Procedure. According to art. 1541 from the Civil Code in force on the adopting date of the Memorandum of Incorporation: *"The mandate must, whenever asked to, inform the principal about his/her works and supply it with everything there is to be received based on the mandate, even when what is received would not have been owed to the principal"*.

Because the legal dispositions concerning the mandate's obligation to answer before the principal is not limited in time in terms of its execution, in relation to the specific nature of the legal relationships between the collective management bodies, on behalf of and for the principal's interests, according to the law, the statutory disposition forces CREDIDAM, within a precise time interval, to complete the calculation operation with the principal who revoked the mandate, in compliance with the principal of the annuity of the financial year and for avoiding to discriminate the budgetary execution annually approved by the General Assembly.

The CREDIDAM Memorandum of Incorporation can only be interpreted in relation to the law, but also to the legal rules of interpretation applied by similarity to those in the matter of conventions, respectively to art. 977 – 985 from the Civil Code in force on the adopting date of the Memorandum of Incorporation.

Consequently, the literal meaning of the used terms cannot be transformed into an absolute one, because the real intention of those who adhere to the CREDIDAM Memorandum of Incorporation is that of voluntarily conform to certain rules which discipline and constrain the collective management organization, by imposing it, also in the hypothesis when the mandate is given up, according to the incident budgetary exercises, to be diligent when collecting the rights due to the principal for the period previous to the mandate revocation, which may be collected after the revocation request date and to cautiously proceed to making estimates for the budgetary projection, in relation to the disciplining of the revocation procedures.

b) Is terminated by law :

- when the member of the collective management organization becomes a member of another collective management organization abroad, having the same object of activity or concluded a representation contract with it;

- when subsequent to a final and binding court order, he/she is prosecuted for one of the facts stipulated and sanctioned by Law no. 8/1996;

- after the death of the CREDIDAM member:

- in case a member dies, the remunerations will continue to be distributed in the account of the entitled persons, until depletion, in line with the dispositions of Law no. 8/1996, being collected by the legal heirs and/or legatees of the late.

- the identification of heirs, as well as the proof of the death, will be made based on the heir certificate, and on the death certificate, within at most 3 years since the death for the categories of rights which are mandatory managed collectively and within at most 6 months for the categories of rights managed optionally.

- if there are no legal heirs, the exercise of such rights belongs to CREDIDAM, in compliance with the dispositions of Law no. 8/1996 and of the Civil Code.

The revenues due to members, whose quality terminated by law, will continue to be received by the association, which will transfer them to the persons legally entitled thereto, until depletion. From the distributed amounts, the management fee (commission) will be withheld.

6. COLLECTIVE MANAGEMENT FORMS

The performers' rights can be mandatory managed collectively and/or optionally by the collective management bodies.

The performers' rights must be analyzed on a multidisciplinary basis, as they are connected to the civil law, labour law, fiscal law, civil procedural law, criminal law, criminal procedural law, and Community law.

The collective management of copyright and neighbouring rights represents a necessary stage for the materialization of certain rights in relation to the numerous means of exploitation. Certain patrimonial rights of the performers or players have proven from the beginning to be difficult to analyze individually. The technical process and the mass exploitations generalization have made the individual control almost impossible.

The collective management presupposes first of all the collection of the remunerations owed by users/importers and the distribution thereof to those entitled, pro rata with the real use of everybody's repertoire, within at most 6 months since the collection date.

According to art.123 paragraph 1) from Law no. 8/1996, the holders of copyright and neighbouring rights can exert such rights acknowledged by this law either individually or, based on a mandate, through the collective management bodies. Based on the analysis of this text, one can say that the rule is represented by the exercising of rights personally and not through intermediaries, by the right holders, and the exception is represented by the possibility to exert such rights through the collective management bodies.

The patrimonial rights acknowledged through this normative act may not be transferred to the collective management bodies by the holders of copyright of neighbouring rights.

The collective management of copyright is made only for the works previously made public, and the collective management of neighbouring rights can be made only for performances or plays previously fixed or radio broadcast, as well as for phonograms or videograms previously made public.

Law no. 8/1996 on copyright and neighbouring rights restrictively and expressly establishes the categories of rights which can be mandatory managed collectively and those that can be managed optionally.

Thus, according to the dispositions from art.123^1 paragraph1) the collective management is mandatory for the exercising of the following rights:

a) the right to compensatory remuneration for private copy[24];

[24] We understand by *levy (compensating remuneration* the right of the authors of works reproduced after sound or audiovisual recordings, after paper works, reproduced on any other type of support, as well as of publishers,

b) the right to a fair remuneration for public lending stipulated in art. 14^4 paragraph 2)[25];

c) the resale right[26];

d) the right to the radio broadcast of musical works[27];

e) the right to the public communication of music works, except for the public projection of cinematographic works[28];

f) the right to a fair remuneration acknowledged for performers and phonogram producers for the public communication and radio broadcast of commerce phonograms and the reproductions thereof[29];

g) the right to cable retransmission[30].

The law stipulates that for the categories of rights provided in art.123^1 paragraph 1), the collective management bodies also represent the right holders who did not grant a *mandate* to them.

Moreover, art.123^2 paragraph 1) presents the rights which can be managed collectively, meaning optionally. Such rights are:

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producers of phonograms and videograms and performers to receive an amount of money for private copying done under the law (Rodica Pârvu, Ciprian Raul Romiţan, *Copyright and Related Rights*, All Beck Publishing House, Bucharest, 2005, p.90). We understand by *private copy* reproducing a work without author's consent, permitted by law without the author's consent, when done for personal use or normal circle of a family, provided that the work has been previously brought to the attention of the public, and the reproduction is not contrary to the normal exploitation of the work and does not impair either the author or the holder of rights of use (Rodica Pârvu, Ciprian Raul Romiţan, *op.cit.* p.28).

[25] According to art. 14^4 paragraph 2) of Law no. 8/1996 „ Lending by the library does not require consent of the author and entitles him to an equitable remuneration. This right may not be waived".) We understand by *lending*, to make available for use, for a limited time and without economic or commercial advantage, directly or indirectly, of a work through an institution allowing public access for such purpose (art.14^4 paragraph 1). We understand by *fair/equitable remuneration* the right of performers and phonogram producers to receive an amount of money for direct or indirect use of phonograms published for commercial purposes or of their reproductions via radio broadcasting or any other means of communication to the public (Rodica Pârvu, Ciprian Raul Romiţan, *op.cit.* p.90).

[26] We understand by *resale right* the right of the author of an original work of graphic or plastic art, or of a photographic work , to get a share of the net selling price obtained for any resale of the work, subsequent to the first transfer by the author, as well as the right to be informed of the location of his work.

[27]We understand by *broadcasting*: a) issuing a work by a radio or television broadcasting organization, by any means of wireless transmission of signals, sounds or images, or of their representation, including its public communication by satellite in order to be received by the public; b) transmission of a work or of its representation, by wire, cable, optical fiber or any other similar procedure, except for computer networks, in order to be received by the public (art. 15^1).

[28] We understand by *public communication of musical works* the communication made in a place opened to the public or in any other place where people gather in a number exceeding the normal circle of a family and acquaintances, regardless the method of communication either by direct presentation by the performers or by using electronic or electroacoustic means (television, radio receivers, tape recorders, stereos, computer equipments - PC, CD-player, amplifying equipments and any other devices playing sound or audiovisual recordings), for the purpose of creating the environment in order to perform other activities not requiring the use of musical works (see the Methodology for the use of musical works through public communication and remuneration representing royalties due to authors of musical works). The *Musical work* is „an expressive sound order codified in a graphic score" (Bucharest Court of Appeal, Civil Section IX and intellectual property cases, Decision no. 134A dated May 24th, 2007, published in the Off. Gazette no. 610 on September 4th, 2007, p.10).

[29] We understand by *commercial phonogram* a phonogram which is communicated or broadcasted to the public by that category of users in report to which it is impossible to individually exercise the right to equitable remuneration by the holders of rights related to copyright; and we understand by *phonogram published for commercial purpose* a phonogram which is communicated or broadcasted to the public by that category of users in report to which it is possible to individually exercise the right to equitable remuneration by the holders of rights related to copyright.

[30] We understand by *cable retransmission*, as defined by law: a) a simultaneous retransmission of a work by an operator, unaltered and in full, by wire, cable, optical fiber or by any other similar procedure, except computer networks, for its reception by the public or b) by a short wave broadcasting system, for reception by the public of an initial transmission, by wire or wireless, including by satellite, of program or television broadcasting services, intended for reception by the public.

a) the right to reproduce music works on phonograms or videograms;

b) the right to the public communication of works, except for music works and the artistic performances from the audiovisual field;

c) the lending right, except for the case stipulated in art. 123^1 paragraph 1) item b);

d) the right to radio broadcasting of artistic works and performances in the audiovisual field;

e) the right to a fair remuneration resulting from the transfer of the rental right stipulated in art. 111^1 paragraph 1)[31];

f) the right to a fair remuneration acknowledged for performers and phonogram producers for the public communication and radio broadcasting of phonograms published for commercial purposes of the reproductions thereof.

For the categories of rights stipulated in art.123^2 paragraph 1), the collective management bodies represent only the right holders who granted a mandate to them and elaborate methodologies, to the extent of the managed repertoire, if the conditions stipulated in art. 130 paragraph 1) item a)[32] are fulfilled, or directly negotiate with the users the license contracts. The collective management bodies will allow, upon the users' request, the analysis, at the bodies' headquarters, of the managed works repertoire, from among those requested by the applicant, in the form stipulated in art. 126 paragraph 2)[33], as well as the list of Romanian or foreign copyright and neighbouring rights holders, that it represents. This collective management activity is under the supervision and control of the Romanian Copyright Office, as guarantor for the application of the law.

Upon request, the collective management bodies authorize the use of intellectual creation works, only based on the documents attesting the existence of the mandate given by the holders of copyright or of neighbouring rights, except for the cases when the collective management is mandatory.

All the rights acknowledged by the law, except for the ones stipulated in art. 123^1 and 123^2, they can be managed through the collective management bodies, only to the extent of the special mandate given by the right holders.

Regarding the negotiations with an individual title, concerning the rights acknowledged by Law no. 8/1996, the existence of the collective management bodies does not prevent the holders of copyright and of neighbouring rights to address to certain intermediaries, which can be both specialized natural persons and legal entities, in order to be represented.

As it can be seen, based on the analysis of the texts in art. 123^1 item f) and art.123^2 item f), the law giver wanted to differently regulate the social relationships concerning the remuneration owed for the radio broadcasting of the "commerce phonograms", as opposed to the same radio broadcasting activity of the "phonograms published for commercial purpose".

For the correct interpretation of the law, we deem that the text found in art. 123^1 is the correct one, being in line with the dispositions of art. 12 from the Rome Convention and with art.15 paragraph1 from the WIPO Treaty*"*.

In relation to the technical-juridical dispute regarding *"commerce phonograms"* and *"phonograms published for commercial purposes"*, our point of view is and still remains the same,

[31]According to art. 111^1 paragraph 1) of Law no.8/1996 „If an author or performer has transferred or ceded his/her right to rent or loan, with respect to a phonogram or a videogram, to a producer of phonograms or of audiovisual recording, he/she retains the right to obtain equitable remuneration".

[32] According to art.130 paragraph 1) item a) collective management organizations have the obligation to grant non-exclusive license to users, by their request, made before using the protected repertoire/playlist, in exchange for a remuneration, by written non-exclusive license.

[33] According to art 126 paragraph 2 of the law regarding copyright and related rights, such repertoire/playlist is submitted to ORDA a database protected by law, both in writing and in electronic format, as established by general manager's decision, and contains at least the name of the author, the name of the holder of rights, title of the work, identification elements of the performers, phonograms and videograms.

the law not making any distinction between the two wordings and the juridical regime applicable for the phonograms is unique.

The legislation in Romania transposed the dispositions of the international regulations, having as purpose the homogenization of the standards regarding the protection of intellectual property rights at international level.

Phonograms have a unique definition in each of these international instruments:

a) art. 3 paragraph 1 item b) from the Rome Convention[34] defines the phonogram as: "any fixation of an audio reproduction of the sound of a representation or of other sounds".

b) art. 2 paragraph 1 item b) from the WIPO Treaty[35] on phonograms and public reproduction (WPPT) defines the phonogram as the fixation of the sound of a representation or of other sounds or the production of sounds, other than in a fixed form and incorporated in a cinematographic or audiovisual work.

Moreover, art.12 from the Rome Convention establishes: "when *a phonogram published for commercial purposes* or a reproduction of such phonogram is used directly for radio broadcasting or for any other type of communication to the public, the one using it will pay to performers or players or to the phonogram producers or to both, a fair and unique remuneration".

Art. 15 The WIPO Treaty[36] establishes the fact that the performers and phonogram producers will benefit of a right to a fair and unique remuneration for the direct or indirect use of the phonograms published for commercial purposes for radio broadcasting and for any public communication.

We ascertain that on an international scale, there is no distinction between "commerce phonograms" and „phonograms published for commercial purposes".

The distinction made by the Romanian law is artificial and contradictory, as long as the subsequent amendments from Law no. 8/1996 only intended to transpose the international regulations, which contain no difference, in this sense.

According to art. 20 from the Romanian Constitution, in which the provisions of international treaties to which Romania is a part, prevail, in case when there are incongruities or contradictions between them and the regulations from the national legislation, the regime applicable to phonograms is unique and there isn't necessary to make any distinction in this field[37].

De lege ferenda, through the bill on the amendment and supplement of Law no. 8/1996 on copyright and neighbouring rights, with subsequent amendments and supplements, drafted by the Government in order to be submitted to the Romanian Parliament for adopting, the envisaged purpose is to eliminate the drafting errors found in the text of Law no. 8/1996, including the elimination of the notion of *"commerce phonogram"* from art. 123^1 paragraph 1, item f from Law no. 8/1996, and the replacement thereof by the wording *"phonogram published for commercial purposes"* (wording used throughout the contents of the Law). Moreover, item f in art. 123^2 from Law no. 8/1996 will be eliminated, in order to remove any doubt in relation to the obligatory nature of the management activity in the case of phonogram radio broadcasting.

[34] Law no. 76/1998 for Romania's accession to the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, concluded at Rome on October 26th, 1961, published in the Off. Gazette no. 148/1998.

[35] The World Intellectual Property Organization

[36] WIPO Treaty on performances, executions and phonograms, ratified by Romania by Law no. 206/2000.

[37] See Civil Resolution no.57A/2011 of BCA Civil Section IX and for IP causes, unpublished.

7. NEGOTIATION OF REMUNERATIONS

In order to start the negotiation procedures, the collective management organization must submit to the Romanian Copyright Office an application, accompanied by the methodologies proposes for negotiation, according to art. 130 paragraph (1) item a) from Law no. 8/1996.

The methodologies proposed and submitted to the Romanian Copyright Office are negotiated within a commission set up based on a decision of the General Manager of the Romanian Copyright Office, issued within maximum 5 days since the reception of the application for the start of the negotiation procedures. The decision of the General Manager of the Romanian Copyright Office will be published in the Official Gazette of Romania, Part I, on the expense of the collective management bodies.

According to art. 131 paragraph 2) from the Law, the final part, the negotiation commission is composed of: one representative for each main collective management organization, which function each for one category of rights and one representative for each main associative structure mandated by the users, appointed from among them, and one representative of each of the first 3 major users, established based on their turnover and market share in the field, provided they are declared at the Romanian Copyright Office on their own responsibility, as well as of the public radio broadcasting and television societies, if applicable.

In the view of being appointed within the above mentioned commission, the collective management bodies submit to the Romanian Copyright Office, together with their methodologies, the list of the associative structures of their users and the list of their major users, which will be convened for negotiations, as well as the identification data thereof.

The main negotiation criteria:

a) the category of right holders, members or non-members, and the field for which the negotiation is being carried;

b) the category of users represented during negotiations by the associative structures or by the other users appointed to negotiate;

c) the repertoire, confirmed by the Romanian Copyright Office, managed by the collective management organization, for its own members, as well as for the members of other similar foreign bodies, based on their representation contracts;

d) the percentage of use of the repertoire managed by a collective management organization;

e) the percentage of uses for which the user fulfilled the payment obligations by direct contracts with the right holders;

f) the revenues obtained by users from the activity which uses the repertoire constituting the scope of the negotiation;

g) in case there are no revenues, the European practice in the field will be used;

h) the European practice on the results of negotiations between the users and the collective management bodies.

If the collective management is obligatory, the methodologies will be negotiated without taking into consideration the criteria stipulated in paragraph (1) items c) and e), the repertoires being considered extended repertoires.

The negotiation of methodologies takes place according to the schedule established by the two parties, over a time span of maximum 30 calendar days since the setting up of the commission.

The understanding between the parties in relation to the negotiated methodologies will be recorded in a protocol, which will be submitted at the Romanian Copyright Office, Part I, on the expense of the collective management bodies, based on a decision of the General Manager of the Romanian Copyright Office, issued within 5 days since the date of submission. The methodologies thus published are enforceable against all the users in the field for which negotiations were carried

and against all the importers and manufacturers of supports and devices for which the compensatory remuneration for private copy is owed.

Based on the analysis of these legal texts, it results that the negotiation stage must be extremely serious, the parties being bound to concretely establish their claims, which means actual elements, grounded on the general principles established by the law[38].

8. ARBITRATION PROCEDURE

According to art.131[1] paragraph 3) from Law no. 8/1996, the Romanian Copyright Office can be requested to start the arbitration procedure[39] performed by arbitrators, in the following situations:

a) the entities forming a party which will attend the negotiation were not able to agree on a mutual point of view that needs to be presented to the other party;

b) the two negotiating parties were not able to agree on a unique form of the methodology, within the deadline stipulated in paragraph (1);

c) the collective management bodies were not able to agree on the conclusion of a protocol for the distribution of remunerations and for the establishment of the commission owed to the sole collector.

Within 5 days since the request for arbitration, the Romanian Copyright Office will convene the parties in the purpose of appointing, by drawing of lots, 5 titular arbitrators, who will form the arbitration court, and 3 backup arbitrators. The latter will replace the unavailable titular arbitrators, in the drawing of lots order. The appointment of arbitrators through the drawing of lots will also be made in case the convened parties are absent.

Moreover, within 5 days since the appointment of arbitrators, the Romanian Copyright Office will convene at its headquarters the appointed arbitrators and the parties, for the setting up of the arbitration court. The arbitration court establishes: the gross fee, based on negotiations with the parties, the first term, but not longer than 5 days, and the place of arbitration, informing the parties about its decision.

The two parties under arbitration, the collective management bodies and the users or other payers, respectively have an equal contribution to the settlement of the fee. The amounts will be deposited at the Romanian Copyright Office's pay desk, before the first arbitration term. The failure to make the payment in time leads to the withdrawal of the right of the party which did not pay the fee, to submit the evidence and to draw conclusions during the arbitration period.

The arbitrators must, within 30 days since the first arbitration term, submit to the Romanian Copyright Office, the decision including the final form of the methodologies submitted for arbitration, in the view of delivering it to the parties. As an exception, the arbitrators may request, on a grounded basis, to the Romanian Copyright Office, the extension of such term, by maximum 15 days. The arbitrators may collect their fee from the Romanian Copyright Office's pay desk only after the submission of the arbitration award.

The arbitration award concerning the final form of the methodologies will be delivered to the parties by the Romanian Copyright Office and will be published in the Official Gazette of Romania, Part I, on the Office's expense, based on a decision of the General Manager, issued within five days since the submission date thereof. The methodologies thus published are enforceable

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[38] For details see Arbitration Resolution dated July 25th, 2007, published in the Off. Gazette no. 586 dated August 27th, 2007, according to the ORDA General Manager's Decision no. 262 dated July 31st, 2007. The Arbitration Panel was composed of the following arbitrators: Ana Diculescu-Şova; Cristian Iordănescu; Alexandru Ţiclea; Mihai Tănăsescu; Gheorghe Gheorghiu.

[39] *Arbitration* is a mean for resolving the dispute between two parties by a third party or by a group of third parties, called *arbitrator* or *arbitrators,* who resolve differences through an Arbitration Resolution enforceable by law (Rodica Pârvu, Ciprian Raul Romiţan, *op.cit*. p.4).

against all users in the field for which negotiations took place and no deductions from the payment of the owed remunerations are granted, others than those stipulated in the published methodologies[40].

According to art. 131^2 paragraph 9) from Law no. 8/1996, within 30 days since the publication of the arbitration award in the Official Gazette of Romania, Part I, the parties can file an appeal against it before the Court of Appeal in Bucharest, which will advise in relation to the cause, in civil session. The arbitration award is enforceable by law until the delivery of the solution regarding the maintaining or the modification of methodologies. The award given by the Court of Appeal in Bucharest is final and binding and will be submitted to the Romanian Copyright Office and will be published in the Official Gazette of Romania, Part I, on the expenses of the Romanian Copyright Office, based on the decision of the General Manager, issued within 5 days since the servicing date.

The methodologies negotiated or established according to the legal dispositions are not enforceable against the users who, on the starting date of the procedure concerning the negotiation of methodologies, undergo a direct negotiation process of a license contract or have already completed such negotiations with the collective management bodies.

A new request for the start of the negotiation procedures in relation to the tariffs and methodologies can be filed by the collective management bodies or, if applicable, by the associative structures formed by users, by major users, by public radio broadcasting societies or by television societies only after 3 years since the publication data thereof in a final form, in the Official Gazette of Romania, Part I.

In the case of negotiations stipulated in art. 107 paragraph 4), either party can file a new request for the starting of the methodologies negotiation procedures only after 2 years since the publication thereof in final form, in the Official Gazette of Romania, Part I.

The remunerations established in fixed form can undergo annual changes, starting with the first month of the year following that when the methodologies were published, by the collective management bodies, based on the inflation index, established at national level. Such modifications will be submitted at the Romanian Copyright Office, and afterwards they will be published in the Official Gazette of Romania, Part I, on the expense of the collective management bodies, based on a decision of the General Manager of the Romanian Copyright Office, issued within five days since the submission date. The modifications become effective starting with the month following their publication.

The remunerations collected by the collective management bodies are not and cannot be assimilated to their revenues.

9. COLLECTING THE AMOUNTS OWED BY USERS

The collecting of the amounts owed by users or by other payers is made by the collective management organization whose repertoire is being used.

If there are several collective management bodies for the same domain of creation, and the managed rights fall into the category of those stipulated in art. 123^2, the beneficiary bodies will establish the following, in a protocol which will be submitted at the Romanian Copyright Office for publication in the Official Gazette of Romania, Part I, on their expense:

a) the criteria for distributing the remuneration among the bodies;

[40] For detail see Bucharest Court of Appeal, Civil Section IX and intellectual property cases, Resolutions no.115A and no.116A dated May 2nd, 2007, published in the Off. Gazette no. 562 dated August 16th, 2007; Resolutions no. 29A dated March 7th, 2006 and 116A dated June 15th, 2006, published in the Off. Gazette no. 841 dated October 12th, 2006.

b) the collective management organization which will be appointed from among them, based on a decision of the General Manager of the Romanian Copyright Office, as collector in the field of the respective right holders;

c) the means of emphasizing and justifying the expenses regarding the real coverage of the collecting costs of the collective management organization.

If for these cases, the beneficiary collective management bodies fail to submit to the Romanian Copyright Office the above mentioned protocol, within 30 days since the effective date of the methodologies, the Romanian Copyright Office appoints from among them the collector in the field of the respective right holders, based on representation, through a decision of the General Manager.

For the above mentioned situation, the unique collector appointed by the Romanian Copyright Office may not distribute the collected amounts either among the beneficiary bodies, or to its own members, until after the submission to the Romanian Copyright Office, of a protocol concluded among the beneficiary bodies, in which the criteria for the distribution of the collected amounts are established. The collecting expenses in this case, are separately highlighted and they must be justified based on documents regarding the real coverage of the collecting costs of the management organization which is the collector in the field of the respective right holders.

Upon the expiry of the 30 days term, any of the collective management bodies may request the Romanian Copyright Office to start the arbitration procedure performed by the arbitrators, for the establishment of the criteria concerning the distribution of the remuneration among the categories of beneficiaries.

The collective management organization, which is a sole collector, must issue the authorization by non-exclusive license, in writing, on behalf of all the beneficiary collective management bodies, and ensure the transparency of all the collecting activities, as well as that of the related costs in relation to the beneficiary collective management bodies. They must support the collecting activity.

The collective management bodies may agree in a protocol which will be published in the Official Gazette of Romania, Part I, based on a decision of the General Manager of the Romanian Copyright Office, the appointment of a joint collector on a field of payers, of the remunerations owed to the categories of right holders represented by them. Moreover, the collective management bodies may set up, with the approval from the Romanian Copyright Office, joint collecting bodies for several fields, which will function based on the legal dispositions regarding the federations made up of private law natural persons without patrimonial purpose, as well as according to the express dispositions regarding the organizing and functioning of the collective management bodies from this law.

9.1 Remunerations owed to right holders

a) unique fair remuneration

b) fair remuneration for the rental or lending of the right

c) compensatory remuneration for private copy

In practice, the distribution of the collected remunerations by the collective management organization of performers is carried out as follows:

CREDIDAM undertakes the obligation to collect and distribute the remunerations according to the management mandate received from the right holders, according to the legal dispositions. The distribution of the collected amounts will be made in compliance with the law, with the Memorandum of Incorporation and with the distribution regulation, approved by the General Assembly. The amounts coming from the remunerations collected by CREDIDAM will be directly distributed to right holders, to performers or players, pro rata with the real use of their own performances, minus a management share (commission) for covering the functioning expenses.

The management share (commission) for the members of the CREDIDAM collective management organization is the maximum percentage stipulated by Law no. 8/1996 with subsequent amendments and supplements. For non-members, the management share (commission) is given by the real expenses incurred with the management of rights (collecting and distribution), but not more than 25%.

The amounts thus remaining will be taxed according to the legal dispositions in the matter.

The distribution of the remunerations to the rights beneficiaries will be made twice a year.

If the bilateral contracts concluded with the partner management companies abroad stipulate otherwise, the distribution to the foreign beneficiaries will be made according to such contracts.

The distribution of the collected rights will be made according to the regulation for the distribution of remunerations towards the holders of neighbouring rights, as follows:

Compensatory remuneration for private copy

The reserve fund for the requests of right holders submitted within 3 years since the collection date is set up. The size of the reserve fund is of 20% from the amounts collected annually for private copy. This can undergo annual changes based on a resolution of the General Assembly, depending on the cashing collected from this source.

The compensatory remuneration owed to performers for private copy will be *distributed to them* in relation to the national market research, which will be done annually by a specialized institution. The Board of Directors appoints the institution and the conditions for performing such market research which establishes the percentages for copying the artists' performances by categories of performance (acting, directors of shows, except for film directors, dancing, music and stunts), by categories of genders (classical music, light music – jazz, rock, pop, folk, dance, manele music, etc. and folklore music) and by categories of origin of the artistic performances (Romanian, European and American).

The value of each phonogram/videogram is given by its radio broadcasting duration and by the amount collected during the period constituting the object of the distribution, in relation to the total number of play lists declared by the Radio and TV channels. The distribution of the amounts to the performers will be made considering, in the absence of a convention recorded with CREDIDAM upon the declaration of the repertoire, the criteria stipulated in radio broadcasting of phonograms/videograms.

Fair remuneration for public lending, internet and reproduction.

For the public lending, the amounts will be distributed according to the information provided by the institution which allows public access to the performances or plays of performers. According to this information, the amounts will be distributed to the performers whose artistic performances are found on the respective lists, in relation to the criteria stipulated in relation to the radio broadcasting of phonograms/videograms.

For the Internet, the amounts are distributed according to the information supplied by the institution which allows public access to the performances or plays of the performers. According to this information, the amounts will be distributed to the performers whose artistic performances are found on the respective lists, in relation to the criteria stipulated in relation to the radio broadcasting of phonograms/videograms.

For reproduction, the remuneration collected based on the special mandate will be distributed as follows:

- The percentage of 80% will be distributed as follows: 50% for the leading role (in case the cast includes several actors or the director's book includes several actors for the same type of role, the resulting amount will be distributed equally to all participants), 30% for the secondary part, 10% for the cameo role and 10% for the actor whose image is on the DVD/VHS, etc cover or for the artists taking part in the promotion.

- The percentage of 20% for the film soundtrack will be distributed depending on the part played by the respective performers or players.

If one of the above mentioned categories is inexistent, the related remuneration will be redistributed pro rata, in the following order: leading roles, secondary roles, cameo roles, etc.

Radio broadcasting of phonograms/videograms

The amounts will be distributed according to the real use resulting from the information received from users (play lists). The value of each phonogram/videogram is given by the radio broadcasting duration and by the amount collected for the radio broadcasting period (the collected amount will be divided by the total number of radio broadcasting seconds, thus obtaining the value per second, which will be multiplied by the number of seconds for each play/performance, thus resulting the value per play/performance). The amount calculated for a phonogram/videogram will be distributed to all the performers who participated to the respective recording, in accordance with the repertoire statement, or with the attendance sheet.

The criteria used to establish the score for each participant to a phonogram/videogram are, in the absence of a convention registered with at the time of declaring the repertoire:

a) The role or title within the recording (fixing).

b) The number of persons participating in the fixing.

The amounts collected from the users which radio broadcast or retransmit by cable works doubled by performers or players will be distributed to the CREDIDAM members, pro rata with the real use of the repertoire, in compliance with the score system based on the declarations given by the performers or players on their own responsibility under private signature.

Public communication

The remuneration collected from the public communication of phonograms/videograms for ambient/lucrative purposes will be distributed as a compensatory remuneration for private copy, respectively according to the provisions concerning private copy.

The remuneration collected from the public communication of the artistic performances in the audiovisual field in cinematographs will be distributed according to the information provided by the user and to the collected amounts. Based on such information, the amounts will be distributed to the performers whose artistic performances are found on the respective lists, in relation to the criteria stipulated for the radio broadcasting of phonograms/videograms.

Distribution of amounts collected from cable distributors

The amounts will be distributed according to the list of radio broadcast channels retransmitted by cable distributors, according to the distribution system stipulated for the radio broadcasting of videograms and phonograms on television channels. The list of retransmitted channels is communicated by the cable distributor, or can be asked by CREDIDAM from the National Audiovisual Council.

The rights susceptible from being collectively managed for which the express agreement of the members is necessary, according to art.123^2 and to art.123^3 will be distributed solely to the performers or players who mandated CREDIDAM for collecting the remunerations pro rata with the direct cashing related to the use of each artistic performance.

Undistributed or unclaimed amounts

The undistributed amounts are the amounts for which within 3 years since the collecting date, CREDIDAM did not received the information necessary for distributing them.

The unclaimed amounts are the distributed amounts, but whose holders failed to request them for 3 years since the notification date or amounts owed to the deceased CREDIDAM members, whose legal heirs did not claim them for 3 years since the date of their distribution.

The undistributed or unclaimed amounts have the following regime:

- with the open vote of the majority of members present at the General Assembly, the undistributed or unclaimed amounts are included in the amounts designated for the distribution of the collected rights following the rule of distribution of the private copy.

- with the open vote of the majority of members present at the General Assembly exerted in the conditions stipulated by this law, the use for mutual purposes of the undistributed or unclaimed amounts can be decided, based on:

- the granting of temporary aids to the association's members undergoing temporary work incapacity, medically certified and verified by the Board of Directors

- the initiation, support and development of certain social, cultural informative and documentation projects or programs, regarding the association's members or the users of their performances

- with the open vote of the majority of members present at the General Assembly, it can be decided to support through mutual programs and projects, the authority's activities following the public-private partnership rules.

Conclusions

The lead path addressed was a concrete analysis of the collecting and repartition way of performers' rights.

This work is of particularly interest for: performers, authors, producers, users, collective management societies etc. and will contribute to the comprehensive acknowledge of the above mentioned rights and interests.

Therefore, allow me to consider a must the thoroughgoing study for "negotiations and arbitrage" provisions in performers' intellectual property rights, both at national level and at EU or international level. It will be useful for all actors in Copyright issues.

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RELATED RIGHTS OF THE PRODUCERS OF PHONOGRAMS GENERATED BY BROADCASTING THEIR PHONOGRAMS

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Abstract:
The exploitation of phonograms by collective management is a topic of increasingly present among the right holders of copyright and related rights, but the issues raised by this activity are multiple and complex. From the type of the right set in our national legislation to individually or collectively management of this right, there are many interpretations that require further analysis. Phonograms broadcasting by radio broadcasting organizations is one of the first secondary uses which generated rights for the rights holders.

***Keywords**: phonogram, commerce, commercial, broadcasting, remuneration.*

Introduction:

As legal framework, I will analyze the applicable provisions of Law no. 8/1996, Rome Convention, WIPO Treaty for the notion of phonogram, notion of phonogram published for commercial purposes, notion of commerce phonogram and the type of management for phonogram broadcasting.

Legal Framework:

- Law no. 8/1996, as supplemented and amended, on copyrights and related rights

Article 103 - (1) A sound recording or a phonogram, for the purposes of this law, shall be deemed to be the fixation of the sounds originating from an interpretation or performance or of other sounds or digital representation of such sounds, other than in the form of a fixation incorporated in a cinematographic work or in another audiovisual work.

(2) The producer of sound recordings shall be the individual or legal entity that has the initiative and undertakes liability for the organization and financing of the first fixation of the sounds, regardless whether it is a work in terms of the present law or not.

Article 105 - (1) Subject to the conditions provided for by Article 92 paragraph (1), the producer of sound recordings has the exclusive patrimonial right to authorize or to prohibit the following:

……

…

_____

f) the broadcasting and communication to the public of his/her own sound recordings, except those published for commercial purposes, case in which he/she is entitled only to an equitable remuneration;

……

……

(2) The definitions from Article 14, 14^1, 14^2, 14^3, 14^4, Article 15 paragraph (1), Articles 15^1 and 15^2 shall apply by analogy to the rights provided for by paragraph (1) as well.

……

……

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Article 106^5. - (1) For direct or indirect use of the phonograms published for commercial purposes or of the reproductions thereof by broadcasting or any means of communication to the public, the performers and producers of phonograms are entitled to single equitable remuneration.

(2) The quantum of this remuneration shall be established by methodologies, pursuant to the procedure provided for by Articles 131, 131^1 and 131^2.

(3) The collection of single remuneration is made subject to conditions provided for by Article 133.

……

Article 112^1. – Should the owners of rights benefit from a mandatory remuneration, by effect of the law, they cannot object to the utilizations that generate it.

Article 15^1. - For the purposes of this law, broadcasting means:

a) broadcasting of a work by a radio or TV broadcasting organization, by any means servicing for the wireless transmission of the signals, sounds or images, or of representation thereof, including the public communication by satellite, for the purpose of reception by the public;

b) transmission of a work or representation thereof, by wire, cable, optic fiber or any other similar procedure, with the exception of computer networks, for the purpose of reception by the public.

Article 92. - (1) Related rights shall not prejudice the rights of authors. No provision of this Title must be construed in such a way as to limit the exercise of copyright.

(2) Patrimonial rights recognized in this Title may be assigned, either entirely or in part, subject to the conditions provided for by Articles 39-43 that apply by analogy. These rights may be the subject matter of exclusive or non-exclusive assignment.

Article 134 - (3) Remunerations collected by the collective management organizations are not and cannot be assimilated to their income.

(4) In the exercising of the mandate, pursuant to this law, the copyrights and related rights or the use thereof cannot be assigned or transferred to collective management organizations.

Article 123. - (1) Owners of copyrights and related rights may exercise their rights acknowledged by this law individually or through collecting societies, based on mandate, pursuant to this law.

(2) Collective management of copyrights can be provided only for works that have already been disclosed to the public, and the collective management of the related rights can only be provided for performances that have already been fixed or broadcasted, as well as for phonograms and videograms previously disclosed to the public.

(3) Owners of copyrights or of related rights cannot assign the patrimonial rights acknowledged by this law to the collecting societies.

Article 123^1. - (1) Collective management is mandatory for exercising the following rights:

……

f) the right to equitable remuneration acknowledged to performers and producers of phonograms for communication to the public and broadcasting of commerce phonograms or of the reproductions thereof;

……
……

(2) For the categories of rights provided for by paragraph (1) the collecting societies also represent the owners of rights who have not mandated them.

Article 123^2. - (1) The following rights may be managed collectively:

……
……

f) the right to equitable remuneration acknowledged to the performers and producers of phonograms for the communication to the public and broadcasting of the phonograms published for commercial purposes or of the reproductions thereof.

(2) For the categories of rights provided for by paragraph (1), the collecting societies represent only the owners of rights who have mandated them and draw up methodologies within the limit of the managed repertoire, if the conditions provided for at Article 130 paragraph (1) letter a) are fulfilled, or negotiate the license agreements directly with the users.

……
……

- Rome Convention for protection of performers, producers of phonograms and broadcasting organizations, ratified by Romania by Law no. 76/1998 – Article 12: If a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonograms, or to both. Domestic law may, in the absence of agreement between these parties, lay down the conditions as to the sharing of this remuneration.

- WIPO Treaty on performances, and phonograms, ratified by Romania by Law no. 206/2000 – Article 15 (1) Performers and producers of phonograms shall enjoy the right to a single equitable remuneration for the direct or indirect use of phonograms published for commercial purposes for broadcasting or for any communication to the public. (4) For the purposes of this Article, phonograms made available to the public by wire or wireless means in such a way that members of the public may access them from a place and at a time individually chosen by them shall be considered as if they had been published for commercial purposes.

2. Content

Domestic law has one definition of the notion of phonogram, and two references to the notion of "phonogram published for commercial purposes", and one of the two references may be deemed as a definition of this second notion.

Phonogram is deemed to be the registration or the fixation exclusively of the sounds originating from an interpretation or performance or of other sounds or digital representation of such sounds, other than in the form of a fixation incorporated in a cinematographic work or in another audiovisual work.

At first glance, we would be tempted to believe that the musical work or phonogram incorporated in an audiovisual work loses the protection that it enjoys, in reality however, should we construe this law text together with the special provisions of Articles 65-67 and 70 from Law no. 8/1996, as amended and supplemented, on cinematographic works and other audiovisual works, it evidently results that only the music especially created may lose its freestanding protection, as this is the only one which is fixed concurrently with the audiovisual work, as the other phonograms used within it are preexisting phonograms, keeping the freestanding protection, generating rights from any broadcasting or communication to the public of the audiovisual work in which they are incorporated.

A literary work used for screening is clearly a preexisting work as well as any musical composition inserted in various stages of the movie, other than music specifically created for that movie. It is detached interpretation of the doctrine in terms of phonograms used in an audiovisual work.*

We stated that only the music especially created for the audiovisual work may lose its freestanding protection, and only insofar as the author of the especially created music assigns to the producer of the audiovisual work the exclusive rights on using the overall work. We notice that this assignment is not part of the cases of assignment presumption between the authors of the audiovisual work and the producer for using the overall work (provided by art. 70 from Law no. 8/1996, as amended and supplemented), therefore the assignment of the especially created music must be especially entered into, otherwise the producer may not use the overall work. Unless otherwise provided for by the assignment contract, the author of the especially created music keeps all the separate use rights of his/her own contributions, as well as the right to authorize and/or prohibit uses other than the specific one of the work, entirely or in part. This aspect is inasmuch obvious as the lawmaker, as we stated above, chose to except the assignment of the especially created music from the presumptions of assignment between the authors of the audiovisual work and the producer even in case of its use within the audiovisual work. Therefore, an express provision regarding further uses is inasmuch necessary.

Another notion found in our legislation is the one of "phonogram published for commercial purposes", not defined by the our Copyright Law, however defined by the WIPO Treaty ratified by Romania by Law no. 206/2000 as being the phonogram made available to the public by wire or wireless means, in such a way that members of the public may access it from a place and at a time individually chosen, whereas Article 11 from the Rome Convention refers to the copies in commerce of the phonogram as an implicit definition of the phonogram published for commercial purposes, confining itself therefore to the physical product on which the phonogram is fixed (CD, DVD, vinyl, and any type of support).

Our Copyright Law has however no limitations on the collective management of phonograms, only on the ones fixed on physical support, providing expressly that collective management may be made only for fixed performances or only previously broadcasted or for phonograms previously disclosed to the public. A phonogram only previously broadcasted or disclosed to the public is not necessarily found on the market on physical support, and even in this latter case, its broadcasting generates related rights for the holder. From this point of view, the provision from the Rome Convention seems obsolete in the context of the latest digital technology development, as sales on physical support dropped dramatically. Otherwise, we would admit the theory according to which, in case the phonogram is not published on physical support [which must be found on the market], it could not generate related rights from broadcasting/any other use.

Our Copyright Law uses another notion, namely the notion of "commerce phonogram", however without any definition in this case either. This notion appears only once in the law text, namely in Article 123^1 letter f), and it is not found in any act or treaty to which Romania acceded. Although it seems an obvious material error [as to which it is true that no institution took any measures in order to correct it], it was deeply exploited by the users of phonograms and vastly debated in the law courts, however for controversial reasons and arguments.

However, this was not the end of this regrettable error, as it also influenced the type of collective management in case of phonogram broadcasting. On this subject, the Decision of the Court of Appeal Bucharest no. 23A/2007 amending the Arbitration Decision from 10 April 2006 [Decision of the Romanian Copyright Office no. 74/2006] is very well known. Therefore, the Court of Appeal Bucharest motivates the concerned Decision as follows:

"Having regard to the considerations above, and seeing the dynamics of the amendments to the Copyright Law, the Court concludes that the two collocations "commerce phonograms" and "phonograms published for commercial purposes" used by the lawmaker in Article 123^1 paragraph

(1) letter f) and in Article 123[2] letter f) from Law no. 8/1996 as it is in force upon the arbitration (therefore with the amendments made by Law no. 285/2004 and Government Emergency Ordinance no. 123/2005) must be construed as follows:

- the collocation "commerce phonogram" means the phonogram communicated publicly or broadcasted by that category of users in relation to which it is impossible to exercise individually the right to equitable remuneration by the holders of the rights related to copyright;

- the collocation "phonogram published for commercial purposes" is that phonogram communicated publicly or broadcasted by that category of users in relation to which it is possible to exercise individually the right to equitable remuneration by the holders of the rights related to copyright.

g) From the analysis of the provisions of Article 123[1], 123[2] and of Article 131[1] paragraphs (1) and (4) from the Law, the Court finds that the different regime of the legal relations on exercising the right to equitable remuneration, depending on the category of phonograms, "commerce phonograms" and "phonograms published for commercial purposes" respectively is evident.

Therefore, in the case of commerce phonograms, the holders of the rights related to copyright may not exercise the right to remuneration individually, but only through a collective management organization, even though they granted no mandate for this purpose to such an organization. Concurrently, users may not refuse the payment of the remuneration due to the reason that the collective management organization has no mandate from the holder of the right or due to the reason that it would pay the due remunerations directly to the right holders [Article 131[1] paragraph. (4)].

On the contrary, in case of phonograms published for commercial purposes, the right holders related to the copyright may exercise the right to remuneration either individually, or through a collective management organization. In such situations, collective management organizations may collect the remuneration only if they can prove that they represent the holder of related rights, and the ratio of using the works for which the user fulfilled the payment obligations by direct contracts with the holders of rights shall be taken into account as well in determining the quantum of the remuneration [Article 131[1] paragraph (4)].

……

Therefore, in case there is a limited category and with a low number of users on a certain market, users who are included in a database, which is easily accessible to the holder of the related right, and which could be verified by a reasonable effort from the latter, the holder of the related right may exercise individually its rights, due to the fact that he/she has the possibility to identify easily the users and to negotiate his/her rights with them.

On the contrary, if the number of users is very high, and difficult to be accessed by the holders of the related rights, they cannot exercise individually their right to an equitable remuneration, and in this case collective management shall be mandatory, with the applicable legal consequences.

By applying the above criterion, the Court believes that, in reference to broadcasting companies, they are part of the category of users easily accessible to the holders of the related rights, due to the fact that the number of broadcasting companies is limited in Romania, and there is a special procedure by which such companies obtain the operation agreement, and the holders of rights have the reasonable possibility to identify them, and to negotiate individually the equitable remuneration corresponding to the phonogram use.

Therefore, the phonograms published by the broadcasting companies from the Romanian territory have the legal status of "phonograms published for commercial purposes".

On the contrary, in case of users who use phonograms in order to assure or to create a pleasant environment for the development of commerce, such as: alimentation units, discotheques, commercial units or service providing units, sports and leisure, tourism and transportation units, the

Court believes that the phonograms used by the latter by communication to the public or by broadcasting have the legal status of commerce phonograms, for which the collective management of the right to remuneration is mandatory. In such situations, it is practically impossible for the rights holders, as well as for the respective companies, to exercise their rights and obligations on the collection and payment of the equitable remuneration, respectively. "

The coexistence of Article 123^1 paragraph 1 letter f) with Article 123^2 paragraph 1 letter f) from Law no. 8/1996, as amended and supplemented, would lead to the entirely erroneous conclusion that the producers of phonograms and the performers would be the beneficiaries of two rights to equitable remuneration, one for communication to the public and for broadcasting of commerce phonograms, which is exercised by mandatory collective management (Article 123^1 paragraph 1 letter f), and another for communication to the public and for broadcasting of phonograms published for commercial purposes, for which collective management is elective (Article 123^2 paragraph 1 letter f). However, Law no. 8/1996, as amended and supplemented, regulates only a single right to equitable remuneration for public communication and broadcasting, namely only in case of phonograms published for commercial purposes (Article 105 and Article 106^5), and this right is exercised only thorough the beneficiary management organizations (Article 106^5 paragraphs 2-4).

Which is the difference between the commerce phonogram and the phonogram published for commercial purposes, in the context in which Law no. 8/1996 has no definitions for these notions? This is obviously a rhetorical question, as there is no difference between them. Has the Court indicated at least one example of commerce phonogram and one example of phonogram for commercial purposes? This is so due to the fact that the same phonograms are used in case of broadcasting as well as in case of environmental communication to the public. However one may see that the notion of "commerce phonogram" is used ONLY ONCE (in Article 123^1 paragraph 1 letter f)) in Law 8/1996, unlike the notion of "phonogram published for commercial purposes", which is used in Law 8/1996 (in many articles) as well as in the WIPO Treaty (Article 15), ratified by Romania by Law no. 206/2000 on the ratification of the WIPO Treaty on performances and phonograms, and in the Rome Convention (Article 12) ratified by Romania by Law no. 76/1998, phonogram whose broadcasting creates a new right to single equitable remuneration for artists and producers. The only definition of the notion of phonogram published for commercial purposes is given by the WIPO Treaty which, according to Article 15 paragraph 4 "phonograms made available to the public by wire or wireless means in such a way that members of the public may access them from a place and at a time individually chosen by them shall be considered as if they had been published for commercial purposes", in the context of regulating the same right to equitable remuneration for the communication to the public and broadcasting of phonograms.

In supporting the mandatory nature of managing the rights of the producers of phonograms, in case of phonogram broadcasting, we indicate the following rules (noted as management principles in our law, as well as in the Community legislation and in international Treaties):

a) the producers of phonograms are entitled only to a SINGLE EQUITABLE remuneration (Article 106^5 and Article 105 paragraph (1) letter f) from Law 8/1996); this rule must be correlated with the one referring to the fact that producers may not prohibit the use of their own phonograms, if they benefit from an equitable remuneration (Article 112^1 from Law 8/1996); therefore, producers of phonograms have no exclusive right to authorize or to prohibit the broadcasting of their phonograms, which is a stronger protection than the one conferred by our lawmaker by the right to single equitable remuneration.

b) the single equitable remuneration is determined BY METHODOLOGIES (such as the one from this case), according to Article 106^5 paragraph (2) and the collecting society has the legal obligation (provided for by Article 130 paragraph 1 letters a and b from Law no. 8/1996) to draft methodologies (such as the present case) in view of authorizing the users, against remuneration "in case of those works whose operating manner RENDERS IMPOSSIBLE INDIVIDUAL

AUTHORIZATION by the holders of rights". This circumstance – impossibility of individual authorization – strengthens the mandate of the management organization to represent the rights and interests of all the producers of phonograms in case of negotiation and determination of the final form of the methodology. The impossibility for individual authorization presumes the incapacity of the producer of phonograms, and of the artist respectively, to control the use of their own phonograms, and to verify the remunerations directly from the user.

c) The methodology drafted by the collecting societies refers to two categories of right holders – performers and producers of phonograms, more precisely to all the artists, and producers respectively, not only the members of the collecting societies.

Therefore, the collecting societies are acknowledged by the law the legal mandate to represent all the producers of phonograms with a view to negotiating and determining this remuneration (also to determine the final form of the methodology). In the relations between the producers of phonograms and broadcasters, the management organization is the representative of all the producers, and concurrently the guarantor assuring the observance of their rights in the relations with the broadcasters, due to the fact that the producers receive the remuneration from the management organization and not from the broadcaster.

In reality, the Court of Appeal grounded its decision by a formal reasoning concerning the qualification of management, starting from the material error that resides in the distinction between the commerce phonogram and the phonogram published for commercial purposes. This reasoning is substantially false, and generates conflicts, interpretations and speculations outside the law, and in reality there is no such distinction. The phonogram is the same as product made by the producer, as is the scope and form of the phonogram use (by broadcasting).

We find that the entire argumentation of the arbitration panel on elective collective management, applicable in case of broadcasting, is based on a MATERIAL ERROR, appeared in the process of drafting Law no. 329/2006 on approving Government Emergency Ordinance no. 123/2005, to amend Law no. 8/1996 on copyrights and related rights. From the analysis of the amendments in time of Law no. 8/1996, one may easily see that the first version of the law (1996) stated a mandatory collective management on radio broadcasting, TV broadcasting or public presentation of sound recordings, and the first amendment to this law by Law no. 285/2004 also provided very clearly the mandatory collective management for these types of use. Subsequently, by the coming into force of Government Emergency Ordinance no. 123/2005, the material error referred above occurred, error also maintained by the approving Law no. 329/2006.

This point of view is affirmed in the very EXPOSITION OF MOTIFS of the bill for amending and supplementing Law no. 8/1996 on copyright and related rights, as subsequently amended and supplemented, drafted by the Government in order to subject it for approval to the Parliament. The bill amending the Law and the exposition of motifs, currently at the stage of public debate, can be found for consultation on the site of the Ministry of Culture and National Patrimony (http://www.cultura-net.ro/DezbateriDetalii.aspx?ID=346). The bill aims at correcting this error, in the sense of removing the notion of "commerce phonogram" from Article 123 index 1 paragraph 1, letter f) from Law no. 8/1996, by replacing it with the collocation "phonogram published for commercial purposes" (collocation used throughout the law). Concurrently, letter f) of Article 123 index 2 shall be removed from Law no. 8/1996, in order to avoid any doubt concerning the mandatory regime of management in case of phonogram broadcasting.

The Court of Appeal attempted to offer a justification of the previously mentioned legal provision, although it is not the will of the lawmaker, on the contrary, it is a MATERIAL ERROR which led to the ERRONEOUS IDEA that the same use, in this case, the broadcasting, may create different categories of phonograms and distinct equitable remunerations, ALL DEPENDING ON THE CATEGORIES OF BROADCASTERS, namely broadcasters whose identification is easier or broadcasters whose identification is more difficult!!!!!?????

Decision 153A of the Court of Appeal Bucharest (published in the Official Gazette no. 470/2011 by Decision of the Romanian Copyright Office no. 216/2011 as being the Methodology for the application of Law no. 8/1996, as amended and supplemented, in the field of broadcasting, as a use generating related right to the copyright) presents nevertheless an entirely different approach of the notions of phonogram published for commercial purposes and commerce phonogram as well as of the type of management of the two types of registrations, as quoted below. We shall use a longer quote from the considerations of this resolution, especially as it is an absolutely different interpretation than the one given also by the Court of Appeal in 2007, but also a lot more interesting.

<<The first aspect that must be clarified, […….], is the one of the contents of the notions "commerce phonograms" and "phonograms published for commercial purposes ", notions for which Law no. 8/1996 establishes a different legal regime in Article 123[1] letter f) and in Article 123[2] letter f).

Firstly, the Court cannot accept the assertion of the plaintiffs in appeal in the sense that there is no difference between the two notions, and that the existence of the two notions would only be the consequence of a material error slipped into the text when the law was amended in 2004.

Thus, should the existence of the two notions be a mere material error, it would have been removed by the lawmaker upon adopting Law no. 329/2006 approving Government Emergency Ordinance no. 123/2005, amending Law no. 8/1996, or by a subsequent amendment, but close in time to the moment of the amendment that included such an error.

Moreover, the use of the two notions within Law no. 8/1996 is not a mere inadvertency of language used by the lawmaker, without any legal consequences, but it involves also a difference of applicable legal regime, which leads to the conclusion that the lawmaker took into account certain distinctions between phonograms, distinctions with a nature to attract for these a distinct regime in reference to the mandatory or elective nature of the collective management of some or other of these categories of phonograms.

Therefore, taking into account the fact that the lawmaker differentiated between the two categories of phonograms only with respect to the regime of collective management, the two notions may be outlined only by starting from the general criteria in relation to which it was established in Law no. 8/1996 that certain copyrights and related rights must be collectively managed, whereas collective management is elective for other such rights.

However, by analyzing the categories of rights for which differences of legal regime were established in reference to the mandatory or elective nature of collective management, the Court finds that in reference to the rights for which the regime of mandatory collective management was established (Article 123[1]) the lawmaker presumed that there is a impossibility of the holders to manage individually the respective rights.

Concurrently, the rights provided at Article 123[2] are rights which, due to their particularities, may be individually managed. Therefore, it was established for these rights that collective management is elective.

As Article 123[1] paragraph 1 letter f), as well as Article 123[2] paragraph 1 letter f) approach the right to equitable remuneration acknowledged to the performers and to the producers of phonograms for phonogram broadcasting, the only conclusion that results is that the distinction between the two categories taken into account by the aforementioned legal provisions is given by the category of phonograms whose use by broadcasting creates this right, and this conclusion, which is strengthened by the circumstance that the lawmaker used different denominations for the two categories of phonograms, the ones taken into account by Article 123[1] paragraph 1 letter f) are named "commerce phonograms", and the ones taken into account by Article 123[2] paragraph 1 letter f) are named "phonograms published for commercial purposes ".

From this perspective, the Court finds that it was erroneously noted in the challenged arbitration resolution that the distinction between the two legal categories of phonograms must be made in relation with the user, due to the fact that the application of such a criterion would lead to

the conclusion that the same phonogram is either a commerce phonogram, or a phonogram published for commercial purposes, depending on the user.

Moreover, the conclusion of the arbitration panel is erroneous in the sense that, "this case, ... is concerned with the right to equitable remuneration for using phonograms published for commercial purposes by the broadcasting companies, and therefore the collective management of this right is elective, ...".

Thus, the present methodology concerns the use of phonograms by broadcasting, use which is taken into account at Article 123[1] letter f), as well as at Article 123[2] letter f) from Law no. 8/1996. Therefore, as long as the use modality of phonograms is the same - broadcasting, it concerns commerce phonograms, as well as phonograms published for commercial purposes, and the difference of legal regime is given by the category of phonograms used by broadcasting.

In reference to the types of phonograms, the Court finds that, in relation to the purpose for which they are created, purpose attracting also a specific use manner thereof, 3 types of phonograms may be identified.

A first type of phonogram is the one which includes interpretations, performances or other sounds or digital representations thereof, whose fixation was mainly made for disclosing such to the public, including by selling the supports on which the respective interpretations are fixed. The best known and most frequent phonograms of this type are the ones that include music performances and interpretations, and the main purpose for their accomplishment is to disclose such phonograms to the public by selling the supports which contain their reproductions. Phonograms of this type or the reproduction thereof are subsequently taken over by different users and are used in various modalities, including by broadcasting. The use by broadcasting of some or other phonograms of this type is made in relation with the free choice of each broadcasting organization, according to its own criteria, with variations of use of some or other phonograms of this type and, concurrently, with variations of broadcasting frequency of the same phonogram. Moreover, when the phonogram of this type is made, one cannot know certainly that it would be taken over and broadcasted. These characteristics render impossible the individual management of the right to equitable remuneration in the vast majority of the cases, right which is acknowledged to the producers of phonograms and to the performers for broadcasting, which makes this type of phonogram fall into the legal category of "commerce phonograms", category taken into account by the provisions of Article 123[1] letter f) from Law no. 8/1996, and their applicable legal regime is the one of mandatory collective management.

A second type of phonograms is represented by the phonograms which include interpretations, performances and other sounds, made for purposes of identification and self-promotion of a broadcaster or of one of its programs, phonograms whose producer is either the respective broadcaster, or another producer of phonograms that made the phonogram as ordered by the respective broadcasting station.

A characteristic of this type of phonogram is the fact that they have no interest is use other than for the respective broadcaster, and there is no interest of the public to purchase the supports that include the reproductions of such phonograms, and no interest of other broadcasting stations to take over and use phonograms that identify or promote another broadcasting station or one of its programs.

Therefore, due to the fact that this type of phonograms is destined to the use by a single broadcaster, the management of the right to equitable remuneration of the producers and performers may be made individually.

Therefore, taking into account the purpose for which this type of phonograms is made, exercising the right to remuneration for broadcasting, of the producer of the phonogram, as well as of the performers, may be made directly in relation with the beneficiary of the phonogram (the respective broadcasting station) within the contractual relations entered into for making the respective phonogram, either by paying a lump sum, or by paying periodic sums.

Moreover, if the broadcaster which is the beneficiary of the identification or self-promotion phonogram is its producer as well, it is obvious that the broadcasting of the concerned phonogram shall be made by it in exercising its capacity as a producer of the phonogram, and the payment to itself for the broadcasting of the respective phonogram is not an issue. In the analyzed situation, only the payment of the remuneration corresponding to the right of the performers could be an issue, and this issue can be solved either within the contract entered into by the performers and the respective station with a view to making the phonogram, or by other modalities that are specific to the case when the performers are concurrently employees of the broadcasting station that produces and uses the concerned phonogram.

In any case, should the issue of remuneration remain unsolved based on the contractual relations established with a view to producing phonograms of this type or in another modality that involves an individual management, the right to equitable remuneration acknowledged by the law to the producers of phonograms and to the performers may be exercised also within the elective collective management, pursuant to Article 123^2 letter f) from Law no. 8/1996.

A third type of phonograms is the one which includes interpretations, performances and other sounds, made with a view to being broadcasted for the promotion of a product or service, belonging to a third party in relation with the broadcasting station, as an advertising form of the respective product or service. The interest for using these phonograms belongs only to their beneficiary, who advertises a product, service or event through these phonograms.

This type of phonograms includes also phonograms from the second type of phonograms presented above, insofar as the phonogram is broadcasted by a broadcaster other than the one promoted by the phonogram, and the characteristic element of this type of phonogram is however the circumstance that the broadcasting is made for a fee or, in any case, based on an understanding with the beneficiary of the phonogram.

Therefore, phonograms of this type are the ones whose broadcasting produces income for the broadcasting stations, and their broadcasting is made as a rule based on advertising contracts.

As a result, considering the scope for making such a phonogram, and the circumstance that its use is only in the interest of its beneficiary, the exclusive right to decide upon the using manner of the phonogram by the beneficiary is, as a rule, assured by the clauses of the contracts entered into with a view to making the respective phonogram, and also by establishing the remunerations due to the producer of the phonogram and to the performers for any manner of use decided by the beneficiary, and these remunerations may be established in the form of a lump sum or in the form of periodic sums.

As in the case of the phonograms from the second type described above, in case the issue of remuneration is not solved based on the contractual relations established with a view to producing the phonograms of this type or by other means that involves an individual management, the right to equitable remuneration acknowledged by the law to the producers of phonograms and to the performers may be exercised also within the elective collective management, pursuant to Article 123^2 letter f) from Law no. 8/1996.

Consequently, the Courts shall establish, as a first point of the concerned methodology, that the phonograms corresponding to the first type described hereinabove fall into the legal category of the commerce phonograms taken into account by Article 123^1 letter f) from Law no. 8/1996, and their management is a mandatory collective one, whereas the phonograms corresponding to the second and third type fall into the legal category of phonograms published for commercial purposes, taken into account by Article 123^2 letter f) from Law no. 8/1996, and their collective management is elective and conditioned by the failure to fulfill the right to remuneration by an individual management.

Therefore, the contents of point 1 of the methodology shall be the following:

"1. Commerce phonograms, pursuant to Article 123[1] paragraph 1 letter f) from Law no. 8/1996, are phonograms which include interpretations, performances or other sounds or digital representations thereof, whose fixation was mainly made for the purpose of disclosing them to the public by selling the supports on which the respective interpretations are fixed.

Phonograms published for commercial purposes, pursuant to Article 123[2] paragraph 1 letter f) from Law no. 8/1996 are:

- phonograms which include interpretations, performances and other sounds, made for purposes of identification and self-promotion of a broadcasting station or of one of its programs, phonograms whose producer is either the respective broadcasting station, or another producer of phonograms that made the phonogram as ordered by the respective broadcasting station;

- phonograms which include interpretations, performances and other sounds, made with a view to being broadcasted for the promotion of a product or service, belonging to a third party in relation with the broadcasting station, as an advertising form of the respective product or service."

Establishing the contents of the notions of "commerce phonogram" and "phonogram published for commercial purposes" as presented above, the criticism [……], according to which establishing the elective joint management regime leads to the infringement of the provisions of Article 106[5] from Law no. 98/1996, may not be accepted.

Therefore, in the initial form of the law, all the phonograms were included in a single legal category, namely in the category of "phonograms published for commercial purposes", however the law failed to establish a mandatory collective management regime. Upon the amendment of the law in 2004 (by Law no. 285/2004), the lawmaker introduced the notion of "commerce phonogram ", establishing for this category of phonograms a mandatory collective management legal regime. Hence, although the notion "phonogram published for commercial purposes" was used throughout the law, the same notion was no longer used in establishing the management regime, therefore the lawmaker implicitly introduced a distinction between two categories of phonograms, some of which had a mandatory collective management regime, named by the lawmaker "commerce phonograms", and the remaining phonograms, which had an individual management regime were not itemized in Article 123[2]. Subsequently, by Government Emergency Ordinance no. 123/2005, letter f) of Article 123[2] paragraph 1 was included, establishing that for the phonograms which are not subjected to the mandatory collective management regime, management may be not only individual, but also collective, and for these latter phonograms the lawmaker used the notion of "phonograms published for commercial purposes". Upon introducing the notion of "commerce phonogram", the lawmaker did not amend however all the other provisions in which the generic notion of "phonogram published for commercial purposes" was used, and therefore the notion of " phonogram published for commercial purposes" used throughout the law in other articles than 123[2] letter f) shall be understood to refer either to both legal categories, in case the legal regime of management is a matter of no concern, or to that legal category of phonograms, whose management regime is compatible with the respective provision

Therefore, the provision included in Article 106[5] from Law no. 8/1996 may concern both legal categories of phonograms, but only insofar as for the category of phonograms published for commercial purposes [Article 123[2] letter f)] management is also performed collectively. >>

Therefore, according to this recent interpretation of the Court of Appeal Bucharest, there is a difference of legal regime between the commerce phonogram and the phonogram published for commercial purposes, as a premiere in the European legislations. To put this into the practice of broadcasting, I could exemplify as follows: the phonogram “Un arici pe-un camp de maci”, performed by Florin Chilian, is a commerce phonogram when it was used to promote the newspaper *Jurnalul National*, and a phonogram published for commercial purposes when it was broadcasted entirely by any radio or TV station OR the phonogram “We love to entertain you”, performed by the band Voltaj, is a commerce phonogram when it assures the promotion of the TV station Prima TV, and a phonogram published for commercial purposes when it is broadcasted entirely by any radio or

TV station. There are obviously phonograms especially created to promote a radio or TV station or to promote a certain product, however it does not mean that they are not published for a commercial purpose, it does not mean that they have a different legal regime.

Therefore, a regrettable error of the lawmaker generated different interpretations in the doctrine, although the attempts to approach this subject are rather shy**, but especially in the case law with a negative impact on the attempt to apply the provisions with the title of methodological norm.

Conclusions

In fact, the name of these works as being published for commercial purposes comes indeed from their publication on the market in sufficient copies, and the term was used for the first time by the Rome Convention, notion which, as presented above, became obsolete in my opinion. Phonograms are works which essentially must be available to the public. In the past, they were made available to the public by marketing audio tapes, CD, vinyl and any other recording fixation form. Phonograms become published for commercial purposes as of their official release in a territory – USA, Europe or worldwide. This characteristic thereof – advertising has distinguished and will further distinguish them from videograms, which can be rarely found on the market – music videograms, and I refer especially to music videos, are never found on the market, and cannot be purchased as phonograms by the consumer public. In fact, movies as videograms have an entirely different course than phonograms as far as protection is concerned – they first appear in cinemas (at that time the movie is not available on DVD), and they appear after a rather long period of time on DVD (home video) and only subsequently they can be seen on TV, and this type of protection is never found in case of phonograms. A fixed concert, which is also a videogram, appears on DVD within approximately 1 year after the end of the tour, and subsequently, after another period, it can be seen on TV by the public.

Phonograms can be however made available to the public nowadays by being broadcasted or used on the Internet, and never being fixed on a support to be included in the commercial circuit.

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- Viorel Ros, Dragos Bogdan, Octavia Spineanu Matei, Dreptul de autor si drepturile conexe TRATAT (Copyright and Related Rights TREATY), 2005, Publishing House All Beck "In relation with the right to authorize or prohibit the broadcasting and public communication of his/her own sound recordings, other than the ones published for commercial purposes [Article 105 paragraph 1 letter f)] we believe that it has an erroneous wording as negation lacks, which could make the text and the regulated exception logical."

SHAKESPEARE, CULTURE AND ECONOMIC INTANGIBLES IN KNOWLEDGE ECONOMIES

A.S. WEBER*

Abstract
This contribution investigates the vexed question of economic intangibles in the knowledge economy using Shakespeare as a locus of inquiry. Shakespeare is particularly suited for this analysis since as England's widely-acknowledged greatest dramatist, the author possesses considerable cultural capital, but also contributes substantially to the tangible, measurable economy of Great Britain through productions of his works, tourism, and fee-generating activity in universities, museums and heritage sites. In addition, a considerable number of knowledge products (Intellectual Property) arise directly from Shakespeare including books, films, instructional materials, and research articles. Due to the large number of peer-reviewed books and articles annually produced by scholars of Early Modern history and literature, academics joke about "the Shakespeare industry." Drawing on cultural economics, cultural theory, and knowledge economy research, this paper attempts to bridge the gap between quantitative statistical based economic theory and qualitative research into culture, value, and artistic transmission.

Keywords: *Shakespeare, economic intangibles, cultural economics, intellectual property, cultural economics*

I. Introduction

As a cultural icon, symbol of the achievements of a golden age of literature, imperial expansion, and prosperity (and I will argue below that these aspects of Elizabethan culture are inter-related), Shakespeare still commands international and national attention. The 'Isles of Wonder' theme drawn from Shakespeare's play *The Tempest* will form the backdrop of the £27m Olympic Opening Ceremony for the 2012 London summer Olympic games. A 27-tonne bell to be used in the ceremony, twice the size of the 13.5 tonne Big Ben bell cast in 1856 in the same foundry, will be inscribed with a line from Shakespeare: "Be not afeard, the isle is full of noises." The line introduces the theme that England has many 'Isles of wonder,' i.e. tourist spots. Hosting the Olympics obviously provides a wide range of tangible economic benefits to the host country in addition to tourist revenue, such as job creation, advertisement, and foreign direct investment ('showcasing' the country for potential investors). As the Culture Secretary Jeremy Hunt argued, "the Games represented 'an extraordinary business opportunity' likely to attract foreign investment.""[1]

The Olympic ceremony bell additionally signals to the world the geopolitical message that the UK is still a modern, wealthy, industrialized, and a continually advancing nation able to outdo its previous achievements in manufacturing (casting a larger, more expensive bell than was possible in 1856). Without delving into the reality of this self-perception, this recent example demonstrates how culture (Shakespeare as a cultural symbol) is intimately linked to both tangible and intangible economic assets as well as related political and social power structures.

Exactly what are tangible and intangible cultural capital assets? *Tangible capital* includes forms of property such as buildings, physical locations and sites that possess cultural significance, often called 'cultural heritage', along with artworks, artifacts, paintings and sculpture.[2] They exist in the physical world primarily in the form of land, structures and movable objects (the word tangible

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[1] Jane Mower and Michael Hirst, "London 2012: Isles of Wonder theme for Olympic ceremony," *BBC News UK*, January 27, 2012, accessed February 1, 2012 http://www.bbc.co.uk/news/uk-16747032.

[2] David Throsby, "Cultural Capital," Journal of Cultural Economics 23 (1999): 7.

derives from Latin *tangere*, to touch). *Intangible* cultural capital, according to Throsby, "comprises the set of ideas, practices, beliefs, traditions and values which serve to identify and bind together a given group of people, however the group may be determined, together with the stock of artworks existing in the public domain as public goods, such as literature and music. These intangible cultural assets also give rise to a flow of services which may form part of private final consumption and/or may contribute to the production of future cultural goods."[3]

The concept of intangible cultural heritage gained international recognition at a 2003 UNESCO meeting in Paris. The meeting drafted *The Convention for the Safeguarding of Intangible Cultural Heritage* which has spawned a number of programs in addition to a list of Masterpieces of the Oral and Intangible Heritage of Humanity.[4] Part of the reason for establishing this list was to counter-balance UNESCO's designation of World Heritage Sites, which are physical locations such as monuments and natural habitats. Another reason was to preserve cultural traditions, particularly oral-based performances and practices, in imminent danger of disappearing. Although Shakespeare in many senses would fit in to the UNESCO definition of intangible cultural heritage–for example, Shakespearean language such as figures of speech, famous quotations, metaphors, and neologisms which he coined have become part of the oral heritage of Britain–there is still so much attention paid to this author and his influence that there is little likelihood that Shakespeare, Shakespeareanism or Shakespearean language will become endangered and die out in the near future; hence Shakespeare's cultural influence would not be in need of UNESCO protection.

The modern economic discussions about capital and economic assets, both tangible and intangible, would not be entirely foreign to Shakespeare himself. His father was a wealthy glover and wool merchant and Shakespeare himself became wealthy through acting, joint stock ownership in theatres, and the reputation he built through the (often illicit) publication of his poetry and drama, which became a box office draw for theatre-goers. He owned, for example, along with fellow members of the Lord Chamberlain's Men, a 12.5% share in the immensely profitable Globe Theatre (1599-1642) where many of his plays were performed.

The present analysis takes a qualitative cultural economics view of Shakespeare–the man, his creative works, and the cultural institutions that have grown up around him. Shakespeare is particularly interesting because he, along with Ben Jonson and other contemporary writers, contributed to the development of the concept of intellectual property (our modern term) during the critical period spanning the founding of Caxton's first printing press in Westminster in 1476 until the 1709 Statute of Anne which broke the 1557 monopoly of the Stationer's Company. The Statute of Anne invested rights of reproduction or copyright in authors instead of a single guild and is recognized as one of the first modern copyright laws.

II. Shakespeare and Economics

Two immediate concerns arise in these kinds of discussions of cultural value: the term culture itself is a contested concept and economics likewise spans a wide range of methodologies. As Doyle observes: "But it remains that conceptions of what counts as culture are varied and, likewise, economic research in the area of culture is diverse."[5] Culture is here defined as creative products of a society imbued with shared ritual and symbolic meaning. In one sense, cultural institutions can be understood using well-established laws and principles of classical economics. For example, the sites and buildings managed by the Shakespeare Birthday Trust are simply a non-profit business (technically under British law, an educational Registered Charity) that through visitor fees and

[3] Throsby, "Cultural Capital", 7.

[4] "Text of the Convention for the Safeguarding of Intangible Cultural Heritage," UNESCO, accessed January 15, 2012, http://www.unesco.org/culture/ich/index.php?lg=en&pg=00006.

[5] Gillian Doyle, "Why culture attracts and resists economic analysis," Journal of Cultural Economics 34 (2010): 246.

donations must manage and maintain several historical buildings (essentially museums), and a library and archive. The value of properties such as these can be calculated simply by market value–what the land and structures would command if offered for sale–or if buildings remain protected from sale in non-market public trust, one could determine how much the public is willing to spend on their upkeep and preservation. David Throsby, who has been instrumental in defining and developing the field of cultural economics, believes a new concept of capital called *cultural capital* may be useful in defining the total value of such properties as Shakespeare's birthplace. These kinds of buildings (Throsby uses the related example of an historic church) possess a "'cultural value', a multidimensional representation of the building's cultural worth, assessed in quantitative and/or qualitative terms against a variety of attributes such as its aesthetic quality, its spiritual meaning, its social function, its symbolic significance, its historical importance, its uniqueness and so on."[6]

As such, cultural capital at times does seem to be a real physical entity, easily recognizable as such to both specialists and non-specialists. Throsby, however, seems over-optimistic about the possibility of developing quantitative measures of cultural capital. For example, we can recognize in Shakespeare spiritual meanings (as the greatest English dramatist, and embodiment of the English character) and symbolic meanings (evidenced by his incorporation into the Olympic ceremony), but placing a number value on these meanings would have to be done indirectly through proxies or through qualitative methods or common sense approaches. The benefits of introducing this new kind of capital and quantitative measures of it into the traditional economic formulations of physical or manufactured capital, human capital, and natural capital, are obvious in that cultural objects including non-physical objects such as a country's songs, oral poetry, and traditional theatre can be understood and managed under a rational system, for example, the system of investment. Both society and governments, in other words, can plan more wisely how much they want to invest in preserving a particular art form, such as traditional dance, by building theatres, supporting educational scholarships for transmitting the art, or underwriting the costs of performances, etc.

Some of the early research on Shakespeare and economics–or example, Henry W. Farnham's *Shakespeare's Economics* (1931)–came to the odd conclusion that Shakespeare "seldom sets out to give a picture of the economic condition of his times, or to moralize on its economic problems."[7] But this assessment was based on Farnham's inability to uncover any of what passed for the specific and technical terminology of economics of Shakespeare age. The term economics appears nowhere in Shakespeare's works. In fact, during Shakespeare's day, economics, variously spelled, referred specifically to the two works on household management by Xenophon and Aristotle entitled *Oikonomikos* and only gradually during the late 18th to early 19th centuries did a recognizable vocabulary of modern economics emerge.[8] However, Elizabethan thinkers and politicians developed a both practical and philosophical economic discourse and theory of mercantilism which impacted all levels of society since mercantilism fuelled England's overseas adventures.

Trying to demonstrate Shakespeare's ignorance of technical economic terms, however, is misplaced and even inaccurate: he was not university educated and his primary reading was in classical Latin literature as per the standard grammar school education of his day. T.E. Baldwin has meticulously reconstructed Shakespeare's learning and reading in the absence of any surviving school records. The classical literature to which Shakespeare was exposed (possibly including excerpts from the *Oikonomikos* treatises), contains a great deal of history, theory and speculation about intrinsic value, worth, rent, payments, balance of trade, etc. Thus several important abstract concepts that we would recognize today as economic in nature can be found throughout his plays.

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[6] David Throsby, "Cultural Capital," in A Handbook of Cultural Economics, ed. Ruth Towse (Cheltenham, UK: Edward Elgar, 2003), 167.

[7] Henry W. Farnham, Shakespeare's Economics (New Haven: Yale University Press, 1931), 3.

[8] "Economics," Oxford English Dictionary, third edition, last modified March, 2008, accessed January 31, 2012, http://www.oed.com/view/Entry/270555.

For example, Shakespeare humorously explores in the *Tempest* through the character of Gonzago an ideal commonwealth where money is not employed:

Gonzalo. I'th'commonwealth I would, by contraries, / Execute all things; for no kind of traffic / Would I admit; no name of magistrate; / Letters should not be known; riches, poverty, / And use of service none; contract, succession, / Bourn, bound of land, tilth, vineyard, none; / No use of metal, corn or wine, or oil; / No occupation; all men idle, all; / And women too, but innocent and pure; No sovereignty–

Sebastian. Yet he would be king on't.

Antonio. The latter end of his commonwealth forgets the beginning [II.i.148-159].[9]

In this passage the impossibility of a Utopian state without the underpinnings of any system of money, exchange, commerce or trade is brought into focus.

Likewise *The Merchant of Venice* contains a nuanced analysis of usury and money through Shylock's exposition of the biblical tale of Jacob and Laban. Similarly, Shakespeare's line in *Troilus and Cressida* "what is aught but as 'tis valued" signals a concern with intrinsic worth and illuminates the theme of the bartering of women in the play, evidenced by the trading of Cressida for the hostage Antenor. In addition, the not accidental repetition of the etymologically related words "price," "prize," "praise" which has been noted by several literary critics reveals an underlying theme of trade and barter and what objects are really worth. Both the Greek and Trojan commanders question whether the *praised prize* Helen has been properly *appraised*: whether her *price*, the blood of many brave soldiers, is worth the killing and chaos that her abduction has sparked. This question of value has wide ranging implications for modern economics (i.e. the gold standard, valuations, assessments, monetary policy, sources of wealth, etc.). The brilliance of Shakespeare lay in the fact that he could talk about the fundamental and complex ideas embedded in wide range of fields (astronomy, philosophy, and theology to name a few) in a language understandable to a reasonably intelligent Englishman.

As Turner has shown, Shakespeare has embraced a rich lexicon of words that have historically been used in an economic sense, and many of which are still part of the technical lexicon of economics, including 'bonds, trust, good, save, equity, value, mean, redeem, redemption, forgive, dear, obligation, interest, honor, company, balance, credit, issue, worth, due, duty, thrift, use, will, partner, deed, fair, owe, ought, treasure, sacrifice, risk, royalty, fortune, venture and grace."[10] Interestingly, many of these words simultaneously maintain a moral and ethical dimension, since, in essence, they regulate and control the interactions among moral agents and they reveal a host of difficulties in quantifying human emotions and feelings, such as trust, confidence, and security that moral agents feel towards one another.

Commoditization of artistic production has been a interesting locus of debate in modern economics with respect to knowledge products–art can be consumed (a play watched, a book read), but the production is not destroyed if the know how to reproduce it again remains and its consumption does not lead to resource scarcity. Today, recreation of artistic production (i.e. copying an MP3 of a song) is often trivial, hence the recent frenzied interest of IP holders to develop software tools and laws such as SOPA, PIPA and ACTA to tackle online piracy to protect their investments in original content. These intellectual property laws may be the only way that creators can safeguard innovation or creativity without fixation (placing creativity into a physical form) and then physically safeguarding that fixation.

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[9] William Shakespeare, The Tempest, in The Riverside Shakespeare, ed. G. Blakemore Evans (Boston: Houghton Mifflin Company, 1974), 1620.

[10] Frederick Turner, Shakespeare's Twenty-First Economics: The Morality of Love and Money (New York: Oxford UP, 1999), 11.

Turner observes provocatively that Shakespeare created worth from entities with no individual intrinsic economic value: "Poets spend their lives making value out of combinations of words that have no economic worth in themselves, being common property, infinitely reproducible, and devoid of rarity value."[11]

III. Shakespeare and the Development of the Concept of Intellectual Property

Shakespeare and his contemporary Ben Jonson, along with their publishers, were among the first creative artists to capitalize on their cultural influence due to the expanding literacy brought about the Elizabethan school system, the introduction of printing, and the emergent concept that the creative productions of authors were property and could fall under property rights laws (intellectual property). If we look at previous well known English authors before the introduction of printing, such as Chaucer, we see a different manuscript culture and different economic model of literary production and dissemination. Writing a well-received poem or other form of literature had only indirect financial benefits for authors, who could sell a work outright to a *stationarius* (who then retained rights for copying) for hand copying and renting to readers, such as students, for copying at their own cost. But the main economic motivation for authors in the medieval period (and there were obviously many purely non-economic motives, such as the aesthetic joy of language and stories), was to increase one's fame and reputation for wit, intelligence, and wisdom which could lead to court appointments, invitations to foreign courts (including stipends) to entertain or tutor, or offices from the king. Geoffrey Chaucer's (1343-1400) poetry was greatly appreciated and rewarded at the English court and he served in a number of royal offices.

However, when mass production of literary output began to be facilitated by the printing press, theatres began jealously protecting their playscripts. Due to the numerous "bad quartos" of Shakespeare's plays published during his lifetime and without his permission, it is surmised that copyists would attend plays and clandestinely write them down to sell to publishers. Also, play scripts, often kept under lock and key, could be smuggled out of the theatre for copying and then replaced, or actors could reconstruct an entire play from memory and sell it to a stationer. What is interesting is the continuing concern with the physical object of the manuscript itself and securing it against theft, as opposed to its creative content, a concern that would shift during Shakespeare's age. The price of the manuscript (medieval manuscripts were expensive, hand-produced objects often illustrated and made of highly priced vellum) became a trivial concern when cheaply printed paper books arrived. These practices made authors and play acting companies realize that the performance when fixed in a manuscript had a property value attached to it, and that the creative content had a value as well since it was the origin of the profit-making physical object (the book). However, there were no copyright laws at the time which assigned rights to authors. Acting companies normally would register their works with the Stationer's Company through booksellers for the sole (monopolistic) right to publish a certain work.

IV. Shakespeare From the Perspective of Quantitative Economics

Shakespeare is difficult to remove from English department curricula in U.S. high schools and universities – parents and administrators would interpret such an action as tantamount to an attack on western rationalism and the liberal arts tradition itself: as a faculty member quoted by Brantlinger has stated: "It's a fetish thing. Bardolatry. You can deconstruct other authors into oblivion, but Shakespeare really is immortal"[12] Thus, even if theatrical productions and performances of Shakespeare's works die out–which does not seem likely in the near future–Shakespeare will continue to be a source of economic activity in universities in the form of professorships, courses,

[11] Frederick Turner, *Shakespeare's Twenty-First Economics*, 11.

[12] Patrick Brantlinger, "Who Killed Shakespeare? An Apologia for English Departments," *College English* 61.6 (1999): 681.

textbooks, institutes, libraries, and scholarly research. Many of these activities consume and generate capital and are easily quantifiable.

Quantitative economic research has asked the question whether productions of Shakespeare's plays are subject to Baumol's disease. William J. Baumol, along with William G. Bowen, formulated Baumol's Disease, which theorizes that sectors like manufacturing have undergone productivity increases followed by wage increases as workers share in the benefits of greater profitability of their labor. But some sectors, particularly labor-intensive ones, cannot increase productivity (for example, the same number of musicians are needed to play a Schumann symphony today as in 1854, thus the productivity of classical symphonies have remained static). But wages for classical musicians have risen along with other wages; if they didn't, then workers would abandon industries like teaching where maximum efficiencies have been reached long ago for higher paying jobs, which creates shortages and consequent rise in salaries in the abandoned industries to match more productive industries. Attempts to analyze the effect of Baumol's disease in the theatre have been unsatisfactory, such as Gambling and Andrews' analysis of Royal Shakespeare Company operations from 1968-78[13] – the analysis quickly becomes a large complicated multi-variate equation with unfortunately, several important variables not known, such as seasonal production costs. Another notable attempt to understand the economics of Shakespearean performance using the records of the Royal Shakespeare Company include James H. Gapinski's 1984 article in the *American Economic Review* and the responses and replies to it.[14]

V. Conclusions

In this brief discussion, the field of inquiry into Shakespeare as a locus of cultural economic activity can only be briefly delineated. Shakespeare's works themselves provide in depth economic analyses, albeit primarily in non-economic terminology that must be interpreted and teased out by literary scholars. Furthermore, due to his unique historical position, Shakespeare was one of the first authors to solely and directly capitalize on the remuneration of his creativity through profits from performances of his writings, with minimal benefit from the financial patronage system that had previously existed for poets since Roman times. The posthumous publication of his works proved that creativity could be fixed in mass produced objects (books) that would generate further wealth. This necessitated a stricter regime of intellectual property rights control which came a generation after his death with the Statue of Anne. Thus the circumstances of his authorship were instrumental in the development of copyright law in England. Also, as one of the world's most popular and widely performed playwrights, studying performances of Shakespeare using such resources as the well documented financial records of the Royal Shakespeare Company or box office receipts from the numerous film versions of his works can be a valuable exercise for economists for understanding the quantitative financial aspect of artistic performance and knowledge products. The quantitative aspect of intangible goods, however, is a new area of quantitative economic inquiry and needs more development.

[13] Trevor Gambling and Gordon Andrews, "Does Baumol's Disease Exist? Some Findings from the Royal Shakespeare Company," *Journal of Cultural Economics* 8.2 (1984): 73-91.

[14] James H. Gapinski, "The Economics of Performing Shakespeare," *The American Economic Review* 74.3 (1984): 458-466; Edwin G. West, "The Economics of Performing Shakespeare: Comment," *American Economic Review* 75 (1985): 1206-09; James H. Gapinski, "The Economics of Performing Shakespeare: Reply," *The American Economic Review*, 75.5 (1985): 1210-1212.

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SCIENTOMETRIC CRITERIA IN SOCIAL SCIENCES EVALUATION

STELIANA SANDU [*]

Abstract

The concern for ensuring research excellence and international competitiveness, together with the increasingly higher demand for greater transparency and accountability of the public funds for scientific research called forth a rapid development of systems, methods and instruments for evaluation of the research output that would help sifting the relevant from the piles of research papers.

As R&D funding is directed towards natural and physical sciences, evaluation processes and procedures by scientometric criteria is of greatest concern. When the interest for assessing social sciences research activity increased, it underwent the almost same evaluation processes, despite characteristics that would have called for different and specific criteria, procedures and methods. It is well recognized by different experts in specialized field that socio-economic R&D should answer to the both, the socio- economic needs and opportunities and scientific performance requests. The literature on scientific research evaluation highlights the potential pitfalls associated with applying only scientometric assessment tools, methods and data sources for Social Sciences and Humanities research, ignoring the specificity of this type of research, which is addressed, first of all, to the economy and people.

Following a review of the relevant literature on the issue, the present paper surveys the recently elaborated and officially established evaluation criteria for research performed within the SSH fields, in Romania. The author will look into the potential merits, as well as setbacks of the new regulation, underlining challenges and likely impact on the SSH research community, output and performance.

Keywords: *economic and social sciences, evaluation criteria, scientometric criteria versus socio-economic effects, and responsibility in social science evaluation*

Introduction

Substantiate, objective and reliable assessment of scientific research work has always been a constant concern and pursuit for both scientific community in search for recognition and performance, and outer stakeholders such as R&D funding agents, be they public or private contributors, prestigious journals, publishing houses or society as a whole. Performance orientation and evaluation has became more adequate to prove efficiency of public funds using, as well as competitiveness, expressed as international rankings. The experience of different countries proves that, in last time, research activity is increasingly linked to innovation and interaction with society.

Effective and timely integration of the Romanian research system within the European Research Area has become a national strategic target and, consequently, the policy makers are searching for tools and mechanisms for increasing the international competitiveness of the national research work. The public investment in R&D was more and more related to the scientific performance at international level and evaluation procedures adopted, also, international scientometric criteria, even for social and humanities sciences. Incorporating international standards in the scientific evaluation has often brought the desired balance between financial effort and researcher scientific performance.

The most traditional, common and widely accepted evaluation method remains the *peer-review* assessment, which involves anonymous appraisal by experts. Especially useful in journal / book editors' decision making, as well as in merit-based funding, it's objectivity level is improved through multiple simultaneous reviews. With rising competition for funds and other acknowledgements, the issue of bias and subjectivity became wide spread asking for new, more

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objective quantifiable tools and techniques to evaluate science output and scientists' careers and potential. These should complement or substitute peer evaluation, which, by itself, might favor the creation and domination of "select few cartels of senior scientists" (1, 6, 7)

The new sub-discipline of scientometrics – or bibliometrics – has proved very productive, many research papers elaborating on the citation, publishing and Impact Factor (IF) figures, addressing mostly the interests and decision making processes of librarians, potential employers, research institutions and universities, funding agencies, etc.

Alongside its widespread application, increasing criticism emerged (2, 5, 8, 10)[1], especially when it is applied in social sciences evaluation.

1. The Specific of Social Sciences in terms of output evaluation

It has been largely acknowledged that the pace, impact pattern, publishing and citation culture and behavior associated to the research output significantly differ between the natural and life sciences, on one hand, and social and humanistic sciences, on the other. Ever since 1955 (4), considerable research work has been done to draw attention to the differences between the two broad scientific research areas that should call for different approaches, criteria of evaluation, bibliometric tools, computation methods. (5,6 etc)

Following extensive reviewing of social science bibliometric methodology and papers, some authors (5) warn that, relevant and correctly performed bibliometric based evaluation of Social Sciences output is possible, but with high costs, complexity and difficulty. Compared to the natural and life sciences, properly assessment of social scientist's scholarly work cannot rely solely on the same methods and data (e.g. SSCI-Social Science Citation Index), which, even cheaper and easier, misrepresent the true state of the subject examined.

It has been noted that the scientists of natural sciences publish most often in English (16), are oriented to the research frontier, referencing recent papers, and work within disciplinary frameworks and normally reach consensus. SCI (Science Citation Index) [2]covers mostly English work, use short citation windows and rely on the premises that there is large consensus among scholars regarding criteria of relevance, importance, truth, etc. Therefore, using bibliometrics through SCI may remain effective, reliable and extremely useful sound evaluation of scientific work in natural and life sciences, despite the criticism presented above. This might not be, unfortunately, the case for social sciences.

Foremost, social sciences (SS) address, very often, their national public, as society is their concern. Therefore, even if scientific research transcends national borders, social science is, to a considerable extent, of national interest. SS research priorities reflect national trends, local policy concerns and may not even stay relevant if expressed in other languages. Bibliometric evidence suggests that both, producers and consumers of social science, are nationally oriented (5, 8, 10) and

[1] Other most acknowledged limitation and deficiencies generally associated to bibliometrics are related to: some lack of transparence in Thomson Reuters's methodology and process in journals selection, citations collection and IF computation ; the citation window applied in counting IF is often questioned, being considered sub-optimal; other factors than relevance and quality might often alter the indicators as it has been noticed that open-access journals, available online and journals with higher frequency receive good IF despite their lower scholar recognition in their scientific fields; given the huge volume of scientific research output and full automation of evaluation, it happens that controversial and even invalid, fraudulent and retracted articles continue to be cited and counted for IF, as there is no system of linking indication of retraction in the original publication; it has also been frequently reported that editors and publishers are able and accustomed to manipulate and manage the IF of their journals (impact factor game), especially through citation cartels and through publishing more review articles which are more often cited than the original research papers, etc. Many authors have also urged attention on the fact that SCI seems to be biased towards North American journals due to a higher frequency of self and colleague citations (5, 7, 9) and to the fact that English journals are much better covered in the detriment of other languages.

[2] In 1960, Eugen Garfield's Institute for Scientific Information introduced the first citation index for papers published in academic journals, first the Science Citation Index (SCI) and later the social Science Citation Index (SSCI) and the Arts and Humanities Citation Index (AHCI).

that national science literatures are largely excluded from the SSCI, which provide the main data for bibliometric evaluation of the social sciences[3].

Literature highlights that the research front on many topics in the social and behavioral sciences are more and more international. Social scientists seem to become more internationally oriented and there are clear tendencies towards the homogenization of social sciences given the economic globalization, widespread internet usage, high European pressure for international collaboration, the national level evaluation requiring publishing in high impact journals (5). The percentage of social scientists publishing in English is increasing.

Nevertheless, there is still large amount of relevant, high-quality scientific literature that elaborates on national issues that address primarily a national audience being, therefore, under-appreciated and excluded in bibliometric-based evaluations.

Secondly, it is important to note that many of the social sciences research work is stirred by the mission of educating the public they observe, of informing, of enlightening and determining behavior. If psychologists, statisticians and geographers do not publish much in non-scholarly literature, other fields, such as economics (despite it being scientific in publication patterns), linguistics, education and sociology do, as they address non-specialists.

Moreover, non-scholarly literature has been acknowledged as of a high applicative character, being, therefore, associated, in substance and role, to patents. Yet, it has not been subject for consistent bibliometric evaluation, as it requires a sound qualitative evaluation base (5).

Be it scholarly work or non-scholarly literature, this research output loses its meaning and relevance if published in other language than the national one, as its readers would be others than the addressed ones. (2,5,8). It is obvious that non-scholarly literature, as well as national literature is less well indexed and international evaluation criteria, usually based on bibliometrics, would certainly misrepresent the real performance of a scientist career in social sciences.

Bibliometric based evaluation criteria, widely used on an international base, also focus on scientific *journals bibliometrics* (mainly SSCI), leaving under shadow book publishing. Extensive research literature on this issue arguments that journal based bibliometric indicators are generally based on a smaller fraction of research output in the social sciences than in the natural sciences. (5). The percentage for natural scientists publishing in journal articles or conference proceedings is considerably higher than for social scientists.

The classic bibliometrics techniques (used in SSCI) are also frequently criticized (5, 7) for applying the same citation windows as for SCI (used for natural and life sciences). The time distribution of citations shows that a much longer time is needed in order to capture the slow pace of citation accumulation in SS and the germinative potential of research work in social sciences.

The strong transdisciplinary character of social sciences often alters the SSCI based bibliometric results, as it leads to fragmentation of literature. That would cause a weaker coverage of journal literature by SSCI, which cannot identify any core literature and cannot provide comprehensive coverage (5).

However, bibliometric evaluation in the social sciences gains more credit, as fields like economics and psychology come to resemble more and more in publication patterns to natural and life sciences. Scholars try to boost their evaluations, tending to change publishing behavior towards SSCI indexed journals, leaving aside book publishing and other disseminating means.

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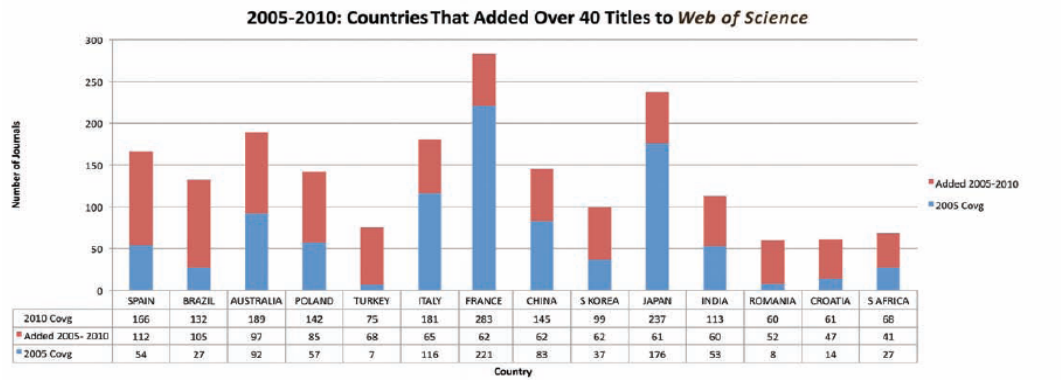
[3] To name a few examples, the afore-mentioned papers conclude that German and French authors cited material in their own language more than 60% of the time, although such material accounted for less than 10% of literature in the field (Yitzhaki, 1998); the top 20 most cited documents by Polish sociologists in the Polish SCI versus SSCI contained none in common, as all but one of the SSCI cited documents were in English and all PSCI cited documents were in Polish; the most cited sociologist on the national list ranked far lower in the SSCI and vice-versa; SSCI lack in coverage of Chinese and Indian social science, etc. These results show that the SSCI and national literatures represent partially overlapping, yet different worlds.

2. Recent approaches towards social sciences research evaluation, in Romania

World scientific publications in "Economics" and related area have experienced the greatest growth during 2005 - 2010. Globalisation gave a good impetus to "Management", "Business, Finance" and "Social Sciences" fields of sciences. Consequently, these fields increased by over 30 world journals each. Social & Behavioural sciences had one of the highest rates of growth that is 31%.[4] Romania is represented in Social and Behavioral sciences for the first time during 2005-2010, with 10 journals coverage.

Fig.nr.1



	SPAIN	BRAZIL	AUSTRALIA	POLAND	TURKEY	ITALY	FRANCE	CHINA	S KOREA	JAPAN	INDIA	ROMANIA	CROATIA	S AFRICA
2010 Covg	166	132	189	142	75	181	283	145	99	237	113	60	61	68
Added 2005- 2010	112	105	97	85	68	65	62	62	62	61	60	52	47	41
2005 Covg	54	27	92	57	7	116	221	83	37	176	53	8	14	27

Source : James Testa : The Globalization of Web of Science:2005-2010, Thomson Reuters, June 2011 , p.4

Recently, Romania has also increased its performance in scientific publications. The number of articles published and monitored by the Web of Science by Romania's researchers increased from 8,228 articles in 2000 to 11,739 in 2010. At the same time, it has been the increase of the number of Romanian journals, which are monitored by the Web of Science from 8 in 2005 to 60 in 2010, that is higher international visibility of Romanian researchers. Despite this, Romanian researchers still mainly publish in "national international journals", but Romania has become more international. On average, a country is expected to have 10% of its publications among the top 10% most cited ones worldwide but for Romania it is too early to have such high international performance[5].

Given the path-dependency character and the specific evolution of the social sciences in Romania, the issue of science and scientist evaluation would have required a sound substantiation based not only on recent international practice but, also, on the rich literature available on the matter and on the past experience of other more advanced countries regarding R&D performance, scientific visibility and expertise (1, 6). This would allow for avoiding potential pitfalls hidden in evaluation criteria less adequate for social sciences, or uncorrelated to the specific of the Romanian context.

The good intentions of policy makers and the optimistic expectations that drew forward the recent radical reform in the policy of scientific activity evaluation haven't been completely confirmed in the aftermath. The scientific community support has also been lower than expected[6].

[4] James Testa : The Globalization of Web of Science:2005-2010, Thomson Reuters, June 2011

[5] Technolpolis Group: Mid –term Evaluation of the National Strategy and of the National RD&I Plan 2007-2013, Final Report, 23 January, 2012.

[6] "Rapidly improving, but many of the research institutes and university research groups still don't perform well, even though there was a significant slug of extra money between 2005 and 2008. The money did not necessarily get distributed to the best people, and academic positions don't necessarily go to the best people either. Some academics tend to hold several powerful positions at once, and this results in potential conflicts of interest. Scientific nepotism still exists. We need more input from Romanian scientists abroad and an influx of the best international practices. I know

Scientometric criteria were mostly applied for the project proposals evaluation within the Excellence Programme in 2005. In 2011, new criteria, very demanding and setting high standards, were used in evaluation of the applications for projects financed through the national programme IDIAS. These criteria sets requiring ISI indexed articles and books available at minimum 3 to 12 European or OECD Universities' libraries, were the same for all projects proposals, no matter the scientific area they may have belonged to. This undifferentiated approach brought forth protests and criticism, especially from the arts, social and humanists scientists (3, 11, 12).

Romanian Government has approved new standards and methodologies for evaluation in social sciences, having in view specific indicators for each field of social sciences, in order to implement the requirements of the National Education Law (number 1/ 2011). While the literature suggests that the application of bibliometric techniques is at least questionable in a number of social science disciplines, it seems that, according to the Romanian criteria, a social scientist should be evaluated by very exigent scientometric criteria.

The minimal standards regarding the scientific performance required for designation of academic titles and distinctions in higher education, professional degrees and ability certificate for scientific fields were published in three Ministerial Orders pertaining to the Ministry of Education, Youth and Sports [7]. These ministerial acts take into consideration scientific work published in journals indexed in international recognized data bases, as well as books and book / volume chapters, conference proceedings published by international prestigious publishing houses.

It is noteworthy that the indicators used for the appraisal of economic scientists research activity – necessary for being designated with academic or research degree – are very different compared to other social science fields. While for the other social disciplines the indicators applied are numerous (between 20 for Psychology and 22 for Juridical and Military sciences, some of them more easier to be accomplished), the criteria for Economics and Business Administration evaluation are restrictive, based on publications of high originality in ISI indexed journals with Impact Factor higher than 0,25, or, in other journals indexed in prestigious special data bases. In order to be appreciated for conference participation, the author needs to present the evaluation reports of the scientific referees that evaluate the paper before publishing the proceedings (with a prestigious publishing house). Moreover, the author must prove that his paper, directly presented at international conferences, has been commented within the Conference works, by at least a scientific referee designated by organizers and acknowledged in the Conference program. Self-citations, or half-self citations are not considered; other citations have to be made in ISI or other journals indexed in at least 3 international data-base, or in books and volumes published at internationally acknowledged publishing houses and only in English, French, German, Italian or Spanish.

Specific historical context of the economic science evolution in Romania cannot and shouldn't be overlooked. Given the political impact over this scientific field before 1989, through the requirements regarding the research themes and the restrictions imposed to international collaborations and publications, the collaboration of the Romanian scientist from economic and social field with the international one were very poor. Even if the situation has significantly improved within the last years, the evaluations criteria are too exigent compared to the past evolution and, even, to those imposed to economic researchers in other European countries. Time is needed for proper alignment to the new standards and exigency.

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how science needs to be managed. I know the nuts and bolts of a scientific career and how to recognize the best research, worthy of funding from public resources. I am also a big fan of private research. People, who were used to getting money, even though their results were humdrum, are angry. They know they can't convince me that what they are doing is important if it isn't. I hope that most of the dynamic scientific community supports my attitude"(Interview of minister of Education, Research, Youth and Sport, Daniel Funeriu for the NatureNews , 12 January 2011).

[7] Order 4478 / 23 iunie 2011 for mathematics, natural, engineer and biomedical sciences, Order 4691 / 26 july 2011 for social sciences, Order 4692 / 29 july 2011 for humanists and arts.

Social sciences should be considered not only of intrinsic scientific merit in itself but as an indispensable tool for improving the quality life and as an engine for economic recovery and growth. Therefore, the spending of public funds in this field of sciences must be justified not only by scientific scientometric indicators but also by the quality of answers to the needs of economy and society .The educational impact of the social and economic research on the individuals and society could be grater when we take into consideration research result published in national review than the articles published in prestigious international reviews.

One obvious way to accomplish this requirement and introduce a real evaluation in the Romanian social science is to use an adequate system of indicators, combining scientometric indicators with other qualitative indicators that could measure national impact and visibility of research results for the present and for the future.

Consequently, new procedures must be built based on strengths and weaknesses of existing system of evaluation with enhanced dialogues between scientists and policy and social science managers, using bottom up and top down procedures of evaluation. Mutual learning from experiences used by different other countries could help in this process.

It may be difficult to evaluate the return of social sciences in strict economic terms but collateral, intangible benefits, discovering many business opportunities or ways for economic and social activity improving, recommendations for increasing the living standard of the people need to be taken into account when we evaluate social sciences output.

On the other side, social scientists , especially those from the economic and social fields, must change their behavior and demonstrate flexibility and an increasing capacity for adopting reactively and proactively to the new conditions and demands of the economy and society, especially in this difficult period of economic crisis.

3. Conclusions

1. Setting guidelines and standards, delineating integrated system of evaluation criteria for scientific research have been meant to encourage researchers to improve the quality and visibility of their scientific contributions.

2. The literature of evaluation in the S&T field and the experience of other advanced countries urge caution in indiscriminate and excessive use of scientometric evaluation criteria, especially regarding social sciences research. Bibliometric, SSCI based evaluations, even if recently more reasonable and relevant, remain partial and misleading, as they would neglect the integrative picture of the economic and social science, with its important contributions to understanding and serve their national human communities and societies.

3. With the view of shrinking the gap between the national and European R&D performance, of convergence towards the quality of the European scientific output, a complex set of procedures, standards, criteria and principles, internationally applied, have been adopted within the Romanian research system.

4. The evaluation criteria for social sciences are not fully adapted to the specific context of the Romanian scientific culture and community, to the specific of the social science area. The evaluation methodology and procedures contain very exigent and inadequate scientometric criteria for Social Sciences and the most exigent of them are for Economic Sciences.

5. It is, therefore, strongly recommended in the literature, that the bibliometric evaluation of SS be supplemented by other means of evaluation. Even though they involve higher costs, efforts and time, they would carry more relevance and reliability, avoiding the scientific research behavior alteration that would be detrimental to the very social science mission.

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THE WAY OF PROCESSING DATA IN APPROACHING ECONOMIC APPLICATIONS

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DANA-FLORENTA SIMION[***]

Abstract
Economic Informatics originates in the industry economy and the electronic processing of information. A clear distinction is made between IT and economic informatics, and further between general and particular economic informatics (the particular economic informatics meaning administration, industrial informatics etc). Economic informatics is deemed to be an applicative science relating to the conception, working modality and representation of IT and communication systems, oriented towards companies which are using electronic computers.
This paper pursues to integrate applications allowing the information systems to interconnect at informational level, by information sharing, and at service level, considering the control of the related processes in real time.

Keywords*: information systems, economic applications, integration, XML, CRM (Customer Relationship Management)*

Introduction

The paper approaches a current theme that takes into account data and information processing which may lead to economic applications development using a series of latest technologies.

Technologies such as XML, HTML, CRM allow the achievement of integrated systems, giving efficiency in user's activity. The revealed text analyses a series of specialized papers, emphasizing and comparing the advantages and disadvantages of the shown systems.

The modern management of the activity of a trading company is unthinkable without being grounded on sufficient information. Obtaining timely and top quality information implies using the **e-computing technology** on a wide scale. The quality of the decisions made to ensure the proper course of the economic activity ultimately depends on the quality of the information that the upper management operates with, and on their ability to analyze it.

Paper content

We could state that, in terms of management, information is the bearer of news about the economic phenomena and processes taking place inside or outside a company, but relating to it, such information being used in business analysis and decision making.

Information is the output of an entire range of primary data processing occurring as result of the carrying out of a trading company's activity.

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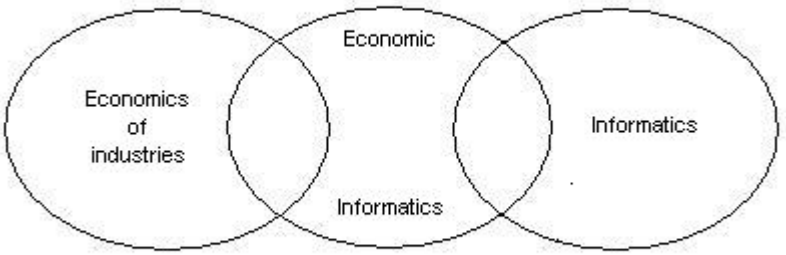
The processing activity turns data into a useful form, endowing them with additional knowledge. In terms of the processing cycle, **information** represents the outcome of data processing, designed to be used in the management and decision flows.

Seen as a means of knowledge, information represents a news-story, a signal reflecting the state of a system or of the environment within which it operates, and bringing added value.

As information results from data processing, we could say that it means nothing else than the final product of such process.



Picture 1 Fields of Economic Informatics

Programming languages, techniques and methods have known a tremendous boost since the appearance of computers until nowadays, due to the need to respond to the continuing increase in number and complexity of miscellaneous issues to be settled and therefore, implicitly, of the related programs. Thus, programming has evolved from the initial stage of introducing notions directly in binary code, and continued with the advent of assembling languages allowing the symbolic representation of instructions for computer.

The main issues arising in data integration process are generated by:

The use of multiple data sources resorting to different versions of data representation,

The necessity to synchronize in time the data taken over from different sources

The use of non-conventional data,

The ad-hoc connections to be made between different types of data or between different software applications.

Unconventional data are not standardized, semi-structured and newly defined within applications data, data with a dynamic structure or changeable in time. Given the specific characteristics of unconventional data, it is extremely difficult, and sometimes even impossible, to define general rules, universally accepted, for handling and using such types of data in software applications.

The distributed application is that application running on multiple computers simultaneously so as to improve the application performance and scalability.

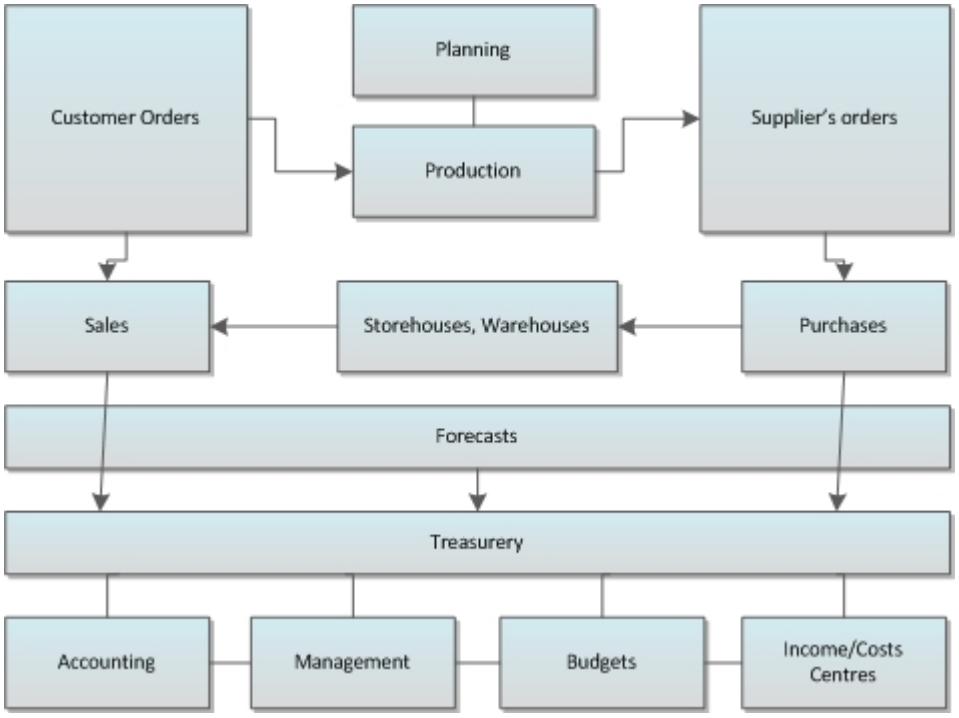
The use of distributed architectures for the development of economic applications offers several advantages, namely:

The provision of the application with automatic scalability, by adding other computers to the system,

The possibility to integrate applications running in different environments, on different platforms or operating systems,

The possibility to synchronize and to allow real-time communication between multiple clients,

The possibility to support poor computer systems in terms of technical characteristics to ensure the hardware resources required to run the related applications.

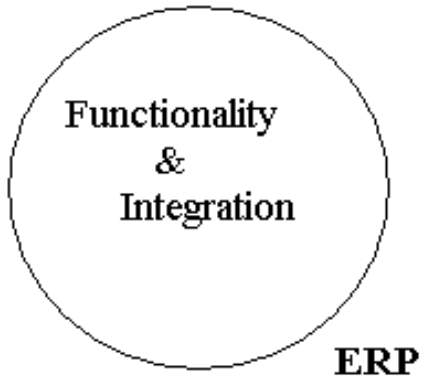


Picture 2 Flow of data exchange between a company's departments

The accelerated changes in the business environment and the increase in complexity of the activities carried out by companies impose a permanent adjustment of the effort and analysis capabilities of the human being.

Able to process a large volume of data and aggregated information in order to optimize processes and to render them more efficient, the ERP systems have been created as a solution to such challenges. The main idea relating to the development of software applications for enterprise systems consists in their evolutionary nature[1].

[1] Lungu, Ion *Integrarea sistemelor informatice,(IT Systems Integration),* A.S.E. Publishing House, Bucharest, 2007



Picture 3 Fundamental Properties of ERP

Integration ensures the connectivity between the flows of functional economic processes. It may be construed as a communication technique. Here are some common ways in which communication takes place through and for integration: source code, extensive local networks of computers, Internet, e-mail, workflow, automated configuration tools, protocols and databases. We could state that integration is achieved through communication, and communication is achieved through integration.

The functional part of an ERP system ensures the flows of economic processes within each function. Therefore, in an ERP sequence we can find from several to tens of functional modules (general accounting, debtors, payroll, inventory, supply, production planning, logistics and sales orders).

Data integration combines the basic elements of data management systems, content management systems, data warehouses and other enterprise applications, bringing them altogether into a common platform.

Development of XML-based applications

XML is a relatively new technology. Still, this does not prevent it to impose itself almost in all branches of information technology. Obviously, since XML has become a usable component of computerization, business might also be useful.

Less than a year after its release, XML has impressed many developers and users. Currently, XML is becoming increasingly popular and irreplaceable. In 1998 the international organization W3C has strengthened the XML specification as "Extensible Markup Language (XML) 1.0. This meant green light for the development and implementation of XML.

It is clear that HTML and XML documents are based on the same structure using tags. But the functions of these two languages are quite different.

HTML	XML
Used to **display data**	Used to **carry on data**
Used to **visually define data**	Used to **describe data**
Used to show **how data are displayed**	Used to show **how data are used**

Table 1 HTML – XML Differences

The above table reveals that XML is working with data definition and transportation. An eloquent example would be the one described below, where we determine information relating to a physical entity. If we described the given information in a relational database, it would look like below:

Name	James
Surname	John
Date of Birth	07.23.1985
Height	179

The weakness of the above-described information is that it can be processed only by database management systems, which, most often, are incompatible.

From HTML to XML

The two languages have been created for different purposes:

XML was designed to describe data and to focus on their structure;
HTML was designed to display data and to focus on their design.

The XML Objectives are reflected by the following characteristics:
Simple to use on Internet;
Able to support a wide variety of applications;
Compatible with SGML (Standard Generalized Markup Language);
Fit for easy writing of programs processing XML documents;
Designable quickly, formally and concisely.

The XML data can be used in HTML language and allow a rapid identification of documents via the search engines. By means of codes such as javascript, php etc., the XML files can be embedded in web pages, the most notable example being the RSS system that uses an XML file to carry on information from one web page to several web pages.

Advantages of XML:
Extensibility (new indicators can be defined, if necessary)
Validity (the data structural accuracy can be assessed)
Facility for users to represent their data independently of applications
Simple and accessible (they are text files created to structure, store and transport information)
Easy to edit and modify (it only requires a simple text editor such as Notepad, WordPad, etc.).

XML language provides a method of inter-human communication, not of data interchangeability between machines, therefore creating relationships between the designers and the beneficiaries of their documents. XML inherits the neutrality of the platform and speech, and the liberty of the data present in SGML.

All these remarks indicate us that XML provides users with an information markup open standard, without limits in terms of annotation techniques (provided extensibility), easy to use (able to support knowledge databases) and easy to implement.

The future of XML will impact not only the IT employees, but also the political and economic world. The combination of XML with XSL could replace all current formats of text processing and publishing:

A unique format for Web posting and printing;

A common format for storing data in various software products;

A single format for all languages.

The success of XML can be foreseen both as regards Web, where is allows the creation of extensible multimedia applications, and as regards the information processing in general.

Application development using the concept of CRM (Customer Relationship Management)

The CRM application is a dedicated solution for customer relationship management which offers: direct support for developing business strategies and the ability to connect front-office and back-office roles into a complete customer oriented business solution. Also, the ability to collect and analyze information, to be able to anticipate customer needs and build a profitable and long-term relationship is another important feature of this type of software solution.

The sharply increasing transition of "traditional" business towards electronic media has brought along important mutations in the crucial field of relationship administration between companies and their customers. The Customer Relationship Management (CRM) is now one of the fashionable concepts in the new digital economy, but it is hardly an innovation of recent years. Historically, the relationship between the customer and those who provided a particular product or service has arisen since the first customer. This relationship has been managed over time in the most different ways, yet using the "traditional" methods, which implied direct contact between a company's sales representatives and its customers. As until recently a letter, a catalog sent by mail, a phone call, or an elegant restaurant were "tools" more than sufficient to maintain a close relationship of loyalty with the customer, things have changed with the appearance of the Internet. What the digital revolution brought along was an unprecedented widening of a company's customer base, and thus, almost an exponential growth of the problems involved in dealing with them.

The CRM has become a priority for the companies that have sought to have an advantage in today's stormy economy. Worse now, even if they invest hundreds and thousands, if not millions of dollars in CRM, most companies are not closer then before than when the system appeared.

The Customer Relationship Management can be defined in the following ways:

Strategy for selecting and maintaining the customers so that their value to the firm is optimal; it involves a business philosophy that puts the customer at the center, through all the processes; the success is possible if and only if the leading team, the strategy and the organizational appropriate culture act simultaneously;

A process of implementing a business strategy that places the customer at the center, which, in a "chain reaction" determines to redefine all the functional activities - this implies new work processes, possible only by using information technology;

"Super-class" of business models, processes, methodologies, interactive technologies, to achieve a high retention rate of clients belonging to identifiable groups of customers with great value for business and growth potential;

Extension of the concept of selling as an ongoing process, considered both art and science, to collect and use customer information in order to "educate" their loyalty - which is impossible without the use of appropriate technology;

A concept of development and implementation of business strategies and related technology support, to eliminate the difference between the actual and the possible acquisition level, the development and maintenance of customer relationship - which improves the efficiency of assets;

A timely process for enlarging and applying the knowledge (and not necessarily of data storage) on a client, leading to the individualization of acquired strategies and business to meet the personalized needs of each client;

Specific management approach that places the customer at the center of the business processes and practices, the purpose of this approach being the increase in the profit and productivity;

The management of all interactions with the customers, with the purpose of expanding its customer base by bringing in new customers and meeting the needs of the existing ones;

A term specific to the information domain on potential methodologies, to the software packages offered and to the Internet, to help a company conduct customer relationships in an organized manner;

The "overall" approach that integrates the processes of receipt of orders, sales and service, which unifies and coordinates all the channels through which the customers interact with the company, that "something" which has most to do with customer satisfaction and, in fact, has nothing in common with technology and for which technology is only a means and not an end in itself;

A process to guide the entire company towards its outside, towards the clients, which involves understanding the customer needs and process management within the company to develop and maintain customer relations.

The information about the customers is the essence of CRM. Although the development and maintenance are important, clear and well structured data about the customers are vital. Unfortunately, many businesses do not pay enough attention to the importance of consistent and quality data. In fact a study by PriceWaterhouseCoopers showed how widespread are the data on quality problems in companies around the world.

Based on a survey of 600 mid-level companies in the U.S., Europe and Australia, the following conclusions were drawn:

70% of companies have recognized that insufficient data have a negative financial effect on the business. 50% added extra costs to reconcile the data.

30% have been forced to postpone investments in new systems because of data issues.

A company stated that data problems have caused a loss of $ 8 million only in one fiscal year.

Many leaders have considered the subject of data management companies as boring, until they realized how much is at stake. When a critical project can not come alive because of data problems or clarity, or when they realized how much it will cost to clean the institutionalized data, the negative effect of data neglecting became clear, and the responsible persons were notified.

More than money, poor quality data means low analysis and performance indicators which makes the management take appropriate decisions to get out of this impasse. When it comes to customer information, poor data quality can lead to problems that are no less critical. Each has a story about incorrect data related to customers. But the quality of customer data is no joke, they are

absolutely necessary to develop and maintain operational CRM enterprise and analytical systems. Thus consistent and quality data are critical components of the CRM system.

Customers require easy and convenient access through the channels that they choose. Creating multiple points of contact with the customer is served is a prerequisite. Unfortunately, creating multiple points of contact increases the risk of appearing inconsistent interactions. In companies where we can not reconcile information about the same customer at various points of contact, dissatisfaction shows up.

The creation of a single universal database is, unfortunately, not feasible for most large companies because of differences in portfolio applications and associated databases. However, an integrated view, and a multi-channel on the customer is feasible and represents one of the main advantages of the CRM applications. To achieve this, these applications must be integrated pragmatically, using intermediate components with intermediate applications, each dealing with a portion of data collection.

A well organized target reduces the development effort necessary to document and code the interfaces between systems, reducing duplication in technology integration, and shortening the time required to change existing applications.

Definition of customer transactions can vary widely between business-to-business (B2B) and business-to-consumer (B2C). In B2B customers are the companies and their customers, and B2C client is usually an individual, but can be a family.

The next step is to inventory the available sources of data, determining where to collect data from internal sources or whether they will be obtained from external sources. To create an analytical view, the data must be extracted from various sources, converted into consistent and usable information, and then loaded into the analytical data structures. Tools for extracting, transforming and loading (ETL) can be used for this. They are driven by data sets and have a strong support for meta-data. In addition to collecting the data from internal sources, methods to fill in the external uncovered gaps should be available.

CRM Implementation

Alone, the CRM is not a technology, but a process of collection and retention of customer information and their interactions with the company. CRM implementation tends to be a complicated and expensive test. It is estimated that during the next two years, 2,000 companies will have to spend $ 250 million each on CRM solutions. While money is exhausted, many companies have not been able to determine what kind of return on investment they obtain in their system, beyond the obvious data.

A recent study by Andersen Consulting is seeking direct correlation between CRM and the business income. Typically a billion $ turnover could add $ 40 million profit would increase the CRM capacity by 10 percent. Besides this, the CRM increases performance and the business income.

Significantly, companies that have successfully implemented CRM solutions do not see CRM as an IT project driven away from a specific department - that is, they see CRM as a broad initiative. Most CRM implementations have been fragmented, put into operation in a department without an over viewing perspective. Similarly, the CRM software needed to be transferred to all levels throughout their organization. Marketing will be able to formulate responses and to provide the results of specific promotions or campaigns across the customer segments. The employee dealing with customer relations will be able to provide superior customer support and satisfaction services.

When talking about the technologies used to achieve the implementation of CRM system, we must first refer to the server level of the CRM. Thus the operating system on which the CRM system developed is Microsoft Windows 2000 Server and the IIS Web server is used. The application is developed in MS Visual Studio.NET Framework and the Server software is MS Framework 1.1

SDK. CRM customers that will benefit from this application should have as 2k/NT Windows operating system and IE5.

The dynamic information accessed in/through the CRM interface information will be considered as "functional" (interface elements such as labels, Message box sites, input fields sites) and "business" information (data about customers, products).

The support for the "functional" data consists in a MS SQL Server database. These data allow direct access from the interface through a ADO.net. connection. The business information is accessed through predefined Web services.

Advantages of CRM

The impact on the cost and quality data

Using data integration solutions (CDI) can produce a significant return on investment (ROI). Benefits of the CDI are:

Better cross-selling and up-selling "(facilitated by an improvement in the modeling and better targeting of the customers)

Improving customer retention (achieved by avoiding worn out customers)

Improving attracting new customers

Competitive advantage through CRM

The CRM is defined as a strategy to manage customer relationship and interaction with them in the most profitable way possible for both. There are several providers of operational CRM solutions that enable traditional CRM implementation strategies. These typical strategies are supported by solutions focused on how the services, sales and marketing of more effective departments should be made, this increasing the profitability of such organizations and of their customers.

Conclusions

Web services and applications are emerging as a key technology for conducting automated interactions between distributed and heterogeneous applications and for connecting various business processes.

At software and hardware level, *technology integration* is the main phrase for the current IT products. Thus, the various existing technologies allow an interaction with outstanding results between databases and web services.

ICT infrastructures containing databases, large volumes of data, OLAP, Java turn into web platforms, therefore hardware decreasing in relevance.

A series of advantages of IT integration and interaction are outlined below:

Diminishing of implementation, exploitation, conversion and other hidden costs;

Increasing of data security due to the submission to common restrictions;

Diminishing of the complexity of different technologies;

Avoidance of scalability-related problems;

Avoidance of issues relating to the implementation and management of different software products by using a single product;

Obvious evolution of end users.

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HOW TO SUSTAIN ECONOMIC PERFORMANCE? ECONOMIC GROWTH AND ITS IMPACT FACTORS

OANA SIMONA HUDEA (CARAMAN)*

Abstract

This paper intends to render several important factors of impact on economic growth and to describe the particular types of relationships of the latter with each one of its influencing elements. In order to correctly determine such issue, we have resorted to three carefully selected models that have been estimated and compared so as to identify the most adequate and representative regression. For this purpose we have performed an analysis based on cross-section annual data for 105 countries spread all over the world. After having tested and rejected certain exogenous variables initially considered, such as imports or exports, we have finally retained the external debt and foreign direct investments as explanatory items of the dependent variable. The results revealed that both of them positively affect the gross domestic product of the analysed countries, this one being inelastic in relation to the exogenous variables considered. Even if the relationship between the economic growth and the external debt of a country is usually negative, as the money exit out of the country due to the debt service causes non-achieved potential investments, yet, there is an inflexion point up to which the external debt has a positive influence on economic growth by the increase of the investments funds acquired as result of the external credit contracting, this being the case reflected by our study. As for the relationship existing between foreign direct investments and GDP, the economic theory confirms that FDI and economic growth are directly correlated, the former contributing to technical progress, production increase and, finally, to the improvement of the living standard.

Keywords*: economic growth, external debt, FDI, causal relationship, economic modelling*

1. Introduction

The present study based on cross-section annual data for 105 countries all over the world is destined to render various essential issues on the economic growth phenomenon and to provide a sound analysis of several important influencing factors of it.

As reflected by the economic theory, economic growth means the increase of the real GDP from a period to another one and indicates the living standard and well being of a society. Considering this, the identification of the key factors significantly impacting on economic growth and the decryption of their related relationships becomes essential is proposing and adopting the best possible economic policies. These influencing elements cover a large range, comprising, among others, without limitation, investment, unemployment rate, budgetary deficit, exports, imports, governmental expenses, external debt or population increase. Given their variety, we have undertaken to introduce them separately into models and to further render our analysis increasingly complex.

Therefore, we have started our study, by resorting to only one explanatory variable, meaning external debt. Later on, after having calibrated the model, we have introduced other exogenous items: foreign direct investments, exports and imports. After having considered several issues described hereinafter, we have finally selected for estimations the equations below:

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$\log_{gdp08} = \alpha + \beta_1 * \log_{dat08} + \varepsilon$
$\log_{gdp08} = \alpha + \beta_1 * \log_{dat08} + \beta_2 * \log_{inv08} + \varepsilon$
$\log_{gdp08} = \alpha + \beta_1 * \log_{dat08} + \beta_2 * \log_{inv08} + \beta_3 * \log_{exp08} + \varepsilon$

The relationship between the economic growth and the external debt of a country is, basically, negative, considering the opportunity cost relating to the money exit out of the country due to the debt service, this rendering non-achieved potential investments. Yet, there is an inflexion point, an optimum level up to which the external debt has a positive influence on economic growth by the increase of the investments funds acquired as result of the external credit contracting. In this case, it is important to see whether the investment yield is sufficient to cover the long-run debt service rate, so that the leverage should not reverse once the reimbursements begins. In order to achieve a positive impact of the external debt on growth, an efficient and comprehensive debt strategy is absolutely necessary.

In respect of foreign direct investment, these ones are usually deemed to be one of the major catalysts to economic growth, therefore the relationship between such variables being positive. Yet, the benefits obtained via FDI do not accrue automatically and evenly across countries. The characteristics of host country economy and industry largely affect the FDI impact on growth in developing economies. FDI has a favorable influence on economic performance as it reduces the gap between the existing production level and a steady state production border and besides, it comes with built-in advanced technologies and last hour knowledge from more developed countries. But, if the target country doesn't have a high absorption capacity so as to take advantage from what powerful nations provide, all such advantages might vanish.

The debates regarding the export - economic growth relationship have mainly revealed a positive connection between these two items, as exports can help the country to harmonize with the world economy and to reduce the impact of external shocks on the domestic economy. Also, exports help domestic production in achieving a high level of economies of scale.

In view of rendering this paper as clear as possible, we have decided to structure it into six sections, as follows: Introduction in section 1 (the current section), a brief Literature Review which appears in section 2, followed by the description of Data in section 3, the presentation of the Methodology and Empirical Results in section 4, Conclusions in section 5 and, finally, Suggestions for Further Research in section 6.

2. Literature review

The analysis of the relationship existing between economic growth and its various influencing factors represents one of the main topics of interest approached by economists all over the world.

The relationship between the total external debt and the GDP growth rate is carefully examined by Patillo et al. (2002, 2004). They analysed 61 developing countries, for the period 1969-1998 and discovered a backward bending growth curve with a debt-growth positive relationship at low levels of national debt and negative relationship at high levels, thus indicating us that the debt-overhang effects might occur only after having reached a certain threshold. Clements et al. (2003) resorted to the generalised method of moments with fixed effects econometric technique, applied on data for 55 low-income countries, over the period 1970–1999, in order to render the channels through which economic growth is affected by external debt in the analysed countries. They evidenced that a high decrease in external debt for heavily indebted poor countries might determine an increase per capita income growth and might contribute to economic growth by their effects on public investments. The analysis of Hameed et al. (2008) was directed towards the long-run and short-run relationships between external debt and economic growth. In this respect, they made appeal to annual data collected for Pakistan during 1970-2003. The debt service ratio proved to have a negative

impact on GDP translated into a decrease of the economic growth rate in the long-run, with adverse consequences as for the capacity of the country to service its debt. Also, the estimated error correction term indicated a significant long-run causal relationship among the said variables. Reinhart and Rogoff (2010) used in their study 3,700 yearly observations for 44 countries covering about 200 years and drew the conclusion that the relationship between government debt and real GDP growth is weak for debt-GDP ratios below a threshold of 90% of GDP, while, above 90%, median growth rates fall by 1%, and average growth falls considerably more. As regards the emerging markets, there are lower thresholds for public and private external debt: when external debt reaches 60% of GDP, annual growth decreases by about 2%; for higher levels, growth rates are roughly cut in half.

The idea emerging from most of the studies regarding the influence of FDI on economic growth is that the developing countries should provide a supportive business environment and should have reached a minimum level of economic development before they can capture the FDI growth-enhancing effects. Alfaro et al. (2003) revealed, by using cross-section data between 1975-1995 for various OECD and non-OECD countries, that FDI causes economic growth only if the the target countries benefit from well developed financial markets. Countries should be interested not only in attracting FDI but also in improving their local conditions, as in this way, on one hand many foreign companies could be attracted and, on the other hand, the host economies would have the possibility to optimize their foreign investment-related benefits. Kinoshita and Lu (2006) carried out an empirical study based on a reduced form approach, in their panel data analysis for 42-non OECD countries. For them, infrastructure seems to be the one of the key elements in providing FDI efficiency. The central result is that FDI does not represent an economic growth driver by itself. The host country should undertake infrastructure investment before attracting FDI so as to maximize the incidence of technology spillovers from FDI. Lee, Chang (2009) applied panel cointegration techniques and panel error correction models for 37 countries for the period 1970-2002, based on annual data in order to explore directions of causality among FDI, financial development, and economic growth and revealed a strong long-run relationship. Besides, the financial development indicators proved to have a larger effect on economic growth than FDI. Overall, the findings underscored the potential gains associated with FDI when coupled with financial development in an increasingly global economy.

The export-economic growth correlation has been also approached by various authors. Jordaan (2007) focused on the causality relationship between exports and GDP of Namibia over the period 1970 – 2005, resorting for this purpose to Granger causality and cointegration analysis and concluded that exports influence GDP and GDP per capita and that the export-led growth strategy based on incentives has a positive influence on growth. Ullah et al. (2009) discovered a positive relationship between exports and economic performance when resorting to VEC models for time series from1970 to 2008 for Pakistan. The results indicated that there is uni-directional causality between economic growth, exports and imports. Besides, Granger causality through VEC is checked by means of F-value of the model and t-value of the error correction term, partly reconciling the traditional Granger causality test.

3. Data

In order to achieve our research, we have selected the following data series:

The gross domestic product in 2008 (gdp08) - expressed by GDP at PPP in USD, annual series taken over from the UNO database.

The external debt in 2008 (dat08) - represented by the credits contracted by authorities and by the economic agents from the banks reporting to IRB, corrected by the implicit index for passing to PPP standard, for comparability. These data have been annualised (given that the external debt series is quarterly) and they have been taken from UNO and IMF databases.

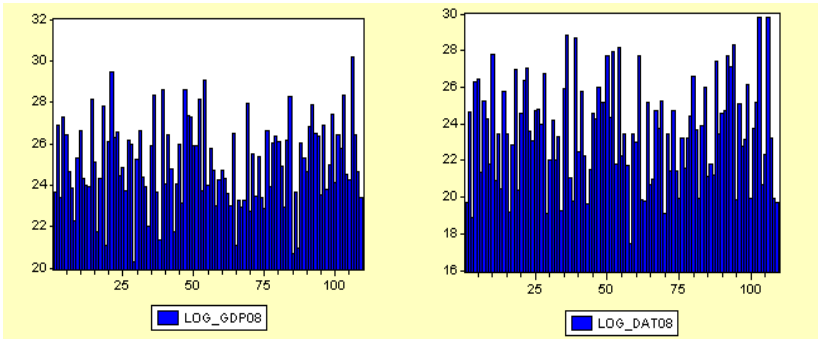
The foreign direct investments (I08), exports (EXP08) and imports (IMP08) in 2008 - computed based on the series of their percentage expression in GDP. These are annual series taken over from the UNO database.

The data correspond to the year 2008 and refer to the economic standing of 105 countries. This study is a continuation of the previously presented simple regression model.

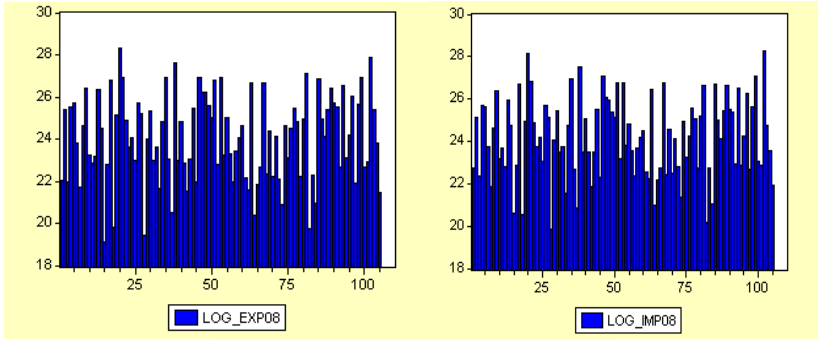
4. Methodology and Empirical Results

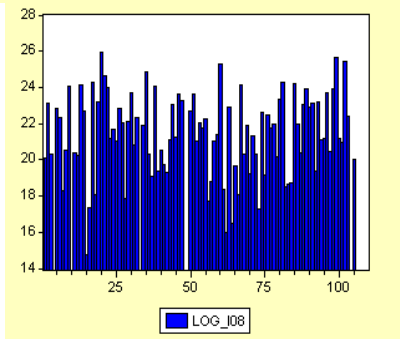
4.1. Data Descriptive Analysis

The graphic representation of the gross domestic product and of the external debt reveals the major differences between the analysed countries, even if these have been partly compensated by the logarithmic transformation performed. As for GDP, the differences indicate the distance separating the well developed countries from the poor ones. Such significant differences are also obvious in the case of the external debt series. We specify that this series is adjusted with the implicit index for passing to PPP standard and it comprises both external public debt and external private debt.



We have also rendered below the graphs specific to the three series in logarithm added to our previous analysis:





As noticed, the size differences preserve in this case too, but their amplitude is less significant for imports and exports. The foreign direct investment series also contains negative values, so that, by the logarithmic transformation, they have been turned to 0.

Correlation Matrix

	GDP08	DAT08	I08	EXP08	IMP08
GDP08	1.000000	0.717154	0.640893	0.791651	0.903491
DAT08	0.717154	1.000000	0.628806	0.529327	0.657320
I08	0.640893	0.628806	1.000000	0.794587	0.791705
EXP08	0.791651	0.529327	0.794587	1.000000	0.963921
IMP08	0.903491	0.657320	0.791705	0.963921	1.000000

According to the matrix of correlation coefficients, the import series is positively correlated to the export one, with a correlation coefficient very close to 1 value. Therefore, in order to avoid this phenomenon, we have decided to exclude the data series relating to imports from our analysis. Even if it has a higher correlation coefficient in relation to GDP than the export series, exports are theoretically deemed to have a superior influence on economic growth.

As for the other correlation coefficients, the estimations of the models by pairs have indicated that, the other variables being retained, no multi-collinearity phenomenon should occur.

4.2. Parameter Estimation by OLS

Model 1:

$\log_{gdp08} = \alpha + \beta_1 * \log_{dat08} + \varepsilon$

Comments based on model 1:

- The probability of F statistics and that of parameters α and β1 is 0%. Therefore, the parameters are significantly different from zero, and the eternal debt variable is correctly introduced in the model.

- F statistics = 215.7692 is higher than F with (P-1,T-P) freedom degrees and 5% significance level, whose critical value obtained from the specific table is F(2-1,105-2) = 3.936. This confirms the correct definition of the model (the explicative variable – external debt – is fit for explaining the behaviour of the GDP variable).

- The t-statistics value – computed for the parameter estimators – exceeds the one rendered for t critical value with (T-P) freedom degrees and a significance level of 5%; t (105-2)=1.645. It results that the external debt variable is relevant within the model.

- The adjusted R-squared is 67.37%, this meaning that our explanatory variable explains 67.37% of GDP variance.

The Durbin Watson (DW) statistics indicates a value of 2.235523, belonging to the interval (d2,4-d2)=(1.72 ; 4-1.72), meaning that the error series in uncorrelated. (d2 is extracted from the table considering k=2 parameters and T=105 data).

In order to improve this simple regression model, we have decided to add one more variable: foreign direct investments.

Model 2:

$\log_{gdp08} = \alpha + \beta_1 * \log_{dat08} + \beta_2 * \log_{i08} + \varepsilon$

Comments made based on model 2:

- The probability of F statistics and that of parameters α, β1 and β2 is 0%. Therefore, the parameters are significantly different from zero, and the explanatory variables are correctly introduced in the model.

- F statistics = 172.4927 is higher than F with (P-1,T-P) freedom degrees and 5% prag de significance level, whose critical value obtained from the specific table is F(3-1,105-3)=3.087. This confirms the correct definition of the model (at least one of the two explanatory variables – external debt or foreign direct investments is fit for explaining the behaviour of the GDP variable).

- The t-statistics values – computed for each estimator of the two parameters exceed the one rendered for t critical value with (T-P) freedom degrees and a significance level of 5%; t (105-3)=1.645. It results that both explanatory variables used are relevant within the model.

- The adjusted R-squared is 77.77%, this meaning that the three explanatory variables explain 77.77% of GDP variance.

The Durbin Watson (DW) statistics indicates a value of 2.242166, belonging to the interval (d2,4-d2)=(1.74 ; 4-1.74), meaning that the error series in uncorrelated. (d2 is extracted from the table considering k=3 parameters and T=105 data).

Subsequently, we have introduced a new explanatory variable in 2008, in order to render our model more complex.

Model 3:

$\log_{gdp08} = \alpha + \beta_1 * \log_{dat08} + \beta_2 * \log_{i08} + \beta_3 * \log_{exp08} + \varepsilon$

Comments based on model 3:

- Ads notices in Table 2.1, the variables $\log_{dat08}$ and $\log_{i08}$ are incorrectly introduced in the model, having probabilities 68.08%, respectively 17.53%.

- The probability of F statistics and that of parameter β3 is 0%; the probability of the intercept parameter is 3.03%, still it belongs to the interval 0-5%. Therefore, only β3 and α parameters significantly differ from zero, this meaning that just the exports explanatory variable is correctly introduced in the model.

- F statistics = 384.9854 is higher than F with (P-1, T-P) freedom degrees and 5% prag de significance level, whose critical value obtained from the specific table is F(4-1,105-4) = 2.696. This confirms the correct definition of the model (at least one of the three explanatory variables – external debt, foreign direct investments or exports is fit for explaining the behaviour of the GDP variable).

- The t-statistics values – computed for each estimator of the first two parameters are lower than the one rendered for t critical value with (T-P) freedom degrees and a significance level of 5%; t (105-4)=1,645. It results that the first two explanatory variables used are not relevant within the model. The t-statistics for the third parameter (13.308) exceeds the related critical value.

- The obtained adjusted R-squared is indeed higher than in previous models (92.16%), this meaning that the three explanatory variables explain 92.16% of GDP variance.

The Durbin Watson (DW) statistics indicates a value of 1.737297; this value do not belong any more to the interval (d2,4-d2)=(1.76 ; 4-1.76), meaning that the error series in auto-correlated. (d2 is extracted from the table considering k=4 parameters and T=105 data).

Table 2.1.

Indicators	**Model 1**	**Model 2**	**Model 3**	**Model TSLS**
Coeficient β1	**0.610929**	**0.330684**	**0.016963**	**0.409588**
Coeficient β2	**-**	**0.460119**	**-0.078361**	**0.493743**
Coeficient β3	**-**	**-**	**1.027295**	**-**
t-statistic β1	14.68909	5.832822	0.412661	2.596898
t-statistic β2	-	6.718064	-1.365715	2.655667
t-statistic β3	-	-	13.30821	-
Prob1	0.0000	0.0000	0.6808	0.0109
Prob2	-	0.0000	0.1753	0.0093
Prob3	-	-	0.0000	-
Coeficient α	**10.71861**	**7.390172**	**1.577747**	**4.824524**
t-statistic α	10.95133	7.708104	2.198428	4.425868
Prob	0.0000	0.0000	0.0303	0.0000
R-squared	**0.676882**	**0.782306**	**0.923997**	**0.764195**
Adjusted R-squared	**0.673745**	**0.777770**	**0.921597**	**0.759282**
F-statistic	**215.7692**	**172.4927**	**384.9854**	**186.0950**
Prob F-statistic	0.0000	0.0000	0.0000	0.0000
Akaike	**3.196818**	**2.836981**	**1.804859**	**-**
Schwartz	**3.247370**	**2.915621**	1.909713	-
Durbin-Watson	**2.235523**	**2.242166**	**1.737297**	**2.150270**

By analysing the table with centralized results for the three analysed models, we see that the third model cannot be considered due to the probabilities of the parameters β1 and β2 that exceed 5%. By comparing the first and the second model, we notice that the second one has a superior R-squared. In conclusion, model 2 is selected as the most appropriate of them.

4.3. Selected model parameter estimation by TSLS

As our analysis has started with data series at a given moment in time, delayed variables (t-1, t-2) would not have been an option for being used as instrumental variables. If we have used as instrumental variables exactly the explanatory ones: $\log_{dat08}$ and $\log_{i08}$, the same results as by means of OLS would have been obtained.

By using dat08 and i08 as instrumental variables, the results are close to those obtained by resorting to OLS, but the probabilities of the parameters β2 and β3 are 1.1%, respectively 4.55%. After several trials, we have decided to use as instrumental variables dat08, i08 and $\log_{exp08}$, for which the probabilities of parameters are: 1.09% for β1 and 0.93% for β3.

Comments made based on TSLS:

- All parameters have probabilities lower than 5%; therefore, the variables are correctly introduced in the model.
- As for OLS, in this case too the F and t statistics values exceed the critical ones taken from the related tables. Still, the adjusted R-squared decreases in TSLS as compared to OLS, from 77.77% to 75.93%.

4.4. Selected model autocorrelation and homoskedasticity hypotheses testing

4.4.1. Autocorrelation

The error autocorrelation has been rejected by the Durbin-Watson test for model 2 estimated by OLS. Yet, in order to strengthen this result, we have decided to use also the Breusch-Godfrey test.

The statistics BG = (T-P') * R² follows a distribution $\rightarrow \chi^2$ with P' freedom degrees and 5% significance level. It is also to be mentioned that P' represents the number of parameters contained in the model having as explained variable the resid series, obtained after having estimated model 2 (the analysed model), and as explanatory variables, the explanatory variables of model 2 completed by the delayed values of the endogenous variable:

$$\varepsilon_t = b_1 * \log_{dat08} + b_2 * \log_{i08} + a_1 * \varepsilon_{t-1} + a_2 * \varepsilon_{t-2} + a_2 * \varepsilon_{t-3}$$

In this model, we have P=3 parameters and T=105. P' is 2+3=5, so that the test statistics has the value:

$$BG = (105 - 5) * 0.22555 = 2.2555 < \chi^2_5 = 11.07$$

This statistics indicates us that we cannot reject the null hypothesis according to which the coefficients of the above-mentioned model are null, therefore model 2 presents no error autocorrelation.

4.4.2. Homoskedasticity

In order to test the error homoskedasticity, we have resorted to the White test implemented in Eviews.

The statistics W = T * R² follows a distribution χ^2 with 2*P freedom degrees, where R² is the determination ratio computed for one of the two regression models having the square of errors as explained variable and the square of the explanatory variables as explanatory variables, without cross terms, respectively with cross terms.

Without cross terms: W = 105 * 0.104471 = 10.969455 < W with 2*3 freedom degrees taken from the table = 12,592 => the null hypothesis, according to which the data are homoskedastic, is accepted.

With cross terms: W = 105 * 0.113288 = 11.89524 < W with 2*3 freedom degrees taken from the table = 12.592 => the null hypothesis, according to which the data are homoskedastic, is accepted.

In consequence, the White test reveals the absence of heteroskedasticity in model 2 estimated by OLS.

5. Conclusions

As result of our attempt to study the economic growth and its influence factors, we have created various models that have been estimated by OLS and TSLS methods, the best one being finally selected based on several criteria.

Out of the chosen series, the imports one has been eliminated due to the high level of collinearity. The trials to improve the simple regression model have lead to the selection of two important factors determining GDP: external debt and foreign direct investments, both having a positive influence on the economic performance of countries.

The positive relationship between external debt and GDP revealed by this study may have one of the following two explanations:

- considering the major differences between the values of the analysed series, the negative leverage effect obtained for some of them has been compensated the positive effect of the other ones, so that, as a whole, a positive relationship emerged for the two variables of interest;
- at the world level, in average, the threshold above which the indebting influence on the economic performance should become negative has not been reached yet.

The coefficients obtained within the estimations may be interpreted as elasticities and indicate that, while GDP is inelastic in relation with debt, the latter has a supra-unitary elasticity, so that the conclusion may be drawn that its modification is ampler than the GDP one.

Such result could be explained by stating that, if an increase of the debt determined a quicker increase of GDP, then many countries would indebt themselves until the maximum limit so as to obtain economic growth, and the debt service would be always covered by it.

The debt elasticity in relation with GDP is supra-unitary and it is confirmed for the developing and emerging countries, with significant economic growths, but highly indebted in order to reach a superior development standard, especially considering that their governments are involved in expensive development projects.

As regards the extended model, the positive relationship between GDP and external debt remains unchanged, the statement of its reversal after a critical threshold being still valid. We could also mention that the inelasticity of GDP maintains, but it has a lower value as compared to the one obtained within the simple regression model.

As for the relationship existing between foreign direct investments and GDP, the economic theory confirms that FDI and economic growth are directly correlated, the former contributing to technical progress, production increase and, finally, to the improvement of the living standard.

We can find in the economic theory cases when a negative relationship has been revealed for these two variables, but just for certain areas (for instance, the Latin America countries) and for short periods of time.

Considering that we have used logarithmic values, the values of coefficients can construed as elasticities. As regards the foreign direct investments, the elasticity coefficient is sub-unitary, this involving that GDP is inelastic in relation to foreign direct investments, increasing only by 0.33% when FDI increases by 1%.

By comparing our results to those obtained by the authors of the articles considered as basic bibliographic sources, we could state that this study has revealed the same trend as that reached by Patillo et al. (2002, 2004), with the mention that the latter found a debt coefficient much closer to the inflexion value above which the leverage on GDP becomes negative. Our findings are in compliance with those reacjed by the quoted authors also as regards the foreign direct investments. Still, their analysis does not comprise TSLS estimations, therefore a comparison from the perspective of this method being impossible.

6. Suggestions for further research

In view of going on with our economic growth analysis, we propose to resort to a panel data approach, therefore enlarging the perspective on the economic performance phenomenon and its

impact factors. As for the methodology, a GMM econometric estimation technique, with fixed versus random effects could be applied. The long-run relationship between variables could be also examined so as to see whether cointegration is present or not. If a cointegration relationship is revealed, the use Error Correction Models would be an interesting approach which might significantly enrich our study.

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THE INFLUENCE OF SPARE PARTS EXPENSES ON PRODUCTION COSTS WITH THE PREPARATION OF THE JIU VALLEY COAL

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Abstract
The activity of supply and that of exploitation of the spare parts from the composition of the equipments that realize the preparation of the Jiu Valley coal influence its production costs.
In this respect, this paper deals with, during some periods of time, initially determined, the specific costs of the spare parts for the sieves, pumps and pipes, equipments, and also auxiliary equipments that are part of the endowment of the Exploitation of the Jiu Valley coal preparation.
The results got can be used to rank and determine the causes which determine the high expenses of some spare parts categories as well as the possibility to reduce the production costs within E.P.C.V.J.

Keywords: *spare parts, energetic coal, washing subjected coal, sterile.*

Introduction

The Jiu Valley exploitation of coal preparation is a subunit of C.N.H. – S.A. PETROŞANI, it realises the raw coal processing and preparation extracted by the mining units, as well as the delivery of final products obtained.

Part of the extracted raw coal is directly delivered to the beneficiaries from the loading points belonging to the mining units after making a claubage that consists of manual evacuation of rocks, wood, metal, rubber etc and that of some sifting operations; after that it is loaded into wagons and delivered under the name of sorted energetical coal.

The remained raw coal quantity is subjected to concentration at the Coroesti factory within E.P.C.V.J.-Vulcan , where the following finite products are obtained:

Superior energetical coal
Washed energetical coal
Mixed energetical coal
Hydro-cycloned energetical coal
Filtered coal slate

The technological flow consists of: claubaging, sieving and breaking the raw coal received from the mining units, followed by its concentration in the machines and the draining of the obtained products with the help of draining sieves and of the vibrating spins.

The small coal in the circulation waters is concentrated with the help of the hydro-cycloning and recovery batteries, as well as drained with the help of draining sieves. The soft sterile from the residual waters is purged in the decanters of sterile sludge, and then filtered in press filters. The big sterile resulted after the preparation process is drained in cups elevators and transported with the help of the cableway on the sterile landfills.

Spare parts expenses in coal preparation process

The vibrating sieves realise hard and exact screenings, through the vibrating system with " obliged oscillation", obtained by means of an eccentric tree, fixed in the walls on the chassis, that leads to the same amplitude of oscillation of the housing independently from the material weight, that

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is better material selection. The oscillating housing is made up of superior width board and the selection stands are fixed with auto locked screws, avoiding the risk of internal tension forming in the welded areas, tensions that can provoke leaks or breakings of the housing.

The single-deck vibrating screen **WK1 – 2.6 x 5.0** is designed for classification of coal and other granular materials on screens. The vibrating screen includes:

Riddle
Sieve-deck
Inertial drive / vibrator
Drive of the vibrating screen
Support of the vibrating screen

The riddle is made of two side-plates tied toghether with box girders which form a bearing for the sieve deck. Inside the side walls, mounting pcokets of the vibrator bearings are fastened, connected by a tube shielding the shaft of the vibrator.

The sieve deck is made of sieve panels placed with a slight sloping on oblong ribs lined with protective pads. On the sides, the sieves are fastened by means of terminal strips.

Perforated sieves, made of sheet or woven of wire, can be applied in the vibrating screen. The kind of sieves and the size of sieves meshes in the deck depend on the required technology.

The vibrator of the inertial type vibrating screen forms a long unbalanced bearing shaft in two special barrel bearings. The bearings are fastened in the side walls of the riddle in removable mountings sealed by labyrinth covers. Extra unbalanced masses, allowing to change the pitch of the vibrating screen, are placed on the pins of the shaft.

The vibrator is originally assembled with 1 pads g = 20 mm in the weight. The remaining two pads are given separately.

The choice of weights of the vibrator shaft other than the installed g = 10 mm can be made exclusivley with acceptance of the producer.

The two-deck vibrating screen **SccII – 1.8x5.25** is designed for dewatering and classification. This vibrating screen includes the following units:

Riddle
Inertial drives
Sieve-decks
Drive of the vibrating screen
Support of the vibrating screen

The **riddle** is made of two plates tied toghether with bearing and stiffening beams of the I-section. In the walls of the riddle, bearing mountings of the vibrators are fastened. The central casings of drives work as additional beams stiffening the construction of the riddle.

The inlets and outlets fastened to the terminal beams of the riddle enable supply and reception of products.

The upper sieve deck consists of panels of welded sieves. The lower sieve deck is the made of slotted sieves in the form of frames. On the sides, the sieves are fastened by means of shielding terminal strips.

The vibrating screen is equipped with two **inertial drives** (each composed of two vibrators), fastened in the sides of the riddle, connected directly with electric motors. The whirling unbalanced backward masses of the vibrators generate centrifugal forces, neutralizing each other or accumulating in definite positions, inducing a harmonic motion of rectilinear trajectory or near-eliptical trajectory of the springily supported riddle.

The vibrator consists of a mounting fastened with a flange to the riddle side. Inside the mounting, a short shaft on two roller bearing is mounted. Weights witch replaceable cylindrical pads are placed on the shaft necks, allowing the change of the stroke of the vibrating screen. Two opposite vibrators are connected together with a coupling shaft. All rotating elements are protected by

protective shields. The same numbers of pads must be mounted in all weights of a given vibrating screen.

Originally, vibrators are equipped with 2 pads, 16 mm thick, in each weight. The remaining pads are supplied separately. To a maximum, one pad 8 mm thick can be mounted additionally with the approval of the producer. Also, another amount and size of pads can be mounted in the weights after obtaining the producer's acceptance.

The **drive of the vibrating screen** consists of two electric motors mounted on a common frame. The motors are connected directly with vibrators by means of properly shielded bow-clutches.

The **support of the vibrating screen** consists of four sets of spiral springs. The upper seats of the supports are fastened to the pins of the riddle, while the lower seats are connected with the supporting construction (substructure). The support allows to change the angle of inclination of the vibrating screen according to technological instructions of the development design.

Table 1. Technical characteristic of the vibrating screen SccII – 1.8 x 5.25

PARAMETER	UNIT	VALUE
Size of sieve holes of the upper deck	mm	21
Gap width of slotted sieves of the lower deck	mm	1
Frequency of vibration	min^{-1}	960
Stroke of the riddle	mm	9 ± 0.5
Surface of the sieve	m^2	2 x 11
Type of the vibrator	-	100W/1800
Engine power	kW	2 x 11
Engine speed	min^{-1}	960
Static load of 1 pillar	kN	17.2
Dynamic load of 1 pillar	kN	± 2.6
Mass of the vibrating screen	kg	7680

The supporting construction of the vibrating screen should be appropriately rigid in order to take over strengths and vibrations generated by the vibrating screen effectively and to guarantee proper work of the machine.

The construction should ensure a comfortable access to:

sieve decks and sides of the riddle

vibrators and their lubricating points

supporting springs

clutches and driving motors

Chutes, funnels and elements of the stationary construction should be installed with the minimum distance of 50 mm from the riddle. The supplying chute should ensure smooth distribution of the feed over the whole breadth of the vibrating screen.

The oscillating group disposes of an eccentric tree, treated and rectified, mounted on 4 special bearings for vibrating machines width a large front. According to the selection needs, on the stands sieves can be mounted or steel bars. The main stand is made of sections that confer an adequate support, having a dismountable and protected with anti-wear board or with rubber.

The spare parts for sieves and pumps, as well as the transports pipelines of the water and the material influence the production costs for the coal that is "subjected to washing", as well as the "washed net".

Table 2 The specific expenses with spare parts for sieves

Nr. crt.	EQUIPMENT NAME	YEAR	SPARE PARTS NAME	CONSUM-PTION (piece)	VALUE (lei)	THE COST INFLUENCE ON THE WASHING SUBJECTED (lei/to)	THE COST INGLUENCE ON THE WASHED NET (lei/to)
1.	SIEVES	2005	Surface. Ranking	24	23509.68	0.024943296	0.041157395
			Surface. Ranking 18 G 2A(perforated board)	6	10152.54	0.01077164	0.017773619
				TOTAL 2005	33662.22	0.035714936	0.058931014
2.		2006	Spring damper sieve	28	6860	0.010427053	0.017016463
			Elicoidal spring damper sieve	96	26880	0.040857025	0.066676754
			Typical sieve beam	16	35900	0.054567232	0.089051171
				TOTAL 2006	69640	0.10585131	0.172744388
3.		2007	Spalt OL 600x875 mm with holes 0,8	132	177067.56	0.34704159	0.496390794
			Typical sieve housing	2	133078	0.260824742	0.373070562
			Delivery system for the sieve	2	168910.36	0.331053977	0.473522918
				TOTAL 2007	479055.92	0.938920309	1.342984273
4.		2010	Sieve arches	48	21840	0.039218362	0.075703481
			Spalts 650x875	96	165120	0.296508057	0.572351591
			Spalts 600x875	73	110960	0.199252265	0.384618051
			Perforated board 8x1000x2000-20	50	41100	0.073803786	0.142463968
			Perforated board 8x1000x2000-50	50	37750	0.067788149	0.130851941
				TOTAL 2010	376770	0.67657062	1.305989033
5.		2011	Spring damper sieve	8	13702.16	0.059886801	0.110409579
			Spring damper sieve	8	8086.56	0.035343202	0.065160069
				TOTAL 2011	21788.72	0.095230003	0.175569648

Table 3. Specific spare parts expenses Warman pumps

Nr. crt.	NAME	YEAR	SPARE PARTS NAME	U.M.	CON-SUMPTION	VALUE(lei)	THE COST INFLUENCE ON THE WASHING SUBJECTED (lei/to)	THE COST INGLUENCE ON THE WASHED NET (lei/to)
1.	Warman pumps	2010	Overall group bearings	Pcs	4	74696.38	0.134133228	0.258918314
			Sealing gland	Pcs	16	1225.28	0.002200251	0.004247159
			Gland	Pcs	4	3205.94	0.005756947	0.011112675

			Discharge seal	Pcs	4	756.76	0.001358923	0.002623139
			Suction plate	Pcs	4	25994.66	0.046678937	0.090104682
			Intake gasket	Pcs	4	684.08	0.001228411	0.00237121
			Sealing gasket	Pcs	4	1296.68	0.002328465	0.004494652
			O-Ring	Pcs	4	122.52	0.000220011	0.000424688
			Rotor	Pcs	4	54164.06	0.097263083	0.187747613
			Wear shirt	Pcs	4	72113.24	0.129494651	0.249964436
			Seal wear shirt	Pcs	8	1592.76	0.002860139	0.005520947
			Discharge board	Pcs	4	21635	0.038850241	0.074992894
			Sealing liner	Pcs	4	13936.66	0.025026235	0.048308318
			Restrictor ring	Pcs	4	1123.12	0.002016801	0.003893045
			Distance	Pcs	4	3808.34	0.006838684	0.01320076
			Wearing sleeve	Pcs	4	4645.56	0.00834209	0.016102796
					TOTAL 2010	281001.04	0.504597096	0.974027328

Along with screeners and pumps, pipelines (with diameters between 76 and 325mm) introduce high specific costs as shown in Table 4.

Table 4. Specific expenses for pipelines

Nr. crt.	NAME	YEAR	PIPELINE TYPE	U.M.	CONSUMPTION	VALUE(lei)	THE COST INFLUENCE ON THE WASHING SUBJECTED (lei/to)	THE COST INGLUENCE ON THE WASHED NET (lei/to))
1.	PIPELINES	2005	Pipe Ø 108	Pcs	50	21500	0,022811066	0,037639133
			Pipe Ø 219	Pcs	50	8900	0,00944272	0,015580851
					TOTAL 2005	30400	0,032253786	0,053219984
2.		2006	Pipe Ø 108	Pcs	20	4700	0,006933135	0,01165851
			Pipe Ø 259	Pcs	62	16965,68	0,02502667	0,042083946
					TOTAL 2006	21665,68	0,031959806	0,053742456
3.		2007	Pipe Ø 108	Pcs	50	7535,5	0,014769119	0,021125004
			Pipe Ø 800	Pcs	1,5	933,46	0,001829525	0,00261686
					TOTAL 2007	8468,96	0,016598644	0,023741863
4.		2009	Pipe Ø 76	Pcs	10	1719,5	0,035685379	0,005930537
			Pipe Ø 159	Pcs	10	3271,4	0,067892498	0,011283024
			Pipe Ø 325	Pcs	20	10160	0,210854	0,035041733
			Pipe Ø 325	Pcs	85	15045	0,312234098	0,051890046
					TOTAL 2009	30195,9	0,626665975	0,10414534
5.		2010	Pipe Ø 108	Pcs	25	6514,75	0,011698618	0,022581925
			Pipe Ø 159	Pcs	22	9559	0,017165216	0,033134138
			Pipe Ø 325	Pcs	4	2032	0,003648888	0,007043474
					TOTAL 2010	18105,75	0,032512723	0,062759537
6.		2011	Pipe Ø 108	Pcs	30	7229,9	0,031599075	0,058257254

			Pipe Ø 159	Pcs	30	13458	0,058819673	0,108442181
			Pipe Ø 219	Pcs	25	17250	0,075393027	0,138997446
			Pipe Ø 325	Pcs	90	15714	0,06867977	0,12662063
					TOTAL 2011	53651,9	0,234491545	0,43231751

Tables 2 and 4 reflect the specific expenses with the spare parts that are necessary for sieves and pipes, during 2005-2010 (inclusively for 10 months of 2011); in table 4 there are the specific spare parts expenses necessary for the Warman pipelines in 2010.

It results that with a production of 228.801 to of washed coal, in those 10 months of year 2011, the expenses are:

-for spare parts necessary for sieves: 0.095230003 lei/to x 228.801 to=10348.66992 lei

-for pipes: 0,234491545lei/to x 228.801to=53651.89999 lei

As for the net coal, the situation of the spare parts expenses is the following:

- for spare parts necessary for sieves: 0.175569648 lei/to x 124103 to=21788.72003 lei

-for pipes: 0,43231751 lei/to x 124103 to=53651.89994 lei

At the same time, in 2010, for a production of 556882 to, washed coal, the spare parts expenses necessary for pumps are 0.504597096 lei/to x 556882 to=281001.04 lei, and for the net coal 0.974027328 lei/to x 288494 to=281001.04 lei.

The costs influences with spare parts differs from one year to another, as well as from a machine to the other due to their usage, in the production process, but also the maintaining[3] activities that are difficultly realised. There is a double in the specific spare parts expenses for sieves, pumps and pipes.

All the above mentioned costs reflect a high financial effort both for the washed coal and for the net one, that is necessary both for respecting the maintenance activities of the machines/equipment and for their reconditioning (where possible).

By reconditioning, the maintenance costs are reduced with 30-70% as the reconditioning cost can be between 20% and 70% out of the factory cost of a new part, of an appropriate quality. The reconditioning cost of a part can be determined (in a workshop or office) with the help of the relation:

$$C=c_{mc}+c_m+c_r \text{ ,lei} \quad (1)$$

where:

c_{mc}- the cost of the materials consumed to recondition the part, lei

c_m-the manoeuvre cost, lei

c_r-the workshop activity, lei

The economical efficiency condition includes both the new part working time (t_{pn}) as well as the reconditioned part working time (t_{pr}):

$$C_{pr} / t_{pr} \leq C_{pn} / t_{pn} \quad (2)$$

where:

C_{pr} –the reconditioned part cost

C_{pn} –the new part cost.

It`s estimated that at least 50% out of the spare parts mentioned in tables 1,2 and 3 can be reconditioned, without any supplementary endowments, within the enterprises belonging to C.N.H.Petroşani, which could allow an important increase of the coal preparation activity worth.

Routine maintenance and fault finding for Warman Pumps

Warman pumps are of sturdy construction and when Correctly assembled and installed, they will give long Trouble-free service with a minimum amount of maintenance. However, regular observation checks by the operator can minimise the risk of costly stoppages.

It should be periodically checked gland seal water supply and discharge. Operator should always maintain a very small amount of clean water leakage along the shaft by regularly adjusting the gland. When gland adjustment is no longer possible replace complete gland pack.

Maintenance personnel should inspect gland packings at regular intervals, not longer than six months (1800 hours) to determine when packings need to be changed. Warman International Limited can supply all recommended packings in individual blocked rings, cut to length and moulded to the correct size for each type of pump.

Warman pump performance is inversely proportional to the clearance between the impeller and the intake liner. This is more pronounced with an open impeller.

With wear, the clearance increases and pump efficiency drops. For best performance it is necessary, therefore to stop the pump occasionally and adjust the forward impeller clearance. This adjustment can be carried out without any dismantling of the pump.

Before restarting, it should be checked that impeller turns freely and that bearing housing clamp bolts are tight.

Maintenance personnel should open bearing housing at regular intervals (not longer that twelve months) to inspect bearings, lubricant and to determine each time the course of action and the period for the next inspection.

The wear rate of a solids handling pump is dependant on the severity of the pumping duty and of the abrasive properties of the material handled. Therefore, the life of wearing parts, such as impellers and liners, varies from pump and from one installation to another.

Wearing parts must be replaced when the performance of a given pump no longer satisfies the requirements of the particular installation. Where a pump is used on a particular duty for the first time and especially where failure of wearing part during service could have serious consequences, it is recommended that the pump be opened at regular intervals, parts be inspected and their wear rate estimated so that the remaining life of the parts may be established.

Where stand-up-pumps are standing idle for long periods, it is advisable to turn their shafts a quarter of a turn by hand once a week. In this way all the bearing rollers in turn are made to carry static loads and external vibrations. Alternatively run all pumps at weekly intervals.

Conclusions

Reconditioning and rehabilitation of the parts for the coal preparation equipments, as well as the equipments of the maintenance activities meant to re-establish the geometrical shape of the used landmarks and even to improve their physical- mechanical proprieties according to the initial ones, appear as an immediately applicable solution and with effects of productive activity worth.

The opportunity of spare parts reconditioning is made according to technical-economical analysis, regarding their final reconditioning and sustainability. The correct choice of the material as well as the already applied treatments to the part, the functional conditions and requests, the limit performances that are to be assured, the usage size and the reconditioning cost.

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LABOR MARKET POLICIES AND EFFECTIVENESS.

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DORINA ZENELAJ[**]

Abstract
In this paper will be examined some important issues of the labor market policies in Albania. As well, the analysis of labor market institutions such as the Social Insurances or the Syndicates on the efficiency of employing active labor forces. Which are the policies on the protection of the labor forces and the criteria of definition of the minimum salary? Furthermore, it continues with the importance of reforms in the labor market policies, to be examined in the labor market aspect as a production factor and as a regulator of the internal market. Fast globalization is causing continuous risk and movement for the active labor forces. The increase and development of technology puts out of the market many employees, decreasing the number of unqualified employees and increases the demand for the qualified ones. Does the globalization really affect the labor market, efficiency and as a consequence increase production, or the latter are benefits only for the developed economic countries? At the same time, we shall examine the movement of the labor forces from one country to another and the fluctuation of the relevant salaries.
In general, the analysis of this paper faces two key issues: the first being raised on discussion of the kinds of programs on the active labor forces, such as programs of direct employment or consideration of employment in public sector, and the second regarding the methodology of evaluating these programs. How effective are them on the domestic market?
The paper ends with conclusions and recommendations on the efficiency of policies for the labor market forces.

Keywords: *efficiency, policies, labor market forces, program, migration.*

Introduction

Unemployment and employment of active labor forces is a major concern for each society. In 1991 Albania was unprepared to face this reality. The shift from a dictatorial system with centralized economy where the employment was guaranteed to a democratic system with capitalist economy and an individualistic employment model on basis of personal skills, made the Albanian society fall into chaos in terms of employment and opportunities offered by the labor market.

From the entire transition period to present time, the labor market situation in Albania was associated with several issues such as informal employment, migration, limited involvement of women in the labor market compared to men, lack of guidance of the young people to labor market needs and professional education, difference of salaries between women and men etc.

The improvement of living standards and consequently the economic growth have been the main challenges of Albania for a period of almost 20 years. The Foreign Direct Investment Report in Albania qualifies the domestic economy for 2010 with a 6 % average increase of GDP. However, according to the equality of purchasing power, the GDP per capita is only 25% of the EU-27 average, lower than the one of Bulgaria which is an EU member country with lower incomes.[1]

Accordingly, this paper will introduce a survey of the labor market situation in Albania on the effects it will have after the integration of the market to the European Union, identification of problems encountered in the course of implementation of labor market programs and their effectiveness as well as the internal migration of the population.

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[1] UNCTAD, Foreign Direct Investment Report for Abania (Tirana: 2011), 20-25.

The importance of this scientific paper lies in the sensibilization of the main stakeholders, either be policymakers, implementers, employers or employees, that although the program and policy implementation is a challenging phase, the importance of this phase is vital. On the other hand, we wish to emphasize that unemployment and poverty cannot be reduced only by drafting qualitative laws and policies but their practical implementation is essential.

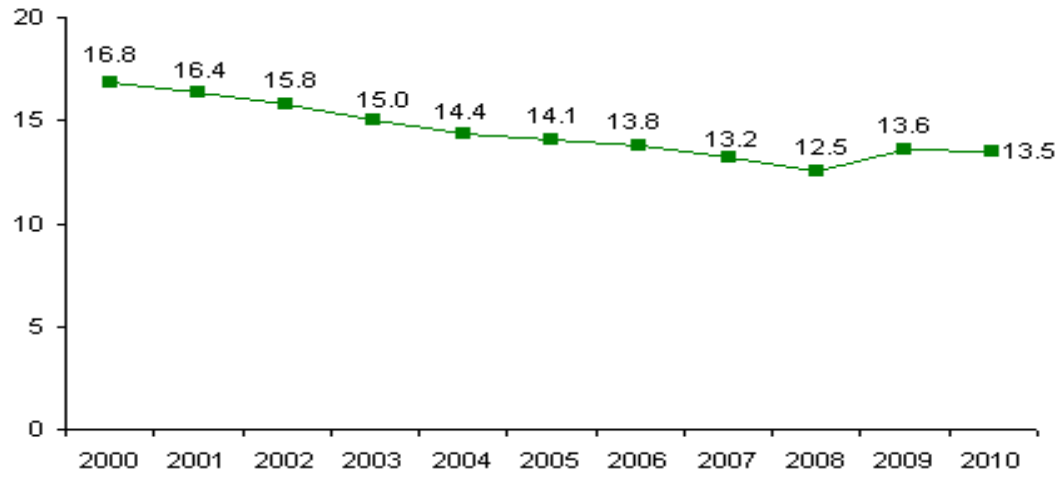
We have endeavored to make a realistic overview of the labor market in Albania, of the existing labor market policies and programs and the obstacles for their implementation. Alternatively, we offer various recommendations for overcoming the obstacles encountered with the view of improving the current situation.

The paper introduces an in-depth analysis of the labor market policies and programs in Albania. On the other hand, we draw a comparison of these policies with the evaluation reports of international organizations covering the Albanian labor market. Some of the main sources used in this paper are the Albanian legislation on labor market, reports of the World Bank, UNDP, ILO and statistics from INSTAT. The paper will be closed with some conclusions and recommendations of the authors.

Labor market policies and programs in Albania.

The labor market in Albania has experienced and still has a low level of employment of active labor force. A characteristic of the transition period Albania has already passed is naturally both unemployment and lack of labor market policies. The first ten years of the transition period showed high rates of unemployment in the country. Hence, "the number of employed people in the public sector is reduced from 850.000 in 1991 to 189.000 in 2001, and further on in 176.000 people in 2004"[2]. In the meantime, according to INSTAT, the average figure of unemployed people in the country for the first 9- month period of 2011 is 142.082."[3]

Scheme: The Registered Unemployment Level, 2000 - 2010



Source: INSTAT, Data from Professional Education and Training (PET), published in 2011.

[2] Ministry of Labor, Social Affairs and Equal Opportunities , Sectorial Strategy of Employment 2007-2013(Tirana: 2007), 5.

[3] "Results from the Labor Market Questionnaire, Labor Market in Albania", INSTAT, accessed Janary 10,2012, http:// www.instat.gov.al

Unemployment still has not good indications, while the labor force is growing and may become a major source of future economic growth. If Albania is not able to improve the new job generation climate, this "potential demographic gift" could further aggravate the unemployment issue. **"**During this decade, the working age population will grow approximately by 5% every year and by 2015 it will constitute two third of the total population."[4] Under these conditions, the labor market situation in Albania requires the engagement of many stakeholders in order to enable the required changes and further social and economic development.

In Albania, the Law "On Promotion of Employment" was drafted in 1995 and approved by the Law No. 7995, dated 20.09.1995*. This Law placed special focus to the "employment, information and professional training, National Employment Service and adoption of general active policies in support of full, productive and free choice employment by the individuals"[5] This law has been subject to key amendments in 2005, which draft was approved later in July 2006, bringing other improvements in several issues such as: 1) improvement of its definitions and introduction of other adapted definitions, 2) introduction of the orientation and advisory concept for new jobs creation and employment, 3) new provisions related to modifications in the procedures of management of financial funds of professional training, which entered into force as a result of the Law No. 8872 dated 19.03.2002, "On professional education and training in the Republic of Albania".[6]

Articles 3 and 4 of this Law clearly specify its main goals. Respectively, the ***Article 3*** emphasizes that every individual looking for a job shall be addressed for registration as an unemployed person to the National Employment Offices which gives appropriate advice and orientation for the labor market. Foreign citizens, without Albanian citizenship, coming from countries which have or do not have bilateral agreements with Albania can also benefit from this Law. This Law is also beneficial to the foreign citizens married to Albanian citizens who are residents in the Republic of Albania.

The Article 4, in its paragraphs 1 and 2, emphasizes the measures of national employment policies in support of both the promotion of employment and provision of related financial support. Economic development, employment and development of active state policies for employment are primarily focused on the concept that every citizen looking for a job has the right job, the job has a fruitful performance and the individual can choose the job in accordance with his skills and capabilities.

In Albania, there are also several programs in support of those looking for a job and the market labor offers in the country. Let's have a look ahead on the specifics of these programs which have a common ground in the reduction of the registered unemployed people in the National Employment Offices, and the shift of these individuals from the passive financial support scheme, such as the unemployment financial support and economic support.

The programs currently being applied in Albania are as follows[7]:

1) Employment promotion program of unemployed people; the employers providing temporary employment for unemployed people (3-6 months) shall benefit financial support of their monthly wages up to 100 % of the minimum wage and the expenses for the social security of the beneficiary employed people. If the beneficiary employed people are employed for a period up to 1 year and with regular contracts, the employer shall benefit a financial support equal to a minimum monthly wage and the obligatory contribution to social security for a period up to 5 months. If the

[4] World Bank, Albania: Market Labor Assessment, Report No. 34597-AL,(Tirana:May 2006), 4-6.

Note*: Law 7995 on "Promotion of Employment " was amended by Law No. 8444, dated 21.01.1999, with the Law No. 8862 dated 07.03.2002, and the Law No. 9570 dated 03.07.2006

[5] Official Journal, "On Promotion of Employment", Law No. 7995, dated 20.09.1995, 3-4.

[6] Ministry of Labor, Social Affairs and Equal Opportunities , Sectorial Strategy of Employment, 30-32.

[7] Ministry of Labor, Social Affairs and Equal Opportunities , Sectorial Strategy of Employment, 22.

beneficiary employed people do not have related professional training skills for the job to be performed, and the employees have the possibility to offer that training, then he can benefit an increase of 10-20 percent of the total fund for each individual employed.[8]

2) Employment promotion program through on-the-job-training practices; this option support the employers conducting specific training programs with the beneficiary unemployed people followed by the creations of jobs for a number of the trained individuals. In this case, employers shall be supported with the wages and social security expenses for the trained unemployed people they employ, provided that the employers offering these training sessions shall at least employ 40% of the trained individuals.

3) Employment promotion program through institutional training and education; the employment offices shall assign and provide appropriate training for the beneficiary unemployed individuals of those companies which: a) guarantee the employment of individuals after the training, or b) show through studies and investigation of the labor market that the training shall be useful for the participants. The beneficiary individuals refusing the participation in these training courses are checked out from the list of unemployed people and their unemployment wage is interrupted.[9]

4) Employment promotion program for the unemployed individuals of female gender; this program is focused on the integration in the labor market of marginalized women, such as Roma women, ex-trafficking abused women, elderly and disabled women, and;5) In 2007 for the first time it was applied the employment promotion program for unemployed individuals holding a Bachelor diploma, who have completed their studies in or out the country by means of their participation in professional training and education programs in public or private institutions/ enterprises. Public employers are obliged to provide employment for these unemployed individuals engaging them under a free of charge policy, based on the internship status scheme of employment of 1 in 50 personnel of the public administration.[10]

As described above, Albania has in place the appropriate policies and programs but they shall cover and balance the protection of workers as well. It is necessary to develop legal arrangements for the types of contracts including obligations for both employers and employees, as well as other procedures including the removal from job. The basic legislation in Albania is the 'Job Code' with legal effects from 1995 with various key amendments in 2003. "Employment Promotion Legislation (EPL) offers job security for the covered employed individuals, but it can also give undesirable consequences concerning the discouragement of creation of new jobs, especially in the public sector."[11]

As a conclusion, Albania has related policies and programs on employment of active labor force, but the key question mark is to the quality of their implementation. Quite often, business and company entrepreneurs are not well-informed on Albanian legislation. Sometimes they are not aware of the forms of financial support provided by the government in cases of employment of young individuals, marginalized women, or regarding the training of unemployed people; not to say that a skeptical view is in place regarding the question of validity and implementation of these employment promotion programs in Albania.

Globalization effects to the labour force.

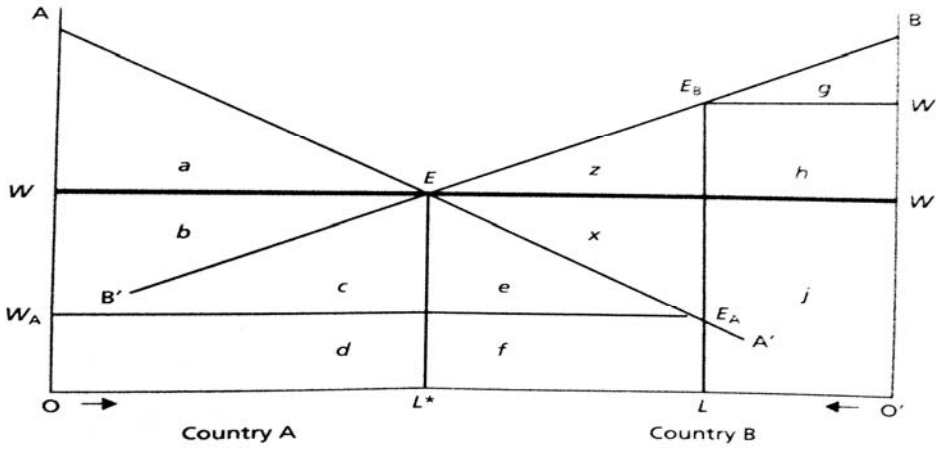
Without mentioning the stages and the processes the Albanian economy will experience, there is no doubt that the final destination is the unification and accession of the Albanian economy to the economy of the European family, which it geographically belongs from the very existence of the planet. On one side, there is no doubt that the transition from one economy with barriers and

[8] Ministry of Labor, Social Affairs and Equal Opportunities , Sectorial Strategy of Employment, 32-33.
[9] Ministry of Labor, Social Affairs and Equal Opportunities , Sectorial Strategy of Employment, 22.
[10] Ministry of Labor, Social Affairs and Equal Opportunities , Sectorial Strategy of Employment, 23.
[11] World Bank, Albania: Market Labor Assessment, 6-7.

quota levels to a global economy without borders and tariffs will be associated with mutual benefits for the respective countries. On the other side, this phenomenon will be connected with some visible disorders in the labour market, for both respective countries.

Economic integration of a country in the European common market and the free movement of labour force from a country to another will have immediate impacts on the labour force offer and demand for these countries. It will have an impact on the increase and decrease of wage rates as well.[12]

For study purposes, let us take two countries, with more or less approximate characteristics. Let's say Albania (A), and another country of the European Union (B), which both produce the same product X, using the same technology, and with the same production factors, the Stock Exchange (K) and Labour Force (L). Below, let us introduce both countries in a common scheme.



Source: Hitiris Theo, European Union Economics,16.

Albania, country A, is shown on the left side of the scheme, and the size of the labour force is represented by the segment OL in the horizontal axis of the scheme. The country B is shown to the right side of the scheme and the size of the labour force is O'L. As it can be seen from the scheme, the size of labour force for both countries is the horizontal axis OO', while the vertical axis show the marginal product of labour (MPL), and wage rate (W) for both countries. With no changes in the above mentioned parameters, the requirements of Albania A for labour force is presented in the line AA', which is the marginal product of labour, MPL_A. As it can be observed from the table, it goes down as long as the labour employment is increased. The same thing happens in the other country but in the opposite side of the scheme. According to the European Union Economics "equilibrium with full factor employment and profit maximization behaviour, is reached in each country when the marginal product of labour equals the market wage rate"[13], so that $MPL_A=W_A$ for Albania (A) and $MPL_B=W_B$ for the country B. While, in the country A we have a larger number of labour force compared to the country B, (OL>O'L), under the conditions of a full employment of labour, the wage rates as observed by the scheme, are higher in the country B, ($W_B>W_A$). For both countries, national revenues are equal throughout the entire area below MPL, up to the crossing point of country A and the same thing in the country B.

[12] Theo Hitiris, European Union Economics:Fifth Edition,(Prentice Hall Europe: 2003), 6-15.
[13] Hitiris, European Union Economics, 15-19.

At the moment of the liberalization of labour market in a common market, where between Albania (A) and the other country (B) all barriers are removed, we are facing the fact that in the country (B) the labour force, for the same job, is paid at a much higher price that in Albania. Under these conditions, Albanian employers are facing a dilemma: to stay and work for the Albanian employers with lower wages or run to work for the employers of the country B? Under these conditions, we will experience a massive movement of the labour force from the country A to the country B. That means we will have an increase of the job offer in the country A and a decrease of the job offer in the country B. As a consequence, we will see an inflation of the labour force in this country. Based on Adam Smith market economy, "this phenomenon will be associated with a decrease of the wage rates."[14]

While in the country B, we will observe an inflation of the labour force, the employers in Albania (A) will suffer a situation of an extreme lack of labour force, which will seriously damage their business. Under these conditions, the Albanian employers will try to attract their employees in order they do not immigrate to the country B, by offering an increase of their wages. Therefore, we are in a situation when in the country B there is a tendency of the decrease of the wage rates as a consequence of the inflation of the labour force; in Albania there is a tendency to increase the wage rates as a consequence of the movement of the labour force. This phenomenon will continue until the wage rates are made equal in the two countries, in W. As a conclusion, we will have an increase of the wage rates of the employees in Albania from W_A in W. Meanwhile, we will see a drop of labour force from OL to OL'. In the country B, we will see a decrease of the wage rates of the employees of the country B from W_B to W, and an increase of the labour force from O'L to O'L'. Simply, let us suppose we have two bottles, one of them empty and the other full of water. At the moment both bottles are connected with a tube at the bottom of the bottles, the water will start to move quickly from the full bottle to the empty one. This phenomenon will continue until the height of the water in both bottles is at equal levels. It does not matter if the bottles are equal in size or not. In this case, the height of water level means the wage rates, and the width of the bottle means the labour market. This study does not consider various expenses (transport, rent, accommodation), which are added to the employees moving to the other country. They are forced to live away from their families, so they will have some additional expenses.

Based on the above table, we can reach the following conclusions:

At the W quota level, we have a unification of the wage rates for both countries, as well as the decrease of the wage rates in the country B, and the increase of the wage rates in Albania.

Incomes of Albania will fall into the areas (a+b+c+d), that means it will lose the areas (e+f), which will be in favour of the country B.

Historic incomes of the country B, (g+j+h), will be increased not only in the area (e+f), to be recovered by Albania but also in the area (z+x), which could be recovered as a result of the integration of the labour market.

As a result of the integration of the labour market of both countries, total national incomes of both countries will be extended to the area (z+x), which will be recovered as a result of the integration of the labour market.

Migration of active labor force and informality.

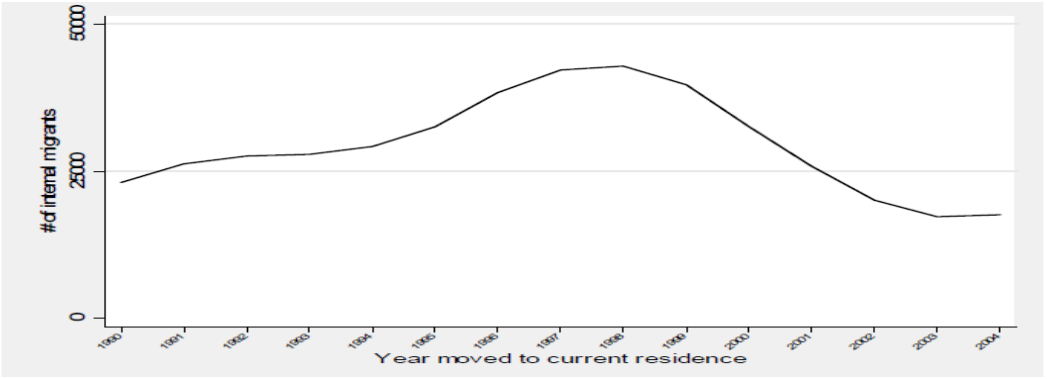
Economic opening of Albania after the 90-s was associated with the internal migration of the population to the areas with broader opportunities for employment and living. During the period of democratization of the country, the privatization of many enterprises, especially in the capital, opened many opportunities for employment. "The trends show that internal migration was grown during the period from 1990 to 1998 and at that point it fell again. This migration culminated in the years following the collapse of the pyramid schemes in the country when many people around the

[14] Adam Smith, trans.,The Wealth of Nation,(Tirana: Toena 2001), 10-40.

country moved to Tirana. Since 1998, the flow of people is considerably decreased and it seems it is stabilized to an average figure of some 20,000 persons a year."[15]

The movement of the population from rural to urban areas of Albania was not foreseen to be so difficult to be kept under control, and as a consequence, it brought a number of social problems in the country, such as unemployment, informal employment, low education, non-registration of the population in registry offices, overcrowding in several areas, where Tirana and Durres had more newcomers from other districts and especially from the north of the country. According to World Bank, "... with regard to the destination, the flows of people are equally distributed, where about one third of the total number of migrants goes to Tirana. In the last years, the part of internal migrants going to Tirana is further increased. Within the period from 2002 to 2004, some 4 out of 10 internal migrants have moved to Tirana municipality."[16]

Scheme: Flow of internal migrants by year



Source: World Bank, Albania: Urban Development, Migration and Reduction of Poverty, 57.

One of the most acute problems of internal migration in Albania was the informal employment of the active labor force. In economy, the informality has taken a large proportion and as such, it remains a problem to be solved for the entire Albanian society.

The informal sector, in accordance with the contemporary literature, and especially based on the definition of authors such as Schrage (1984) and Thomas (1992), is given the definition as: "A number of activities that are legally exercised in principle, which shall be subject to tax and tariffs but which are not declared as legal commercial activities, and are not included in the total value of national incomes or partially included in the GDP of the country"[17] Of course, the informal economy with the informal sector and fiscal evasion, are a consequence of an unsuccessful economic transition.

According to AFP data "... For 2009, some 55.8 % of general employment relates to informal economy. The employees to whom are not paid the social security contribution represent 27 % of the total of general employment. This is small compared with the other part of the self-employed people in the private sector of agriculture."[18] According to INSTAT, the majority of unpaid employees

[15] World Bank, Albania, Urban Development, Migration and Reduction of Poverty:Report No.40071- AL (Tirana: June 2007), 33-35.

[16] World Bank , Albania, Urban Development, Migration and Reduction of Poverty, 57.

[17] Richard Allen and Daniel Thomas, Managing Public Expenditure: A Reference Book for Transition Countries, (OECD: 2004), 12-16.

[18] PET, 9- Month Analysis 2011, Young professional educated people and their employment, (Tirana: Janary 2012), 3-5.

belong to the age-groups of 30 to 54 years old, where the young people are 27% of the total while the employees of 55 years old are 11 % of the total. The part of young unpaid employees of the family and the young self-employed individuals, presented in the value of informal employment, is about 66 % of the total of young employees. [19]

These figures are really worrying for the Albanian economy; therefore there is an immediate need for an intervention, and especially for the implementation of policies related to the employment of young people. Special attention shall be paid to the management of the high rates of informal economy in the country. Priority should be given to the fact that programs and policies being formulated and approved on the labor market and active labor force shall be well adapted to our national reality. As a matter of fact, figures on unemployment and employment of labor force are not realistic, not to say they are unreliable. This is also another reason for the unsuccessful implementation of employment policies and programs in Albania.

According to some economy experts in Albania, the main factors which led to consolidation of the informal economy in Albania are:[20] 1) Massive closure of the working activities during the first period of transition 2) large demographic movement to field areas (internal migration), to large cities and especially to Tirana. 3) High level of political orientation of public administration and significant interventions of the politics in the economic decision-making. 4) Development of a new legislation framework and periodic update, but still with uncertainties to the flourishing of the informal economy.

The causes of ill-functioning of actual policies for the employment of unemployed people and the existence of the informal market are many and of different nature. The Action Plan for the Employment of Young People (2010-2013) developed in cooperation with the International Labor Office (ILO) has identified other causes related to the existence of the informal market, such as; "lack of cooperation or institutional bureaucracy among executive bodies, such as Tax and Tariffs, National Labor Inspectorate, and the Institute of Social Securities. Another cause is connected with the lack of full control of movement and currency circulation favoring informality and unfair competition. Further on, the high flow of movement of labor force based on the demand-offer driver of the market, especially in the construction sector is rendering the control and identification of this black-collar labor market difficult...etc."[21]

As a conclusion, internal migration of the population, informal employment and the existence of informal market, promotion of illegal employment practices for the young people, lack of active policies for the protection of employed people in the informal market, bring growing negative social and economic consequences for Albania. Low wages, job related insecurity, shift from a profession to another, and poverty, are phenomena that accompany the informal unemployed people. A considerable number of them are people who have moved from rural to urban areas. These conditions of informality call for an immediate need for intervention. Based on these problematic issues of informality, it is very important to have related arrangements on the tax system in Albania.

Often, the content of taxes is very difficult to be understood by the entire population, because they are not realistic and very difficult to be applied. Reduction of taxes shall enable the control of formality. On the other side, bureaucratic barriers of Albanian state institutions have considerably influenced the increase of informality. As a consequence, the reliability of these institutions is at a low level and we could not further refer to the efficiency and effectiveness of the policies. Also, lack

[19] INSTAT, Results from the Labor Market Questionnaire, Labor Market in Albania, 28-30.

[20] Fatmir Mema and Zef Preçi, Informal Economy – A Barrier to a Sustainable Development, Special number of magazine: Transition and Economy, 1998), 2-4.

[21] Youth Employment and Migration and ILO, Albania: Action Plan for the Youth Employment 2010-2013, (Tirana: Printed at PEGI, 2010), 62.

of exact figures of the migration of population and active labor forces makes it difficult to have exact figures on informal employment and informal economy in general.

Legislation on protection of labor forces and minimum wages.

In early 90-s, the institutions under the subordination of the Ministry of Labor assumed some commitments for the health and security protection of active labor forces. The labor market was opened at that time and it encountered difficulties such as the poor quality of working environments, either be environments of private or public institutions. "This was also a challenging reality as Albania was under the conditions of a ruined economy, associated with transition-related issues. The policy makers faced the need to implement more comprehensive reforms for the protection of employees."[22] The main objective of the Ministry of Labor was the formulation of policies for the security and health protection, as their priorities: "Protection of physical, mental and social integrity of employees and the institution which had to deal with the implementation of these policies was the State Labor Inspectorate, which promoted the implementation of the labor legislation."[23]

A sustainable economic development definitely requires the production progress and high quality but to achieve this, it is required the creation of proper conditions for labor, health protection and security of the employees. The implementation of policies for the employees' protection is in full compliance with the European Community standards, which aims at the improvement of the well being at work. Accordingly, the State Labor Inspectorate launched the initiative for drafting the strategy on security and health at work for the period 2007-2010, a legal package which supplements the Labor Code establishing the European Directive "Directive Cadre" 89/391 dated 12.06.1989."[24]

On 16.12.2009, "the Council of Ministers approved the draft law "On Security and Health at Work", drafted by the Ministry of Labor, Social Affairs and Equal Opportunities, in the framework of the approximation of the Albanian legislation to the EU one and the obligations of Albania for the implementation of the Stabilization Association Agreement".[25] The employers' obligations to insure the employees in relation to the health at work, prevention of different risks due to accidents within the working premises, professional diseases and collective and individual protection were for the first time regulated by law only in 2009.

The Labor Code of the Republic of Albania has clearly stipulated all rights of the employees and employers' obligations. Hence, the working environment, supply of heavy machineries and other necessary equipment, conditions of illumination, humidity, temperatures of working environments, sanitary installations, cabinets for personal belongings, hygiene conditions in all premises, and in particular in the environments where food is consumed during the rest hours, fire extinguishment equipment or first aid kits, working or rest hours and drafting of regular legal contracts etc, are obligations of the employers to the employees.[26]

The payment of employees is certainly a legal obligation of employers who, by the most recent decision of the Council of Ministers, have defined the minimum monthly wages which still remain of the lowest in Europe. According to DCM 1114, the " for the purpose of the calculation of social and health security contributions, from 01.07.2010 onwards the minimum monthly wages will be not less than 16 820 (sixteen thousand and eight hundred and twenty) ALL while the maximum monthly wages will be 84 100 (eighty four thousand and one hundred) ALL. The minimum monthly amount of contributions for all security branches for the period from 1.7.2010 onwards will be 4 693 (four thousand and six hundred and ninety three) ALL. "[27]

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[22] World Bank,Albania: Evaluation of the Labor Market, 15-16.

[23]Ministry of Labor, Social Affairs and Equal Opportunities , Sectorial Strategy of Employment, 24-25.

[24] Ministry of Labor, Social Affairs and Equal Opportunities , Sectorial Strategy of Employment, 37.

[25] Ministry of Labor, Social Affairs and Equal Opportunities, Law No 10237: On Security and Public Health, (Tirana: official jornal 2009), 1-2.

[26] Ministry of Labor, Labor Code of the Republic of Albania, (Tirana 2003), 8-9.

[27] General Tax Directorate, DECISION No.1114, dated 30.7.2008, (Tirana: July 2008), 5.

All of the above components give an overview of the policies and legislation for the protection of employees and minimum monthly wages, which is the obligation of each employer. However, if we explore the reality of the employees in most of state businesses and institutions, the working conditions are far from desirable. The protection and security of employees is a legal requirement that is hard to be implemented for some important businesses within the country.

Such abuses that may be easily identified are not supported by the trade union organizations or the State Labor Inspectorate. The existence of trade unions as custodians of the employees' rights has not demonstrated proper effectiveness, which is so necessary. The trade unions in Albania have still not displayed the typical characteristics of trade union organizations for the protection of employees' rights and this group has unfortunately been under the influence of the Albanian politics.

As cited above, the Albanian legislation was significantly improved during the recent years. It has even progressed toward the unification with the European legislation. Yet, it is worth mentioning there is still much to be done for its practical implementation.

Effectiveness of labor market policies and programs in Albania.

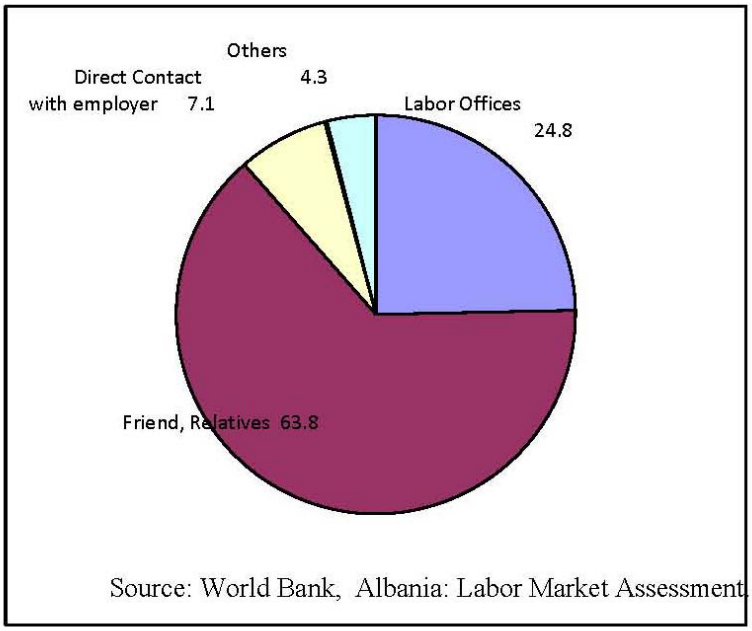
We have examined below some issues of the labor market in Albania, where some causes of domestic unemployment were explored. Lack of effectiveness of the labor market programs only discourages the employers and increases the number of unemployed. According to ILO (International Labor Office) in Albania, many problems are identified in relation to the effectiveness of labor market programs, where some of the most distinguished are: "1) incompliance between the level of professional skills of the jobseekers and professional skills required by the labor market, 2) low demand for the labor force, 3) unemployment period is long for the jobseekers due to the absence of information about job vacancies."[28]

Lack of precise information for finding a job discourages the jobseekers. The shift of unemployed individuals to the labor market is a challenging and chain process, therefore the effective implementation of labor market programs is crucial.

The employment counseling programs are essential and have been assumed as cost-effective programs, enabling the reduction of the number of unemployed. It is critical for these programs to support the unemployed, thus making possible the counseling process adaptation to real needs and potentials of those persons, jointly setting more realistic employment objectives. In Albania, this type of service to the unemployed is fictitious in most of the cases as the relations between the employment experts and the unemployed are generally short. Consequently no specific forecasts for each unemployed client may be realized. Hence, the provided service is less likely to comply with the client's needs and the type of job he/she is looking for.

On the other hand, another challenging factor is the information of jobseekers about free vacancies. The information of jobseekers via Internet has been applied in Albania only during last years as this type of information was generally provided through personal acquaintances of each individual and a limited number of people was informed and could find job through the employment offices. However, not all jobseekers have proper skills to apply for jobs via these websites or be informed of free vacancies.

[28] Valli' Corbanese and Gianni Rosas, Guide for drafting, monitoring and evaluation of innovatory programs of the labor market, targeting individuals at risk of exclusion from the labor market, (Tirana: ILO 2009), 9-10.



Source: World Bank, Albania: Labor Market Assessment

Job training programs developing the professional skills of jobseekers are an objective which, if effectively accomplished, has a major impact on the reduction of unemployment. In Albania, the Vocational Training Centers are extended to the main cities and towns and offer professional training for some of the professions currently required from the labor market. According to the data of PTA (Professional Training Agency), the young people who attend vocational training courses are more oriented to the labor market needs; therefore they have larger employment opportunities in comparison to the young people who follow higher education studies. "Accordingly, only for the first nine months of 2011, 2086 young people have been certified all over the country in different professional profiles and only 460 of them were employed, where 230 are females.

The largest number of employed people is reported in Shkodra district for the *telemarketing* course where 150 young people[29] are employed". We have observed that the professional training at these centers indeed covers the most required professions of the labor market but there are also some challenging issues in these institutions such as shortages of premises which are necessary to exercise the adequate working practice for a specific profession, unqualified human resources, concentration of training in theoretical aspects rather than practical ones.

In particular, compared to the training sessions conducted only in the teaching environments, the training which combines the classroom learning with on-job learning increases by 30 per cent its chances for positive effects on the labor market and when combined with other employment services; the positive impact probability is increased at 53 per cent.[30] Also, this program, although proving to be productive for the employment of local jobseekers, is again associated with a series of problems which make it partly effective.

[29]Dritan Shoraj and Dorina Zenelaj, Employment of young people with professional education, (paper presented at the seminar conducted by Don Bosco Center, Tiana: Janary 2012), 8-10.

[30] J. Fares, O.S. Puerto, *Towards comprehensive training*, (World Bank Mimeo: Washington D.C. 2008), 21-25.

Jobseekers subsidy programs are indeed likely to have a positive impact on the increase of the number of employed. The reduction of labor force costs for the employers is a policy encouraging the latter to increase the number of employees in their enterprises.

However, according to ILO assessment about the effectiveness of labor market policies in Albania, "a series of evaluations carried out for the employment subsidy programs suggest that the latter may increase the chances for the disadvantaged individuals to fill the job vacancies. Alternatively, there are insufficient facts demonstrating that these programs really increase the number of available job vacancies."[31]

In addition to the foregoing, it seems that the subsidy programs for the jobseekers in Albania have no significant impact on the reduction of the number of unemployed. There are two potential causes to produce this type of result. Firstly, similar policies are little implemented in Albania and secondly, not all local enterprises and businesses are realistically informed of the employment promotion programs and policies. Hence, it seems that the system as a whole does not properly function, the lack of cooperation between respective factors and bureaucracy represent a main barrier rendering these programs ineffective.

In the meantime, the employment promotion programs for marginalized women or employment promotion programs for the young Bachelor graduates, are currently more challenging in respect of their implementation. "Over 40% of women have not participated in the labor market. For many women it is hard to find a job and there is a high level of unemployment such as the long-term unemployment. The labor market situation for women is particularly negative and demanding in urban areas where only a little more than one third are employed and the unemployment level is almost 30%."[32] However, according to the World Bank, the involvement level of women in the labor market in Albania is very low compared to Europe and shows lower figures in comparison to Turkey, Bosnia-Herzegovina or Macedonia.

Again, numerous difficulties have been encountered in this case for the implementation of this program as a whole. On the other hand, the employment of young Bachelor graduates is a challenge for the policy makers in Albania. "The trends of young people to follow higher education studies, without taking into consideration the real needs of the market for this type of profession they may benefit from such education, has made the market for young Bachelor graduates be oversaturated , generally in branches such as law, international relations, diplomacy, psychology etc."[33]

Conclusions and recommendations.

On the basis of the foregoing, the positive impact of employment policies and programs and entry of the unemployed to the labor market should be related to the increase of the number of employed persons. However, such a reality is not present in Albania. The programs still lack the desired effectiveness.

Firstly, the whole paper represents that policies and programs in Albania are not missing and the Albanian legislation is even too modernized and adapted to the labor market needs. The premises to be part of EU have made Albania growingly unify the labor market policies and programs. Their successful implementation is a weak point for the respective institutions. A larger cooperation between the comprehensive institutions may lead to the increase of effectiveness of these policies and reduction of unemployment.

Secondly, the opening of labor market to the EU will bring the unification of salaries for all countries and consequently, the social welfare development. In the meantime, as observed in the above graph on movement of labor forces as a consequence of the merger of these two markets, the

[31] Valli' Corbanese and Gianni Rosas, Guide for drafting, monitoring and evaluation of innovatory programs of the labor market, targeting individuals at risk of exclusion from the labor market, 14-17.

[32] World Bank , Albania: Labor Market Assessment, 79-82.

[33] Dritan Shoraj and Dorina Zenelaj, Employment of young people with professional education, 9-10.

total incomes of these two countries will be increased in the area (z+x), which remained unexploited prior to their merger. The Albanian Government should properly arrange for the increase of salaries and their approximation to the European standards for the purpose of avoiding the massive movement of active labor forces.

Thirdly, the transition period has made the internal migration reach high figures and there are still no accurate figures on the settlement of population towards areas with larger employment and living opportunities. Hence, the lack of statistics on internal migration makes the informal employment of this stratum of population difficult to be controlled, so there are high informal employment figures within the country.

Consequently, the informality has caused low salaries for the employed under informality, without security at work due to the non-involvement in social securities, high health and social risks and poverty. In reducing the informal employment, the cooperation among the Tax and Duty Authorities, State Labor Inspectorate and Institute of Social Securities would be effective, as well as the promotion of these policies and programs to enable their recognition by the employers.

Fourthly, according to all evaluations made on the effectiveness of labor market programs, Albania has qualitative employment programs but due to their poor implementation, the effectiveness is very low. Consequently, there is a very high level of unemployment, one of the countries with the highest figures in the region, with 13.25% of the population unemployed for the first nine months of 2011. The creation of specialized groups to enable the training of teams dealing with the implementation of on-site labor market policies and programs. Supervision and continuous motivation of these groups, their performance evaluation and benchmarking.

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POLITICAL REGIMES AND ECONOMIC PERFORMANCE

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Abstract
The present paper brings a contribution to the research area dedicated to the relationship between political regimes and economic growth. Implicitly the interdependence relation between the two large domains, namely politics and economy will be the core of the study.
The major focus will be on the way politics influences the economic evolution and development of a country.
The premise is that political institutionsplay an essential part with respect to the economic performance as they have the potential to relax the constraints imposed over the economic structure and not only. The three basic dimensions used in constructing the paper are thedegree of political freedom, the level of political stability and the level of political security.

Keywords: *political regime and economic performance, political institutions, political freedom, political stability, political security.*

Introduction

During the last decades, the economic, political and social development has reached new levels. Regarding the academic interest presented, political researchers, economic scientists and sociologists transformed this area of research into one of the most prosperous and dynamic fields of social sciences.

Despite the fact that the difference of development between the countries represents a reality, it is only recently that the scientists started to focus on the elements that are responsible for painting this reality and to properly examine them.

Every economy is in fact sustained by a certain political framework, therefore it is impossible for the economic agent to be insensitive to the political structure sustaining that economy. Thus, the ***political regime***, along with its government and taking into account its characteristics and level of efficacy, attracts repercussions over the economic framework of the country in question[1].

The level of economic development brings information not only about the implemented political regime, but also about the rules and goals of the respective country. Therefore, looking into the causes and primary elements that lead to a favorable economic performance became a topic of major interest for the 21st century scientists.

It is only recently that the existing relationship between political regime and economic performance started to be properly analyzed.

There are more and more studies pointing towards the failure at the level of governing as primary cause for the slow and inequitable economic growth, as well as the defining element of the poorest countries in the world.

It is these studies that put the form of government, including here its characteristics, on a superior level of any research agenda having as main goal a better understanding of the political economy regarding economic development[2].

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[1] Yi Feng, *Democracy, Governance, and Economic Performance. Theory and Evidence* (Cambridge, Massachusetts, London, England: Massachusetts Institute of Technology Press, 2003), 17.

[2] Philip KEEFER, "Governance." *The SAGE Handbook of Comparative Politics*. (2009). SAGE Publications, accessed March, 10, http://www.sage-ereference.com/hdbk_compolitics/Article_n25.html.

The present paper brings a contribution to the interest presented in analyzing the relationship between political regimes and ***economic performance***.

My target in this article is to underline the political determinants over the economic performance, meaning on the way politics affects the economic performance. Therefore, the question here is: Does politics, and here I am making reference as well to policies, play any role in determining the degree of economic performance?

Therefore, my objective is to analyze the types of political regimes capable of providing social and political conditions favorable for the economic and social development. For this I will briefly define and explain the major elements of political regimes. Afterwards I will discuss the relationship between political regimes and economic performance, having in mind the major political factors that bring along repercussions over the economic growth and development. Finally, after drawing a line, I will come up with the concluding remarks.

Content

In a modern society, the state is often identified with the political community or with the government as such[3], and implicitly with the type of political regime or the way of governing.

There is no universal definition of the political regime. From the many interpretations and visions, I chose to explain the political regime as the regime that brings into light the way of organizing and ruling a country in which it is reflected both the activity of the state institutions, as well as of the political parties, of the groups of interest or pressure groups and of the other organizations of the civil society. Such an interpretation of the political regimes is not based on the identification of those who detain state power, but on the way these exercise the power in the state[4].

The tight relationship between institutions, primarily ***political institutions***, and economic performance represents a major issue of academic preoccupation during the last decades[5].

A rich society supposes a political regime characterized by strict rules that allow an efficient economic system and the implementation of institutions capable of sustaining this performance.

It is the state the primary mechanism of resource allocation and the one capable of stimulating or inhibiting the economic growth and therefore performance. The political institutions are those that mold the political economy[6], and the political reasons spring from the welfare brought by the existence of resources.

The group of politics that brings a solid contribution to the economic performance of a country points towards the protection of the property rights, the maintenance of macroeconomic stability, a sufficient level of economic freedom and of the free market, the assurance of a public goods network as well as the existence of a proper infrastructure and a certain level of education[7].

Because the economic development takes place when the individuals put away capital and make investments, appealing to present sacrifices aiming future gaining, this cannot happen in the absence of a proper frame[8].

Therefore, the economic development and performance depend on the country's ability to offer a favorable environment for the individuals to make investments in their own economy, as

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[3]LiahGreenfeld, „Nationalism and Modernity", *Social Research,* Vol. 63, No. 1, Spring, (1996), 20.

[4] T. Draganu, *Dreptconstitutional,siinstitutiipolitice*(Bucharest: Lumina Lex , Vol. I, 1998), 266.

[5] Michelle Egan, "Markets", *The SAGE Handbook of European Studies* (2009), SAGE Publications, accessed March 10, 2008 <http://www.sage-ereference.com/hdbk_eurostudies/Article_n8.html>.

[6]Thad Dunning, "Resource Dependence, Economic Performance and Political Stability", *The Journal of Conflict Resolution,* Vol. 49, No. 4, Paradigm in Distress?Primary Commodities and Civil War, (Aug., 2005), 474.

[7]Stephan Haggard and Robert R. Kaufman, *Development, Democracy, and Welfare States. Latin America, East Asia, and Eastern Europe, (*New Jersey:Princeton University Press, 2008), 353.

[8]Yi FENG, *Democracy, Governance, and Economic Performance. Theory and Evidence, (*Cambridge, Massachusetts, London, England :Massachusetts Institute of Technology Press, 2003), 21.

investments have proved to be the essential component of growth, among other potential factors that can lead to a good economic performance[9].

To analyze the existing differences at economic level between the world's nations, we cannot reach very far regarding the gross categories of political regimes, namely liberal-democratic political regimes, populist authoritarian political regimes, oligarchical authoritarian political regimes, totalitarian political regimes, or regarding the gross categories of the economic system, capitalism or market economy versus communist economies[10].

Yet, in general terms we can talk about three types of political regimes: democratic, totalitarian and authoritarian.

A short vision of a democratic regime points towards that regime in which political parties lose elections as the results of the democratic processes are uncertain and determined by the people[11]. It is about the officials elected through secrete vote, about free, fair and frequent elections, about the freedom of expression, alternative sources of information, freedom of association and universal suffrage[12]. Thus, by democracy we can understand the type of political regime characterized by civil rights, representative institutions and public liberties[13].

Totalitarian regimes can be fascist or comunist regimes. Both types cancel or decrease the rights and liberities of citizens, annihilate opposition and political adversaries, impose an official doctrine, manipulates the public opinion through its demagogical discourse, enforce the repressive apparatus, and so on[14]. In other words, the state interferes and annihilates the forces of society by creating new institutions subject to the unlimited control of the ruling elite, control which can be found in all fields, such as economy, education, culture, religion and even over the family[15].

As for the authoritarian regimes, which many have evolved into dictatorships, these are characterized by the restrainment of certain rights through the excessive rationalization and the marginalization of the parliament, through the restriction of political pluralism and the concentration of the political power in the hands of one authoritarian leader. Yet there is allowed the existance of autonomous groups, more if these appeared long before the regime[16].

Basically, the conclusion that we can draw from here is that every time we talk about a certain political regime and about its economic performance, we must take into account its particularities, and in the context of globalization, there must be included in the general picture the cultural turning or change to which many countries are subjected[17].

In the case of non-democratic political regimes, power represents at any time a delicate topic. In most cases, the communist party takes control over the mobility of all important party members and officials' carriers through the nomenclature system. Personnel control is based on the core of the party's political power. Thus, on the one side, the communist ideology does not separate politics from economy, and on the other side, the communist regimes are maintained through the compensation of the right people appealing to professional promotion. The good economic performance does not necessarily describe the most loyal and important candidates for power

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[9] Michelle Egan, "Markets".

[10] Harold L. Wilensky, *Rich Democracies. Political Economy, Public Policy and Performance, (*Bekerly, Los Angeles, California :University of California Press, 2002), 216.

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[14] CristianIonescu, *RegimuriPoliticeContemporane,* (Bucharest:All Beck, 2004), 86.

[15] Karen Dawisha and Bruce Parrott, *The Consolidation of Democracy in East-Central Europe,* Cambridge, (New York:Cambridge University Press, 1997).

[16] Dawisha and Parrott, *The Consolidation of Democracy in East-Central Europe,*

[17] Trevor J. Barnes, „Retheorizing Economic Geography: From the Quantitative Revolution to the Cultural Turn", *Annals of the Association of American Geographers, (*Vol. 91, No. 3, Sep., 2001), 457.

positions in such political regimes. Finally, the economic performance of local leaders counts only in the measure these manage to bring political and financial benefits to the higher rank elites of the regime[18].

As for the democratic regimes, voting on economic bases has most of the time a punishment role, and the best reward for an official is to be reelected. This comes in contradiction to the communist regimes where the economic responsibility consists in rewards, especially in promoting the official, and the punishment for incompetence represents a rarity[19].

Despite the fact that many political scientists associate democracy with social and economic welfare, today's reality clearly points us that a spectacular economic performance can be obtained not necessarily by a democracy, and the best example in this case is China[20].

The premise of the present paper consits in that political institutions play an essential role regarding economic growth, in the sense that it is these institutions that have the potential to relax the contraints imposed over the economic structure and not only. That is, the level of performance of the different economies consists in the political institutions belonging to the political regime that establish the political parameters regarding both the economic as well as social development. Cutting loose, the political regime, with its political institutions, generates the general political conditions for the economic performance[21].

Yet, not to forget that even the political institutions and values are exposed to changes[22].

Due to the fact that the paper represents a study of the connection between political regimes and economic performance, I suggest to focus primarily on three major dimensions specific to any political regime, namely the type of political regime, and here I am referring to the ***level of political freedom***, the ***level of political stability*** and the ***level of political security***.

Relating these three dimensions to economic development, it can be drawn the following: no political dimension, per se, can determine economic performance. Besides the direct impact of these dimensions in relation to the economic development, these come to affect as well the economic performnce throught the influence they have over other variables that are in themselves in favor or against economic growth. Thus, these dimensions constitute the political bases of the economic management and affects not only the economic performance, but also the economic growth determinants, such as inflation, investments, human capital, income distribution, property rights, population growth, and others[23].

Why the three dimensions?

The degree of political freedom, political stability and political security represent the three major political dimensions that shape the political institutions of any political regime. Taking into account the fact that the political institutions are those that create the political environment for the economic growth and social and economic development, it must be underlined that also the institutions are the ones that condition and constrain the economic decisions of the individual to invest in consistent capital. Therefore, the decisions of the economic actor are influenced by the political conditions on the local market. As such, the economic growth, which is a function of accumulation for the consistent capital, will increase or decrease according to the three political variables: political freedom, political stability and political security.

Various studies have concluded that the lower the probability for the regime to survive or the higher the level of political instability, the lower the level of economic growth. Moreover, the more

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[18] Gang Guo, „Retrospective Economic Accountability under Authoritarianism: Evidence from China", *Political Research Quaterly, (*Vol. 60, No. 3, Sep., 2007), 380.

[19] Gang Guo, „Retrospective Economic Accountability under Authoritarianism: Evidence from China", p. 382.

[20] Henry Wai-Chung Yeung and George C.S. Lin, „Theorizing Economic Geographies of Asia", *Economic Geography, (*Vol. 79, No. 2, Clark University, Apr. 2003), 107.

[21] Yi Feng, *Democracy Governance, and Economic Performance.Theory and Evidence,* 11.

[22] Morton R. Davies and Vaughan A. Levis, *Models of Political Systems,* 92.

[23] Yi Feng, *Democracy Governance, and Economic Performance.Theory and Evidence,* 1.

polarized the position of the parties in opposition or the higher the degree of uncertainty or security, the lower the degree of performance. Finally, the more repressive a political regime is, meaning the lower the level of political freedom, the lower the growth rate[24].

It is important to underline that the lack of political freedom is about the impossibility of the individual to reach a certain goal, and not about the incapacity of reaching that goal as when the individual is too poor to obtain what he wants without confrunting any legal interdictions.

For a political regime to be firm, this has to be accepted by the society. As for the political stability, it is the form of government rather than its content. The public officials and policies are subject to change, rather they remain firm in the sense that the political institutions show a capacity of resistance without any major change of the model.

The radical political changes that lead to the replacement of the political regime are those to increase the level of uncertainty when it comes to investments, the main element of performance, thus there is place for negative effects.

Political security, the third major dimension, can be understood as the absence of disagreement over the public policy between government and opossition. The uncertain policy impedes growth and investments through the increase in the retained goods and the decrease of the present investment value.

Studies in the field have shown that irrespective of the degree of political freedom, a secure and stable society is prefered instead of a stable but unsecure society or secure but unstable society[25].

Again, none of the three variables represents a necessary or suffiecient condition for the economic growth. An undemocratic regime can enjoy a favorable economic performance if this is politically stable or if it is economically efficient[26]. On the other side, a democratic regime, which most of the times is conceived to promote growth and development, can experience an economic slow down if it is affected by the lack of political stability and security[27][28].

The life of a political regime is associated in a positive manner with the level of economic growth. The higher the economidc performance of a regime, the more popular the party in power.

Besides the direct and visible effects created by political freedom, political security and political stability, the indirect effects present quite a similar importance. The determinats of economic growth such as inflation, human capital, investments, income distribution, property rights, population increase, affect both the economic and social evolution of any country.

Inflation, which is both an economic and a political phenomenon, brings negative effects over the private investments and therefore over the economic growth rate, and it represents a consequence of the macroeconomic uncertainty[29]. The lower the level of political security, the higher the level of inflation. The higher the level of political stability, the lower the inflatin rate. Yet there cannot be said if a democracy can bring lower rate of inflation than a nondemocratic regime. What is sure is that political instability brings a major impact over inflation, as it can come up with devastating consequences over the price stability[30].

Investments represent another key element for the economic growth. Irrespective of the type of political regime implemented, the government has to be consistent in executing the policy. Even though we might deal with a bad policy which is going to be carried out, the investor may still find ways to make money. The really important aspect here is consistancy in carrying out the policy. Besides the domestic political institutions that affect the level of savings and investments, the international factors also have to be taken into consideration. Many times the domestic environment

[24]Yi Feng, *Democracy Governance, and Economic Performance.Theory and Evidence,* 21.
[25]Yi Feng, *Democracy Governance, and Economic Performance.Theory and Evidence,* 37.
[26] This is the case Of Taiwan during 1970's and 1980's.
[27] This can be the case of Russia and Poland at the beginning of the 1990's.
[28]Yi Feng, *Democracy Governance, and Economic Performance.Theory and Evidence,* 37.
[29]Yi Feng, *Democracy Governance, and Economic Performance.Theory and Evidence,* 126.
[30]Yi Feng, *Democracy Governance, and Economic Performance.Theory and Evidence,* 157.

for investments is constrained by the economic relationships between countries and by the international security. Also there must be pointed out the consequences of international economic sanctions or international conflicts. What is certain is that the more obvious the growth is in the past, the more probable is for investors to make investments in the future[31]. Political corruption affects as well the level of investments[32].

Instability and economic stress bring consequences too over the level of investments by destroying the confidence that the political arrangement will remain untouched[33]. Only a capable, stable and powerful government is able to maintain the political capacity consistent with the desired politics and the stability of political freedom and of the civil liberties.

Between politics and education there is an obvious connection, as the state is the one shaping the educational system with the purpose of realizing its political agenda, and science is the one ensuring the progress of society and the improvement of the human quality of life. If democracies, through the production of human capital, manage to enlarge the formation of human capital necessary for the economic growth, for the authoritarian regimes sometimes science can harm its political control[34].

As for the income distribution, a democratic regime has more chances to reduce income inequalities than a nondemocratic regime. For the latter, the strong minority holds the power as well as the motivations to influence the political elite when favourable politics for the income augmentation need to be adopted[35].

The relationship between economic freedom and political freedom is important for our study. Political freedom is an important factor, if not a condition for economic freedom. As for the economic freedom, this presents two major components, the protection of private property and the freedom of usage and exchange of the property. Two conditions are required. First, when the purchased property takes the legal and peaceful way, it is protected against the physical invasion of others, and secondly, when the individuals enjoy their freedom to use, exchange or offer their property as long as by their actions no identical rights of other are being violated[36].

The birth rate brings also indirect effects over the economic performance of a country. In case of a stable, capable and free government, the birth rates face a decline.

In order to make applicable its agenda, a country has to spend. If in the case of the democratic regimes, the political leaders are compensated or punished by the electorate by renewing or not their mandate, in the case of non-democratic regimes, while the stake is the promotion of the national good, the compensation or the punishment for the local leaders in conformity with the economic records of their jurisdictions can represent an efficient strategy to enforce the legitimacy of the political regime[37].

Conclusions

The premise of the paper states that the political institutions play a major role regarding the economic performance as it is them that have the potential to relax the constraints imposed over the economic structure and not only. It is the political institutions of the regime as such, including its particularities and the cultural turn, that establish the political parameters not only for the economic

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[31] Yi Feng, *Democracy Governance, and Economic Performance. Theory and Evidence,* 172.

[32] Stephen Knack and Phillip Keefer, „Institutions and Economic Performance: Cross-Country Tests Using Alternative Institutional Measures", *Economics and Politics,* (1995), 7:207-227.

[33] Jeffrey E. Cohen, „Economic Perceptions and Executive Approval in Comparative Perspective", *Political Behavior, (*Vol. 26, No. 1, Mar., 2004), 30-31.

[34] Yi Feng, *Democracy Governance, and Economic Performance.Theory and Evidence,* 193.

[35] Yi Feng, *Democracy Governance, and Economic Performance.Theory and Evidence,* 193.

[36] Yi Feng, *Democracy Governance, and Economic Performance. Theory and Evidence,* 252-253.

[37] Gang Guo, „Retrospective Economic Accountability under Authoritarianism: Evidence from China", 379.

development as for the social development as well. Thus, the political regime, with its political institutions, generates the general political conditions for the economic performance.

As a general rule after years of studies, the conclusion in the field is that for a certain and continuous economic growth, a country has to maintain a stable political atmosphere, to improve both economic and political freedom, to maintain a capable and efficient government. Political stability and governmental efficiency have been declared stimulators for economic performance.

The accent fell on three major dimensions: the degree of political freedom, the level of political stability and the level of political security.

In the case of economic performance, political stability is preferred to instability, and in the case of instability, the lower it is, the better. Yet, if there is a high level of instability, as long as the existing policy is maintained in the future, its negative effect can be significantly reduced. Political liberty is important as well as the political reform towards a higher level of openness can lead to a better economic performance, and more as the democratic institutions bring important effects over the degree of competition. Yet, irrespective of the degree of freedom, investors prefer a stable and secure society.

Economic growth is sustained by savings and investments. A regime that is unstable determines its consumers to reduce economies and to increase consumption. In case of political uncertainty, both demand and supply for capital go down. More, the political instability makes the working opportunities less attractive and available, decreasing this way the potential for savings.

Yet, none of the three variable represents a sufficient and necessary condition to ensure a good economic performance. But a combination of the three creates effects over the economic growth. A regime deprived of freedom, unstable and uncertain is destined to have a disabled economy, and this because the political repression, instability and uncertainty define and constrain the economic decisions taken by the individuals on the market[38].

A non-democratic country can enjoy a good economic performance if it is politically stable or if it is economically efficient[39]. A democracy, which most of the times is conceived as promoting growth and development, can experience an economic slow down as result of the lack of political stability and security[40].

Besides the direct impact of these three dimensions, there stand the indirect influences over other variable that can be either for or against economic growth. These dimensions constitute the political basis for the economic management and affect not only the economic performance, but also the determinants of economic growth, such as inflation, investments, human capital, income distribution, property rights, and population increase[41].

The economic growth and development depend on the capacity of the regime to offer a favourable environment for the individuals to invest in their own economy, as investments represent one of the potential factors which sustain economic performance.

Drawing a line, the key to success seems to consist in a group of policies that sustain economic growth. This group includes the protection of property rights, the maintenance of macroeconomic stability, the control of inflation as a major economic objective, a sufficient degree of economic freedom and the existence of a free market, the insurance of a public goods network as well as infrastructure and education[42].

Despite the fact that most political scientists tended to associate democracy with the social and economic welfare, the case of Asia comes to question this assumption.

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[38]Yi Feng, *Democracy Governance, and Economic Performance.Theory and Evidence,* 89, 90, 296.

[39]The case of Taiwan during 1970's and 1980's.

[40]The case of Russia and Poland at the beginning of the 1990's.

[41]Yi Feng, *Democracy Governance, and Economic Performance. Theory and Evidence,* 1.

[42]Stephan Haggard and Robert R. Kaufman, *Development, Democracy, and Welfare States.Latin America, East Asia, and Eastern Europe, (*Princeton, New Jersey Princeton University Press, 2008), 353.

Most recent studies in the field have concluded that the effects of democracy over the growth are statistically insignificant. Democracy can promote performance through the facilitation of certain factors as investments, inflation, education, birth rates, economic freedom/ property rights, income distribution, political stability, factors that by themselves lead to an improvement of the level of performance. Despite the fact that democracy does not bring a direct effect on economic performance, due to its principles, primarily a strong middle class, responsibility in front of the electorate, etc., it can decrease the degree of political instability, improving indirectly the economic performance[43].

Economic performance is not about democracy or non-democracy, but about a secure, firm, strong and in a continuous development economy.

No matter the type of political regime, the government has to be consistent in the execution of its policy. In the case of a bad policy, but consistent, investors can still find ways of making money.

The impact that political regimes can have over the economic institutions can be critical. The maintenance of economic freedom depends not only on the tradition of respecting the property rights, but also on a political system consistent with the economic freedom. Thus, while the direct effect of democracy over the growth has an ambiguous character, its indirect effects can have a positive impact due to the secure property rights and other economic liberties[44].

To conclude, about the three main dimensions it can be said that first, the lower the probability for the regime to survive, the higher the level of political instability and as such the lower the rate of economic growth; second, the more polarized the position between the opposition parties or the higher the degree of uncertainty/ insecurity, the lower the degree of performance; and finally, the more repressive a regime is, that is the lower the level of political freedom, the lower the rate of growth.

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DO REALLY EMPLOYEES RESIST CHANGE? CASE STUDY AT A CREDIT INSTITUTION

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Abstract
Organizational management literature describes resistance to change as an impediment, an inevitable and natural reaction to change. The purpose of this study is to show that employees do not always resist change, at least not change per se. We have conducted a survey in a credit institution that underwent a major change in the last few years. Data was collected using questionnaires, interviews with managers and other employees and direct observation. The objectives of the study are to identify the real reasons why employees resist change, what is the outcome expectation of the change process and if the employees support the change process. Some researchers argue that top management usually opposes the new changes, while others confute these statements. The identified results show that few employees resist change, willingness to change being the general response in the organization.

Keywords: *organizational change, resistance, credit institution, personal interests, status quo*

Introduction

Organizational change and resistance to change received academic interest when Kurt Lewin (1947) developed his theories of change and field theory in social science in the late 1940's (Marsh, 2009). Since 1928, Lewin had been working on the idea that the status quo represented an equilibrium between the barriers to change and the forces favoring change. Even if Lewin's activity was followed by many researchers and practitioners who developed more complex change models, the success of achieving major change in organizations has been chronicled as being poor, some researchers noting failure rates reaching as high as 70 per cent (Beer and Nohria, 2000; Burnes, 2005; By, 2007, Carleton and Lineberry, 2004; Wildenberg, 2006). A study published by the Center for Creative Leadership reported that between 66 per cent and 75 per cent of all public and private change initiatives fail, a depressing statistic for those who seek to change an organization (Kee and Newcomer, 2008).

Resistance to change represents a common concept in the field of organizational change, being recognized for a long time as an important factor that impacts the success of an organizational change effort. Through this study, we tried to highlight employee's reaction towards change. The objectives of the study are: first, to identify the main reasons why employees resist change, if they resist it of course, second, what is the outcome expectation of the change effort and the third, do employees support the change process. Some researchers argue that top management usually opposes the new changes, while others confute these statements. To answer our objectives, we have conducted a survey in a credit institution that underwent a major change for the last years. Data was collected using questionnaires, interviews with managers and other employees and direct observation.

Literature review

Any change, no matter how apparently beneficial to workers and the organization, will be met with and often be sabotaged by resistance (Spiker and Lesser, 1995). Even if many organizations try to implement new changes, because of the employee's resistance, a lot of them fail to accomplish the results of the change process.

Resistance is often viewed as the enemy of a change process. Many authors (Lawrence, 1954; Maurer, 1996; Strebel, 1994; Waddell and Sohal, 1998; among others) highlight that the reasons for

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the failure of many change initiatives can be found in resistance to change. In Schein's view (1988), resistance to change is considered to be one of the most ubiquitous of organizational phenomena. Ansoff (1990) defines resistance as an impediment, a multifaceted phenomenon that affects the change process, slowing it down and introducing costs and instabilities. Resistance also represents any behavior that tries to maintain the status quo. Employees adjust to certain conditions, create social relationships and any change that might disrupt their working environment is seen as an obstacle.

Resistance to change represents a natural reaction of the people, which is why it is expected. Many reasons of resistance to change are due to human nature, but most of them are affected by life experiences. Kotter and Schlesinger (1979) identified four most common reasons for resisting change: people focus on their own interests and not on those of the organization, misunderstanding of the change and its implications, belief that the change does not make sense for the organization, and low tolerance for change (Bennebroek Gravenhorst, 2003). Conner (1998) mentions that loss of control is the most important cause that determines people to manifest resistance. In the romanian literature 15 reasons that cause resistance to change have been identified and presented by Mariana Prediscan (2004).

Resistance to change has usually been recognized as a significant factor that can influence the outcomes of an organizational change effort (Sikora, Beaty and Forward, 2004). People are afraid of new changes, because they will disturb their status quo. Employees get used to their routines and the change process can make them feel insecure. The outcome expectation of the change process can be positive for some organizational members, while for others negative. But according to Huang and Huang (2009), it is definitely confirmed that resistance to change is negatively related to change outcomes.

It is obvious that those who had negative experiences with previous changes wil not support the new ones and vice-versa. That is why it is essential for mangers to identify the main reasons why employees resist change and to outline the benefits that it will bring for them. If executive managers want to obtain the support of their employees they must communicate with them frecquently and try to involve employees as much as possible. An effective change manager almost welcomes resistance because it is a sign that the change process is unfolding (Davidson, 2002).

However, the almost generally accepted axiom that people resist change has recently come under challenge (Jansen, 2000). As Dent and Goldberg (1999) note, the best way to challenge the conventional wisdom is to suggest that people do not resist change, per se. In their research, the authors found few or no instances of employees resisting change. Similar results have been provided by Kotter (1995) and Spreitzer and Quinn (1996). Despite the fact that some authors argue that employees do not resist change, others suggest that employees do manifest resistance, representing a barrier to change. In general, resistance is not a negative concept, as not all change efforts are beneficial for organizations. As Mabin, Forgeson and Green (2001) argue, resistance is viewed as both a positive and necessary force that can inform change efforts through providing alternative ideas, harnessing people into the problem solving process and aiding the consideration of alternatives.

According to Bennebroek Gravenhorst (2003), resistance seems to apply to everyone in an organization, except to top management. Since top managers are the ones who decide what changes should be implemented and how, it is deducted that they are the initiators of the change processes and therefore, will not manifest resistance. As change strategists (Kanter et al., 1992) they initiate change processes and subsequently are confronted with line-managers and employees who resist this changes. This view is contradicted by other researchers (Smith, 1982; Spreitzer and Quinn, 1996), who argue that the ones who usually work toward maintaining the status quo are the top managers, resisting most of the change efforts.

Further, through the proposed case study, we are going to examine if employees really manifest resistance to change and will try to answer to each of our objectives.

Method

We have conducted a survey in a credit institution that underwent a major change during the last few years. The credit institution has emerged twice and despite the financial difficulties, the management kept all its employees.

On-site data collection, analysis and literature research were carried out between july and december 2011. Data was collected with questionnaires, interviews with bank managers and employees and also direct observation. The questionnaire consisted of 15 statements, which were grouped in three categories. Each category contains a number of statements which respond to one of the three objectives mentioned above. The first four statements reffered to the employee's reasons, the next six outline the outcome expectation of the change process and the last five statements, highlight the support of employees.

The questionnaire was send to 136 employees which work in the bank's branches and agencies in the west region of Romania. The questionnaire was fully completed by 104 employees, which represents 76.37 per cent. As Edwards, Thomas, Rosenfeld and Booth-Kewley (1997) state, there is not an accepted criterion for survey response, but generally one can be satisfied with 50 per cent or more. It was given personally to 30 per cent of employees and send by email to the rest.

Results

Staff structure was represented mostly by employees with the age between 27 and 35 years old, the average age of the respondents being 32.22 years. 14 were men and 90 were women. The youngest employee was 25 years old and the oldest was 57 years of age.

Analyzing the first objective, the real reasons why employees resist change, we have concluded that most employees usually understand the need for change and believe that it will make sense for the organization, but at the same time, they do not neglect their own interests. The main motive why employees resist change is their personal interest. For 63.47 per cent of employees, their personal interests count more than those of the organization. If a loss is expected due to the new change, they will not support it and try to prevent a proper functioning.

Analyzing the main motive in terms of age, we have concluded that employees who treasure most their personal interests, had the age between 25 and 36 years, being less loyal to the organization than those after 37 years.

The second motive is represented by the understanding of the goal of the new change. Employees need to know exactly what is going to happen and what impact the new change will have on them. Security is very important for employees, which is why top management must communicate constantly with their subordinates.

Employee's results regarding the first objective are shown below, in the table 1.

Motives of resistance to change Table 1

Scale	1 – Strongly disagree (%)	2 – Disagree (%)	3 – Agree (%)	4 – Strongly agree (%)
My personal interests count more than those of the organization	2.88	33.65	43.27	20.2
I do not understand always the goals of the new change	2.88	51.04	42.23	3.85
I have the belief that the change does not make sense for the organization	11.53	82.7	5.77	0
I have low tolerance for change	12.5	77.88	9.62	0

The general outcome expectation of the change effort is positive, 87.5 per cent of employees having a good feeling regarding the new change. Over the years, employees got used with the frecquent changes and gained enough knowledge and experience to perform well after changes are implemented. Even if 12.5 per cent of employees still expect a negative outcome, the rest are more open minded, expecting positive results. In terms of age, 11 per cent of the employees who expect negative results have the age between 27-36 years old.

Table 2
Outcome expectation of the change,

	Percent %
Outcome expectation	
Very negative	0.48
Negative	12.02
Positive	76.76
Very positive	10.74

Do employees and managers support the change process? Analyzing table 3 we can say that almost 78 per cent of members manifest support for change, being willing to put an effort to make the change happen. Even if 76 per cent of employees find the changes necessary, 38 per cent disagree with the fact that the new changes will have clear advantages for them. Usually new changes equate with more tasks and responsabilities, but taking into account the current economic situation, employees do not mind working harder.

Table 3
Support for change

	Percent %
Support for change	
Very low	0
Low	22.11
High	68.27
Very high	9.62

As the interviewed employees occupy different positions in the company, we wanted to find out which ones are more or less resistant to the new changes. Dividing employees in three categories, operations officers, middle management and top management we discovered the following:

The operations officers are very adaptable to the new changes. As the work procedures change constantly, they are used to work in a changing environment. Even if they agree with the fact that the new changes will not have clear advantages for them, they still support the goals of the change process and are willing to put an effort to make the new changes stick.

Middle managers also support the new changes and are willing to put an effort in the change process, despite the fact that almost 25 per cent of them do not find the new changes necessary.

Executive managers are the ones who want the new changes to be implemented. They support the new changes fully and consider most of them vital for the further development of the organization.

After conducting a few interviews with four bank managers and observing the employees for three months, we have concluded that most employees welcome the new changes, but of course, there are a few exceptions.

According to one manager, "because the company started to make redundancies, employees work harder than before. New changes are expected and they are trying to get involved as much as possible in the process". Even if deep in side, some of the employees do not like the new changes, they do not manifest resistance. They comply to the new situation and as their job is at stake, everyone tries to welcome the new change and do their job as good as possible. An interesting fact revealed by another manager was that some employees manifest resistance by not doing their job properly. "Even if most employees say that they understand the need for change and agree to go to trainings, some are not willing to do the things according to the new procedures". In some cases, it is easier for employees not to check if a company's situation has changed during one or two years, completing the form with the previous details and sending it for further analysis.

Conclusions

Results show that few employees resist change, willingness to change being the general response in the organization. Employees usually understand the need for change and even if their own interests count more than those of the organization, they are willing to support the goals of the change process. The general outcome expectation of the change is positive, 87.5 per cent of employees having a good feeling regarding the new change.

Analyzing the stuff structure we observed that most employees are young, with an age around 32 years old. According to our results, both middle and executive managers want the new changes to be implemented and they fully support them. This results confute Smith's (1982) and Spreitzer and Quinn's (1996) hypothesis, according to which top management tries to maintain the status quo while middle managers manifest desire for implementing new changes.

Taking into account the current economic situation, we can say that employee's general response to change is mainly supporting it. To keep their jobs, employees work harder and sometimes overtime.

The limits of this research are:

We can not assert that the obtained results are valid for all credit institutions;

For greater impact it would be recommended to analyse bank's branches from all over the country and see how employees react to change in other regions;

Employees general assessments regarding their workplace might have a high degree of subjectivity;

The economic crisis influences employee's decisions regarding job opportunities.

For further research, we would like to analyze employee's resistance to change in organizations that operate in different economic sectors and of course, to make a prospective comparison between the present time and a future time of economic growth.

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OVERVIEW OF THE COMPANY'S FINANCIAL STRUCTURE

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Abstract
The purpose of the paper is to highlight the fact that the company's financial structure is, empirically speaking, the parent entity from which starts all the activities that generate the self existence of the company. The company's financial structure also known as the company's capital structure conducts directly the organizational and inter-organizational behavior and indirectly the classification on the market of the referred economic agents.
This paper aims to describe the factors that influence the company's financial activity, it's direct and related sources of funding used to maintain or increase a satisfying turnover and the theories that conduct the company's capital structure.

***Keywords**: financial structure, company, economic agents, capital, turnover*

Introduction

The financial structure of the company reflects the composite formation of the capital that can be borrowed and represents the ratio between the short and long term financing.

The financial structure of the company generated countless disputes along the theories of classifications of companies in the market, theories regarding the financing resources of an enterprise and the organizational and inter-organizational behavior of the direct participants in the economy.

Over the time informational frames were formed regarding the necessary theories for companies classification in the market, theories regarding the financing sources and also debates, critics and additions to the financing decisions as in practice and in theory.

The first economic representation of a company has been shaped by the neoclassic model and started from the ideas promoted by Adam Smith in 1776 regarding the fact that individual focused interests pursuit should lead to a common interest. The neoclassic theory regarding the economic balance, partial and global, as Prof. Ion Stegaroiu said, is considered to be the best finalized representation of market economy functioning, where the company has the central role.

The traditional model includes a number of significant features of the analyzed environment, as follows: the description of balance conditions in the perfect competition context, characterized by the atomicity of participants (the existence of a high number of buyers and sellers whose volume of individual exchange is negligible compared to the overall volume of trade), the product homogeneity (the suppliers trade identical goods, so the buyers are indifferent to the identity of the seller), free and transparent market entrance (the traders are perfectly informed regarding the price and quality of products) and the individual rationality principle.

In the neoclassic theory, the company is seen as an entrepreneur expressing its own will (the atomicity feature) who, eventually, will seek the maximization of profit (rationality feature), promoting its product (the homogeneity feature) to a group of perfectly informed buyers (economic transparency feature).

The neoclassic reasoning has many advantages and has been considered over time to be eloquent and relevant. The advantages are extremely important and regarding the theoretical possibility of seeing the optimal conditions thorough which the producer has at disposal an important analyzing mechanism that adds to its management instrument (break-even, elasticity, productivity, etc.) that permit the identification of maximum profit opportunities.

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The neoclassic theory has been often criticized and labeled unrealistic, bringing the argument that the existence of a platform which has all of the offers and requests centralized is rarely seen. Another argument brought is that the theory is dedicated to the market efficiency issue, without considering the cost of its operation.

Despite the criticism, the issues addressed by this approach cannot be totally rejected. Over time the assumptions were reconsidered, retreated, adapted to the existing market model, leading to other theories that have been guiding the competitive environment and the economic activity both to microeconomic and macroeconomic level.

Goods homogeneity assumption was shaped in a different manner by E. H. Chamberlin who proposed a monopolistic competition analysis through which "every supplier has absolute monopoly over his product, but it is subjected to competition by more or less substitutable goods"[1].

The assumptions of individuality, subjected to a new analysis by A. A. Berle and G. Means highlighted the property exclusion from the company's management.[2]

The principle of rationality has known a conceptual retreatment proposed by H. Simon[3] namely the addition in the neoclassic model of the bounded or procedural rationality concept over the perfect rationality, starting from an economic behavior analysis implicated in decision taking processes, given the substitution of the profit maximization principle with the satisfaction principle, so, the individual can be pleased with a satisfactory decision and not necessarily with an optimal decision so it is taken to consideration that the individual does not seek the higher earning but the acceptable solutions.

Comparing the perfect rationality with the bounded one, we can observe that the perfect rationality is founded both from decisional processes results and objectives and the means to achieve them aprioristic, while the bounded rationality is based on decisions taking procedures and the objectives and means to achieve them are settled as reference base and as research results.

Based on the new framework created by the introduction of new notions used above, J. G. March and H. A. Simon (1958) [4] and R. M. Cyert and J. G. March (1963) proposed a contractual and behavioral model of the company as a productive organization which consisted in a coalition of individuals that contribute to the well functioning of the organization in exchange of a satisfying payment. By combining the production elements and highlighting the managerial art involvement, the organizational practices are highlighted and they lead into a more general model that takes into account the economic efficiency, to the contractual theory. The purpose of this theory consists in describing the exchange relationships between the parts taking into consideration the institutional and informational restrictions that govern them.

As alternative approaches to the attempt to eliminate the contractual theory's inadvertences, the conventions economy and the evolutionary economy emerged.

The conventionalist approach states that the company is a conventional framework, therefore a convention that defines working in common and the market as a qualification convention that defines the exchanges trough which the consumer has the role of expressing its wishes and the company has the role of answering to them.

The evolutionary approach tries to settle the way that different behavioral model are perpetuated over time and aims to decipher and understand the processes involved in all the evolutional stages both at technological and organizational level.

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[1] E. Chamberlin, *The Theory of Monopolistic Competition: A Re-orientation of the Theory of Value*, Harvard University Press, 1933, 1965, 8th ed.

[2] A. A. Berle and G. C. Means, *The Modern Corporation and Private Property* (2nd edn Harcourt, Brace and World, New York 1967).

[3] Simon, Herbert, *Bounded Rationality and Organizational Learning*. Organization Science 2 (1): 125–134.

[4] March, James G., *A Primer on Decision Making: How Decisions Happen*. New York: The Free Press.

This kind of evolution leaded to the renewal of microeconomic analysis instruments, as the finality to the new theory emerged – The Theory of Games.

The Theory of Games was introduced into economy by John von Neumann and Oscar Morgenstern[5], both of them defining the game: "the game is simply the totality of the rules which describe it". Taking into consideration that this description can be applied to any type of phenomenon, the Theory of Games has found a series of uses in both the social and economic domains, distinguished from other theories by the pronounced mathematic character.

The base assumption of the Theory of Games is the assumption that includes the rationality of players, according to whom each player has as purpose the maximization of his own earnings. These earnings depends both on his and others decisions. The main approach consists of the assumptions and questions that each player will ask himself: what will others do? This is the only question available because another essential assumption of the Theory of Games is based on the fact that each player has a complete set of information: each player has information on the game and other players – common knowledge, except for their decisions, the only issue being the right anticipation of these decisions. Theoreticians signaled situations where the players do not take into consideration various characteristics of the game, this being the complete informing situations. If the information is not completely defined, in its minutest details, then the theory is not relevant.

The result of the Theory of Games and economic information lead over time to the contractual theories that have as purpose the description of inter-agents exchange relationships taking into consideration all the institutional and informational restrictions in which they fit at evolutional level. Punctually, the contractual theories can be used to describe the applied strategies in negotiating contracts, as in substantiating the finance, management, marketing and other decisions. In these theories, the company is considered a perfect framework that incorporates a perfect network of contracts, policies and agreements between the component individuals. Inside the contractual theories we also find the Positive Theory of the Agency based on the article "Theory of The Firm: Managerial Behavior, Agency Costs and Ownership Structure" published by M. C. Jensen and W. H. Meckling in 1976" [6]. Founder's initial concern of the Positive Theory was to show to the managers an analysis pattern that will allow understanding the degree of the organizational structure involvement in the performance in order to shape the actions and the decisions in this way.

The presentation of the above mentioned theories aimed to highlight the initial microeconomic framework, which trough the adhesion at a dynamic economic environment in a continuous evolution scale, emerges to new approaches of the important issues of financial microeconomics, namely the issues regarding the company financing and optimal capital structure selection.

In 1985 M. Miller and F. Modigliani[7] sustained the famous theory under which the value of the company is independent from the means of financing, theory criticized for its restrictive assumptions that, over time has been enriched and as a result brought in foreground the reflections centered on the financial structure selection throughout the systemic principle of arbitration between costs and advantages of different financing sources.

New microeconomics theories have removed two hypothesis of the classical scheme: the symmetry of information for all agents and the identity of their interests (income maximization or company's value). Regarding the financing principles, the Theory of Signals shows that the level of indebtedness can serve as a signal from the managers to their external partners, fact that can

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[5] John von Neumann and Oskar Morgenstern, *Theory of Games and Economic Behavior*, Princeton University Press (1944).

[6] Jensen M. C., Meckling W. H., *Theory of the firm: Managerial behavior, agency costs and ownership structure*, Journal of Financial Economics, vol. 3, 1976.

[7] Modigliani, F.; Miller, M. (1958), *The Cost of Capital, Corporation Finance and the Theory of Investment*, American Economic Review 48 (3): 261–297.

determine the balance for each financial structure. The Theory of Agency states the indebtedness as a solution to the conflict of interests between the managers and shareholders mentioning that it can also cause other conflicts (between the managers and shareholders on one hand and creditor on the other hand).

The classic company financing scheme, with the perfect market assumption and maximizing company's value behavior for the financial market can be highlighted trough two essential ideas. The first idea refers to the fact that enterprises do not use self-financing for net investment but the depreciation fund installments for the corresponding amount for replacement investments, distributed as dividends for shareholders and use external capital to finance their net investments. The second idea underlines the fact that companies have two external sources of financing: increase of share capital by shares issuing and credit indebtedness[8]. The issue of finding the advantageous financing sources was brought up, thereby the answers to M. Miller and F. Modigliani's theorems. The first theorem can be enounced as follows: for the given class of economic or exploitation risk, the market value of the company (the sum of equity and expenses) is independent to the financial structure, in these conditions the average weighted cost and company's value are constant. The second theorem states that the investment decisions are independent to the financing decisions.

Criticisms of the classic scheme are presented as three aspects: the purpose of self-financing, heterogeneous character of external financing sources and the real issues of indebtedness[9].

The purpose of self-financing refers to the fact that depreciation funds allow financing a part of the growing investments by the game of multiplication effect – Lohmann-Rüchti effect and by keeping a part from the net result inside the company, underlining the important part of self-financing in financing the growth and replacement investments.

The heterogeneous character of external financing sources refers to the heterogeneity of loaning or cash intake from shareholders. About the increase of share capital method of external financing, it has been observed that unlisted companies cannot use the same conditions used by the listed ones.

The issues of real indebtedness limits that are referred in the theorem of independent company value in relation to its financial structure is knowing why the companies are not totally indebted and why in reality certain companies indebted more than other, even if belongs to the same class of economic risk. M. Miller and F. Modigliani solved this problem, proving that companies choose to maintain a certain capacity of indebt to benefit from flexibility.

Empirical studies showed that the classic scheme doesn't provide answers to lots of questions that are subject to actual concerns at company's financing, but financial neoclassicism, trough the Theory of Agency and the Theory of Signals brings not only answers but real solutions to solving the optimal financial structure issue. The Theory of Signals begins from the assumption that markets are rarely in balance and the obtained information has a defined cost criteria conducting to different delivery times to the managers. Having this theory as basis, the managers of a company can have access to information that investors cannot, hence the interest of obtaining information before others do. This activity can sometimes be misinterpreted because of manager's opinion, unfounded and exaggerated optimism leader of hidden advantages. The signal is actually a financial decision with negative consequences for the one launching it, in this case the one who tries to send erroneous message. The Theory of Signals analyses the company's financial decisions – financing policies, dividend distribution policies, indebtedness policies, repurchase of shares policies, etc., as signals from managers to investors.

Indebtedness policy explains why an increase of liabilities means an increase in the company's risk. Managers of companies from this situation send information that authorizes the market to believe that the company's performance will allow reimbursing this debt without

[8] *Encyclopédie de gestion*, vol. II, Economica, p. 1223, 1989.
[9] Perez R., *Grande entreprise et système de financement*, in Mélanges offerts à P. Vigreux, Toulouse, 1981.

difficulties. If the signal is false, the following sanctions can even discharge the managers if taking into consideration that the company will be in difficulty at the reimbursement time, this means that the managers are stimulated, most of times, to send correct signals.

The dividends distribution policy transmits information regarding several studies that demonstrate the managers are reluctant to decrease of paid dividends. Distributions of dividends is interpreted as a positive signal sent to market, centered on the idea that managers believe that the performance evolution of the company will allow to maintain current dividends in the following years, or even increase the amount. Otherwise, a decrease of dividends has a negative signal impact, noticing unclear perspective to the evolution of the company.

If the Theory of Signals reconsider the classic premesis regarding the uniform spread and accesibility of information, the Theory of Agency reconsider the premesis by which the company has as sole representative the share holder manager, claiming that the company can solve conflict by completing a contractual relationship network, company's behavior being now incomparable to the market's, meaning it represents the result of a complex balancing process.[10]

Conclusions

The financial structure of a company will always rise issues of specific capital components, of their nature, considering that from the first theories until present, their studying will know a large expansion in interest granted by the factors influencing the financial structure - meaning the assets structure, sales stability, manager's behavior, internal climate and the financial market conditions, taxation and low trust in banking institutions.

The own funds/borrowed funds controversy, developed by finance theoreticians who tried to find the optimal liabilities structure is vaguely found in the practice because the practitioners are more interested in the conclusions of the Theory of Signals, for which a viable enterprise borrows and manages to repay at term [11] and the conclusions of the Theory of Agency who's originality consist of rejecting the convergence assumption in the interest of all partners of the company.

Concluding, the traditional approach shaped by M. Miller and F. Modigliani resumes to the fact that in the presence of income tax, the value of an indebted company is equal to the value of a company without loans with the addition of the economy of income realized from indebtedness. The Theory of Agency approach reflects on the fact that the optimal financial structure results from a compromise between various ways of financing that allows solving those conflicts of interest, considering that indebtedness and equity attenuates some conflicts and starts other ones.

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[10] John von Neumann and Oskar Morgenstern: *Theory of Games and Economic Behavior*, Princeton University Pres, 1944.

[11] M. Glais, *Le diagnostic financier de l'enterprise*, Paris, Economica, 1984.

- John von Neumann and Oskar Morgenstern, *Theory of Games and Economic Behavior*, Princeton University Press (1944).
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- M. Glais, *Le diagnostic financier de l'enterprise*, Paris, Economica, 1984.
- Perez R., *Grande entreprise et système de financement*, in Mélanges offerts à P. Vigreux, Toulouse, 1981.
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BUSINESS OFFSHORING IMPLICATIONS ON THE LABOUR MARKET

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Abstract

In terms of economic policy, three new aspects are important in the current context of globalization which brings forward new strategies regarding the outsourcing and offshoring of activities and functions of the value chain. These aspects refer to the instant appearance of an offshore transferable function , to the unpredictability of winning and losing functions and to the lowering of competition from the levels of sector, company or professional qualification category to an individual level.

Of the three features, the most problematic for policy makers is the unpredictability of the impact of globalization. For example, in Europe we can not reasonably believe that workers in the most competitive sectors will be in a position of winners, nor that these winners will be the most prepared or trained in analytical functions. Many European workers currently work at prices fixed by the local market and not covered by productivity. But when the competition on functions will expand through globalization outside the country or area, their choices will be either a job loss or a reduction in salary. The question that will be raised ever insistently will be the following: what jobs are more exposed to this new competition?

On the one hand, offshoring is on balance positive for Western economies, because it makes domestic companies more competitive. At the same time the material outsourcing is, for most developed economies, much more important than the outsourcing of services and the implications for labor market must be objectively differentiated in the two sectors.

On the other hand, if we take into account the amplification of the effects that offshoring already has on the structure and distribution of labor, the socio-economic European policy of labor orientation to the coordinates of a "knowledge based" economy and to the jobs of the "information society" could be wrong.

Keywords: *outsourcing, offshoring, labor market, competition, education*

Introduction

In recent years, a host of famous economists in the study of international economics and social issues, argued, in one way or another, the idea that globalization has entered a new phase. As Professor Gene Grossman from the Princeton University said, this phase is so different from previous ones, that its understanding claims even a new paradigm.

In an article published in 2006, Professor Richard Baldwin from the Institute of International Studies in Geneva[1] is trying to clarify the paradigms of the old and the new globalization, analyzing the phenomenon as a long process, characterized by two major " unbundlings ". The first unbundling, driven by rapid drop in transportation costs, has put an end to the need of

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[1] "Globalisation:The Great Unbundling(s)" – article published in the report "Globalisation Challenges for Europe" of the Secretariat of the Economic Council of the Government of Finland, march 2006.

manufacturing the products near the areas of consumption, allowing the spatial separation of factories and consumers. The basic levels at which globalization spread its effects were firms and economic sectors.

The second unbundling was driven by significant reduction, in the last decade, in the costs of communication and coordination of activities in the international space, which ended the need to perform most phases of production in close proximity. Also, more recently, period, a further decoupling of activities or functions of the company (besides the production) has taken place, by offshoring the service sector activities. Thus, the second unbundling has dissociated in space factories and offices and drew the global competition to the level of functions that these structures previously retained. This unbundling can be found under names such as fragmentation, offshoring, vertical specialization and segmentation of the value chain.

Marketing of products is replaced by marketing of functions, including those individually performed, which lowers the overall competition at the level of individual workers in manufacturing or services, which perform similar tasks in different countries.

The second unbundling triggered by globalization

By the mid '80s globalization was developed exclusively at the level of companies and industries. Though savings could be achieved by transferring labor intensive activities to the South, production bases were maintained in individual locations in the North, to facilitate coordination of activities of managers and workers. Both financial considerations and those of coordination made sense to coupling labor, capital and European technology right in Europe, despite salary differentials. The geographical separation of the different bases of production has become more attractive with the growing wage gap, adjusted for productivity and for the cheaper cost of fragmentation through the reduction of telecommunications and air transport costs. The importance of distance, especially on travel costs of managers and skilled workers results also from the fact that the first major unbundlings in industry started in the mid 80s, on short geographical distances: Japan to Southeast Asia and the U.S. to Mexico.

This trend was pejoratively called "the voiding" of the Japanese economy. The differentiation of countries in headquarters- countries and production host- countries has increased further by practicing the same " voiding " by countries like Taiwan, Korea, Singapore and Hong Kong. China's readiness to integrate into the global economy in the '80s spurred offshoring's strong appeal.

More recently, the second unbundling was reflected also in the field of "offices", by outsourcing functions that were previously regarded as nonmarketable. The classic example are the American call- centers in India.

Meanwhile, the latest unbundling process is found in the services area. This is in rapid expansion, although at a smaller scale.

The result of these processes of unbundling functions and tasks is the transfer of competition to the level of production phases, tasks of departments and duties of individual employees. Also, competition may affect functions which are common to a large number of sectors, regardless of their characteristics, namely labor intensive or capital-intensive. In conclusion, the North losers of globalization are not anymore just industries or activities that are labor intensive. Because transportation costs do not vary significantly, depending on the nature of goods, we can say that the reduction of these costs affects likewise all sectors.

For functions, the situation is different. Some of these, such as truck driving, are completely uninfluenced by lower international costs of coordination, while others are strongly affected, such as call- center services.

In terms of economic policy, three new aspects become important:

- the unpredictability of the winning and the losing functions. At present, even economists have difficulty in understanding the glue that unites the various functions in "packages" (of factories and offices), and thus how they will be removed in future.

- the instantaneous appearance of an offshore transferable function, due to the differential impact of the reduction in telecommunications costs on various functions and development of new management technologies.

- the lowering of competition from the levels of sector, company or professional qualification category to an individual level.

Implications of offshoring on the labor market

Of the three features mentioned above, the most problematic for policy makers is the unpredictability of the impact of globalization. For example, in Europe we can not reasonably believe that workers in the most competitive sectors will be in a position of winners, nor that these winners will be the most prepared or trained in analytical functions. Many European workers currently work at prices fixed by the local market and not covered by productivity. But when the competition on functions will expand through globalization outside the country or area, their choices will be either a job loss or a reduction in salary. The question that will be raised ever insistently will be the following: what jobs are more exposed to this new competition?

Already in 1996 P. Krugman[2] warned that the differentiation will operate not due to the education level of workers, but due to the entering of the various services in the category of marketable services. This point of view was recently taken over by other authors, such as A.S Blinder (2006)[3] or G. Grossman and E. Rossi-Hansberg (2006)[4]. The latter's analyzed the implications of offshoring in general, and especially on wages, in terms of three effects: the effect of business conditions, the effect of employment and , the effect of productivity.

The first effect of production offshoring to countries with lower wages is to reduce product prices on international markets. This price will trigger the reduction of wages in the country of origin, remaining in the same sector. Their salary will be reduced also by the decreased demand for jobs in the sector. In reality, workers in the country of origin will focus on functions involving higher productivity, in order to increase the salary in accordance with this productivity. Of course the productivity effect may be exceeded by the cumulative effect of business and employment conditions, but Grossmann and Rossi-Hansberg paradigm allows the following important conclusion: if commodity prices fall and offshoring is not allowed, the workers in the country of origin will face even higher wage cuts.

Offshoring refers, in this case, to the routine (both normal routine, and cognitive routine) functions (tasks). In contrast, non-routine functions involving face-to-face interaction and continuous optimization and revaluation are not unboundling. An American study from 2003 shows that the share of jobs with routine functions declined since 1970 and this trend accelerated after 1990. Simultaneously, the share of non-routine job rised. This study urged Grossman and Rossi-Hansberg to say that the offshoring of routine functions is already underway.

Two examples of North-South tradable and non-tradable functions are provided by A.S.Blinder (2006)[5]. The first category includes, for example, taxi drivers in Sweden and India. Prices of these functions are set locally and no matter how small would be the difference in productivity between two taxi drivers in these countries, it can not influence their relative wages, because it does not create competition between the functions performed by these drivers on the two markets.

An example of until recently non-marketable functions, are the computer security or informatic systems analysts. Many routine activities in this area can be provided remotely now. Remotely means another floor the same building or another office in Germany, either, due to the

[2] Krugman P.(1996): "White Collars Turn Blue" Article for centennial issue of the NYT magazine.
[3] Blinder A.S. (2006): "Offshoring: The Next Industrial Revolution?"
[4] Grossman G. & Rossi-Hansberg E. (2006): "The Rise of Offshoring:It's Not Wine for Cloth Anymore".
[5] Blinder A.S. (2006): "Offshoring: The Next Industrial Revolution?"

lower costs of communication and management technologies, a company in India. This option puts the Germans and Indian computer workers in direct competition with the very important consequence that the German-Indian wage differential has to be justified now also by a compensating differential in productivity.

However the difference should be made between the services sector and the trade in goods sector, thus involving industrial area, where it is considered (R. Baldwin 2006[6]) that the North-South wage differential has been brought more or less in line with the productivity differential. A massive offshoring of jobs in production with intensive use of labor had taken place between Japan and China, and this has led to a significant increase of the international competitiveness of Japanese industry, even without any noticeable impact on unemployment. Japanese workers have rapidly specialized in new functions that maintained the productivity gap against Chinese workers, abundantly justify the wage gap towards them.

Regarding the U.S. market, A. Bardhan and C. Kroll (2003)[7] estimated that about 10% of the U.S. workforce was employed in occupations that can be transferred offshore, such as financial analysts, medical technicians, computer and math specialists.

D. Van Welsum and X. Reif (2005)[8] and D. Van Welsum and G. Vickery (2006)[9] define tradable and offshorable jobs as those characterized by the following four characteristics:

- To be IT intensive
- Results to be IT-transmittable,
- Functions to be encodable,
- To require little face-to-face interaction.

Based on this definition, they found that about 20% of the American workforce could be offshored.

Studying the occupational statistics C. Mann (2005)[10] shows that most affected were the low-wage American workers in IT institutions, about one third of the jobs disappearing in the 1999-2004 period, despite the very low wages ($ 25,000 on average per year). This includes occupations such as telemarketing, telephone operators, computer operators, etc..

In antithesis stood the occupations implying high skills, reasoning and solving problems, in which wages are three times higher, and which have offered 17% more jobs in the same period. Regarding the situation in Europe, the study prepared by M.Falk and Y. Wolfmayer (2005)[11] estimated that due to offshoring about 0.3% of jobs in the industry were lost annually during 1995-2000, with sensitive differences between sectors, but, in some of the most dynamic of them, no losses of jobs due to offshoring have been recorded.

K.Ekkholm and Hakka K. (2006)[12] conducted an analysis of the effects of offshoring of intermediate productive inputs on the labor force in Sweden and found that:

- Offshoring to low-income countries has reduced demand for workers with average level of education;
- Offshoring to high-income countries (mainly in the case of Sweden) did not produce statistically significant effects on the workforce.

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[6] R. Baldwin (2006): "Managing the Noodle Bowl: : The Fragility of East Asian Regionalism".

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[10] Mann C. (2005):"Accelerating the Globalisation of America. Institute for International Economics."

[11] Falk M. & Wolfmayer Y. (2005):"The Impact of International Outsourcing on Employment: Empirical Evidence from EU Countries. Austrian Institute od Economic Research Paper".

[12] Ekholm K. & Hakkala K. (2006): "The Effect of Offshoring on Labour Demand: Evidence from Sweden".

Also, other studies for Germany, such as, for example, those of M Falk and Koebel (2003), show that offshoring reduces the demand for medium skilled workers.Another type of analysis attempts to show what type of outsourcing has greater effects on developed countries. In this respect M. Amiti and SJWei (2005)[13] analyzed the statistics on trade in services of the U.S. and other industrialized countries, in the period 1983-2003, concluding that:

- Outsourcing of services has increased significantly in recent years but it is not still an important phenomenon (eg for U.S. imports of IT and business services in 2003 represented only 0.4% of GDP).
- U.S. and other developed countries are net exporters of IT and business services, the surplus increasing even for some of these countries (ie USA).
- the material outsourcing is far more important than the outsourcing of services.

A recent study prepared by H.Goerg, D.Greenaway and R. Kneller (2008)[14] points out some implications of offshoring on the U.K economy. Research has covered a total of 66,000 companies and, after they found that offshoring is practiced mostly by large companies with branches abroad, focused on the 2850 British multinationals with foreign subsidiaries.

Thus, during 1995-2004, the offshoring of these companies increased by 35% in production and 48% in services. But even after this increase, it was still below 5% of GDP in 2004. Despite the somewhat automatic association of offshoring with the call centers in India, only 4.5% of multinationals in services and 8% in the industrial sector had branches in India and China. Most of the international outsourcing is done in other developed countries, and primarily in the EU. An essential problem is related to the offshoring's impact on unemployment, but unlike media exaggerations, the study in question found that in 2005, only 3.5% of the jobs lost in England can be attributed to offshoring . Simultaneously, however, companies could produce more because offshoring made them more competitive and thus, overall, have created more jobs than were lost. In the analyzed period there were added due to offshoring about 100,000 new jobs.

A negative impact of offshoring and more generally of globalization is considered to be the alleged phenomenon of wage cuts in developed countries. The study to which we refer does not discover such an effect in the industrial sector, but in the services sector it is however found some average decrease. The explanation seems to lie in the fact that companies in the services sector outsource more qualified and better paid work. But the reduction was small and by extrapolation it was estimated that if the offshoring will continue to grow at the same rate in a decade, the average salary in services will directly shrink with only 2%.

The conclusion of the study is optimistic through the fact that offshoring is on overall positive for the economy because it makes companies more competitive and generate jobs in the country and abroad.

Conclusions

In terms of socio-economic impact of policies promoted at EU level, we have to emphasize the idea brought into question since 1996 by Paul Krugman[15] and reiterated by Alan Blinder (2006) and R. Baldwin (2006), that the European economic policy of orientating the workforce in accordance with the coordinates of a " knowledge based economy " and with "information society" jobs could be wrong.

If the offshoring trend in the services sectors is maintained, many analytical jobs, which today seem to have a high value added could be outsourced to other countries. Overall, such offshoring will be an opportunity for Europe to improve productivity, but the investments in qualification of workers

[13] Amiti M & S.J. Wei (2005):"Fear of Service Outsourcing:Is It Justified? Economic Policy".

[14] Goerg H., Greenaway D. & Kneller R. (2008):" The Economic Impact of Offshoring. Nottingham University's Globalisation and Economic Policy Centre".

[15] Krugman P (2006) "White Collars turn Blue" – NYT magazine.

would be unnecessary. Emphasis on analytical skills should be at least doubled by a similar emphasis placed on the ability to be flexible and to learn new skills. The most important conclusion for educational policies becomes that that is more important for future generations to learn how to learn than to teach skills in a particular field. The educational system must prepare them for lifetime employability, and not for lifetime employment.

Also, the employees protection policies become more feasible than workplaces protection policies. Offshoring will become more attractive to companies located in countries with more powerful social policies of jobs protection because, ultimately, offshoring gives companies the flexibility they need to go out of the rigidity of legal schemes in the country of origin .

As for Romania, starting from the analysis of the factors that favor offshoring decisions internationally, but also from the strategies of TNCs present in the country, that would not be late to predict the evolution of Romania in terms of offshoring host of activities and functions and also as source of offshoring. The logical purpose of such a study would be the development of appropriate strategies and policies in the labor market area, and the rethinking of the foundations of the Romanian educational system of tomorrow.

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PREMISES FOR CREATING KNOWLEDGE-BASED ORGANIZATIONS IN ROMANIA

ADELA ANCA FUCEC*

Abstract

The transition to the knowledge-based economy in Romania is the main path towards obtaining a sustainable economic growth and may even be the feasible solution our country needs in order to exit the current economic crisis. The knowledge-based organizations are the main vector, a necessary and ireplaceable condition and factor for the creation of the knowledge economy, therefore every leader should be at least familiar with the premises needed to increase the number of these kind of organizations in Romania and sustain a propitious environment for their development. Therefore, the purpose of this paper is to identify and unfold the premises that need to be fulfilled in order to facilitate Romania's transition to the knowledge economy. To this end, following the macroeconomic and microeconomic situation, not only from an economical perspectrive, but also from a managerial one, there have been two categories of premises, which are actually conditioning elements for Romania's transition to the knowledge economy. At macroeconomic level, the main premise is that of the need to substantiate (found), elaborate and implement a genuine strategy for the transition to the knowledge economy; at microeconomic level, the organizations need to embrace a strategic management, relocate their attention towards the human resources, receive support from the IT departments and give the proper importance to organizational culture and the processes related to change management. By emphasizing the details of these premises, the objectives of ilustrating Romania's vulnerabillities and needs regarding the transition to the knowledge economy have been attained.

***Keywords**: knowledge economy, knowledge-based organization, strategy, organizational culture, sustainability;*

Introduction

The paper presented finds itself at the encounter of at least two fundamental domains, specifically economics and management, but considering that the issue of the knowledge-based economy and the knowledge-based organizations is under review, it is safe to say that this is an interdisciplinary study. The purpose of the paper is to identify and unfold the premises that need to be fulfilled in order to facilitate Romania's transition to the knowledge-based economy, in particular by creating the main components of such an economic environment: the knowledge-based organizations. The European Union officialy aknowledges the importance of the knowledge-based economy by outlining the Lisbon Strategy, therefore this paper shows relevance in pointing the way towards how to achieve this major and complex transformation as soon and as efficient as possible in our country, emphasizeing the vulnerabillities and requisitions of Romania in regard to the transition to the knowledge-based economy. The study describes how Romania should best prepare itself to embrace the new worldwide economic circumstances, enveloping two approaches: a top-to bottom approach, the macroeconomic one, residing in the presentation of Romania's strategy for the creation of the knowledge-based economy, and the second approach, the bottom-to-top one, at a microeconomic level, consisting in the necessary organizational prerequisites. Documentation research entailed the unfolded results of the paper. Since there is no strategy for Romania's transition to the knowledge-based economy, the following national and european documents have been reviewed in order to give foundation to the upcoming strategy: the National Reform Plan 2011-2013, the National Development Plan, 2007-2013, the National Research, Develoment and Innovation Strategy 2007-2013, the Lisbon Strategy, and, of course, the Europe 2020 Strategy, as well as other

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strategical or tactical initiatives such as the listed ones. In regard to the microeconomic premises, the current state of research is considered to be incipient. Although a number of researches conducted in this domain (Nicolescu 2005, 2011; O'Dell, Hubert 2011; Geisler, Wickramasinghe, 2009) have lead to several interpretations and definitions of this grand economic system, a consensus has not been reached yet, so that leaves the knowledge-based economy and its organizations as an indefinite subject. Starting from the main elementes found in such reasearch and taking into account the elements unfolded by the strategy, the choise has been made to present and emphasize on the premises that are of true relevance in the particular context of Romania.

The knowledge-based economy and organizations

The knowledge revolution[1] and the tranformation of the informational society into a human resources centered[2] society, actually, have secventially lead to what we know and refer to today as the knowledge-based economy.

Knowledge, in all the shapes it is found, has always been the foundation of economic and even social growth. Knowledge has not just appeared over night so as to lead to the development of the knowledge-based society and economy. What did, however, occur, was the aknowledgement of the importance and the capability of knowledge to deliver a sustainable competitive advantage, considering that the clasical resources are becoming fairly outdated[3]. When the attention of academicians and practicians revealed the catalyst character of knowledge in regard to economic growth and susteinability, was marked the effective beginning of the transformation of the society and the economy. Moreover, when the managers of the great corporations joined the tempo, especially after the first papers dedicated to knowledge and knowledge management were elaborated, the incipient discipline of knowledge-based management emerged[4]. Therefore, when managers spotlighted knowledge and recognized the potential impact it can create, amplified by the expanding information society and advocated by globalization, this was the outlining of the elements entailing to the new shape of the economy: the knowledge-based economy[5].

The knowledge-based economy "is characterized by the transformation of knowledge into raw material, capital, products, essential production factors and by economic processes in which generating, selling, buying, learning, storage, development, sharing and protecting of knowledge become prevalent and critically condition the profits and the assurance of the economy's long term sustainability"[6].

Among the most pregnant traits of the knowledge-based economy are namelly the accelerated rythm of change and learning, digitalization, globalization, focus on intellectual capital and a high rate of innovation. A particular trait of this type of economy is entailed by the specificity of intellectual capital. The explanation would be the following: "if a physical object is sold, the seller ceases to own it, but when an idea is sold in the new economy, the seller still posses it and can sell it over and over again"[7]. Thus, the growing worldwide potential is practically close to infinite.

In regard to the knowledge-based organizations, they constitute "the main component of the knowledge-based economy"[8]. Hereby, it is difficult to conceive an environment where this kind of organizations exist and the requisite of the host-environment is not fulfilled, namelly the knowledge-based economy does not exist. Therefore, this paper proposes in the following pages, as premises for the development of knowledge-based organizations in Romania, two types of actions: at

[1] O. Nicolescu and L. Nicolescu, *Economia, firma si managementul bazate pe cunostinte,* 19-28
[2] Geisler and Wickramasinghe, *Principles of Knowledge Management: Theory, Practice and Cases*
[3] Geisler and Wickramasinghe, *Principles of Knowledge Management: Theory, Practice and Cases,* 67
[4] Geisler and Wickramasinghe, *Principles of Knowledge Management: Theory, Practice and Cases,* 24
[5] Geisler and Wickramasinghe, *Principles of Knowledge Management: Theory, Practice and Cases,* 83
[6] Translation from O. Nicolescu and L. Nicolescu, *Economia, firma si managementul bazate pe cunostinte,* 48
[7] Geisler and Wickramasinghe, *Principles of Knowledge Management: Theory, Practice and Cases*, 68-83
[8] Translation from Nicolescu et al., *Dictionar de management*, 302

macroeconomic level, the elaboration of Romania's strategy for the knowledge-based economy, in order to assure this transition beeing handled in the best way possible; at microeconomic level, the main dirrections in which organizations should redirect in order to turn into knowledge-based organizations are unfolded. These dirrections include the practice of a strategic knowledge-based management, spotlighting human resources, having technology and information systems to rely on and taking into consideration the organizational culture and the processes relating to change management.

The macroeconomic prerequisite: Romania's transition to a knowledge based-economy, the pad for the development of knowledge-based organizations

In light of this prerequisite, Romania is in need for a strategy for the creation of the knowledge based-economy. Following, we present the European Union's strategy in this domain, we argue the need for a national strategy and outline a sketch of this strategy for Romania.

The European Union's strategy and the need for a national strategy in Romania

In march 2000, the European Council settles in Lisbon the development plan of the economy of the European Union (EU) for the following 10 years, outlining the Lisbon Strategy, which aimed ar turning the EU into "the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion"[9]. Around the middle of the implementation interval, information concerning the progress evaluation of the member states were revealed. As far as Romania is concerned, these results war far from positive. "The Lisbon Agenda may appear as a luxury for Romania at the moment", finds Daianu in a study[10] former to the evaluation of the strategy. It was the first time that significance was officially granted to knowledge and the appearance of the knowledge based-economy was aknowledged, but it was obvious that Romania was not ready to complete the transition in 2004. The same study finds that the structured bases of the romanian economy are rusty, the agriculture activities don't deploy at a proper efficiency, financial intermediary is an incipient faze, granting of state aids requires revision and liberalization of the utilities market is not yet under debate. "Under these conditions, the effort of going forward in the direction of a knowledge based-economy, when we have not yet consolidated the market economy, is a dashing attempt. Nevertheless, the effort must be made."[11], argues Daianu.

Therefore, by 2010, since the objectives of the Lisbon Strategy were not accomplished (and not just in Romania's case), the European Commission proposes the Europe 2020 Strategy, as an extension of the previous one. In addition to the Lisbon Agenda, Europe 2020 is not only a strategy for the transformation of the economies into knowledge-based economies, although this goal is still pursuited, but this strategy also represents a solution for ending the financial-economic crisis which entered into force during 2008-2009.

At national level, in the member states, the EU2020 strategy is implemented by means of the National Reform Plans (NRP); this is where the first big deficiency appears and prevents the whole implementation process in the member states. The European Strategy cannot be implemented in the member states by means of (just) a plan. We are facing a strategic motion with implications throughout all micro and macroeconomic domains in a country, thus such a motion of complexity and profound impact on the economy demands the existance of a veritable strategy in each of the countries.

Merely by existing, these european strategies represent only the first phase. In a logical and strategical sequence, the next phase should be the distribution of these strategies and their adjustment

[9] "Lisbon European Council", *European Parliament*, March, 2000, accessed November 24, 2011, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/00100-r1.en0.htm

[10] Translation from Daianu et al., "Romania si Agenda Lisabona – aderarea la UE si competitivitatea economica", *Group of Applied Economics*, November, 2004, 4

[11] Translation from Daianu et al., "Romania si Agenda Lisabona – aderarea la UE si competitivitatea economica", *Group of Applied Economics*, November, 2004, 4

to the charasteristics of each country under the economic entity known as the European Union, because it is not enough just to set national targets for the objectives, as has already happened. It is obvious that Romania cannot have the same target for the unemployment rate as, for example, Germany or France, since the basic values are perceptibly different. In the best case scenario, it would take a longer period of time for Romania to reach the targets set in Germany. Each country needs its own strategy, acording to the national specificity, with a mission and objectives of its own, achivable strategic options, resources and deadlines according to the growth rate of the significant indicators and, last, but not least, a feasible competitive advantage. Romania needs a strategy for the transition to the knowledge-based economy moreover due to the fact that the evaluations conducted in order to estimate the degree of the construction of such an economy have placed our country at the end of the european ranking[12].

The year 2004 has brought along great consideration made by the European Commission in regard to the implementation of the Lisbon Strategy. Thus, the European Institute of Romania presented in a paper[13] the three main categories of action in the approach of the research-development-innovation trinomial: a modern approach, a traditional approach and a group of country with peculiar approaches, different ones, hard to add up into one category. Romania was not yet a member of the European Union at the time, but still the European Commission considered it to be one of the countries with a special, peculiar approach. Also, it was found that in Romania fundamental academic research comes first and industrial innovation is not enough emphasized. The same paper mentions that only 6 countries had at that moment a national strategy according to the Lisbon Strategy, only 4 countries had a ministry for research-development and innovation, but 24 countries had a national strategy for research-development.

One other major aspect needs to be attended to when debating the macroeconomic situation and international position of Romania. Our country is currently facing three fundamentally important and extremlly difficult to implement processes: defining the market economy (not yet finalized), the European Union integration and building the knowledge-based economy[14]. The essembly of these three processes has an essential sinergetic potential, but the bad management of these phenomenons may deepen the vulnerabilities of our country, affecting the long term economic development.

Moreover, in the past few years, a new proccess emerged for our country to also handle: the worldwide economic crisis[15]. Under these circumstances, outlining the knowledge-based economy may be the sustainable solution that Romania needs so as to exist the current economic crisis. But this grand process must be unrolled strategically, this clearly showing the need for a national strategy, adjusted accordingly to the EU's strategy, in order to be able to obtain the sustainable economic growth.

For the elaboration of Romania's national strategy for the knowledge-based economy, we propose the model presented by Nicolescu and Verboncu in "Metodologii manageriale"[16]: foundation of the strategy, the effective elaboration of the strategy and its implementation. Each phase, its steps and elements are unfolded as follows.

Romania's strategy for the knowledge-based economy

Foundation of the strategy

The foundation of the strategy is the first and most important phase of the whole process. If the fundamentals are not relevant and consistent enough, the elements of the strategy will not have

[12] Daianu et al., "Romania si Agenda Lisabona – aderarea la UE si competitivitatea economica", *Group of Applied Economics*, November, 2004

[13] Voinea, Pauna and Marinescu, "Performanta in contextul Agendei Lisabona: experiente de succes, design institutional", *European Insitute of Romania*, accessed November 25, 2011, 13

[14] Nicolescu and Nicolescu, *Organizatia si managementul bazat pe cunostinte,* 181

[15] Nicolescu and Nicolescu, *Organizatia si managementul bazat pe cunostinte*

[16] Nicolescu and Verboncu, *Metodologii manageriale,* 59-86

essence, will be only apparently serving a purpose, but never will the implementation lead to long term results. Therefore, considering the basic pillars of the foundation of the strategy, we unfold a sketch of the items that the strategy for the knowledge economy should be based on:

Diagnosis studies

Since we are dealing with the construction of a national strategy, specialists say that a diagnosis, as in a "realistic evaluation of the state of evolution of Romania towards the knowledge-based economy can only be achieved by means of an international comparative approach"[17] (Nicolescu, 2011). Such an evaluation was conducted in 2004 by the Group of Applied Economics, and the results placed Romania nearly at the end of the european ranking, in the inferior part (Daianu, 2004; Nicolescu, 2011). The 2004 statistics are presented in tabel 1, but considering the integration of Romania in the European Union in 2007 and the effects of the economic crissis incipient in 2008-2009, the indicators most surely have suffered changes that ought to be recorded and resumed. An evaluation as the one in 2004 should be available for 2011. Also, the evaluation has to be taken into consideration when setting quantitative targets and national objectives, because they cannot be identified without such a reporting scale.

Ecological studies

Worldwide preocupation for polution and a sustainable use of natural resources was first displayed in Rio de Janeiro, in 1992, when the spotlightes highlighted the concept of "sustainable development". Then what followed was the negotiation of an international covention regarding the environment, in 1997, agreement known as the Kyoto Protocol. The document reffers to the period between 2008-2012, during which the signing countries agreed to reduce their greenhouse gas emissions by 5.2% on average in comparison to the values is 1990. Recently, during the conference in Durban, South Africa, it was decided to prolong the Protocol until the year 2015[18]. Due to the current global situation and an obvious and justified concern towards environmental issues, it is safe to say that this international convention will continue to exist and press the signing countries into taking responsabilities, both on the short and medium term and the long run.

Tabel 1

Domain	Synthetic evaluation[19]
Innovation and research	D
Market liberalization and fluidization	D+
Entrepreneurial and entreprenourship development	D
Employment rate and social cohesion	C-
Sustainable development	C-

Source: translation from O. Nicolescu, C. Nicolescu[20]

Romania, as a participating country in the Rio de Janeiro Covension and the Kyoto Protocol, cannot dissregard these agreements and the targets for greenhouse gas emissions reduction, when debating the ecological fundaments of the strategy for the knowledge economy. On the other hand,

[17] Nicolescu and Nicolescu, *Organizatia si managementul bazat pe cunostinte*, 177

[18] Morosan, "Acord mondial pentru continuarea Protocolului de la Kyoto", *Curentul*, December, 2011, accessed December 17, 2011, http://www.curentul.ro/2011/index.php/2011121266618/In-lume/Acord-mondial-pentru-continuarea-Protocolului-de-la-Kyoto.html

[19] Evaluation was made on a three-scale from A (best) to E (worst), with three intermediate grades (e.g.: A-, A, A+)

[20] Nicolescu and Nicolescu, *Organizatia si managementul bazate pe cunostinte,* 180

the domain of environmental protection has been favorized when elaborating the EU 2020 strategy, the domain having assigned to it the biggest number of objectives (three, when other domanins have only one or two). This could be explained by the statement of the romanian Ministry of Foreign Affairs' website, saying that "the European Union has taken upon itself the role of a global leader in fighting climate change, committing itself unilaterally to reduce greenhouse gas emissions by 20%, by 2020, compared to the levels in 1990"[21].

Another document important to mention in this context is the ex-ante environment evaluation included in the National Development Plan (NDP) 2007-2013, based on information from november and december 2005. "The environment evaluation of the NDP was conducted as part of the ex-ante evaluation of the NDP, included in the Phare project RO 2002/IB/SPP 01 '*Building Structural Fund compatible Capacities and Instruments*'."[22]

Marketing studies

When dealing with a company we require marketing studies in order to analyse the market and the organization's environment, but in the case of the national strategy, the issue will not be approached from this angle. Both theory and pratice have already shown that the one viable and sustainable response for survival and growth is the transation to the knowledge-based economy. On this behalf, instead of a marketing study, it could be more appropiate to conduct a specific SWOT analysis, emphasizing the threats and opportunities from the international surroundings in respect to the construction of the knowledge-based economy in Romania.

Included in the NDP 2007-2013 can be found a SWOT analysis for Romania, concluded after researching 12 domains of interest (the socio-economic situation; production sector; infrastructure; human capital; employment rate; social inclusion; health sector; agriculture, rural development and fishing; regional differences in economic development; european and territorial cooperation; public management capability; spatial development situation). Based on this analysis and sprinkling other relevant elements, we outline in table 2 a summary SWOT analysis for Romania from the perspective of the knowledge economy.

The national (international) strategy

Since we are fundamenting a national strategy for Romania, we shall search one level higher, at a european or international scale, in order to be able to identify this base for the strategy. Therefore, the Lisbon Strategy and the EU 2020 Strategy are the two strategical documents thet we point our attention towards.

Other important documents that need to be mentioned and taken into consideration are: the National Development Plan (NDP) 2007-2012, the National Reform Plan (NRP) 2011-2013, the Convergence Programme 2011-2014 and all the sectorial strategies elaborated so far in Romania (the National Strategy for Research, Development and Innovation; the Energy Strategy; the National Strategy for Exports; the National Strategy for Sustainable Development; the National Strategy for Lifelong Learning; the Fiscal Strategy, the National Strategy for Waste Management, etc.)

[21] Translation from "Schimbari climatice la nivel UE", *Ministry of Foreign Affairs*, accessed November 18, 2011, http://www.mae.ro/node/1663

[22] NDP 2007-2013, 372

Tabel 2

Strenghts	Weaknesses	Oportunities	Threats
Availability of a research and development strategy	The research and development sector is underdeveloped and not practical, unrelated to the economic realities.	New forms of organizations available (the network company, the network of companies, the virtual firm, etc.)	The financial-economic crisis and the post-crisis period
"A big number of ITC specialists"[23]	Smooth and insuficient financial and cultural base for SMEs	The Internet and the expansion of social networks (Facebok, Twitter, etc.)[24]	Decrease in the intensity of several industrial sectors, which move along to other locations that offer them significant financial benefits
High and increasing share of the tertiary sector in the GDP (Gross Domestic Product)	Difficulty and numerous bureaucratic barriers to obtaining financial or informational resources in the business sector	Liberalization of the public aquisition processes and the markets and the redesign of the business models	Increasing rate of Romania's perception in Europe as an economy based on the primar productive sector, where the added value rate is low
Increase and diversity in exports	Bad climate management, bad business environment management and miss-handling of the informational infrastructure	Development of the internal business environment (clusters, business incubators, networks of firms, etc.)[25]	Emigration of the human resources with faculty degrees, especially knowledge-based employees (doctors, researchers, etc.)
High access rate to human resources, available at a low cost and with a solid informational base	Work force insufficiently adapted to the economic conditions and not enough engaged to handle the lifelong learning necessity	Proliferation of the e-society, including e-commerce, e-government, e-banking	Deterioration of the natural environment and tranciency of natural resources

Source: adapted from NDP 2007-2013

Effective elaboration of the strategy

The mission

Romania's **mission** could be somewhat like the following: Romania wishes to become an economy with a durable growth sustained from internal sources, knowledge-based and economic,

[23] Translation from NDP 2007-2013, 235

[24] O'Dell and Hubert, *The New Edge in Knowledge*

[25] Nicolescu,Verboncu and Profiroiu, *Starea de sanatate a managementului din Romania in 2010,* 144

social and ecological performance-orientated, seeking to achieve these by exploiting and increasing the competitive advantages it has, for the final purpose of maintaining the main productivity, social cohesion, employment rate and environment protection indicators at the most adequate levels in the European Union, so as to blur the socio-economical development differences between Romania and the other member states of the European Union.

The basic ideas included in mission are the main elements of the EU 2020 strategy, but also the pillars of a knowledge-based economy. Thus, knowledge is under the spotlight (*knowledge-based*), and the outcomes comprehend the three key areas of the knowledge economy (*economic, social and ecological performance-orientated*). By transiting to a knowledge-based economy, Romania will be able to maintain the sustainable growth that any state needs to have, and, moreover, it will be able to obtain and support this growth by means of internal knowledge, specifically by completing the competitive advantages of each industry (*become an economy with a durable growth sustained from internal sources, ... , seeking to achieve these by exploiting and increasing the competitive advantages it has*). The point of this transition resides in consolidating Romania's position in the European Union, by diminuishing the disparities concerning socio-economic development between Romania and other member states (*for the final purpose of maintaining the main productivity, social cohesion, employment rate and environment protection indicators at the most adequate levels in the European Union*).

Since the expression "most adequate levels" is particular to a mission, ambigous and subjective, we hereby link the following phase of the elaboration of the strategy, the setting of the objectives, in order to be able to quantify and control the evolution of the strategy. This following stept is likely to be the most important, complex and comprehensive one.

Objectives

The **objectives** that need to be accomplished will be set from two perspectives: they will be personalized national targets adapted from the EU 2020 objectives, in order to assure the coherence and integration in the EU (these are the national targets set by the European Commission), and they will also be set individually, by each country, in such a way as to permit the overall development of the economy. Without pretending a comprehensive approach, we unfold a sketch of the main long term objectives of Romania for the transition to the knowledge-based economy, based on several targets already established by romanian and european officials.

The objectives of the EU 2020 Strategy:

According to the EU 2020 Strategy, its objectives have been transposed into national objectives, adapted to the specificity and circumstances of each country. Romania's case is presented in tabel 3. To better understand these national targets, we also present in tabel 4 a synthesis of the levels of each indicator from tabel 3 in Romania during 2000-2010.

Tabel 3

Member states targets/ EU	**Employ-ment rate (in %)**	**R&D in % of GDP**	**CO_2, emission reduction targets, base year 1990**	**Renew-able energy**	**Energy efficiency – reduction of energy consumption in Mtoe**	**Early school leaving in %**	**Tertiary educatio n in %**	**Reduction of population at risk of poverty or social excusion (number of persons)**
Main EU target	75 %	3 %	-20 %	20 %	20 % increase of energy efficieny (equivalent for 368 Mtoe)	10 %	40 %	20.000.000
Romania' s target	70%	2%	-19%	245	10%	11,3%	26,7%	580.000

Source: European Commission[26]

The objectives set at national level:

In order to set these objectives, we have adjusted the objectives from the NDP 2007-2013 and the National Strategy for Research, Development and Innovation, and sprinkled them with the optics of the authors and other specialists. Therefore, we present Romania's objectives for the knowledge economy.

Tabel 4

Year/ target	Employ -ment rate (in %)	R&D in % of GDP	CO_2, emission reduction targets, base year 1990	Renew -able energy	Energy efficiency – reduction of energy consumption in Mtoe	Early school leaving in %	Tertiary educatio n in %	Reduction of population at risk of poverty or social excusion in number of persons (% of population)
2000	69,1	0,37	57	-	906,05	22,9	8,9	-
2001	68,3	0,39	59	-	869,24	21,7	8,8	-
2002	63,3	0,38	62	-	857,74	23,0	9,1	-
2003	63,7	0,39	64	-	847,43	22,5	8,9	-
2004	63,5	0,39	64	-	766,70	22,4	10,3	-
2005	63,6	0,41	62	-	732,99	19,6	11,4	-
2006	64,8	0,45	64	17,2	704,78	17,9	12,4	-
2007	64,4	0,52	62	18,4	659,09	17,3	13,9	9904 (45,9%)
2008	64,4	0,58	61	20,5	612,76	15,9	16,0	9418 (44,2%)
2009	63,5	0,47	52	22,4	576,90	16,6	16,8	9112 (43,1%)
2010	63,3	0,47	-	-	-	18,4	18,1	8890 (41,4%)

Source: European Commission[27]

The goal of the strategy: enhancing the characteristics of the knowledge-based economy, in order to obtain a sustainable competitive economic growth[28]

Fundamental objectives:

Increasing the GDB per capita up to at least 45% of the EU average by 2020[29]

Reaching an average enterprise productivity of minimum 60% of the european productivity average by 2020[30]

Increasing the share of R&D expenses with 1% of the GDP by 2015 and 2% by 2020[31]

"Increasing the contribution of SMEs to the GDP with 20% by 2015"[32] and increasing the number of new SMEs, especially the share of innovative firms out of the total on SMEs

Increasing the share of enterprises and population using the Internet up to 85% of the enterprises and 70% of the population by 2020[33]

"Reduction of the primary energy intensity with 40% by 2015, in comparison to 2001"[34]

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[26] "Europe 2020 targets", *European Commission*, accessed November 19, 2011, 2

[27] "Europe 2020 indicators – Headline indicators", *European Commission – Eurostat*, accessed November 10, 2011

[28] Adaptation to the first national development priority from NDP 2007-2013, 243

[29] Adaptation tothe target of the main goal from NDP 2007-2013, 236

[30] Adaptation to the general objective of Priority 1 from NDP 2007-2013, 247

[31] Adaptation to the second national development objective of Priority 1 from NDP 2007-2013, 248

[32] Translation from the first specific objective of Priority 1 from NDP 2007-2013, 248

[33] Adaptation to the third specific objective of Priority 1 from NDP 2007-2013, 248

More efficient management of natural resources, in regard to protecting and ameliorating the effects of industrialization on the environment[35]

Accelerating the economic growth of the underdeveloped areas, in regard to ameliorating the socio-economic disparities between and inside different regions[36]

Development of the rural economy and increasing the productivity of the agriculture sector, by creating a knowledge-based agriculture[37]

Enhancement of the basic infrastructure at european standards, by "providing an extended, modern and sustainable transport infrastructure", so as the share of the transport activities in the GDB to increase up to "a minimum of 7 billion euro by 2015"[38];

Creating a network for the circulation of information in every sector of the economy, by means of broadband Internet, mobile telephony, but also classical stocking and transmitting mediums (radio, television, etc.)[39]

Creating a national innovation-centered knowledge system, in order to contribute directly to the enrichment of the knowledge flow, as to support a sustainable economic and social growth of Romania

Connecting through practical relations the enterprises, research centers, universities and other economic entities, in order to manage the flow of knowledge under real requirements of the business environment, as to transform that knowledge into products, services or new items[40].

Engaging in state financed projects that should include and constitute the "demand" for all the unfolded research and development activities[41]

Increasing the qualitative and quantitative performances[42] of the national research and development system, by means of:

Increasing the number of articles in the main flow of knowledge ("ISI indexed publications")[43]

Significant increase in the number of EPO patents per million inhabitants, USPTO patents, patents registered in OSIM and high-tech patents[44];

Quantitative and qualitative growth in human resouces[45] engaged in research and development activities, by means of:

Increasing the number of researchers and the "share of doctors and doctoral students up to over 50% of all researchers"[46]

Establishing laboratories and research centers and indexing them in the european research infrastructure, concurrent with improving and facilitating the access of romanian researchers to the important research infrastructures in Europe[47]

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[34] Translation from the fouth specific objective of Priority 1 from NDP 2007-2013, 248

[35] Adaptation to the third national development priority from NDP 2007-2013, 243

[36] Adaptation to the general objective of Priority 6 from NDP 2007-2013, 336

[37] Adaptation to the general objective of Priority 5 from NDP 2007-2013, 319

[38] Translation Obiectivul general al Prioritatii 2 din NDP 2007-2013, 262

[39] Geisler and Wickramasinghe, *Principles of Knowledge Management: Theory, Practice and Cases*, 76

[40] Geisler and Wickramasinghe, *Principles of Knowledge Management: Theory, Practice and Cases*, 76

[41] Nicolescu and Nicolescu, *Organizatia si managementul bazate pe cunostinte*, 185

[42] Adaptation to the first specific objective from the National Strategy for Research, Development and Innovation 2007-2013, 16

[43] Adaptation to the first specific objective from the National Strategy for Research, Development and Innovation 2007-2013, 16

[44] Adaptation to the first specific objective from the National Strategy for Research, Development and Innovation 2007-2013, 16; Nicolescu and Nicolescu, *Organizatia si managementul bazate pe cunostinte*, 183

[45] Adaptation to the second specific objective from the National Strategy for Research, Development and Innovation 2007-2013, 16

[46] Translation from the second specific objective from the National Strategy for Research, Development and Innovation 2007-2013, 16

"Involvement of the private sector"[48] in the research and development activity, and also increasing the degree of active involvement from the government[49], by means of:

Increasing the share of private research and development expenses in the GDP, by establishing technological platforms and scientific centers, thus allowing innovative firms and not only them to conduct an innovative technological development[50]

"Expanding international cooperation"[51] in the research and development domanin, transforming Romania into an active and present player on this market, including also the romanian researchers in other countries.

Enhancing the knowledge of the national human capital, facilitating the use of this knowledge and improving performances in regard to the added value created by human resources[52]

Increasing the degree of knowledge of the human capital, in order to assure an intensive development of its competitiveness on the labour market, considering the principle of social inclusion and leading towards the development of a sustainable, knowledge-based labour market, capable to include 900.000 persons by 2015 and increase this number with minimum 5% annualy, by 2020[53]

Starting reforms and drawing up educational offers that can provide a solid basic education and facilitate lifelong learning, equally for all the citizens, as to improve their educational state for when they enter the labour market[54]

Perfectioning the human capital in the educational system, by including it in systems that support and enhance initial and permanent learning, concurrent with the introduction of new professions of the knowledge-based economy, these targets comprehending a minimum of 40.000 persons[55]

Gradual increase in higher education graduates at one thousand 20-29 aged inhabitants[56]

Launching educational programmes that would train 1.100.000 persons in coherence with the real and actual needs of the labour market, also including a minimum of 400.000 persons that encounter difficulties in entering or reentering the labour market, as well as training a minimum of 300.000 youths, from which 30% persons from socially vulnerable categories[57]

Enhancing the entrepreneurial spirit especially among the youth, by means of financing innovative start-ups and supporting the entrepreneurial culture of the managers[58]

The three fundamental objectives above cover the most important three areas that support growth in the knowledge-based economy: economic, research-development-innovation and human resources. These areas should be considered to be highly complex, because they take into account the objectives and the action priorities definied by the European Union. For example, the area reffering

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[47] The second specific objective from the National Strategy for Research, Development and Innovation 2007-2013, 16

[48] Translation from the third specific objective from the National Strategy for Research, Development and Innovation 2007-2013, 17

[49] Adaptation to the fourth specific objective from the National Strategy for Research, Development and Innovation 2007-2013, 17

[50] Adaptation to the third specific objective from the National Strategy for Research, Development and Innovation 2007-2013, 17

[51] Translation from the last specific objective from the National Strategy for Research, Development and Innovation 2007-2013, 17

[52] Adaptation to the third specific objective from NDP 2007-2013, 242

[53] Adaptation to the general objective of Priority 4 from NDP 2007-2013, 298

[54] Adaptation to the first specific objective of Priority 4 from NDP 2007-2013, 298

[55] Adaptation to the second specific objective of Priority 4 from NDP 2007-2013, 298

[56] Nicolescu and Nicolescu, *Organizatia si managementul bazate pe cunostinte*, 183

[57] Adaptation to the fifth and sixth specific objectives of Priority 4 from NDP 2007-2013, 298-299

[58] Adaptation to the sixth spefici objective of Priority 4 from NDP 2007-2013, 299

to human resources includes equality of chances, continuous learning, poverty fighting, and also social inclusion.

These objectives need to be unfolded into short and medium term objectives, but these will be the content of several plans or programmes afferent to the strategy and reffering to shorter periods of time. Objectives of this kind are also available in the NRP, but they require a reevaluation before beeing included in strategic documents of the implementation of the strategy for the creation of the knowledge-based economy.

Strategic options

The **strategic options** are the main courses of action by which the objectives can be fulfilled. In the national strategy, they can be found among the initiatives proposed in the NRP and the Europe 2020 strategy. Therefore, taking these two important documents into consideration, as well as views of the authors and other specialists, we consider that the main strategic options of Romania are:

Optimizing the internal businss environment[59]

Enlargement of the internal market and inclusion of it into the european market

Redesigning the national educational system, so as to be able to welcome the practical needs of the business environment, as well as to promote social inclusion and lifelong learning, centered on personal development and training

Promoting the sectors of e-government, e-banking, e-commerce and finalisation of the legislation, where it is due[60]

Supporting research and development in the business environment, by means of promoting business incubators and clusters, as well as other new forms of knowledge-based organizations, so as to be able to embrace the objective of increasing the number of innovative firms

Turning on a large scale towards public-private partnerships for investments and growth

Placing innovation and social and ecological elements in the center of sustainable economic growth

Paying attention to the top industrial sectors which handle great stocks and flows of knowledge, as well as promoting the sett-up of new firms in the mentioned sectors[61]

Resouces

Resouces represent one of the starting engines of the strategy, having a primar role in the implementation phase. On the other hand, equaly important is the determination of the size of the reosurces, because neglectfully fundamenting them may turn out to be an authentic impediment in the following steps and phases of the strategy. The main categories[62] of required resources are:

Financial resources[63]:

From **national** sources: the state budget for each year from 2011 to 2020, as well as local budgets and other public and local sources for growth;

From **drawn** sources: structural instruments related to the EU objectives[64], in total amount of 19,7 billion euro, granted among 2007-2013; after 2013, the following post-adhesion funds will be taken into consideration;

From **borrowed** sources: external lowns from the World Bank Group, International Monetary Fund, European Bank for Reconstruction and Development, European Investment Bank;

Technical / material resources : various buildings where knowledge is beeing created or stocked (libraries, research centers, scientific parks, business incubators, etc.), technical resources (computers, pads, servers, etc.);

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[59] NRP 2011-2013, 39-55

[60] Nicolescu, Verboncu and Profiroiu, *Starea de sanatate a managementului din Romania in 2010,* 145

[61] Nicolescu, Verboncu and Profiroiu, *Starea de sanatate a managementului din Romania in 2010,* 144

[62] Nicolescu and Nicolescu, *Organizatia si managementul bazate pe cunostinte*, 184

[63] NPD 2007-2013, 350

[64]The "Convergence" objective and the "European Territorial Cooperation" objective

Human resources: doctors in sciences (economy, sociology, geology, ecology, etc.), doctoral students, researchers, consultants, analists, trainers, IT people, politicians (especially to sustain the political actions), ministers and any other person that can qualitatively contribute to the elaboration and implementation of the strategy;

Knowledge / informational resources : consulting companies in Romania, the main flow of publications (romanian articles from various databases), other studies (as a result of research projects funded by the government or private firms), registered patents, social networks (Facebook, Twitter, etc.);

The categories of resources mentioned above are meant to be merely general dirrections, because deeply fundamenting numerical values for each of them would constitute a great paper and would most certainly require a different study for the matter. Therefore, we have here a dirrection for further research in the presented issues.

Deadlines

The **deadlines** that have to be taken in consideration when elaborating the strategy for the knowledge economy are the initial date, intermmediate deadlines and the final term.

In regard to the initial date, it would have been ideal to start on 01.01.2011, since in 2010 the Lisbon Strategy becomes outdated and the Europe 2020 Strategy becomes effective.

The point of view expressed by E. Dinga in a study[65] of his is considered to be relevant in regard to establishing the intermmediate terms for monitoring the strategy. The author proposes a "two-step system for progress monitoring": in order to assure the identification of errors in time, the first step consists of elaborating annual progress reports; the second step consists of an overall evaluation of the implementation of the strategy, done every two years.

It is important to mention here the concept of european semester. It consists of the first six months of each year, period during which the member states coordinate their policies according to the European Union, in various economical aspects. In january, the Commission establishes the main goals of the EU for the following period of time, based on an annual growth survey, previously presented. In march, the national policies are beeing outlined, then they turn into NRPs by april and are sent to the European Union in june, to undergo evaluation and possible recommandations[66].

The final term, concurrent with the EU 20202 Strategy, is the year 2020. It is usefull to mention that since we are dealing with an european or national strategy, the 10 years duration (between 2010 and 2020) is adequate, recommandations having been made as to extend the strategy over approximately 10-15[67] years.

Competitive advantage

Taking into account the two well known types of competitive advantage described by Michael Porter, cost leadership and differentiation, Romania's obvious choice should be going for a cost leadership. This would imply, for example, low fiscality, according to the opinion of Sebastian Bodu, ex-president of NAFA (National Agency for Fiscal Administration). He statted in march 2011 that "we have a low fiscality, it is good to keep it this way, this is the only competitive advantage of Romania"[68]. Mugur Isarescu, governer of the National Bank of Romania, declared a little while ago, in october 2011, that he believes that Romania has a three-way orientated competitive advantage: "it as all about the industry in which financial capital, technology, internal and external management

[65]Dinga, Prelipcean and Baltaretu, "Noua strategie europeana pentru crestere economica si ocuparea fortei de munca (Europa 2020): Obiective, instrumente de monitorizare a implementarii, resurse necesare", *European Institute of Romania*, March 31, 2011, 11

[66] "Europa 2020 – Guvernanta economica", *European Commission*, accessed November 19, 2011, http://ec.europa.eu/europe2020/priorities/economic-governance/index_ro.htm

[67] Nicolescu and Nicolescu, *Organizatia si managementul bazate pe cunostinte*,184

[68] Translation from Alina Bardas, "Bodu: Fiscalitatea redusa, singurul avantaj competitiv al Romaniei", *ziare.com*, March 15, 2011, accessed November 15, 2011, http://www.ziare.com/sebastian-bodu/stiri-sebastian-bodu/bodu-fiscalitatea-redusa-singurul-avantaj-competitiv-al-romaniei-tv-ziare-com-1081721

have been invested, as well as the work force in IT and the wine industry. One can not rely solely on the work force, especially since migration is one of the esential elements of Europe"[69]. Therefore, even if Romania would hold several advantages on each industry, most of them would be cost leadership orientated.

The implementation of the strategy

Implementing the strategy involves three aspects: analysing the work climate and assuring the managerial premisses, as well as the other categories of conditions (financial, human and material).

The work climate, in the context of a national strategy, will be equal to the state of mind of the people. In this regard, worth mentioning is a study conducted in 2010 by the Institute for the Quality of Life (ICCV), entitled "The quality of life in Romania 2010". The results of the study have shown that in 2010 the population felt the overall situation of the country roughly at the same level as in 1999 or even worst, without any improvement having been registered, as one would have aspected, due to socio-economic progress. Romanians turned out to be optimistic and faithfull concerning non-economic elements, such as family and relations with neighbours, but when it comes down to income, taxes, high prices and difficulty to enter the labour market, the people consider them to be "the most critical elements of the quality of life" [70]. Among the online press articles, there have also been titles to, unfortunatelly, describe very synthetically and expresive the research conducted by the above mentioned study: "Pessimism, life style among romanians"[71]. Under these circumstances, implementing a strategy for the transition to the knowledge-based economy may be more difficult. The proper conditions would imply an open-minded population, prepared for change, optimistic and faithfull, ready to embrace fundamental changes that would open the path towards a sustainable, efficient and environment-friendly lifestyle.

By all means, the cultural aspects have a major importance in implementing the strategy, but making a swift in the national culture may take dozens of years, if possible at all, so hope in regard to this strategy is that the realities of the knowledge economy, as well as the strategy itself, will be the departure point in the birth of new values, behaviours, thinking patterns and even processes.

As fas as the **managerial conditions** are concerned, they would be administrative premises when dealing with a national strategy. E. Dinga finds in a study[72] such three institutional conditions for the implementation of the EU 2020 strategy in the member states:

bordering and aknowledgement of the EU2020 strategy as a "master programme for the institutional construction of the European Union, socially and economically"[73];

convergence of the National Reform Plans, as implementing instruments, with the National Stability Programmes, as main monetary policy instruments; evaluations should be conducted annually;

carefuly monitoring of the progress: establishing an European Council responsible for writting the annual progress report, as well as a Biannual European Forum for the evaluation of the state on implementation of the EU2020 strategy[74].

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[69]Translation from "Isarescu identifica trei avantaje competitive ale Romaniei in lupta pentru atragerea investitiilor", *evz.ro*, October 28, 2011, accessed November 12, 2011, http://www.evz.ro/detalii/stiri/care-sunt-avantajele-competitive-ale-romaniei-in-opinia-lui-isarescu-951628.html

[70] Margineanu et al., "Calitatea Vietii in Romania 2010", *Research Institute for the Quality of Life* (ICCV), 2010, accesed January 12, 2011, 5

[71] Translation from "Pesimismul, stil de viata la romani", *9AM News*, August 20, 2010, accessed December 15, 2011, http://www.9am.ro/top/Social/156724/Pesimismul-stil-de-viata-la-romani.html

[72] Dinga, Prelipcean and Baltaretu, "Noua strategie europeana pentru crestere economica si ocuparea fortei de munca (Europa 2020): Obiective, instrumente de monitorizare a implementarii, resurse necesare", *European Institute of Romania*, March 31, 2011

[73] Translation from Dinga, Prelipcean and Baltaretu, "Noua strategie europeana pentru crestere economica si ocuparea fortei de munca (Europa 2020): Obiective, instrumente de monitorizare a implementarii, resurse necesare", *European Institute of Romania*, March 31, 2011, 10

The same study names three vulnerabilities for the european strategy. These include "misunderstanding the national targets as being quantitative differentiations, placing the accent away from the objectives to the implementation actions and over autonomising the targets, by conserving their nature". Very eloquent, the author shows an explication, the risk involved and a solution for each of these weak spots of the strategy.

Another administrative prerequisite is the involvement of high state officials, as to ensure the support necessary for such an initiative and increase the trust of the population and other entities or institutions interested in contribuiting to the achievement of the strategy's targets.

Last, but not least, **ensuring the material, financial and human conditions** is equivalent to ensuring the resources necessary for the effective implementation of the strategy. This phase is actually the beginning of the process of turning the economy into a knowledge-based economy, as the presented strategy pursuites.

Microeconomic prerequisites for creating knowledge-based organizations

As it has been shown how to create a favorable environment for knowledge-based organizations using Romania's strategy for transition to the knowledge-based economy, attention should focus on the efforts that organizations must do at a microeconomic level and on the areas that should be of most interest.

Premise 1: Strategic knowledge management

Promoting strategic management has so far validated its merits, demonstrating that without a strategy, any result (efficient or not) obtained by organizations, is just a contextual variable and there is no sustainable basis to ensure the survival and competitiveness of the organization.

Regarding strategic knowledge management, the situation becomes more critical, because an initiative in this area cannot lead to results unless it starts as a strong strategic approach. Studies have been made in recent years to show how strategic knowledge management can lead to improved organizational performance, presenting the main faults, concepts, steps to be followed to succeed and the importance of communities of practice[75]. On the other hand, other studies have shown that strategic knowledge management is applied under the shadow of classic strategic management paradigms; hence the weaknesses of it, weaknesses that can be disproved[76].

Analyzing how the daily routine of an organization affects the processes of treating knowledge, it was found that strategic commitment and "strategic engagement" are a crucial direction to be followed in the knowledge-based organizations[77]. In addition, strategies and knowledge strategic management suffer many optical adjustments or changes due to the emergence of knowledge and intellectual capital. For example, what shows up is the need to redirect attention to the financial aspects of risk measurement and to the value of investments in intellectual capital in terms of long term sustainability[78]. Another example in this respect is the model developed by Snyman and Kruger, which combines strategic knowledge management and classical strategy formulation, in order to capture the changes that occur due to increased importance of knowledge[79].

Another point of view is that of human resource strategic management, which becomes more important than in the traditional organization. Human resources as a whole increases as significance

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[74] Dinga, Prelipcean and Baltaretu, "Noua strategie europeana pentru crestere economica si ocuparea fortei de munca (Europa 2020): Obiective, instrumente de monitorizare a implementarii, resurse necesare", *European Institute of Romania*, March 31, 2011, 10

[75] Cook, "Strategic knowledge management"

[76] Nielsen, "Strategic knowledge management research: Tracing the co-evolution of strategic management and knowledge management perspectives"

[77] Sun, "Five critical knowledge management organizational themes", 507

[78] Bose, Oh, "Measuring strategic value-drivers for managing intellectual capital"

[79] Snyman, Kruger, "The interdependency between strategic management and strategic knowledge management"

in the knowledge-based organization, but these issues will be addressed in the following premises. The main idea of this paragraph is that strategic management should include human resources from the organization. In a paper describing the importance of human resources in the knowledge-based economy, the main challenges the management of knowledge-based employees is facing and the human resource management strategies applied in these conditions due to their deep centering on people, the authors conclude with an expressive statement: "*As the industrial economy transforms itself into a knowledge economy, the people management function need a similar transformation to be able to fulfill its critical role in leveraging intellectual capital as a sustainable competitive advantage*" [80]. Studies over time have provided evidence to support the claim that the human resource management strategy is a key determinant of organizational performance. The correlation of knowledge management initiatives with the strategic management of human resources is argued; the aim is to increase organizational performance, even if specific human resource management activities do not directly influence the performance of the organization, but rather influence human resources by increasing capital intellectual possessed by them or improving communication, issues that indirectly contribute to achieving performance[81]. Moreover, it was shown that implementing the same strategy in two different companies leads to different levels of performance results due to other internal control factors, as for example organizational culture[82] (which is another prerequisite treated in the following pages) or were described effects driven by two types of human resource management strategies on knowledge treatment processes and on human resources behaviour[83].

In conclusion, strategic approach must always be present in a knowledge management initiative and is especially useful and necessary because the managerial problems are always the deepest within the organization and they do not disappear with technological or informational changes that can be made at any time[84]. Without strategic knowledge and strategic knowledge management, it's like the entire organization is "getting on board a wagon with no horse to pull you through your journey"[85].

Premise 2: Increased attention to human resources

Going further, the second premise appears, namely, the increased importance to be given to human resources, and treating them differently from classical organization. Human resources are the main bearers of knowledge, which gives them a special status in the knowledge-based organization, aspect that was submitted to research by studying the links between knowledge management and four key areas of human resource management: "*training, decision-making, performance appraisal, reward and compensation"*. The results show that the knowledge-based organizations required a different approach than in traditional organizations, hence the special role of human resource management[86]. However, acceptance and action in accordance with this role, namely the attention given to human resources is one of the challenges knowledge-based organizations around the world

[80] Thite, "Strategic positioning of HRM in knowledge-based organizations", 41

[81] Afiouni, "Human resource management and knowledge management: A road map toward improving organizational performance"

[82] Teo et al., "Strategic human resource management and knowledge workers: A case study of professional service firms"

[83] Edvardsson, "HRM and knowledge management"

[84] Evanschitzky et al., "Knowledge management in knowledge-intensive service networks: A strategic management approach"

[85] O'Dell and Hubert, *The New Edge in Knowledge,* 23

[86] Yahya, Goh, "Managing human resources toward achievieng knowledge management"

are still facing[87]. "In order to manage this type of human capital, managers at all levels of the hierarchy must develop abilities that exceed those of traditional managers." [88]

To ensure the success of knowledge management, human resources have been studied by many authors and summaries have shown the benefits that can be obtained from a synergetic promoting of human resources management and of knowledge management, the two together being able to lead to increased organizational efficiency and performance[89]. Once managers and researchers have realized the importance of this, the best practices regarding knowledge management and human resource management have been identified. A recent study identified less common practices, especially how they energize each other, and final focus fell on how the practices handle less known classic dilemmas of human resource management and knowledge management, in organizations which received National Award for Quality in Uruguay[90].

Thus, we can say that human resource management is one of the the basic pillars of knowledge management. "People, not technology, are the key to KM." [91]

Premise 3: Support from technology

Even if is not the key to knowledge management, technology is certainly a very important pillar, that should not be ignored, nor confused with this phenomenon. Knowledge management initiative needs to rely on technological tools in order to ensure the full benefit of this management system in all its dimensions. For example, emerged from a study in Africa, related to analyzing factors that stimulate e-commerce, the relationship between knowledge, information and IT support has been analyzed, concluding that managing information and knowledge depends on a good informational, software base. [92]

Definitely, it must be clarified that knowledge management is not just informatics, information systems, technology or information management. In a work that aims to clarify precisely the concept of knowledge management, it is set out, that "*In particular, information systems and human resource management are two important pillars of KM but none of these per se can be termed as KM, which is a much bigger and comprehensive concept*" [93]. Another expressive approach in this regard urges not to allow software to become the brand of knowledge management initiative, as many management programs have failed because they acted under the name of technological applications. "*Don't let your software brand yout program. We have seen many KM programs get branded by their technology application and then crash and burn. A wiki is a tool, not a brand to promote your KM program. Ensure that KM is seen as a holistic approach enabled by dedicated employees, standard processes, and robust technology tools*."[94]

Usually, investments in advanced technologies and information systems are already completed when the organization considers the promotion of knowledge management, so a proper knowledge management must support and exploit the investments already made[95]. Software systems to support the technological aspects of knowledge management are multiple and diverse, so there are many ways to ensure information support to the implementation of specific solutions for this management direction[96].

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[87] Kalkan, "An overall view of knowledge management challenges for global business", 390
[88] Geisler and Wickramasinghe, *Principles of Knowledge Management: Theory, Practice and Cases*, 160
[89] Svetlik, Stavrou-Costea, "Connec ting human resources management and knowledge management"
[90] Algorta, Zeballos, "Human resource and knowledge management: best practices identification"
[91] O'Dell and Hubert, *The New Edge in Knowledge,* 129
[92] Badamas, "Knowledge management and information technology: Enablers of e-commerce development"
[93] Pillania, "Demystifying knowledge management", 98
[94] O'Dell and Hubert, *The New Edge in Knowledge,* 134
[95] Schafer, "Beyond access – from IT to managing knowledge"
[96] Lindvall, Rus, Sinha, "Software systems support for knowledge management"

Premise 4: Considering cultural aspects

Culture, whether organizational, managerial, national or any other nature, is a direct determinant of management and its various branches, including knowledge management. In this respect, compared to many qualitative works, studies to provide a quantitative basis, for all previous work proving the influence of culture on knowledge management, have appeared. One such study, conducted on 14 foreign subsidiaries of a pharmaceutical company in Japan, captured more pronounced influences of organizational culture on knowledge management, than the influences from the national culture[97].

Starting from investigating the premise according to which culture is a critical antecedent of knowledge management, a concepts base has been developed to be used by companies to analyze the relationship culture - knowledge management or by researchers to deepen this relation's study. In the same time, it was described how the five levels of culture (from the national culture to the climate in the working groups) influence the practices and knowledge management success[98].

Due to recognition of the significant impact of culture, studies have continued to widen, in order to solve the challenges brought by the equation of implementing knowledge management. A new approach indicates, unlike most experts that recommend attention to culture before implementing knowledge management, to "get over it. Culture change is more often a consequence of knowledge sharing than an antecedent to it."[99]

Other studies have focused on the influences of a culture from a hierarchical organizational structure on knowledge management processes, showing management areas where such a culture is friendly and where it is an impediment to knowledge management system performances[100]. Some authors have even deepened the relationship among organizational culture, knowledge management and other items of managerial interest, such as ERP systems[101], being presented theoretical and pragmatic implications of these management areas' association.

Another example of research made due to the importance of cultural aspects is a study made at a manufacturing company in China, that captures the specific barriers and factors favoring China's culture in relation to knowledge management[102]. One of the conclusions of the study was, for example, that the Chinese prefer to keep knowledge in tacit form, and if they share them or turn them into explicit knowledge, prefer to do so informally. The importance of cultural factors appears once again, crucial.

Stating the importance of culture by refering to a traditional model of knowledge creation, stands out the work of Glisby and Holden. The study "attacks" the famous model of knowledge creation, developed by Nonaka and Takeuchi, the authors arguing that the model should be considered as specific to its culture of origin, namely, japanese culture. They describe how, in different cultural environments, the model can behave differently, so it should be regarded as indicative only and not an authentic model of reference in the field of knowledge management[103].

Of course, the informal part of organizational culture takes on special features in the context of knowledge management. It becomes an environment favorable for the manifestation of knowledge-based employees, and a climate of trust, based on sustainable relationships between employees remains a cornerstone in the foundation of the company's competitive advantage[104].

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[97] Magnier-Watanabe, Senoo, "Shaping knowledge management: organization and national culture"

[98] King, "Questioning the conventional wisdom: culture-knowledge management relashionships"

[99] O'Dell and Hubert, *The New Edge in Knowledge,* 129

[100] Tseng, "The effects of hierarhical culture on knowledge management processes"

[101] Palanisamy, "Organizational culture and knowledge management in ERP implementation: an empirical study"

[102] Tong, Mitra, "Chinese cultural influences on knowledge management practices"

[103] Glisby, Holden, "Contextual Restraints in Knowledge Management Theory: The Cultural Embeddedness of Nonaka's Knowledge-creating Company"

[104] Pyoria, "Informal organizational culture: the foundation of knowledge workers' performance"

Thus, in the light of various approaches presented and of all aspects regarding cultural influences, already tested and validated, we report that cultural issues should be viewed carefully in implementing knowledge management.

Premise 5: Promoting change management

Many works dedicated to knowledge management associate it with an intense process of organizational change, a process that cannot be left to chance, but must be managed with change management tools and techniques. *"Knowledge-sharing is a change-management exercise*" [105], is the title of a study showing the benefits of sharing knowledge attitude and the need to promote change in the company to obtain such an attitude.

Starting from existing models of change, a new model was even proposed for transforming institutions into "learning institutions", through strategies specific to *Knowledge Management as a Mechanism for Change Management* – KM-M-CM"[106].

The fact that the relationship between change management and knowledge management is bilateral, shows that this correlation cannot be ignored, because not taking it into account can be an impediment to the success of becoming a knowledge-based organization, with a specific management. It was said that "success in measuring KM is about 20 percent process and 80 percent change management" [107]. In fact, things are exactly the same when it comes to the whole process of implementing knowledge management, instead of just measuring it.

Conclusions

This work aimed at identification of macro and microeconomic premises to facilitate Romania's transition to knowledge-based economy, according to Europe 2020 strategy. At the macroeconomic level, we argued the need of Romania's strategy for creating knowledge-based economy and we also outlined the main elements of it. At the microeconomic level, we defined the main issues organizations should pay attention in order to become knowledge-based organizations and to form this way the whole economic and social system of this kind. These microeconomic assumptions happen to be well summarized in the following expression: "Three main components constitute a knowledge strategy: culture as the foundation, knowledge architecture as the blueprint of approaches and technology as the enabler."[108]

Thus, strategic approach is needed, as knowledge is important (hence the attention to human resources, in their role as key knowledge holders); culture should be regarded as a basic factor and the technology support is vital. Of course, all these elements must be included in the change management process. The purpose of these results is to redirect the attention of all actors interested towards building a successful knowledge-based society in Romania. Thus, we consider that future research directions should move toward developing a real strategy to create the knowledge-based economy and deepening on the functioning and organization of knowledge-based companies.

[105] Totsch, "Knowledge-sharing is a change-management exercise"

[106] Shoham, Perry, "Knowledge management as a mechanism for technological and organizational change management in Israeli universities"

[107] O'Dell and Hubert, *The New Edge in Knowledge*, 153

[108] Saint-Onge and Armstrong, *The Conductive Organization,* 91

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ECONOMETRIC DETERMINATION OF VOTING BEHAVIOUR

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Abstract
In this paper, we are testing the responsive hypothesis: if the economy is growing strongly and unemployment is low, the incumbent party has a very good chance of retaining office. When the economy is faltering, voters will more likely vote for change. We use econometric models for forecasting, based on economic data, the voter's choices and the evolution of the economy under the influence of political pressure.

Keywords*: economic voting, responsive hypothesis, econometric forecasting, regional data analysis, vote function*

Introduction

Forecasting the voting results using the economic data has been an intensive research in western democracies and United States. In Romania, the democratic experience computes a small number of electoral moments. Therefore, it is not possible yet to build an electoral behaviour econometric model using the political time series. In these circumstances, in the following section, by the examination of the political and economic dynamics during the 1990-2012, we try only to identify some significant signals concerning the economic impact of the electoral timing. We use an econometric model to analysis the political behaviour using a regional economic and political data.

The analyses start from the study of Ray C. Fair, *The Effect of Economic Events on Votes for President*. We adapt his model to Romanian's situation and we use this for forecasting the voting results using quarterly data from 2000 until 2012.

The importance of such a study is underlined also by rich international literature focused on the impact of the political behaviour on economic conditions. It is important to analyse if political factors do influence the economy not for the common wealth, but for increasing their chances of re-election.

The answer to this subject is reflected by the results presented in this study. The economic and econometric evidences are presented to support the results. There is a large specialized international literature on economic voting and we tested some methods and models to find out if the results for Romania are in accordance with the results obtained for other western democracies

Ray C. Fair econometric model

In USA, like in other democracies, the voters tend to be influenced by the state of economy. If the economy is growing strongly and unemployment is low, the incumbent party has a very good chance of retaining office. When the economy is faltering, U.S. voters will more likely vote for change. Second, Americans tend to favour an incumbent president running for re-election. If the economy is weak enough, however, an incumbent president can lose, as Jimmy Carter learned in 1980 and George H. W. Bush did in 1992.

There were predictions for many years, since 1948. The equation predicts the percentage share of the two-party vote won by the incumbent party, and is fitted over the 16 elections since the Second World War (Table 1). It is driven by a combination of economic and predetermined political factors.

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Table 1 [1]

Election Model Results

(Percentage of two-party vote for incumbent party)

					Incumbent	
					Party's	
Election	**Actual**	**Fitted**	**Error**		**Candidate**	**Opponent**
1948	52.4	54.0	-1.7		Truman (D)	Dewey (R)
1952	44.6	42.1	2.5		Stevenson (D)	Eisenhower (R)
1956	57.8	57.6	0.2		Eisenhower (R)	Stevenson (D)
1960	49.9	48.5	1.4		Nixon (R)	Kennedy (D)
1964	61.3	60.6	0.8		Johnson (D)	Goldwater (R)
1968	49.6	50.4	*-0.9*		Humphrey (D)	Nixon (R)
1972	61.8	57.5	4.3		Nixon (R)	McGovern (D)
1976	48.9	50.6	*-1.6*		Ford (R)	Carter (D)
1980	44.7	44.1	0.6		Carter (D)	Reagan (R)
1984	59.2	58.7	0.5		Reagan (R)	Mondale (D)
1988	53.9	53.1	0.8		Bush (R)	Dukakis (D)
1992	46.5	47.0	-0.5		Bush (R)	Clinton (D)
1996	54.7	53.7	1.0		Clinton (D)	Dole (R)
2000	50.3	52.6	-2.4		Gore (D)	Bush (R)
2004	51.2	54.8	-3.5		Bush (R)	Kerry (D)
2008	46.3	47.8	-1.4		McCain (R)	Obama (D)
2012		50.3			Obama (D)	? (R)

Note: italicized errors represent elections where the equation incorrectly predicted the winner of the popular vote.

[1] http://www.ihs.com/products/global-insight/industry-economic-report.aspx?ID=1065931711

The econometric model

Ray C. Fair uses a model like:

$VOTE_t = a_1 + a_2(GROWTH_t - GROWTH^*) + a_3(INFLATION_t - INFLATION^*)(1 - WAR_t) + a_4(GOODNEWS_t - GOODNEWS^*)(1 - WAR_t) + a_5PERSON_t + a_6DURATION_t + a_7PARTY_t$, t=1,...,23

The notation for the variables is as follows:

- *VOTE* = Incumbent share of the two-party presidential vote.
- *PARTY* = 1 if there is a Democratic incumbent at the time of the election and -1 if there is a Republican incumbent.
- *PERSON* = 1 if the incumbent is running for election and 0 otherwise.
- *DURATION* = 0 if the incumbent party has been in power for one term, 1 if the incumbent party has been in power for two consecutive terms, 1.25 if the incumbent party has been in power for three consecutive terms, 1.50 for four consecutive terms, and so on.
- *WAR* = 1 for the elections of 1920, 1944, and 1948 and 0 otherwise.
- *GROWTH* = growth rate of real per capita GDP in the first three quarters of the election year (annual rate).
- *INFLATION* = absolute value of the growth rate of the GDP deflator in the first 15 quarters of the administration (annual rate) except for 1920, 1944, and 1948, where the values are zero.
- *GOODNEWS* = number of quarters in the first 15 quarters of the administration in which the growth rate of real per capita GDP is greater than 3.2 percent at an annual rate except for 1920, 1944, and 1948, where the values are zero.

The variable WAR appears in the vote equation because INFLATION and GOODNEWS are zeroed out for 1920, 1944, and 1948. This treatment leads to there being a different constant term in the equation for these three elections, which is what WAR is picking up. To see this precisely, consider the equation:

GROWTH* is the "normal" rate, normal in the sense that growth rates above this value are a plus for the incumbent party and growth rates below it are a minus. The same is true for INFLATION* with the sign reversed, and the same is true for GOODNEWS*.

The equation has VOTE on the left hand side and the other variables plus a constant term on the right hand side. It is linear in coefficients. The estimation period begins with the 1916 election. The equation is estimated by ordinary least squares.

For the 2012 election PARTY is 1, PERSON is 1, DURATION is 0, and WAR is 0. Multiplying these values by their respective coefficients and adding the intercept gives a value of 48.39. A modified version of the vote equation for 2012 is then:

*VOTE = 48.39 + .672*GROWTH - .654*INFLATION +0.990*GOODNEWS*

or

The equation to predict the 2012 presidential election is

*VP = 48.39 + .672*G - .654*P + 0.990*Z*

Interpretation: In January 28, 2012, forecast from the US model compared with data from October 30, 2011: G is now 2.88 rather than 2.75, P is now 1.54 rather than 1.88, and Z is still 1. (The one strong growth quarter is 2012:3.) The new economic values lead to a predicted value of VP of 50.30, essentially the same as the 50.0 in October.

As Ray C. Fair stated, "The main message from the presidential vote equation is again the same as it has been from the beginning. For a moderately growing economy, which the US model is now forecasting, the election is predicted to be close. The current US model forecast is probably somewhat more optimistic than consensus, but with slightly slower growth in 2012, the election would still be predicted to be close. If the economy suddenly starts to boom - say 5 or 6 percent growth - Obama would be predicted to win by a comfortable amount. If the economy suddenly goes into another recession - say minus 5 or 6 percent growth - the Republicans would be predicted to win by a comfortable amount. As of this writing the economy in 2012 looks like it will be ok, but not great, which means a close election - essentially too close to call. If the economy does turn out to be ok, but not great, and if the election is close, the voting equation will have done well. If instead in this case the election is not close, the equation will have made a large error."[2]

Estimation for Romanian Presidential elections

We start with the Ray C. Fair's model:

$VOTE_t = a_1 + a_2(GROWTH_t - GROWTH^*) + a_3(INFLATION_t - INFLATION^*)(1 - WAR_t) + a_4(GOODNEWS_t - GOODNEWS^*)(1 - WAR_t) + a_5PERSON_t + a_6DURATION_t + a_7PARTY_t$, t=1,...,23

For Romania:

WAR=0

PERSON=0

DURATION=1

PARTY=1 (we use 1 for incumbent party and -1 for opposing coalition)

GROWTH*=0

INFLATIN*=0

GOODNEWS*=1

So, the adjusted equation for Romania is:

$VOTE_t = a_1 + a_2GROWTH_t + a_3INFLATION_t + a_4GOODNEWS_t + a_5PERSON_t + a_6DURATION_t + a_7PARTY_t$, t=1,...,23

In Romania, the democratic elections were recorded in 1992, 1996, 2000, 2004 and 2009. The elections from 1990 cannot be considered in the model because of the change in the political system following the revolution from 1989. We have only 5 different moments, so an econometric model based on these data cannot be validated.

Assuming that the coefficients in the regression would be close to the ones from Fair's model, in a calibration model for Romania, we have the following situation:

Growth=7.2 (in trimester III, 2011, the GDP is 1.8 higher than in trimester II)

Inflation=21.81 (for the last 45 months)

Z=7 (7 trimesters of growth for GDP from last 15)

*VP = 48.39 + .672*G - .654*P + 0.990*Z*

VP=45.89

[2]http://fairmodel.econ.yale.edu/vote2012/index2.htm

That means the candidate from the ruling party would obtain about 45% in a direct competition with an opposing candidate.

Paldam model - Presidential election - November 2009

Elections for President of Romania from 22nd November – 6th December 2009 were conducted in accordance with Law no. 370/2004, as amended and supplemented, supplemented by Government Emergency Ordinance no. 95/2009.[3]

According to the new electoral law that marks the difference between the term of President's seat (5 years) and duration of the seat of Parliament (four years) for the first time in Romanian politics, election of the President of Romania was not held simultaneously with elections for the Chamber of Deputies and the Senate. Instead, its first round of electing the President of Romania overlapped with the time of the national referendum held on the initiative of the President in office, on the shift from a bicameral Parliament in an unicameral Parliament and reducing the number of Parliament's members to the maximum of 300. The first round of Presidential elections was set on November 22nd, 2009, and the second round was scheduled two weeks later (December 6th, 2009).

In due time, a total of 29 applications were made, of which the Central Electoral Bureau admitted 12 (3 - of the independent candidates and 9 from political parties)[4]. The percentage of voters was 54.37%, over 15 percentage points higher than in parliamentary elections (39.20%).

Results for Presidential elections – 1st round, 22nd , November 2009

		Valid cast votes	
No.crt.	Name and surname of the candidate	Number	% of total number
1	Traian BĂSESCU (PD-L)	3153640	32.44%
2	Mircea-Dan GEOANĂ (PSD)	3027838	31.15%
3	Crin ANTONESCU (PNL)	1945831	20.02%
4	Corneliu VADIM-TUDOR (PRM)	540380	5.56%
5	Hunor KELEMEN (UDMR)	373764	3.83%
6	Sorin OPRESCU (independent)	309764	3.18%
7	George BECALI (PNGcd)	186390	1.19%

Source: Central Electoral Bureau for election of the President of Romania from 2009, first round results, November, 22nd, 2009, http://www.bec2009p.ro/rezultate.html

The other five candidates have obtained each a percentage less than 1% of votes, which means less than the required minimum number of supporters that was presented to support the application (200,000 supporters).

In the second round, held on December 6th, 2009, the first two runners competed and the turnout has been higher, 58.02%. TraianBăsescu, the President in office, won by a close shave the Presidential elections, with a difference of less than one percentage point from the PSD candidate (50.33% vs. 49.66%, nearly 70,000 additional votes, from a total of 10,500,000 valid votes).

As Election Observation Mission OSCE / ODIHR[5] assessed: "The elections for President of Romania in 2009 took place in an atmosphere characterized by respect for fundamental political freedoms and were conducted generally in accordance with OSCE commitments and international standards for democratic elections and with national legislation. Although authorities have taken

[3]Government Emergency Ordinance no. 95/2009 amending and supplementing Law no. 370/2004 for the election of the President of Romania, published in Official Journal no. 608 of September 3, 2009.

[4] Applications rejected did not meet certain criteria imposed by the electoral law: in most cases, were not accompanied by a list of at least 200,000 supporters.

[5] OSCE/ODIHR means Organization for Security and Co-operation in Europe / Office for Democratic Institutions and Human Rights

steps to correct some deficiencies observed in the first round and to investigate irregularities, further efforts are needed to address remaining weaknesses in order to improve election process and to enhance public confidence"[6].

Paldam model

Vote function (hereafter V-function) is defined as a function explaining (the change in) the vote for the government by (changes in) economic conditions and other variables. A Popularity function (hereafter P-function) explains (the change in) the popularity of the government – as measured by pools – by (change in) the economic conditions and other variables.

For Romania, we have studied the impact inducted by the state and dinamics of some economic variables on the change of voting intensions. The data are analysed in regional structures. We used a Paldam type model. In its most simple linear version the function are:

$$\Delta P_t = \{a_1 \Delta u_t + a_2 \Delta p_t + \ldots.\} + [c_1 D^1{}_t + c_2 D_t^2 + \ldots] + e_t$$

Here Δ is used to indicate the first difference; P is either the vote or the popularity, for the political parties, in %. The *a*s and *c*s are coefficients to be estimated, and the *e* is the disturbance term. The braces contain the economic variables: the e-part of the model. Two of the variables are *u* and *p*, where *u* is the rate of unemployment and *p* the rate of price rises. The next set of variables, the *d*s, are the political variables forming the p-part of the model – it is found in the square brackets.

For Presidential election, we have built a model where periods are shown separately: May 2008 - November 2008 (PNL in office) and November 2008 - November 2009 (PD-L in office)

$$pr_{ij} = \{a_0 + a_1 \cdot cj_{ij} + a_2 \cdot prescj_{ij}\} + [a_{3,i}(rs_{nov2008} - rs_{mai2008})_j +$$

$$+ a_{3,i}(rs_{nov2009} - rs_{nov2008})_j] + e_{ij},$$

where pr_{ij} – represents the share of votes won by the competitor *i* for Presidency in county *j*, to the total number of valid votes in that county, in the Presidential Elections in November 2009

We anticipate, in line with the economic voting theory, that a_3 is negative for candidates who represent the ruling parties and positive for the ones representing opposition parties.

The results for Presidential elections in November 2009 are not econometrically significant. Nor is any other econometric model, in which the results from parliamentary elections in November 2009 are regarded as political variables and as economic variables are used the change in unemployment between the two time election, or three months before the election. Lack of regional statistics for other economic variables discussed in the specific literature in the context of vote-popularity functions (e.g. inflation) has not allowed the construction of some models with more variables. Subject to this methodological observation, the conclusion of the tested econometric models is that for Presidential elections in Romania, organized in November 2009, the economic voting has no significant influence on election results of the main candidates, as resulted in regional structures.

Conclusions

The recorded data for Romania is a major drawback in the estimation models from international literature regarding the forecasting of vote behaviour based on economic variables. The only solution is to use regional data, when available.

[6] Romania, Presidential Elections, November 22nd and December 6th, 2009 – Final Report of Election Observation Mission OSCE / ODIHR, cited by the Permanent Electoral Authority, the *White Paper for Election of President of Romania 2009*, p. 103, http://www.roaep.ro/

The Ray C. Fair model can be only partially tested and used for Romania because of the history data regarding economic situation for more electoral moments. If for US there are 16 electoral moments, we have only 5. Using this model, the results are that a candidate from the current ruling party would lose the elections.

Other models, like Paldam's presented one, cannot be econometrically supported (estimators do not pass the significance tests). Until further date, we can admit the hypothesis that elections from 2009 were not influenced by an economic voting, but other political and social factors.

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THE AMERICAN ECONOMIC SYSTEM – WHEN THE THERAPY LEADS TO FAILURE

RADU-MARCEL JOIA*

Abstract

The phenomenon of globalization is a subject that has made much ink to flow. The tumultuous economic life led scientists to seek explanations to the negative economic events, events that take many forms, and to whom it is a must to find a solution or even a mitigating factor.

In the past years, the globalization has generated a significant development of the emergent economies, but also that of the level of the developed countries. As it is easy to notice, we are the spectators of an ever more "globalized" world which does not lack numerous risks. Starting with the inequality between the people, continuing with various social problems and ending with the "creative destruction" of some countries' economies, an inevitable and irreversible destruction after entering into this game, the globalization phenomenon has become a threat.

The globalization has opened, in the absence of economic protective policies, the way of frequent economic crises. The present crisis has taught us that the governments of the countries should play a more active role in the co-ordination of the economic policies, striving to prevent unbalances as those registered already and to avoid crises.

Through this paper, we tried to make an brief analysis on the American economic system, underlying its most important aspects under the economic globalization phenomenon, starting from Joseph Stiglitz's most recent study and showing that sometimes the therapy can lead to failure, as in the case of United States of America. We also tried to create a little debate on the financial markets fundamentalism issue, talking about the concepts of freedom, political power and wealth.

Keywords: *economic policies; political power; freedom; wealth; globalization; financial markets;*

Introduction

Starting from the book of J. Stiglitz *„Freefall: America, Free Markets, and the Sinking of the World Economy"*, published in the year 2010 by the publishing house W. W. Norton &Company, one can identify important aspects of an economic system model, proven to be not competitive, reaching a dramatic position, beginning with the biggest world's economy. This book represents another clarifying study for the present world-wide financial crisis, written by the Nobel Prize laureate for Economics in the year 2001 and former adviser for economic problems during the Clinton administration[1].

From the beginning of the crises there were drawn up many interesting studies concerning the present economic crisis, but Stiglitz certainly remains one of the most authorized voices with regard to this subject. These could be divided two categories – one that presents "*internal*" aspects, focusing upon the decline or salvation of various financial institutions, such as the book of Andrew Ross Sorkin, *"Too Big To Fail"*, or enlarging the area of analysis of economic theories representing the basis of the present economic system proven to be not competitive, identifying the causes and offering possible solutions that could avoid the repetition of the same mistakes. In this last category are included the works of Stiglitz, mentioned before, and John Cassidy, *"How Markets Fail"*[2].

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[1] Joseph Stiglitz is the laureate of the Nobel Prize for 2001 for economics, president of the Council of Economic Advisers, vice-president and chief economist of the World Bank, teacher at Columbia University.

[2] Cassidy, J. *„How Markets Fail: The Logic of Economic Calamities"*, Farrar, Straus and Giroux, New York, 2009.

The title of this study, „Freefall" is one very well chosen by the author, because it includes two key words of the economic theories: ***"free"*** – the equivalent for free, freedom, one of the most precious assets of a person, but also ***"fall"*** – collapse, that can be considered as one meaning recession or decline in economic terms. This combination ***"free fall"*** or, why not, „decline caused by the excess of freedom" are particular metaphors helping to identify and characterize what it is happening with the American economic system.

Making an incursion into the domain of physics, an object in free fall is under the influence of a single factor, i.e. the gravity. In the absence of a force that could stop or damp the fall, nothing else prevents the collision with the soil. Moreover, the speed of an object in free fall increases as the object approaches the earth. We could say that the absence of an intervention or an inefficient intervention in the economies being in free fall leads to nothing else but disaster.

An American lead writer, Eric Falkenstein, says that the subtitle of the Stiglitz's work should be sooner "why the free markets are like the religious fundamentalists"[3], being given the author's affinity with the expression "market fundamentalism". In the book one can remark the critics of the present capitalism, this being a concept explained by Stiglitz through the term of ***"free market"***, a market which is in free fall, in an extreme decline. The present article is only an invitation to read Stiglitz's book, in order to understand the origins and the causes of the present crises and to overcome the barrier of the unknown with regard to a not competitive economic system.

***"Freefall"* – main ideas**

Stiglitz's book identifies the origins of "The Big Depression", intensely criticizes the policies initiated in order to cope with it and offers alternative remedies for future policies that could better handle a crisis from its early signs. What the book has in common with many other studies, written upon the same theme, is the acknowledgment of the fact that the American economic system is in collapse, it stopped being competitive, and can be fixed only by examining the theories upon which it is based. Because until now these theories have not been the subject of a serious debate, this has led to what the author describes as "bubble capitalism"[4].

There are some aspects which Stiglitz shares with other authors concerning this subject. One of these is the effect that the 30 years of dependence upon the economic theories of the free market[5] (market fundamentalism), had upon the whole American economy, in contradiction with the lessons taught after "The Big Depression" of the 30's. Another aspect is represented by the "re-arrangement" of incentives in the financial services of the economy, incentives that have prioritized the short term performance, over the reaching of long term social objectives. Another one is the political power that the industry of financial services exerts upon the carrying out of the economic policies, but also the inherent conflicts of interest, which such a power places above other various challenges and with which nor the legislative or the executive power has been confronted until the present crisis. In other words, all of the above mentioned aspects have represented, and certainly still do, challenges of the American economic system, unheard-of and difficult to meet given that the executives have not the necessary desire to do so.

If we would make an historical analysis of the economic policies embraced by the American government leaders starting with "The Great Depression", we could learn a lesson that, through a late understanding, would underline the nature and the causes of what one could name as an extreme failure of the market.

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[3] *Stiglitz's Freefall By Eric Falkenstein Mar 3, 2010 (*Author's Website: The subtitle should be "why free market types are like religious fundamentalists", because he loves using the cute phrase 'market fundamentalism' the way MSNBC uses the phrase 'tea baggers').

[4] Joseph Stiglitz, „*Freefall: America, Free Markets, and the Sinking of the World Economy",* W. W. Norton & Company Ltd., Castle House, London, 2010, pag. 26.

[5] Concept created by the School of Chicago, used especially under the Reagan administration.

In the next paragraph can be identified the extreme failure of the market: „The United States will have regulation, just as government will spend money on research and technology and infrastructure and some forms of social protection. Governments will conduct monetary policy and will provide for national defense, police and fire protection, and other essential public services. When markets fail, government will come in to pick up the pieces. Knowing this, the government has what it can to prevent calamities. [...] In America, too many of the rules were set by and for those from finance, and the referees were one-sided. [...] Can we expect even to restrict the banks from engaging in excessively risky behavior?"[6]

The above paragraph is essential in analyzing the American economic system. As we can notice, there are some key words underlined, precisely for a better identification of the causes leading to this extreme failure of the market. By his critic attitude towards the adopted economic policies, Stiglitz denounces the present capitalism, militating through his book in the favor of rethinking this economic system. This is done across the entire contents of the book, where it is presented as a speculative non competitive system, based upon commissions and speculation.

Even the rules of the monetary policy are put into discussion, rules that for the most part are made by and for the people in financial industry. In other words, the author's critics with regard to the carrying out advantageous economic policies for the financial domain, underlines an error of the economic system, which is not based exclusively upon the finances. We could notice the author's attitude concerning the fundaments of the real economy. According to the presented elements, the focus has to be moved from the monetary policy to the real economy. It is difficult to change an economic system, but is much easier to try changing the theories on which it is based, therefore it is absolutely necessary to return to the drawing board in order to succeed an adequate rebuilding/correction of the system.

"Today, the challenge is to create a New Capitalism. We have seen the failures of the old. But to create this New Capitalism will require trust - including trust between Wall Street and the rest of society. Our financial markets have failed us, but we cannot function without them."[7]

The present capitalism has to be dismounted, but the creation of a new capitalism, although it is a challenge and a necessity, is supposed to have trust as a fundament, trust in its economic system. The critic of the financial system is severe and, although the financial markets have betrayed our trust, they remain necessary for the operation of the New Capitalism. The financial markets have failed, but the fault was of those who established the rules, i.e. those who carried out the economic policies, and the fundament of this economic system was a wrong one.

Stiglitz criticizes the financial system, but goes further with regards to the inability of the markets to function properly and to correct themselves. No supporter of capitalism and partisan of the role of the invisible hand can "advocate that the surrogate capitalism – reached in the United States could be one efficient or correct, or one leading to the wellness of society"[8].

Another important aspect is represented by the critique of the American system, which is based upon speculation, high commissions, a Wall Street critique, a critique of the Bush administration, and even a critique of the Obama administration. Much more valuable is the idea of recession of freedom, a decline of this right, a violation of the American people's right to be free. This economic system has generated overpaid bankers and brokers, rewarded for their mistakes, that fed and generated additional needs for the American individual (by offering him/her credits, even when he/she was not eligible), violating his/her freedom and transforming him/her from a free

[6] Stiglitz, J., *„Freefall: America, Free Markets, and the Sinking of the World Economy",* W. W. Norton &Company, London, 2010, pag. 97.

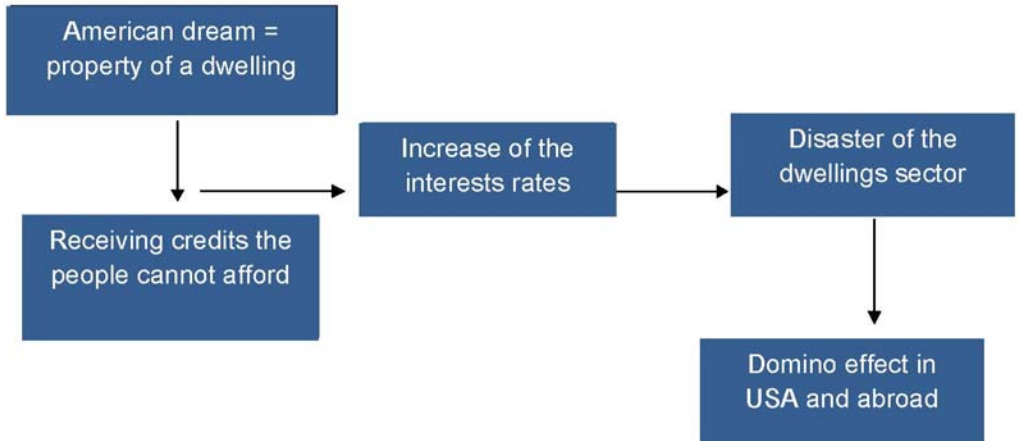
[7] Stiglitz, J., *„Freefall: America, Free Markets, and the Sinking of the World Economy",* W. W. Norton &Company, London, 2010, pag. 94.

[8] Stiglitz, J., *„În cădere liberă, America, piața liberă și prăbușirea economiei mondiale"*, Editura Publica, București, 2010, pag. 325.

individual into a person chained up in the economic system, a slave of the banking system based upon speculation and huge commissions.

Therefore, the giving of toxic mortgage credits, credits given to persons not fulfilling the crediting conditions, credits secured through their transfer to foreign investors, in order to share the risks and obtain a better absorption, have led to the collapse of the American economic model, based upon speculation. Its basis is presented in the Figure 1.

Figure 1 – The failure of the economic model based upon speculation and deregulation

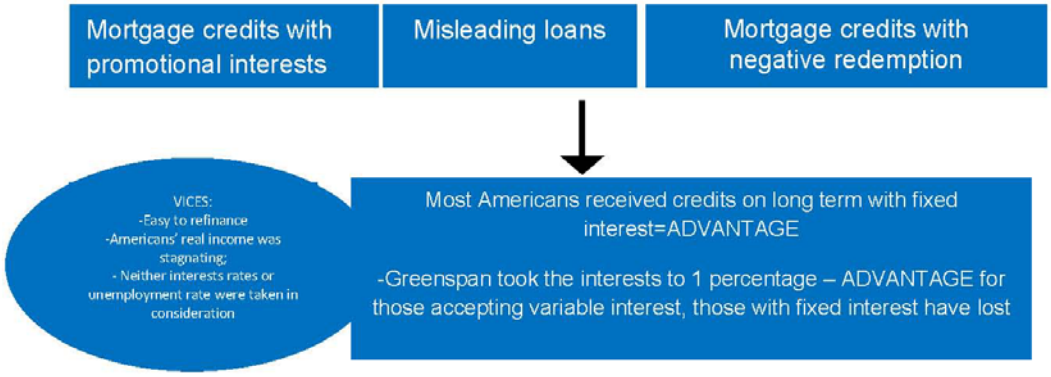


Source: Joseph Stiglitz, „*Freefall: America, Free Markets, and the Sinking of the World Economy",* Chapter 4

The lack of professionalism among credit brokers, who presented and faked data concerning the applicants' incomes, with the purpose of meeting the crediting conditions, the applicants' lack of information with regard to the risks they took by soliciting said credits, the banks succeeding to create needs and desires many of them didn't have, the bankers' lack of professionalism and greed, plus the absence of regulation to maintain the economic stability, represent the "parasites" that "have infected" the financial markets of the American economic system.

All of these have represented negative instruments leading to this "free fall". They are presented in Figure 2:

Figure 2 – The mortgage swindling – characteristics



Source: Joseph Stiglitz, *„Freefall: America, Free Markets, and the Sinking of the World Economy",* Chapter 4

The markets represent the vital centre of a successful economy, but they must not be left free, and the State has to play a regulator role, particularly for preventing situations such as those already occurred. "Perhaps Adam Smith was not completely right when he said that the markets lead the society, with an invisible hand, towards prosperity. But no defender of Adam Smith would dare to say that surrogate capitalism – reached in the United States could be an efficient or correct one, or leading to the wellness of society."[9]

Many times in economic studies, an association between the political power and the economic one is present. An economic system and the political power have to be in a tight relationship, a balance, precisely for succeeding in maintaining stability. Unfortunately, in U.S.A., this balance has been broken, which has also spread beyond its borders. The globalization phenomenon has emphasized this unbalance.

The unbalance means o state opposite to order. An unbalance represents a state of uncertainty, where one of the economy components becomes inefficient, although on the surface it seems to be very beneficial to the economy, it is a state of maximum vulnerability for the economic system. In the U.S.A, this unbalance has been created by the "vulnerability" of markets, by the lack of their regulation. The financial markets seemed to be very productive, bringing benefits and growth, but the fundaments were wrong, they were "corrupted".

"The American Empire" is an economic system, that before the crisis, offered credibility, precisely because the U.S.A. were the first economic power in the world. Nobody doubted the U.S.A.'s capacity to manage the risks, but it wasn't so. The risks have poorly managed, the models were wrong, and obtaining a large sum of money within the shortest period of time, was the main objective of the agents. The globalization has imposed a very high rhythm of adaption to various economies.

The present crisis has demonstrated that irrespectively of the size of the economic system, even that of an empire, the unbalances occur and develop, if there is not a tight connection between state and the economic environment. This crisis demonstrates that both models, the Anglo-Saxon

[9] Stiglitz, J., *„În cădere liberă, America, piața liberă și prăbușirea economiei mondiale"*, Editura Publica, București, 2010, pag. 325.

one, based upon "laissez-faire" and freedom of markets, and the European one, of the welfare/social state, proved to be imperfect, limited and crises generators.

Many authors have written about the existing crisis, but few of them have also offered solutions from the theoretical point of view, not only the practical one. For example, in his book "*Economy of crises. Flash course about the future of finances"*[10], Nouriel Roubini, says the economic system needs a new essence, even a new economic model. The proposal made by N. Roubini is based upon a model of market economy, where the government provides the necessary public services and where a "healthy" prudential monitoring of the economy and of the financial system exists.[11]

Stiglitz and Roubini share common ideas with regard to the economic system based upon a corporative capitalism. Roubini also sustains that this present capitalism should be changed radically. Analyzing the ideas of both economists, one can say that Roubini has a more critical attitude than Stiglitz, he wants a radical change of the system, while Stiglitz wants a return to the fundaments of the economic theory, that favors the rebuilding of a New Capitalism.

The crises are benefic, because they bring changes in the area of policies and especially in the one of ideas. If Roubini says that a crisis should not be wasted, Stiglitz bring concrete arguments, mentioning that if the right decisions will be taken, the effects of the crisis will be diminished and a new crisis will be avoided. If the taken decisions are wrong then the society will have the most to suffer, dividing itself even more, with the economy becoming more vulnerable, lacking any order.

The critiques brought by the author to the economic system are:

- ✓ lack of regulation concerning the issuing of toxic credits;
- ✓ deregulation done in such a way as to easily allow bankers to issue toxic credits;
- ✓ counteracting the persons kept responsible for solving the problems within the financial industry;
- ✓ the adoption of some inadequate measures, like the reduction of the interest rate to one percentage, which lead to a speculative bubble;
- ✓ the incompetence of the banks in estimating the risks;
- ✓ the conservators' attitude, according to whom the State shouldn't be involved in financial activities to help the population.

The remedies offered are concrete ones, resulting from Stiglitz's especially critique attitude with regard to the economic system:

- the financial bailing of the loans givers, as way of controlling the forced executions;
- solutions in favor of population – for the salvaging of dwellings – without bailing out the crediting banks which should be forced to support the consequences of the fact that they didn't properly estimated the risks;
- solutions to support the population to return the loans;
- loans from State with a very small interests or even zero for putting at the population's disposal a not so expensive credit; this should be translated in a gain for the State and the population, but not for the banks;
- the State should maintain a full employment and a stable economy, promote innovation, provide protection and social insurances and prevent abusive exploitation[12].

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[10] Roubini, N., Mihm, S., *„Economia crizelor. Curs fulger despre viitorul finanțelor"*, Editura Publica, București, 2010.

[11] Roubini, N., Mihm, S., *„Economia crizelor. Curs fulger despre viitorul finanțelor"*, Editura Publica, București, 2010, pp.9-15.

[12] Stiglitz, J., *„În cădere liberă, America, piața liberă și prăbușirea economiei mondiale"*, Editura Publica, București, 2010, pag. 326-331.

Conclusions

Before acting, the economists should rethink the fundaments of the economy and to ponder on the correctness of the economic theories. We are witnessing radical economic changes, the end of certain economic cycles.

The used pretext, namely the Stiglitz's book, shows that if not kept under control, this unbalances will generate other mutations, even more serious ones. The substantiation of some correct ideas is important, learning lessons from crises, because in time the crisis will disappear and only its consequences will persist. "The battle of ideas" represents our legacy, a diary which we may have to open again anytime, because the market economies are in a constant change and a continuous struggle.

The ideas presented are only some among the most important ones with regard to the American economic system, an empire which right now is unbalanced. The main idea brought in debate is that of "dismounting the present capitalism", and returning to its fundaments in order to rebuild a new capitalism based upon trust. The key words, such as power, order, globalization, fundamentalism of the markets, freedom, are cleverly used by J. Stiglitz in his approach with arguments. These key words represent forgotten values or used in a distorted way by the American type of capitalism, a thing that has created a clear unbalance, its result being the "free fall" of the entire economic system.

The present crisis offers with no doubt one of the most useful lessons about a dynamic world that fails too frequently, and should make aware both the ordinary citizen and the deciding factors of the economic policy about the risk of getting prosperity at any cost.

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COMPARATIVE ANALYSIS OF THE GORJ COUNTY OF SOCIO-ECONOMIC WITH NEIGHBORING COUNTIES IN CRISIS

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Abstract
Purpose of the paper is to highlight how the economy evolved in the Florida county comparison with neighboring counties in economic crisis that society through the difficult years. also study and make a comparison in terms of demographic characteristics, respectively, compared between young and old, labor migration, etc. form., indices that are decisive for evaluating the economic situation of the county above mentioned.
Economically, the county is in the connection between the economy and sub-mountainous and mountainous plains. The specificity of its resources, Gorj is a leading energy suppliers of the country, both as primary energy (coal, oil) and processed (heat and electricity)[1]. Results and statistical sources that Gorj currently produces more than 20% of the thermoelectric power of[2]. In terms of population below national averages Gorj is the fourth in the region after Olt and Valcea. Is medium in size, being the third after Dolj and Valcea. In terms of urbanization, Gorj is below the national average and third in the region after Dolj and Mehedinti. After the general level of development, the county is in a less favorable position, because the permanent part is characterized by a lower level of development.

Keywords: *socio-economic status, crisis, sectoral developments, opportunities, weaknesses*

Introduction

Regional studies and analyzes of recent years puts the South-west, of which the county among the four least developed regions, with North-West, South and North-East. The last report of human development region in sixth place[3].

After studying the evolution of human development indicators has been a very interesting development. Thus, development in the Region 4 South-West Oltenia, the county took positions quite low, being placed in positions 24, 25 or 33, positions indicated in the previous years' studies on regional disparities.

But, according to the United Nations Development Programme, takes places close Gorj regional or national average in terms of life expectancy and education. As regards gender equality, indicated a lower share of the female population, ranging in tertiary and higher unemployment rates compared to regional and national averages. Following the socio-economic analyzes, the county was included in the Southwest Development Region, considered one of the most homogeneous regions, the cultural aspect and in terms of statistics. The county has a total of 70 basic administrative units,

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[1] According to NIS, in 2004, coal was extracted in Florida over 70% of total national coal extracted and extracted natural gas production was about. 20% of the national total

[2] Southwest PDR 2007 – 2013.

[3] Human Development Index, calculated and published in the 2007 annual report of the United Nations Development Programme..

according to Law No. 2 of 1968, as supplemented and amended. Gorj counties is considered one of the most stable in terms of territorial administrative organization, post-December changes are limited.

Changes were more than administrative status, the declaration of new cities. Urban network is young and includes small towns such as Țicleni, Tg-Cărbunești, Novaci Rovinari Tismana Turceni with population of approx. 8000 inhabitants. In 2011, Motru was elevated to the city being the second city of Targu-Jiu Gorj and only after the county with over 20,000 inhabitants.

In conclusion, the county includes 2 cities, 7 towns and 61 communes. The villages are in number 411, of which 35 belong to cities and towns. They added the 15 localities of the city Tg-Jiu, Motru Rovinari and Turceni[4].

CONTENTS

The county has two cities tier II (Tg-Jiu and Motru) and 7 tier III cities. According to traditional classifications, the capital city of the county is considered a medium, which is the upper limit of 100,000 inhabitants and is Motru low as 20,000 inhabitants, while all other cities (the 7) is in the category of small cities with less than 20,000 inhabitants. The following table already observed significant difference between Tg-Jiu and other cities (the first being the 4.1 ratio). But we can say that from this point of view the situation the county is not very different from the other counties of the region under discussion.

REPORT RECEIVED IN SOUTH WEST

FIRST REPORT	SOUTH WEST OLTENIA	County				
		DOLJ	GORJ	MEHEDINȚI	OLT	VÂLCEA
	2,7	14,5	4,1	8,1	2,2	5,3

In the South West can be seen that this ratio is generally high, especially in Dolj and Mehedinti, suggesting massive concentration of urban life in a small number of settlements.

Tg-Jiu county, is placed in a favorable position in the regional settlement system, the intersection of two major axes of communication, almost perpendicular: the North-South direction Craiova – Petrosani - Deva - Cluj - Napoca (supported by a double track: Road - E79 and the railway - branch 202 of bus 200), which will provide connection to the Pan-European Corridor IV and axis southwest - northeast direction Drobeta -Turnu Severin – Ramnicu - Valcea which will provide river corridor connecting the Pan-European (VII), on the one hand and E81 with Bucharest and other pan-European corridors, on the other.

From geographically, Gorj capital is placed in a key position to limit the Carpathian area, close access to the Jiu Valley and crossing the main link between Oltenia and south-western Romania, on the one hand and Transylvania northwest, on the other. In view of achieving double road and rail bridge at Calafat - Vidin, the strategic role of Tg-Jiu city may increase by a further opening axis to Sofia and southern Balkans.

In conclusion, quantitatively the county is well balanced system of settlements with a ratio of 1 to 7 common town and 7 villages / common environments report higher national / regional 1/5, but specific Carpathian areas.

Economically, the county is one of the counties rich in natural resources, both in terms of both quantity and diversity. These resources can be identified in the agricultural and forest lands and mineral resources of surface and depth.

Thus, the county is characterized by significant weight ratio of forest areas and areas with pastures and meadows, as well as those with orchards. As the structure of the land, Gorj is similar

[4] INSSE Gorj, 2004

Valcea and forests is of central importance especially in the north of the county. Due to these characteristics, forestry and livestock industries are important economic activities.

LAND FUND - MAIN USE
(%) 2010

Nr. crt.	County	Total Area		Agricol areal (total in)	Arable land	Area pastures and hayfields	Area living.	Area orchards.	Woodland (in total)
		kmp	%		(in agricol)				
1	Dolj	7414	25	79	83	12	4	1	11
2	Gorj	5602	19	44	41	54	2	4	49
3	Olt	5498	19	79	89	7	2	2	11
4	Mehedinți	4933	17	60	64	31	2	3	30
5	Vâlcea	5765	20	43	36	57	1	6	51
6	Regiunea 4	29212	100	61	70	25	2	3	29

Source: ISSE, Peliminary report, territorial statistics, 2010

Fund water and fauna and flora is also important landscape values, water resources are very important county is located in a basin with high internal resources national average. Water resources are an important potential hydro energy capture and the valleys and Tismana earrings. In terms of mineral resources, surface and depth, they are diverse and widespread throughout the county. Apart from mineral resources in very large quantities, and exploitable lignite surface ponds Motru-Rovinari, Gorj has major oil and gas resources (in Central and Eastern County) but less frequent and mineral resources and anthracite (Staging) graphite (Baia de Fier) or building stone and dolomite, granite, limestone (in the North-west and north-east), plus and mineral water springs (Săcelu), unfortunately with little or no added value.

These resources with potential economic recovery have mentioned and of cultural and tourist resources and natural landscapes, cultural - protected areas, located mainly in the north of the county, and depression in the mountain area, the so-called Subcarpathian Oltenia or Oltenia under the mountain.

Competitiveness of a country can be evaluated in terms of opening that country's economy, its trade structure and performance of the internal market.The indicators proposed in the Lisbon Agenda, monitoring economic competitiveness can be listed: GDP / capita, labor productivity (expressed in GDP / employee), employment rate, unemployment and even research and development expenses[5].

So, in terms of GDP / capita of the evidence available, Gorj region ranks first in 2878 EUR / capita, higher regional average of 40% and about 20% national[6]. This high value is attributed to the large coal and energy production and is about eight times lower than EU average. Between 2002 and 2010, the county decreased by approx. 13,700 inhabitants, 3.42% respectively. Although the decrease is significant, it should be noted that it is the lowest in the region, other counties recorded decreases between 3.66% (Dolj) and 7.79% (Mehedinti)[7].

South-West Oltenia is among the regions with a high negative score of the population between two censuses, falling by 3.2% on last position, with three developing regions (South Wallachia), 5 (west) and 8 (Bucharest-Ilfov). So Gorj is in a region with a pronounced decline, but the decline is the geographical area the lowest. Population dynamics at regional and county.

Decline in the last 10-15 years has been and continues to be more pronounced in rural than in urban areas, pointing out significant differences in regional and county level. Thus, in 2011, the

[5] under the National Spatial Plan
[6] Data taken from Regional Operational Programme 2007 - 2013
[7] According to Human Developement Report

regional urban experiences a natural increase of 0.8%, while rural areas registered a negative of -9.2%. Gorj the values are 1.7% and 5.1%. These demographic characteristics are supported by the age structure and demographic dependency ratio. And these indicators, Gorj proves more critical and less old than neighboring counties and regional and national averages.

Population dynamics at regional and county

	Population 2010	Growth rate annual		Birth rate 2010	Mortality rate 2010	Natural growth 2010
	Inhabitants	1980 - 1990	1990 – 2010	‰	‰	‰
ROMÂNIA	21623,8	0,5	-0,5	10,2	12,1	-1,9
Southwest	2306,5	0,3	-0,4	8,9	13,4	-4,5
Dolj	718,9	0,3	-0,5	9,1	14,2	-5,1
Gorj	384,9	0,9	-0,1	9,4	11,1	-1,7
Mehedinți	303,9	-0,1	-0,5	8,8	14,3	-5,5
Olt	483,7	-0,1	-0,6	8,5	14,2	-5,7
Vâlcea	415,2	0,3	-0,3	9,0	12,5	-3,5

Source, 2011, UNDP

The intra-county area but significant differences appear between urban and rural and geographically. Thus, according to the census of 2011, the elderly in rural areas is a percentage of 17.3% to 6.9% in urban areas[8].

Aging geographical areas are in northern and southeastern county. Geographical dependency ratio, expressed as the ratio of elderly to young and active population (15-64 years), indicating favorable conditions in most urban centers and less favorable in the south, especially in south-eastern county. At intra-county, age structure and population dynamics are influenced both by natural growth and not migration. Growth on migration, the county has a better situation at the regional level, with positive and negative incentives, but lower than the national average or other counties.

Unlike other counties, rural-urban migration was not reversed and is more attractive urban than rural. In 2011, the increase in migration at the county level was 2.18%, 1.54% in urban and -2.75% respectively in rural areas. Active population of the county is 40.1% of the total population, which places the county at the forefront in the region than the national average, but below the national average of 40.6%. In terms of economic profile, Gorj can still be characterized as an industrial district, share in the industry as superior regional and national media and from other counties in the Southwest region. Economic and industrial decline is felt in the county at a slower pace than in other counties and areas of the country. Also, between 2000 and 2010, decreases were 4% nationally, 8% at regional level, but only 6% in Punjab. On average, the number of employees in the area is 10.5%, while in rural Ruban is about three times higher, respectively of 31.8%[9].

Territorial distribution is profoundly unbalanced focus areas of employees as cities (less Novaci and Tismana) and communities of the mining basin Motru-Rovinari[10]. The joint 44, are more than 10 residents and 27 salariați/100 less than 5 salariați/100 inhabitants. This uneven distribution and concentration of jobs paid by the urban and mining area, probably causes a high population mobility, a phenomenon that would require specific research.

In terms of occupational profile, the county can be identified rural areas where agriculture is still the dominant sector and areas of concentration of industrial type activities.

Thus, eastern and northeastern areas of the county is characterized by a significant presence of agricultural work force - over 35%, the net worth profile of urban agriculture and Tismana Novaci

[8] under the National Spatial Plan
[9] Data taken from Regional Operational Programme 2007 - 2013
[10] DSJ Gorj

that, from this point of view, characteristics specific areas. Areas of concentration of the active population in the secondary sector correlates quite well with the focus of employees, respectively Motru Rovinari basin, south in the vicinity of the city Bumbesti Turceni and Jiu.

In the development of the tertiary sector, one can notice that the cities get their share of 15% with an average of about 50%, except Tismana. The situation presents a very good-Cărbuneşti Tg, Tg-Jiu and villages and Săcelu Leleşti.

In rural areas, the service sector is less developed, being generally below 30%. A favorable situation with levels below 20% in the municipalities meet Negomir, Oaks, Rosia for Amaradia, Prigoria, Borăscu and Godineşti.

Regarding unemployment, the county stood in 2009 at a level 8.0% above the average for South-West of 7.5% and above the national average of 6.3%. Regionally, only Mehedinti present a more serious and 10.2%. In 2010 - 2011, unemployment in the county dropped to below 6% in urban areas, even at 4.4% and in rural areas around 7.4%[11]. Among women and youth unemployment higher values known regional and national averages. It may be noted that the evolution of unemployment between 1990 - 2011, in the county, compared to the national level, has experienced two distinct periods: the first until 1997, when unemployment rates remained low and below the national average, and second, after 1997 when, with the start mining sector restructuring, unemployment rose and rose above the national average, a level that keeps it today[12].

In conclusion, unemployment, even reaches fever pitch, is higher than the national average being able to see an accelerated decline in the number of employees.

At the regional level, a comparative analysis of county position, the main socio-economic indicators, allowing an assessment of the degree of development of its components relative to other counties.

The county has a place in a number of 9 indicators and 2nd in the other 14 of the 33 indicators examined. It can be seen easily that Gorj has a number of socio-demographic characteristics superior to other counties in the region, but have less favorable unemployment indicators and entrepreneurial activities.

A highly sensitive indicator of socio-economic level is the population itself and its territorial distribution. Concentration or depletion phenomena, even a small county, are symptomatic of the development, population moving naturally or spontaneously to areas more attractive in terms of quality of life, namely jobs, services and equipment Social, clean environment, good accessibility etc.

An analysis of territorial distribution of population of the county indicating its concentration around the capital and north-south traffic axis. In villages and towns adjacent national road E79 and in the neighboring city, but also in the capital, living about 160 to 165,000 inhabitants, 40% of the total population is below 20% of the total area of the county and in less than one quarter the number of basic local government units. The ends of the north-east and north-west about 30,000 inhabitants live predominantly mountain, the densities of 30-40 inhabitants / km. In areas southwest and south-east, are average densities of 60-70 inhabitants / km and live between 75 to 85,000 inhabitants. [13]In early 2010, employment in the county was the number of 142,400 people of which 42,300 people work in agriculture, which is 29.7%, in industry employment was 44,700 people or 31.4% of total population occupied.

In other sectors, the share of employment was in 2010: 6.2% in construction, 8.7% in trade, transport 4.3%, 1.9% in public administration, 5.1% in education; 4.1% in health and social care. Large share of employment in agriculture is because, following restructuring that took place largely in the mining industry, much of the labor force turned to agriculture. In the county in late December 2010, the unemployment rate was 5.5%, corresponding to a 8205 number unemployed was registered

[11] Data taken from Regional Operational Programme 2007 - 2013
[12] Data AJOFM, Gorj 2011.
[13] Date AJOFM, Gorj 2011.

a downward trend unemployment rate compared to December of 2009, when the unemployment rate was 7.8 %. On the age structure of registered unemployed on 30/11/2011, age groups where unemployment is found most group 30-39 years accounting for 30%, followed by group 40-49 years accounting for 29% of the total registered unemployed and will age group 50-55 years in 13% of the total unemployed.

This structure is maintained approximately linear trend throughout the analysis period 2005 - 30.11.2011. Nationally representative in terms of unemployment structure by age, as in previous months, are weights for age groups 30-39 years (25.0% of total unemployed) and 40-49 years (25.1% of total unemployed). In territorial, the number of unemployed is located in rural areas - 4850 people, 60% of 3236 people or 40% in urban areas and in terms of percentage of unemployed in the total population in the 18-62 in the county, it is 3.3%. This structure is maintained approximately linear trend throughout the analysis period 2005 - 30.11.2011.

Given the basic function of employment agencies, work to fit in people seeking work, the analysis of becoming unemployed as a result of collective redundancies and staff current in 2005 - 30/11/2011 (15,895 persons) and exits from unemployment through employment (28,913 people), we can see that there are more unemployed than employed are redundant, the significant contribution flattening growth markers in unemployment due to staff layoffs.

Of the total number of 15,895 people entered the period 2005 - 30/11/2011 from unemployment and layoffs occurring as a consequence of restructuring and privatization of various sectors, only 8943 people from collective redundancies, remaining 6952 individuals from the current staff redundancies. Staff redundant, it was only partially absorbed in sectors that have managed to establish new activities, restructuring processes producing major changes, both in terms of total county employment and county economic branches.

It is significant that massive restructuring plan under which they operated since 1997 in sectors prevailing county, namely mining, energy, oil extraction plants and gas, mono-industrial character of the county was not changed and employment level in Punjab , although lower than that recorded in the country and in the counties of South-West Oltenia has a higher share of employment in industry and especially in the mining industry, which justifies the county contribution to GDP, placing 15th place Gorj between counties and between counties in the 2nd South-West Oltenia. At territorial level, the number of unemployed increased in 27 counties recorded increases in Dolj (2170 people), Iasi (732 people), Gorj (696 people), River (640 individuals) and Maramures (498 people) and in other counties and in Bucharest, there were decreases in the number of registered unemployed. The most significant declines are reported in the following counties: Vaslui (562 people), Caras Severin (359 people), Cluj (352 people) and Bihar (294 people). The counties with the largest share of total unemployed not unemployed are: Manchester (87.41%), Mehedinti (86.38%), Science (86.01%), Virginia (85.11%), and Dolj (85.17%).

In the next period, given the issues highlighted the fact that some growth is anticipated the total number of registered unemployed in the country, mainly due to seasonal effects, and promotion of graduates of 2008 entries, it is necessary, careful monitoring the most vulnerable in the labor market because they have actively supported in their quest to find a job quickly, to prevent their becoming long term unemployed.

Conclusions

Economic and statistical data and analysis indicates that the county has a series of regional competitive advantages and that its socio-economic levels superior to other counties.

- Gorj has important natural resources, which is an important economic base development district.

- Also has human potential with favorable socio-demographic characteristics, people with high vitality regional averages and high educational level.

- Infrastructure major means of communication and energy networks is also well developed.

- In the county, there are numerous works and hydro networks exploiting a rich water resource.
- Macroeconomic type GDP / capita indicates a higher level regional and national averages.
- County recipient of valuable natural and cultural heritage sites.

This favorable situation is overshadowed by:

- Gorj still belongs to the category of least developed four regions;
- The natural environment is affected to a significant extent, even if it is not serious pollution events, large areas and large ecosystems are disturbed by mining activities;
- Mining activities are not a basis for long-term economic development and private sector experiences a small slow growth, not strong enough to be considered a solid alternative to a massive restructuring of the mining sector;
- Technical and social infrastructure in underdeveloped rural areas;
- The phenomenon of migration of young population to more developed areas is monitored and known;
- Secondary urban centers are small and either mono-industrial in nature or have a half-urban character.

At intra-county disparities can be analyzed in terms of urban-rural relationship and geographic area, in terms of identifying certain territorial groups with distinct characteristics.

In terms of criteria and indicators for assessing disparities, these belong to the demographic - social, economic, in terms of distribution activities, the equipment infrastructure of utilities and social or terms of natural and anthropogenic.

Opportunities:

- Administrative stability
- Important natural resources of coal and natural gas;
- Significant production of electricity;
- The leading producer of cement in the region;
- Favorable position of the city at the crossroads of major axes of movement;
- Favorable geographical position at the contact zone between the mountain - hill and plain;
- Single center urban system, polycentric development potential;
- Human potential good, young population and high level of education;
- Favorable demographics;
- Development of higher education;
- Natural and cultural heritage sites of outstanding value;
- Good access to major road and rail;
- Integration into the EU;
- Start of work on mixed mode (road and rail) of the Calafat-Vidin;
- Connecting the future pan-European corridors

Weaknesses

- Resource spa tourism in decline (the Săcelu);
- Towns with predominantly rural characteristics (Tismana) or mono-industrial type (Turceni);
- South-East less developed in terms of access to urban services;
- Landscape degradation and damage to natural ecosystems in the coal mines and oil;
- Increasing unemployment;
- Increasing unemployment among young and among women;
- Poor access to drinking water, running for over 30% of the population;
- Low investment in research;
- Low to attract foreign investment;
- High modernized roads;
- Low level of entrepreneurial development (especially in South County);

- Rural areas with low and low associativity equipment;
- Decline of traditional activities (livestock);
- Agriculture, lack of technology in general and modern equipment;
- Industrial restructuring;
- High dependence on extractive industries;
- Application of new environmental regulations;
- External labor migration;
- Competition nearby tourist areas;
- Orientation of foreign investment by major regional centers and capital.

Even if Gorj is better off in a regional context, in terms of population dynamics, there is significant intra-county disparities in some areas knowing a sharp decline or very stressed. If, according to excerpts of the Landscaping Plan at national, central and central-western area known moderate increases or decreases, mountainous and piedmont southeast known acute depopulation processes.

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- *** Data AJOFM, Gorj 2011.
- *** under the National Spatial Plan
- *** According to Human Developement Report
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- *** INSSE Gorj, 2004 -2010

THE RELATIONSHIP BETWEEN THE COST OF EDUCATION AND THE HUMAN CAPITAL. THE ALIGNEMENT OF ROMANIA TO THE EUROPEAN STANDARDS

IOANA-JULIETA JOSAN*

Abstract

Once with the development of the human capital theory, the education received an economic value, which is a quality variable of human resources and the main determinant of economic growth. The famed economists have shown that the remarkable economic effects of the investments in education influence the chances of acquiring a job and earnings, demonstrating how the theory justifies such an investment.

Human capital approach allows also estimating the costs of education in schools and higher education, as well as the profits that comes out of it. Thus, the human capital theory is primarily focused on the demand for education. Moreover, the objective function of the state, in terms of education, contains itself two contradictory arguments: the state, theoretically, is a representative and guarantor of the collective good and its organizer; the state will seek to maximize individual education on the one hand and on the other hand will search for the optimization of the relationship between professional training and formal education. Also, in the context of recent years, the budgetary constraints are raising the problem of optimal allocation of the resources, as well as the funding of the performance of the educational services.

The particularities, in terms of flexibility and cumulative distribution of the investment levels in the human factors, are translated into a practical action in the sense that global competition, from which Romania cannot decouple. In the long run, there are winning and resisting only those with academic flexible formation and the intelligent persons.

Considering the above arguments, the purpose of this paper is to analyze the main characteristics of funding mechanisms for education systems, the volume of spending on education and ways of managing the resources allocated to the education. The cost allocation for education in Romania is investigated in terms of government policies, but also in terms of human capital theory.

Also, to answer to the question how Romania had aligned to the modern trends in terms of allocation of the resources more and more important for human capital formation, this paper attempts to estimate the economic effort claimed by the financing of the education system.

Keywords: *investment, human capital, cost, economic growth, performance*

Introduction

The economy and the efficiency of education is an area that integrates public economy and the economy of human resources. Over time and especially today, the issue of budgetary constraints underlines the problem of optimal allocation of the resources and the funding on performance of the educational services. Following the above considerations, the content of this paper will focus on analyzing the main characteristics of funding mechanisms for education systems, the volume of spending on education and the ways of managing the resources allocated to the education. The cost allocation for education in Romania is investigated in this paper both in terms of government policies and in terms of human capital theory.

Also, to answer the question of how to connect Romania to the modern trend of the allocation of resources more important for human capital formation, we attempted to estimate the economic effort claimed with regards to financing the education.

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As for the literature notes, several currents are highlighted and referred to in this paper. The first research papers have focused on the *cost measurement methodology, the study of determinants of the unit costs, on their laws of evolution*[1]*, and the measurement of educational costs supported by the family*[2]**.** 80s decade has seen a deepening of this line of thinking - further comparative studies[3]and more specific studies mainly on the cost of systems using new technological means (Eicher, Hawkridge, MacAnany, Orivel, 1986). Recently, the scientific speech of financing has been the object of the numerous papers. Thus, education systems are currently funded, sometimes even totally by the public power. On the other hand, economic theory does recommend full public funding only in the cases of pure collective goods. Therefore, in front of growing constraint of the budget, the problem arises not only for the optimal allocation of resources, but also how best to finance educational services. This issue concerns the specialized literature, as well as governments of the developed and emerging countries.

The role of human resources education and training in Economic theory

The education and the training of human resources stands more than six decades in the interdisciplinary focus of governmental structures, national and international non-governmental organizations.

The research and the economics – in their permanent renewal, development and structure included as a separate specialty, in the late 50's, a new branch and economic discipline called education. Although the influence that education can have on human productivity was pointed out and still stressed by classical economists, particularly Adam Smith, in their works are not found consistent and detailed analysis to substantiate their statements. If we exclude the work and management studies (financial - accounting) of the educational institutions that have developed and have considerable experience in Western countries, the new economic approach to education includes two major research topics:

Application of the theory of education analyzed and evaluated by the theory of the human capital;

The correlation between education and training of the labor force and economic growth.

In time, the crisis phenomena accompanied by increasing budgetary constraints have produced an additional application for studies and research regarding optimal allocation of resources for education and lookup for more efficient ways of financing it. Also, growth and persistence of unemployment have generated a certain priority of employment for continuous education and training issues, recycling and retraining the workforce, directly and indirectly influencing demand, content, duration and pragmatism of the formal education.

Therefore, education core economy - the human capital theory - has been a subject to criticism and contradictions, as well as extensions of the scope and content approaches.

Human capital theory and the effectiveness of education

The concept of the human capital is attributed to Theodore Schultz.Theoretical developments around this concept date from the 60s and is related to the author contributions quoted to which we can add the contribution of Gary Becker and Jacob Mincer.

However, the core of thinking about human capital is much older: Jean Bodin states so that "there is no greater wealth than men", Adam Smith, in Chapter 10 of Book I, "Wealth of Nations" show that "the man who was educated by a significant expense and time is necessary to provide work/activity that would reimburse the cost of his training, with an ordinary income at least equal to that of a capital equal value."It can be easily seen that assimilation of the education with an

[1]Eicher, J.C. şi Orivel F., 1979, L`allocation des resourcesàl`enseignement dans le monde, Paris, UNESCO

[2]Mingat, A. şi Perrot, J., 1980, Familles: coûts d'éducation et pratiques socioculturelles, Dijon, Cahier De l` IREDU, N.32

[3]Eicher, J.C, 1986, L`évolution des systems d`enseignement dans le monde de 1960 à nos jours: aspects économiques et financiers, Paris, UNESCO

investment and human capital prepared is obvious, but this idea has been analytically resumed neither by Smith nor by his closer successors.

Among other tangential references, but significant economic importance of education, we can mention Benjamin Franklin – "an investment in knowledge brings the best profit"[4] or John Stuart Mill that argued that the return of development is fast only when the population is allowed to use the same knowledge and skills they had before[5].

At the beginning of the twentieth century, Irving Fischer has developed a theory that considers any stock as capital resources leading to the birth of future income, considering training people, along with the construction of cars as investments.

Thus, the spectacular increase in the needs of specialists of different professions, generated by technical and technological developments determined also the restructuring of general knowledge essential for most jobs; vocational training was becoming more and more perceived and considered as an investment.

Currently, education systems are funded primarily - sometimes almost totally–by the public power, from the public funds, but the economic theory does recommend full public funding only in the case of pure public goods. Since the potential demand for education is higher than the number of places or facilities offered, it cannot practice the principle of non-exclusion and therefore do not represent a "pure public good".

The budget constraints raise the problem not only of an optimal allocation of resources but also of the performing funding of the educational services. As in the developed countries the principle of free primary and secondary education in public institutions is still intangible, the economic research has been focused on the financing of higher education. Related to these issues, under the pressure coming from social demand, higher education budget has a rapidly growing trend and quasi public funding - full of this form of education is income redistribution from poor to rich because at this level of access the social inequalities are particularly evident.

In their approach to finding the best financing mechanisms, the researchers often produced descriptive studies, comparing methods used by different countries, the European solutions compared to the U.S. or Japan solutions. The results show that optimal funding was initially addressed by analysis of the redistributive effects in the higher education; concomitantly there are studied efficiency problems and those of equity, asking to increase tuition fees and scholarships reform, it is proposed more often by funding student by the loans.

Also, as I mentioned above, in the developing countries, the size of the financial crisis and internal and external public debt increased the demand for research on education funding. This research has been conducted mainly under the financial impetus of the World Bank[6]. The results of the researches take in consideration the introduction of the enrollment fees, reforming scholarships, creating credit market for education, development of the private education, etc. Therefore, in education, not only the cost is important but also the methods and the resources of the funding.

The optimal funding issue was first addressed through an analysis of the redistributive effects of higher education[7]. This research was directly achieved by simultaneously taking into account efficiency and equity issues and highlight the need to increase tuition fees, where they are almost nominal (symbolic) and to reform the support systems granted to the students.

With all the explosive nature of the debate on taxes, most European countries seem to take into account the recommendations or being about to implement them.

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The most debated is the support systems granted to the students. The controversy over "Bons education" (Education vouchers) was not always entirely clear, but it has helped, finally, to highlight various possible solutions, the advantages and disadvantages (in Blaug, 1987)[8].While until recently, these findings influenced policies on higher education was almost zero, the recent evolution of influential groups in the principle of student financing through loans and extent of reforms put into action in some countries, like in United Kingdom, shows that these ideas are building their own way.

In the developing countries, the extent of the financial crisis is so great that the demand for research on education financing has become, for some years, very high. The World Bank has played an exciting role. Much of reflections is emanating either from its members (Psacharapoulos and Woodhall, 1988) or from experts working for this institution. They prepared major reports (BanqueMondiale, 1986 and 1988).

Conclusions concerns the favorable effects on the efficiency and equity of the institutionalization establishment of the selective enrollment fees, on a reform of the support systems going to a selective reduction and allocation of scholarships to students in higher education, to create a market for education loans, loan financing for this purpose and, finally, to the relaxation of restrictions on private and local schools.

Regarding the financing of educational institutions by themselves due to the education production, economists have shown that logically they can expect little from these activities (Eicher, 1984).

The cost of the education in European Union

The funding structure and policies applied in education vary from state to state and sometimes even within the same state from one region to another. In the education system of any state is of particular importance its funding mechanisms, and compatibility with public financing legislation.

All sources of funding of education can be grouped into two broad categories, namely: public sources and private sources. Public sources come from central, regional and local authorities, while private sources come from students, households and non-governmental organizations. The relative importance of each type of funding source, whether public or private, varies significantly from state to state, ranging from "total funding of education in countries such as Denmark, Finland and Sweden, while in many Member States taxes for the study are burned by the students"[9]. Therefore, it should be noted that the European Union in recent years, there is a constant concern to find effective ways of financing education. "For example, the Netherlands, is promoting a performance-based lending, where loans can also take the form of reimbursable grants if the student successfully complete its studies. This keeps the public funding source, while contributing to increased efficiency in education"[10]. To highlight the interest that European Union Member States show to education, I will use as support statistical data developed by Eurostat[11] upon the total expenditures for education in 2008. The statistic mentioned reveal that in European Union (EU -27) the public expenditure on education in 2008 measured up to 5.1 % of GDP. The highest public spending on education relative to GDP was observed in Denmark (7.8 % of GDP), while Cyprus (7.4 %), Sweden (6.7 %), Belgium (6.5 %), Finland (6.1 %) and Malta (6.0 %) also recorded relatively high proportions. The situation at the level of all the EU members' states is not so good if we take into consideration that in 2008 the share of public expenditure on education was less than 5% of GDP, in more than half of European countries (Figures 1). It should be noted that the EU-15 total expenditure percentage is below 5%,

[8] Idem

[9] Consiliul Concurenței, Ghid privind finanțarea sistemului de învățământ din România, comparativ cu unele state membre ale U. E., din perspective legislației ajutorului de stat (The Competition Council, Guidelines about the financing of education in Romania, a comparison with some EU member states in terms of state aid legislation.)

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and the situation is slightly better in the EU - 27 where the percentage of total spending severely stands at 5.07 %. Also, compared with 2003, in 2008 the percentage of total expenditure in the EU-15 is lower by 0.06 points; Hungary and Slovenia recorded the largest decreases, both down 0.8 percentage points. It should be noted that changes in GDP (growth or contraction) can mask significant increases or decreases made in terms of education spending.

Tabel 1: Total public expenditure on education as a percentage of GDP (2003 and 2008)

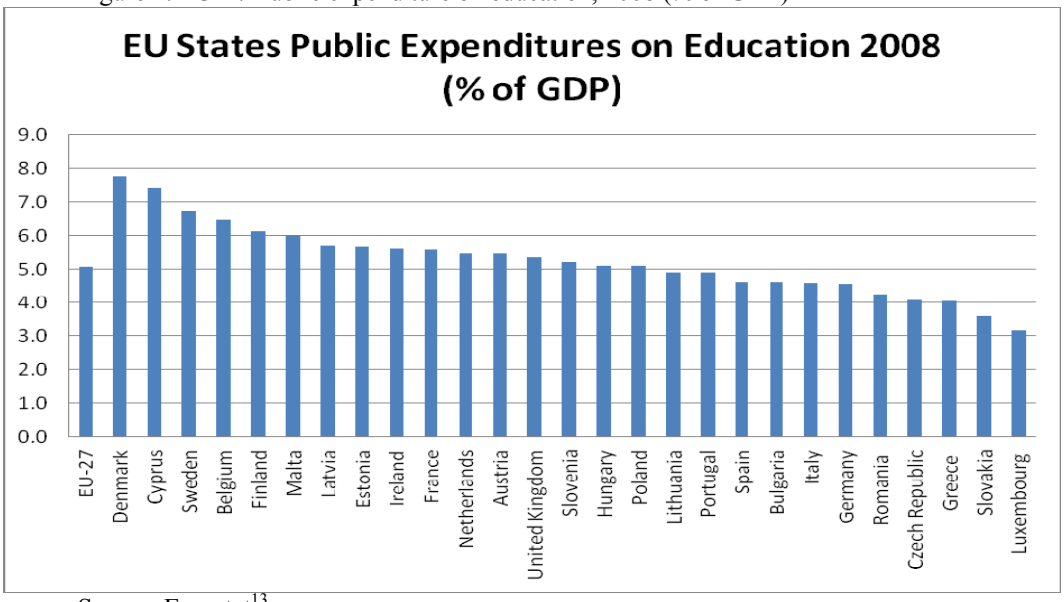
	Public expenditure (% of GDP)		Private expenditure (% of GDP)		Expenditure on public & private educational institutions per pupil/student (PPS for full-time equivalents)	
	2003	2008	2003	2008	2003	2008
EU-27	5.14	5.07	0.64	0.75	5 414	6 459
Euro area (EA–15)	5.03	4.97	:	:	:	:
Belgium	6.03	6.46	0.35	0.37	6 343	7 866
Bulgaria	4.23	4.61	0.67	0.58	1 692	2 840
Czech Republic	4.51	4.08	0.37	0.57	3 354	4 520
Denmark	8.33	7.75	0.32	0.55	7 133	8 701
Germany	4.70	4.55	0.92	0.70	6 005	6 953
Estonia	5.29	5.67	:	0.30	:	4 226
Ireland (2)	4.38	5.62	0.31	0.34	5 279	7 172
Greece	3.56	:	0.20	:	3 778	:
Spain	4.28	4.62	0.54	0.66	5 042	6 941
France	5.90	5.58	0.56	0.60	6 038	7 031
Italy	4.74	4.58	0.40	0.41	6 118	6 609
Cyprus	7.29	7.41	1.35	1.35	5 968	8 461
Latvia	5.32	5.71	0.83	0.60	2 258	4 332
Lithuania	5.16	4.91	0.46	0.52	2 183	3 622
Luxembourg (3)	3.77	3.15	:	:	:	:
Hungary (4)	5.89	5.10	0.56	0.54	:	3 995
Malta (5)	4.70	6.01	1.40	0.31	4 272	6 220
Netherlands	5.42	5.46	0.94	0.92	6 881	8 069
Austria	5.57	5.46	0.31	0.50	7 604	8 836
Poland	5.35	5.09	0.66	0.74	2 524	3 781
Portugal	5.57	4.89	0.09	0.49	4 287	4 979
Romania (6)	3.45	4.25	:	0.50	:	:
Slovenia	5.82	5.22	0.83	0.63	5 021	6 529
Slovakia	4.30	3.59	0.45	0.70	2 325	3 523
Finland	6.44	6.13	0.13	0.15	5 858	6 988
Sweden	7.30	6.74	0.19	0.17	6 825	8 067
United Kingdom	5.24	5.36	0.95	1.72	6 097	7 942
Iceland	7.71	7.57	0.70	0.71	6 727	8 290
Liechtenstein (2)	2.46	2.11	:	:	5 851	7 788
Norway	7.54	6.51	0.10	0.09	8 275	10 084
Switzerland	6.00	5.37	0.62	0.56	:	:
Croatia	3.96	4.33	:	0.36	:	4 147
FYR of Macedonia	3.39	:	:	:	:	:
Turkey (7)	2.96	2.86	0.04	:	:	:
Japan	3.70	3.44	1.25	1.66	6 682	7 530
United States	5.61	5.40	2.05	2.10	9 924	11 759

Source: Eurostat[12]

[12]Educational expenditure statistics ,Eurostat (http://epp.eurostat.ec.europa.eu/statistics_explained/index.php?title=File:Expenditure_on_educational_institutions,_2003_and_2008_(1).png&filetimestamp=20111117102022, accesed March 2012

In essence, education accounts for a significant proportion of public expenditure in all of the EU Member States – the most important budget item being expenditure on staff. The cost of teaching increases significantly as a child moves through the education system, with expenditure per pupil/student considerably higher in universities than in primary schools. Although tertiary education costs more per head, the highest proportion of total education spending is devoted to secondary education systems, as these teach a larger share of the total number of pupils/students. However, in absolute terms, there is almost no change between 2008 and 2009 and several countries even had a decrease in education spending.

Figure 1: EU-27 Public expenditure on education, 2008 (% of GDP)

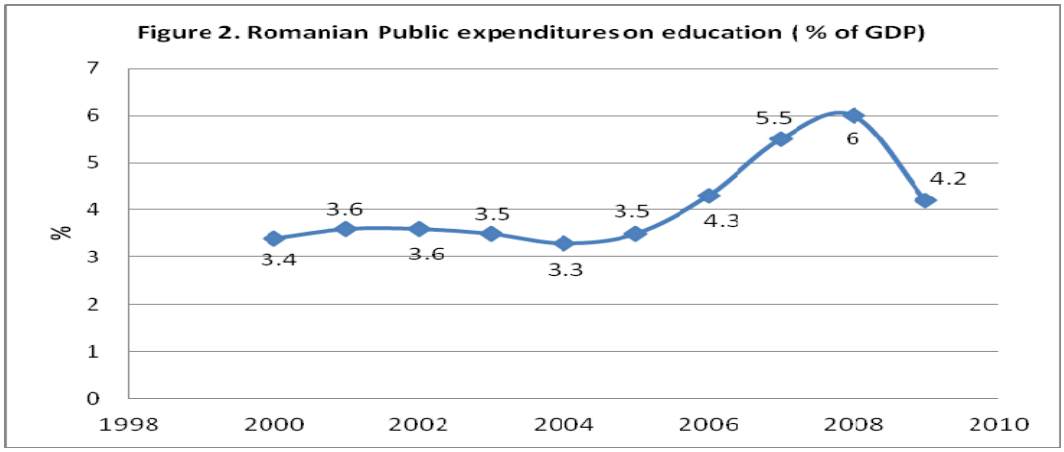


Source: Eurostat[13]

In 2009, government spending on education as percentage of GDP was the highest in Denmark (8.0 %), Sweden (7.3 %), Cyprus (7.1 %), and Estonia (7.0 %). The lowest percentages were found in Romania (4.2 %), Slovakia (4.3 %), Germany and Bulgaria (both 4.4 %), and Greece (4.5 %).

Compared with the other member states, the percentage of GDP allocated to education in Romania ranks our country at the one of the last position of the EU Member States, close to the Czech Republic and Slovakia. In 2009, has decreased its growth rate registered in 2007 and 2008 (see Figure 2) due to anti-crisis measures imposed by the Romanian Government. The significant decrease in GDP in 2009 led to a decrease in funds allocated to education, reaching a value of 4.2%.

[13] Educational expenditure statistics ,Eurostat , http://epp.eurostat.ec.europa.eu/statistics_explained/index.php?title=File:Public_expenditure_on_education,_2008_(1)_(%25_of_GDP).png&filetimestamp=20111117102037, accesed March 2012



Source: Ministry of Education, Research, Youth and Sports

The lower percentage of GDP in education has led to measures, primarily to reduce technology and material investments and, secondly, reduce salaries of teachers and administrative staff. Thus, in Romania, the average salary that a teacher can receive is 21,468 lei (5,063 Euros) per year, while a high school teacher is 23,353 lei (5,508 Euros) per year. Only Bulgarian teachers are paid less than the Romanian, with 4271 Euros per year. In contrast, the highest salary paid per year to teachers in the European Union are in Luxembourg (88 315 Euros), Denmark (61,804 Euros) and Austria (57,663 Euros). Moreover, in some countries, including Romania, the basic gross wages for teachers in the early years of their career are lower than the national GDP per capita, except Germany, Spain and Portugal.

Even so, in all European countries, staff costs represent the largest part of the costs of education, they are found, on average, around 71% of annual costs in the European Union.

Central governments and/or local ones take most decisions on the total amount allocated to public schools in compulsory education cycle, depending on the category of resources involved. Only in four countries, are found the key regional donors and recipients of education budgets. These countries are Belgium, Germany, and Spain and to a lesser extent, the Czech Republic, here more than 70% of funds allocated to education (45.5% in the Czech Republic) are collected and spent at regional level. In three of these countries, regional institutions (Communities of Belgium, the Spanish Autonomous Communities and provinces of Germany) are the highest level of authority in education. In Austria, the situation is slightly more complex - almost 75% of resources are collected by central government contribution, which can spend only 53% of available funds. In Estonia, Slovakia and Finland, the central authorities provide a big part of resources, but uses less than 40%. Countries where there is a greater decentralization are Latvia, Lithuania, Poland, Romania, United Kingdom and Iceland. In these countries, local authorities are providing and consuming most of the financial resources allocated to education. This is due to the organizational structure of education in these countries and because the regional authorities are not involved, except Poland.

In majority of the countries, total public expenditure with the teaching staff are determined centrally, at the government level, while decision-making procedures involving non-teaching staff costs, operational resources and current assets are divided between local and central authorities or are implemented only locally.

The general tendency is to decentralize the decision to determine the total amount which will be allocated to the resources not directly related to the teaching activities.

To support the development of human capital, in all European countries family allowances are granted for studies. They are offered when children born and paid by the end of compulsory

education. The amounts awarded will vary depending on the number and age of children. For example, in Bulgaria, Czech Republic, Italy, Portugal, Slovakia and Iceland, the amounts are proportional to family income. It should be noted that in some cases, families that exceed a certain level of income do not receive financial support in the Czech Republic, Spain, Malta, Poland, Slovenia and Slovakia. Also, scholarships for children who are enrolled in compulsory education exist only a in a few countries. In four countries (Belgium, France, Luxembourg and the Netherlands), scholarships are available only from lower secondary education and family options are always evaluated. In Romania allowance is granted to children from birth until the age of 18 years, provided under the condition that the student is enrolled in an educational institution. The amount allocated does not vary by family income or other criteria. It should be remembered that the person shaving an economic and social disadvantaged can receive additional support from the state as a social scholarship is given throughout the school year. It also supports the involvement of children in Romanian state education system, respectively, human capital formation by free / discounts offered for transport, health, reductions in price ticket for artistic and cultural institutions.

In various countries are implemented and other specific measures to assist parents with children in additional compulsory education. Some of these approaches involve reducing the price of transport, free meals at school, specifically to support the purchase of teaching materials, free distribution of textbooks, etc.

The cost of education in Romania

Education funding in Romania is a long debated topic in the last 20 years. Many analysts in educational policy, theoretical field, press and representatives of education institutions management in Romania presented and analyzed different aspects both positive and negative about the funding of education in our country. A recent study conducted by Eurostat reveals that Romania is the state that allocates the least amount per student across the European Union[14].According to the research cited above, The total annual unit cost of a pupil/student which is on average PPS EUR 5 748 in the EU-27 varies widely between countries. One group of countries (Bulgaria, Estonia, Latvia, Lithuania, Malta, Poland, Romania and Slovakia) is characterized by unit costs per pupil/student which are relatively modest compared to the other member states average and do not go beyond PPS EUR 4 000 (ranging from Romania with 1 467 to Poland with 3 278).

There is a second group of countries in which the unit costs vary from PPS EUR 7 000 to 8 000, namely Belgium, Spain, Cyprus, the Netherlands, Sweden and Liechtenstein and to a lesser extent Ireland, France and Italy (slightly below). In a third group the unit costs are more than PPS EUR 8 000, as in Denmark, Iceland, Norway or Luxembourg, which is way ahead with more than PPS EUR 14 000 per pupil/student.

Lack of funds necessary for financing the European Union average and close to the high costs faced by families to support a pupil / student in school has a direct impact on school attendance by children and culminating in early school leaving. It also shows that between access to education and involvement of children in work there is a double link: on the one hand children are forced to work to contribute to family income (including to cover part of tuition fees) and on the other hand, the involvement of children in school can affect time work, which leads to absenteeism and even drop of education. Data from the Ministry of Education, Research, Youth and Sports reports show that the dropout rate has tripled in the period 2000-2007.

Also in the current context of economic and financial crisis, it is expected that the situation will be worse in the future. Thus, according to recent research undertaken by the Institute for Quality of Life points out that during the crisis, Romania's children will suffer even more, they are “hit indirectly by lowering income families, coupled with decreasing financial support for social system,

[14] Key Data on Education in Europe 2009, Eurostat http://eacea.ec.europa.eu/education/eurydice/documents/key_data_series/105EN.pdf

but also for education and health". The report highlights that the relative poverty rate increased even during the period of economic growth 2000-2008 particularly for vulnerable populations, including single-parent family find with dependent children (relative poverty rate increased from 25.6% in 2000 from 27.1% in 2006), and especially the family of two adults with two dependent children (in which case the increase is about 5 percentage points from 12.8% to 17.6%).

At present, in Romania the education funding is based on standard cost per pupil / preschool. In accordance with decision no. 1395[15], the standard cost per student is determined for each level of education, branch, field, specialization / field, the number of students, language teaching, education and other specific indicators of urban / rural. Therefore, the standard cost per student / preschool is an indicator of substantiation necessary funds to cover basic costs of financing. Standard cost level that of each category of expense base funding is determined by physical indicators of human and material resources consumption established by laws and government decisions or regulations issued by ministries and central institutions in the field. The standard size cost and actual cost per student / preschool is determined by at least two reasons:

Standard cost relates to a school with a standard number of pupils, a number of classes and students/class, a regulated space necessary for a student etc. while teaching a particular unit may have a number of students other than standard, different volume of space per student, a certain degree of education, etc. equipped with means.

Actual costs of staff in a school/ student may be higher or lower than standard depending on the degree of qualification of teachers, average length of education, and number of students per teacher position etc.

These differences between actual costs and standard costs are not related to the objective quality of management or policy management. These differences can be eliminated through a medium and long term policy regarding the school network, concentration and modernization of educational facilities, etc. On average, in the year 2011, the standard cost per pupil / school / day is highlighted in the table below:

Tabel 2: Some standard cost per pupil / school / day

Nr. Crt.	Level / chain / profile	Type of education	Average number of students per class		Standards of cost per pupil, on average and level RON		Standards of cost per pupil, on average and the levels[16]	
			Urban	Rural	Urban	Rural	Urban	Rural
1	Kindergarten with normal program	with frequency	20	18	1.478	1.617	1.478	1.617
2	Primary education	with frequency	22	18	1.701	2.027	2.041	2.432
3	Secondery education	with frequency	25	20	2.230	2.727	2.549	3.117
4	College	with frequency	28**	28	2.119	2.119	2.401	2.401

Source: author

[15] HOTĂRÂRE NR. 1395 privind finanţarea unităţilor de învătământ preuniversitar de stat, finanţate din bugetele locale, pe baza standardelor de cost pe elev/preşcolar pentru anul 2011, publicată în M.Of. nr. 896 din 31 decembrie 2010

[16] Education in minority languages

If we look overall, in reality, the cost of education per student is higher. In the study conducted by Save the Children Organization, in 2010, regarding the cost of education of children at the family level[17] has revealed a number of expenses that the family makes for a student during a school year. The average cost spent by parents for a child's schooling is 1490 RON, and per family is about 2,000 RON. It should be noted that the above amount is calculated taking into account the average costs for parents in the sample budgets, representing a trend as it emphasizes not an absolute value. Also, looking at the results we see that the total cost may reach values of over 4,500 RON per year, per student. The survey questionnaire was conducted based on a sample of approximately 600 parents and 300 teachers, thus the data has a more rough guide character; generally, the expenditures differ regionally, at the school level, considering also school popularity rank and the parent's salary level who allocate more or less financial resources for children human capital development.

Regarding higher education, university funding is based on actual work performed. Funds and thus the responsibility to develop their own strategies for the cost optimization is the freedom of university management. Of the total base funding of 70% shall be distributed based on the number of students unitary equivalent and 30% are considered as quality indicators.

In fact, at higher education institutions in 2011 the average amount paid for a student was about 2,750 RON, slightly lower than in 2010 when the state paid about 2840 RON / student equivalent. In 2010 approximately 470,000 students have disposed of 1,903,513,398 RON - as far as core funding has been granted from the budget for higher education. In 2009, the amount allocated from the budget for students was 1,990,932,992 RON, and in 2011 the Ministry of Education Research, Youth and Sports has provided an allowance for equivalent unit student an average of 2,750 RON. The reason for reductions of funding is the financial crisis affecting our country. This cost varies depending on the criteria above. At a minimum calculation relative to the cost factors used to determine the areas of education funding, it appears that a "a medicine student will benefit from support from the state amounting to 6.187 RON (1467 Euros), a chemist - 5225 RON (1244 Euros), a student of a faculty of the human and socio-economic profile - 2,750 RON (654 Euros). The biggest amount of money - 20,625 RON (4910 Euros) - will receive the students who want to make a career in cinematographic art"[18].In addition to costs incurred by the state, the student and / or family have the direct private annual total costs[19] of between 2000-6000 thousands of Euros, depending on the locality in which the educational institution has it activities, on faculty requirements related to books, on software and on family financial availability. To cover some of the hidden costs that have to support student or family, the Romanian authorities offers performance scholarships for students with exceptional results, scholarships for students with good results, but also social aid scholarships for students from families with very small financial funds. Also, some private companies assist the performing students through foundations offering scholarships.

Therefore, the biggest problem remains at the primary and secondary levels of education where the Romanian state must find better solutions to encourage school attendance and lower school dropout in poor families or with single parents. In terms of human capital it is noted that rural schools in counties with a low level of socioeconomic development are characterized by poor learning conditions, low quality education, socially disadvantaged segment of pupils which get low educational performance: lower participation in the yearly evaluations with very poor results, which often either exclude them from the competition, or do not allow them the enrollment and attendance in a desired school to continue their studies.

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[17] Cercetare cu privire la costurile „ascunse" din educaţie "Învăţământul gratuit costă", realizată de Organizaţia Salvaţi Copiii, Bucureşti, 2010 (Research about the "hidden" costs of education - Free education costs, conducted by Save the Children, Bucharest, 2010). The survey questionnaire was conducted based on a sample of approximately 600 parents and 300 teachers.

[18] Cât investeşte statul roman într-un student, articol publicat în Săptămâna financiară, 4 Martie2011 (How much Romanian state invests in a student. Article published in Financial Week, March 4, 2011)

[19] Becker, G., Capitalul uman. O analiză teoretică şi empirică cu referire specială la educaţie, p. 180

Conclusions

Currently, education systems are funded primarily - sometimes almost totally by the public power, public funds, even if the economic theory does not recommend full public funding. Community practice revealed that at the European Union level funding modalities of the educational system varies significantly from state to state, ranging from full funding to the combination of private funds with public ones. Low potential of the Romanian education funding from private sources and needs and stringent requirements which Romania has to face, require increased attention to the educational process from decision makers, both in the quality and in ensuring an appropriate degree of financing. The need to find adapted solutions for the Romanian education system is urgent because the low level of public expenditure on education (about 4% of GDP) leads to the proliferation of serious effects on educational performance and human capital accumulation. Among them are:

Decreased level of teacher's training because of the lack of motivation due to lower wages;

Migration of highly qualified teaching staff to better paying areas of the country or abroad;

Loss of logistics that cannot sustain an efficient teaching process;

Decreased quality of students performance and accumulation of skills necessary after graduation;

Increased school dropout, especially in rural areas where it is found a constant need for qualified teachers, especially in Moldova.

All these effects cause the loss of human capital among both teachers and pupils. Underdevelopment of human capital can lead to a partial exclusion of human resources able to work, but unprepared in terms of knowledge and skills required on the labor market. This "exclusion" of human resources creates serious social and economic effects like increasing unemployment rate and number of social assistance or hiring on low qualifications jobs for small salaries. These effects will be extended by the author in other works.

In conclusion, the differences of the educational system between Romania and European Union developed countries can be eliminated through a medium and long term policy regarding the school network, concentration and modernization of educational facilities. Therefore, it is recommended that Romania has to create an efficient financial system, along with the development of educational policies designed to enhance the quality and prestige of education that should be regarded as a national priority and activity of a general interest that the future depends largely on the degree of development of the country.

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- ***Hotararii Guvernului nr. 1.618/2009 privind finantarea unitatilor de invatamant preuniversitar de stat, finantate din bugetele locale, pe baza standardelor de cost pe elev/prescolar pentru anul 2010, publicată în M.Of. nr. 283 din 30 aprilie 2010;
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ACTIVE AGEING AND REFORMING PENSION SYSTEM. MAIN CHALLENGES

VALENTINA VASILE[*]

Abstract
Active ageing and economic crisis create a great pressure on pension systems, from the financial sustainability and performance of the old architectures of the 3 tired system point of view. Reforms of public pension systems during the last years highlight that demographic ageing is a major influence factor on financial sustainability of the national insurance and social assistance systems, with long-term effects. Associated with "classic" demographic ageing (low birth-rate, increase of the average life expectancy) for some new member states, such Romania, labour mobility on medium- and long-term and the change of its largest part into emigration, heightens labour force ageing and diminishes participation to insurance systems (due to the low portability of pensions). To these are added also the specific effects generated by the crisis that have put pressure on decreasing social expenditures, in reverse trend against the demand generated by demographic ageing.
Romania, and also several EU member countries are involved in large-scale actions of reforming pension systems both as answer to the increase in the numbers of elderly population, and implicitly of associated social expenditures, but also for stimulating the extension of active life. The increase in the standard retirement age and its correlation to life expectancy constitute priorities of changing the methodology in pension computation. The reformed policies in the field of pensions pursue as well restricting accessibility and diminishing early-age retirement schemes in parallel with stimulating the employability of individuals aged 50 and over.
In this paper we present the main policy action in order to stimulate and develop a new model of old age insurance and a new pattern of incomes after retirement, and also to investigate the support measures among EU member state for active ageing and increase incomes for elder persons.

Keywords: *active aging, reforming pension system, financial sustainability*
JEL Classification: J40, J2, B26

Introduction[1]

The impact of the financial crisis on private pensions and financial restrictions of the state have strengthened the necessity of developing sustainable, combined/multi-tiered pension systems, the creation of financial balances on each component, as well as assuring medium- and long-term the individual sustainability. As a result, assuring decent life at old age turned into an actual challenge, the weaknesses of the public system triggering the rethinking of the association scheme for various types of pensions, for assuring total comfortable/decent incomes (EC, 2011)[2]. Moreover, in some EU countries is pursued to ensure the compatibility of the pension system's structure and the possibility of benefiting from pension under various systems of public or private insurance, irrespective of the fund's type where the contribution was made and the location of the person at retirement age.

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[2] Concluding the first European semester of economic policy coordination: Guidance for national policies in 2011-2012, Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions COM(2011) 400 final, EC, Brussels, 7.6.2011, http://ec.europa.eu/europe2020/pdf/communication_en.pdf

Economic development level, social model and pension system

The level of economic development and the social model represents main determinants of the national pension systems evolution and performance. The main restrictions of the financial sustainability were: economic dependency ratio, the employment rate and average level of incomes of the contributors of the public and private pensions

An economic developed country can afford to build up public insurance systems for pensions that would promote to a large extent the safety of old-age income, supporting at legal and institutional level and by adopted policies the participation to the system and the development of complementariness. Private pensions become attractive for supplementing incomes from the public system and are used as additional safety system by persons with decent and/or comfortable incomes. In the case of weak state insurance systems, where the pensions becomes insufficient and there is no adequate (decent) ceiling of the minimum pension, or where the principle of the social minimum pension is not applied, private pensions are attractive as alternative to public insurances in particular for persons with incomes above average or high, in general non-wage employed population, for whom in many countries, the public pension pillar is optional. The attempt has been made in the last years to increase the contribution base by attracting within the system all types of active population, yet the deterioration of the economic dependency ration leads to the option of aggregating sources for incomes on retirement by broader participation, hence more risky to the private system of old-age insurance.

If the public pillar is mainly based on the PAYG system, the private one, in its constructive variants has as ground principle capitalisation and preserving the purchasing power of the saved amounts (contributions) by investment portfolio.

If, at the beginning, the private systems were predominantly optional, and represented an individual, singular option of the beneficiary, in the last decades, as social relationships and social accountability of the companies and of the state as market stakeholders developed, private pension systems evolved supported by companies or by the state: a) occupational pensions related especially to the activity of the social partners, and firstly of the trade unions and guilds/professional associations, and b) compulsory private pensions supported under various forms by the state, respectively by fiscal deductions, management support systems for the funds, by regulating supervision and guaranteeing institutions, etc.

Also individual insurances remain, yet they develop and diversify, gravitating around the idea of life insurance (pension insurances on the life insurance system), and represents a specific market insurances for those with average and high incomes and a culture of managing incomes oriented on the market mechanisms (as form of risk management and of active participation on the market for generating positive yields of saved funds).

The multi-tiered system is present in several countries of the world, and at EU level was promoted the coordination policy (EC, 2004)[3] for insuring financial flows between national funds and for rendering efficient systems.

Population ageing has developed specific systems of insuring elderly persons, based on integrated adequate health services, social assistance centred on the particular needs, etc. In the field of pension insurances was pursued the *development of individual insurance culture* and of extending the active life as direct active measure. At the same time, the increase of the average number of years spent as pensioner has triggered the reconsideration and reform of public systems – the system of contribution and the calculation formulae, the transfer rate wage-pension. In parallel, as answer to increasing social responsibility, in many countries was constituted (and in the last years also in Romania) the system of the minimal social pension and the access conditions to early retirement pension and invalidity pension were hardened. The entry in deficit of several pension systems due to

[3] Regulation (EC) no 883/2004 of the European Parliament and of the Council from 29 April 2004 regarding the coordination of social security systems.

the diminishment of the contributors' base and of extending the period of paying the old-age pension became permanent and acute in some national systems, the transfer of funds for balancing from the state budget turning more difficult, in particular during the crisis period.

Many experts propose the in-depth revision of the multi-tiered pension system, and even the question of their sustainability for medium- and long-term was raised for the PAYG-type public system! Moreover, the crisis with its manifestation forms and extended duration (and from the relapse perspective but on other more restrictive and complex coordinates) challenges us to analyse from the current pension systems' sustainability viewpoint[4] the survival potential of the present capitalist system (N Roubini, 2011 on K Marx's theory of capitalism self-destruction).

Recent developments of pension policies within the EU and Romania

The pension systems' of the EU member countries are multi-tiered combining the PAYG principle for the public pillar with the one of capitalising for the private and occupational pension pillars, either compulsory or optional. Employers, through the social partners, have developed insurance systems with capitalisation of the occupational pensions' type as form of supporting employees and instrument of stabilising employment, the transfers between these funds being, in general, more difficult.

The private pensions' market is represented on one hand, by actual private funds, subjected to particular regulations in the field of private pensions, and coordinated/supervised by specific institutions, and on the other hand to the life insurance systems of the pension-type, where reimbursement of capitalised sums under the form of annuities or monthly payments is constituted into additional income for pensioners.

The pensions are the most important component of social expenditures and remains the basic source of pension-type incomes. With respect to the private pension funds, according to available data for 2010, is found that these are significant in the Netherlands (over 1.3 times of GDP), Great Britain (86%), Finland (82%), Denmark and Ireland (about 50% of GDP), modest in Portugal, Spain, Poland, Hungary, Estonia and Slovakia (about 7-16% of GDP) and very low (under 1% of GDP) in France, Romania, Latvia. The national pension system analysis of the country files shows thus a very broad variety of the constituents and structure for pension funds, public and private, largely depending on the social model and the history of insurances' development, and the size of state's involvement in the field. Also, a diversity of old-age insurance forms is found as well, and the association with the development level and the social model certifies a stronger involvement of the state in countries with a generous social model and an important public pensions' system. The significance of the public pensions' system for EU-15 countries decreases on the geographic axis North-South. For transition countries, that still define their social models (which are developed to the vast majority under a hybrid form) and that have a lower development level, the public pillar is strong, yet with high efficiency deficit. The reforms in these countries are mostly under development, promoting both adjustment by in-depth reforms of pillar I, and the gradual implementation and expansion of the contributors' basis for the pillars II and III.

Under the conditions in which, at EU-level, by the Green Paper the pension insurance policies are reoriented towards "**adequacy, sustainability and safety**", also a **convergence of the systems** is developed in their reformed shapes. The measures of the last years[5] are focused towards *efficiency*

[4] http://www.realitatea.net/foto_1182141_profetul-crizei-marx-a-avut-dreptate-cu-privire-la-autodistrugerea-capitalismului_875627.html şi http://europe.wsj.com/video/nouriel-roubini-karl-marx-was-right/68EE8F89-EC24-42F8-9B9D-47B510E473B0.html?KEYWORDS=Roubini

[5] The main policy measures in the field of pensions for the last years in EU-27 are synthesised in three categories of documents: a) recommendations of the European Council, specific to each member state; b) working papers for each country elaborated by the Staff of the Commission, and c) national documents, respectively national programmes of reforms and/or Stability Programmes/Convergence Programmes. COUNCIL RECOMMENDATION

and balance of funds, by promoting new insurance and integrated assistance services policies for third-age individuals (employment for active ageing, adjusted health system, a pension system generating decent pensions, safety net for disfavoured categories, increasing efficiency and sustainability of each component/pillar, etc.).

At Euro-area[6] level it is estimated that from the perspective of ageing population, the reform of pensions and of the social security systems are not enough for ensuring the long-term financial sustainability, the Commission requesting measures that would allow for "**coordinating the pensions reform with the national demographic situation**". In this context, recommendations are made for diminishing public debt under the threshold of 60%, including by reforming the public pension systems. At national level, the recommendations and policy measures initiated by governments are varied as impact and severity, with a different potential of adjustment/adequacy of the pension system to particular requirements of ensuring long-term sustainability and correlation with the social assistance measure package for the third age.

For EU-15 countries the pension systems have a history based on the three pillars, well-defined and with a private component integrated into the system long time ago. Transition countries developed an adjusted/adequate public system to the market economy, or in the best circumstances, reformed to which is attached a private system under construction. As result, the reform of the public system under conditions of economic crisis and budgetary restrictions of various intensities, is the more important for countries that cannot support themselves by a coherent and performance private system and that face issues related to the general level of incomes and the capacity of the public pension of ensuring adequate incomes in old age. Additionally, these countries have also poorly developed social assistance systems for third-age individuals, still inadequate to current and future circumstances, or which are still under construction and not always with a clearly defined and agreed on intergenerational responsibility and/or the involvement of the state as artisan of minimal social conditions.

Without performing a detailed analysis of the public pension systems with the EU-27, we shall present some of the current guidelines regarding the PAYG pillar reform, from the viewpoint of its sustainability[7].

The reform of the pension systems based on restricting access, of increasing the contribution period, the retirement age, etc, under conditions of diminishing labour incomes which are the backbone of constituting social funds and budgetary sources of the state for social assistance generate reverse effects and intergenerational pressures, imbalances on the labour market, diminishment of replacement flows of contributors' basis and, finally the decrease of required financial resources. A comparative analysis of demographic ageing costs emphasises the following aspects:

- public pensions represent the most important component of social costs, with an increasing trend, mainly due to a growing number of beneficiaries, and they are followed by health expenditures;

- the ageing dynamics differ on countries and the increase estimated is of up to 15.3 pp from GDP in Luxemburg. In Romania the estimated increase is of 7.4 pp which means almost doubling the expenditures with pensions, and puts the country into the group of countries with a high pressure on budgetary expenditures for pensions;

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of 12 July 2011 on the implementation of the broad guidelines for the economic policies of the Member States whose currency is the euro (2011/C 217/05), Official Journal of the European Union, C217/15

[6] http://ec.europa.eu/europe2020/pdf/recommendations_2011/dts_737_euro_en.pdf

[7] The build-up of the national multi-tiered models is extensively presented and periodically analysed in EU and OECD documents, fact for which we consider as important in the current paper to present the adjustments triggered by the convergence of the systems and by the ones associated with the financial crisis, with emphasis on the development, performances and perspectives of the private pensions' systems, as a constant for a performance system, based on the complementariness between individual's responsibility and the one of the society for decent, active and comfortable ageing under the aspect of incomes and of the quality of life.

- a hierarchy of pensions' pressure on budgetary costs places Romania on the 17th position after the 2010 level of pensions expenditures in GDP, next to Malta and Luxemburg and on the 5th position under the aspect of their expected increase, after Luxemburg, Cyprus, Greece and Slovenia; as compared with the European average, the share of pensions in GDP for Romania is of 8.4%, inferior to the European average of 10.2% and by 5.6 pp lower than in Italy, country which has the highest share and by 3.3 pp over the minimum European value recorded in Latvia. But, this relative ranking hides significant differences of the policies and, particularly, of the performances for public pension funds.

Increase of costs associated with demographic ageing within the EU

% in GDP	Pensions		Medical Assistance		Long-term Assistance		Unemployment		Total	
	2010	Change 2010-2060	2010	Change 2010-2060	2010	Change 2010-2060	2010	Change 2010-2060	2010	Change 2010-2060
RO	**8,4**	**7,4**	**3,6**	**1,3**	**0**	**0**	**2,7**	**-0,2**	**14,7**	**8,5**
EU	10,2	2,3	6,8	1,4	1,3	1,1	4,9	-0,2	23,2	4,6
Italy	14,0	-0,4	5,9	1,0	1,7	1,2	4,3	-0,2	26,0	1,6
France	13,5	0,6	8,2	1,1	1,5	0,7	5,8	-0,2	29,0	2,2
Austria	12,7	1,0	6,6	1,4	1,3	1,2	5,2	-0,2	25,7	3,3
Portugal	11,9	1,5	7,3	1,8	0,1	0,1	5,6	-0,4	24,9	2,9
Greece	11,6	12,5	5,1	1,3	1,5	2,1	3,8	0,1	21,9	16,0
Poland	10,8	-2,1	4,1	0,8	0,4	0,7	3,8	-0,6	19,1	-1,1
Finland	10,7	2,6	5,6	0,8	1,9	2,5	6,4	0,0	24,7	5,9
Hungary	10,5	0,6	5,8	1,3	0,3	0,4	4,5	-0,3	21,0	2,0
Belgium	10.3	4,5	7,7	1,1	1,5	1,3	7,3	-0,3	26,8	6,6
Germany	10,2	2,5	7,6	1,6	1,0	1,4	4,6	-0,4	23,3	5,1
Slovenia	10,1	8,5	6,8	1,7	1,2	1,7	5,1	0,7	23,1	12,7
Sweden	9,6	-0,2	7,3	0,7	3,5	2,2	6,6	0,0	27,1	2,7
Denmark	9,4	-0,2	6,0	0,9	1,8	1,5	8,0	0,1	25,2	2,2
Bulgaria	9,1	2,2	4,8	0,6	0,2	0,2	3,0	0,2	17,1	3,2
Spain	8,9	6,2	5,6	1,6	0,7	0,7	4,8	-0,2	20,0	8,3
Luxemburg	8,6	15,3	5,9	1,1	1,4	2,0	4,0	-0,3	19,9	18,2
Malta	8,3	5,1	4,9	3,1	1,0	1,6	5,0	-0,7	19,2	9,2
Czech R.	7,1	4,0	6,4	2,0	0,2	0,4	3,3	0,0	17,0	6,3
Cyprus	6,9	10,8	2,8	0,6	0,0	0,0	5,8	-0,6	15,5	10,7
United Kingdom	6,7	2,5	7,6	1,8	0,8	0,5	4,0	0,0	19,2	4,8
Slovakia	6,6	3,6	5,2	2,1	0,2	0,4	2,9	-0,6	14,9	5,5
Netherlands	6,5	4,0	4,9	0,9	3,5	4,6	5,6	-0,2	20,5	9,4
Lithuania	6,5	4,9	4,6	1,0	0,5	0,6	3,5	-0,4	15,1	6,0
Estonia	6,4	-1,6	5,1	1,1	0,1	0,1	3,2	0,3	14,8	-0,1
Ireland	5,5	5,9	5,9	1,7	0,9	1,3	5,3	-0,2	17,5	8,7
Latvia	5,1	0,0	3,5	0,5	0,4	0,5	3,3	0,3	12,3	1,3

Source: Belgian Stability Programme (2011-2014), p 55

In fact, it is considered that active ageing represents a sustainable solution for counteracting both the effects of demographic ageing and of the crisis, the reforms within pension systems having, mainly, for the largest part of the member states three general coordinates: *increasing the legal retirement age, diminishing access to early-retirement schemes and diminishing implicit taxation for supporting continued activity for elderly* (Regional Economic Outlook: Europe, Oct 2011, FMI)

A brief synthesis of EC recommendations from 12 July 2011 regarding the reform of the pension systems includes as main required measures and recommends their implementation, the following: *limiting access to early retirement and special schemes; extending the contribution period, and increasing the retirement age (with gender uniformity, establishing relationships*

between benefits and actual demographic and economic conditions, stimulating employment as alternative or in complementariness, stimulating optional/private insurance, etc.

Measures for ensuring the sustainability of pensions' systems and increasing the effective retirement age

Measures	*Countries*
Limiting access to early retirement schemes	AT (for persons with long insurance periods), BE, BG, DK (reform of very early retirement schemes VERP), LU, MT, FR
Revision of the accelerated pension system for public officers, diminishing pension by 10% for newly entered into the system and indexing pensions with inflation.	IE,
Diminishing pensions	PT
Low taxes on pensions	SE
Change of the pensions' indexing system	RO, SK,
Limited access to invalidity pensions	AT
Increasing the standard retirement age	AT, BE, BG, IE, LU, MT, NL, PL, RO,ES, UK (from 65 la 66), FR (from 65 to 67)
Harmonising/equalising the retirement age for women and men	AT, RO,
Establishing a relationship between the standard retirement age and the development of life expectancy at birth	BE, CY, CZ, FI, LU, MT, NL, PL, RO, SK, ES,
Determining a strict relationship between benefits and contributions	EL, RO,
Increasing the standard contribution period	BG, CY, RO, ES,
Promoting attractive participation schemes for wider contribution to the system	CZ,
Maintaining low rates for the pension funds' administrative costs and ensuring transparency	CZ,
Policies for stimulating employment for elderly	BG, DK („flex-job" system), LT, MT,
Measures preventing the increase of poverty risks for elderly	CY
Measures for ensuring the sustainability of the public pillar	CZ, FR, EL, IE, LU, NL, RO, SK, SI, UK, FR (balance in 2018)
Measures for stimulating participation to private insurance and savings systems for old-age	CZ, MT
Eliminating the feeding of the private pensions feeding and transfer of already accumulated sums to pillar I PAYG	HU,
Diminishing transfers to private pensions (temporary)	IE, LV,

Source: Selection based on 2011 Report on Public Finances in EMU, European Economy 3/2011, EC, Directorate General for Economic and Financial Affaires

The majority of recommended or assumed measures by the governments aims **in-depth and radical changes** for long-term/final which imply the calculation methodology or the access conditions to various forms of pensions. Other measures consider short-time periods and do not change the build of the system, only its enforcement. From the latter category we mention the measures taken and/or foreseen by Portugal: progressive diminishment of pensions higher than 1500 Euro, in 2011, suspending indexation and freezing pensions for 2012 (save for the **lower** ones)[8].

For some countries no concrete measures are stipulated, that would aim to reform or restrictions regarding the management of the pension funds, but indirect measures are recommended for stimulating the participation to private systems, among others by diminishing compulsory social contributions to various funds (neutral budgetary manner). Among these countries we mention EE, FR ('niches fiscales'), and DE.

The reforms were accompanied in some cases by the (re)construction/development of the institutional system, like in France, where a public body was created "Comité de pilotage des régimes

[8] Portugal: Memorandum of understanding on specific economic policy conditionality, 3 May 2011, http://www.ste.pt/actualidade/2011/05/memorandotroika_04-05-2011.pdf

de retraite" which presents some yearly analyses on the pension accounts and makes proposals for adjusting policies in the field.

The EU recommendations consider also particular measures, depending on the possibilities of each state and on the build of the national pension system, for ensuring the separate sustainability of each pension pillar. To this end, the measures taken by the member states were extremely different:

- In Hungary eliminating the compulsory private pillar and funds' transfer back to the public pillar;

- Greece: a new reform of the pensions' system in 2012, after the recent one of 2010 for ensuring the sustainability of the state pillar. The reform includes both legislative measures for public and private pensions based on the analysis of the National Actuarial Authority and considers, among others, the auxiliary funds of pension and the welfare funds: diminishing the number of funds, eliminating deficits and ensuring medium- and long-term sustainability for secondary schemes by relating contributions to benefits. It is projected to freeze nominal supplemental pension and adjust the replacement rate for funds with deficit, as well as constituting a computerised system of individual accounts of pensions[9];

- Ireland: increasing the retirement age for the social welfare pension from 65 to 68 years of age in the interval 2014-28 and implementing a single scheme for pensions for the newly entered within the public system which will relate the retirement age to the pension level and average career earnings and annual inflation[10].

- Romania: freezing for 2011 the level of transfers to pillar II at the level of 3 per cents, in order to attenuate the deficit of the public pillar; for 2012 the intention is to increase contribution to 3,5%, but this is conditioned by the economic growth perspectives and on finding the financial sources for covering the deficit of the PAYG system. At the same time, the passing of the legislation for implementing the pillar of occupational pensions is postponed.

Some countries, like Latvia have developed strategic documents that envisage a general rethinking of the pensions system that shall be implemented as of 2012 and by which is pursued ensuring the long-term sustainability of the 3 pension pillars. The intention is that as the economic situation turns around to return to the contribution for pillar II of 6% from the gross wage up to 2013. In a similar manner is reformed the pension system from Latvia, the secondary legislation undergoing approval procedures, in parallel with fiscal measures for maintaining on the labour market individuals of retirement age (eliminating fiscal instruments to restrict the continuation of retirement age persons on the labour market).

Private pensions – role in building-up the pension system for transition countries

The social model on one hand, and the culture of savings on the other hand, determine the role and place of private pensions for each country, and their capacity of satisfactorily supplementing old-age incomes is related to the development level, the average level of incomes as compared with the poverty threshold and the consumption model.

The PAYG system is the backbone of the pension system for the majority of European countries. Several countries have supplemented statutory pensions with a pillar based on defined contributions and in many instances managed in a private system by specialised financial institutions. . Other states have in place, or complementary an occupational and individual system. In some instances, the occupational systems are of the PAYG-type by book reserves constituted by the employer, or by schemes managed by pension or insurance funds (group insurance contracts). Individual pensions have as basis individual contracts signed with the private pensions' provider – in

[9] IMF, Greece: Letter of Intent, Memorandum of Economic and Financial Policies, and Technical Memorandum of Understanding, 28 February 2011, http://www.imf.org/external/np/loi/2011/grc/022811.pdf

[10] EC, Memorandum of understanding between the EU and Ireland, Brussels 20.5.2011 SEC(2011) XXX final, http://www.finance.gov.ie/documents/publications/other/2011/moumay2011.pdf

general an insurance company or a private pensions' fund. Individual contributions are accumulated and invested, and the final sums are the basis of the individual pension. The participation to the occupational and individual pension schemes may be compulsory or voluntary, and in some countries it is used as an alternative to the compulsory pension schemes.

If we would analyse the importance of private pensions, we must consider a series of elements, that is:

- current level of development for private pensions and their history;
- population participation to the life insurance systems of the pensions type and their share against total private pensions;
- level and build-up model of compulsory private pensions;
- possibility of the population to participate to optional old-age insurance systems and their propensity for using this market instrument as compared with the traditional ones of bank savings, or securities;

The countries from the last integration wave (EU 10+2) are in different stages of implementing the multi-pillar system, the most advanced ones being Hungary, the Czech Republic, and Poland. The reform is delayed in Lithuania, Slovakia and Romania for pillar II (compulsory private pensions), and optional private pensions were enforced as of 2004 in Lithuania and are still under implementation in Romania.

Development of non-PAYG components in EU transition countries

Country	Pillar II Compulsory Pensions	Pillar III Optional Pensions
Hungary	1998	1994
Czech R	unavailable	1994
Poland	1999	1999
Slovenia	2000	2000
Latvia	2001	1998
Bulgaria	2002	1994
Estonia	2002	1998
Croatia	2002	2002
Lithuania	2004	2004
Slovakia	2005	1997
Romania	2007	2007

Source: APAPR, http://www.aparp.ro

A multi-tiered system in which the **emphasis changes towards private pensions** as solutions for long-term performance of old-age insurances is not a new orientation (OECD 1992, IMF 1997) and begins with two considerations: the limits of the Bismark modeland the relationship between contributions and benefits at individual level. The diversity of models and the development degree of industrial relations defined and developed a large diversity of occupational funds and a private system that depend on the quality of the social dialogue and the availability of individual incomes. In fact, the existence and performance of the Bismark-type systems (insurance related to obtained incomes) and of the Beveridge-type (basic/minimum pension for all – social pension) have triggered the availability and use of optional and occupational private systems. Yet, the lack of individual optional insurance culture and the low level of economic development associated with low incomes have promoted during the last years in transition countries the implementation of the compulsory private system for those active population cohorts for whom the period remaining for contributing to the system is relevant under the aspect of "building-up" an adequate supplemental private pension (for Romania the participation to the private system is compulsory for individuals up to 35 years of age, and for those aged between 35 and 45 years of age the participation is optional and performance

depends on the level of insurance, and for those above 45 years of age the system is irrelevant under the aspect of the resulting pension).

The increase of labour mobility in the last decades, associated with the change of the employment model and the development of open career and the dynamic of creating new jobs generated by the absorption of RDI outcomes and of promoting LLL on one hand, and the relative rigidity of the transfer between funds on the other hand, have diminished the interest for occupational pensions, allowing for the development of the optional private insurance for old-age.

The main factor supporting or inhibiting the participation to private pensions is represented by the conversion rate between the income on retirement and the total incomes from compulsory old-age insurance systems. Development countries, such as France, Switzerland, the Netherlands, Sweden, Denmark, Germany, Italy, United Kingdom have generous insurance schemes, supported by the economic performances, in various combinations of the PAYG pillar with the occupational one and the promotion of a minimal income of old-age incomes. Others, such as Luxemburg have a strong and on surplus PAYG pillar that allows for continuing the policy even under crisis conditions, without restrictions, but only by modernising the system and strengthening sustainability.

The replacement rate of incomes with public pension (and additionally with the occupational one) is on decrease, same as the long-term financial sustainability of the PAYG system reason for which currently all states consider private pensions as a complementariness alternative (Ebbinghaus B., Gronwald M., 2009)[11]. Yet, access to optional private pension is limited by the supplementary financial effort, the associated costs and high risk of final benefits, being less accessible to those with low incomes.

For some transition countries, the private pension system developed as optional pillar and/or with a compulsory component (Hungary, Romania).

Characteristics and architecture of the Romanian pension system

The pension system in Romania is a multi-pillared one and, theoretically, includes the following categories of pensions:

- the public pillar PAYG, initially adopted and reformed in 2000 and 2010 introducing the calculation algorithm of the personal contribution "history"; there is a minimum and standard period of contribution for access to the pension right of the DC type. Currently the system is regulated by Law no. 263/2010 regarding the unitary public pensions system;

- the compulsory private pillar, constituted by partial and gradual transfer from total individual contribution to old-age social insurance system (to 6% in 2016) with capitalisation of the DC type, compulsory for persons up to 35 years of age in the implementation year, and optional for those aged between 35 and 45 years of age; currently the number of contributors to the system is of about 5,5 million persons, and the share of corresponding assets' volume in GDP is of 0,5% (Hungary 10%, Poland 14%, Bulgaria 4%) – data of CSSPP (Law 411/2004, with subsequent amendments, enforced as of July 2007);

- occupational pension schemes for which the specific legislation is undergoing reviewing/amendments and the implementation of which follows to be realised in the next future, after passing new regulations; in accordance with the Law Draft regarding occupational pensions, the right to propose an occupational pensions' scheme pertains to the employer, alone or in association with other employers, and by consulting the representatives of the employees. Also, the occupational pension schemes would follow to be supplied by managers based on a prospect. At the same time,

[11] Ebbinghaus B., Gronwald M., 2009, The Changing Public-Private Pension Mix in Europe: from the Path Dependence to Path Departure, http://www2.asanet.org/sectionchs/09conf/Ebbinghaus.pdf

the managers collect contributions, invest financial resources of the occupational pension funds, and pay occupational pensions[12];

- individual pension schemes, based on life insurances of the pension-type supplied by national and international insurance companies, regulated by Law 204/2006 applicable as of June 2006; **Pillar III** is the name given to the system of optional pensions, managed by private companies, a system based on individual accounts and optional adhesion. The contributors to this system number almost 212 thousand persons with a fund under 300 million Lei (2010, CSSPP data). As opposed to "compulsory private pensions" (Pillar II), the legislation for Pillar III does not forbid the participation to optional pensions depending on age, anyone being able to contribute to the system with up to 15% from the monthly gross achieved incomes. In order to benefit of an optional pension, the legal conditions impose for each contributor to have at least 90 monthly contributions (not necessarily consecutive) made to the fund, up to an age of at least 60 years, and a minimum accumulated sum[13].

In conclusion, the current contribution scheme for Romania to the pensions' system includes 3 sources of constituting the pension, with the involvement of the state and private national/international market operators. The system develops the voluntary savings side and was reformed for answering better to the profile of the contributor, as to be anticipative, stimulative, and allowing for correlating benefits depending on contribution.

The scheme of the pension insurance system in Romania for the year 2011

System structure	State involvement	Employer's involvement	Individual contribution	Components structure
Pillar I	YES	Compulsory	Compulsory	Employee/employer contributions
Pillar II Compulsory private pension	YES	compulsory	Compulsory up to 35 years of age Optional – 35-45 years of age (in 2007)	Contribution transfer of up to 6% from pillar I
Pillar III Optional private pension	NO	Optional	Optional	Up to maximum 15% from individual incomes

Source: based on enforced legislation for 2011

Contributions to the public pension funds increased in the last two decades from 17%[14] of the gross income bill 31,3% for normal labour conditions (41,3% for special conditions), from which is born by the employer to a share of 20,8% (25,8% – special labour conditions, 30,8% – exceptional labour conditions) and by the employee in percent of 10,5 % for normal labour conditions (10,5% – special labour conditions, 10,5% – exceptional labour conditions). From the compulsory contribution of each employee that fulfils the conditions and is affiliated to a private pensions' fund (selected individually or by automated redistribution), thus in 2011 were redistributed to the compulsory private pensions' fund 3 pp and other 3.5 pp shall be transferred in 2012.

The optional pension has as basis the individual choice and presupposes additional payment. The eligible individuals may contribute to several optional pension funds provided that the maximum

[12] http://www.romanialibera.ro/bani-afaceri/economie/legea-pensiilor-ocupationale-in-dezbatere-publica-16077.html

[13] http://www.csspp.ro/pilonul-3

[14] http://www.mmuncii.ro/pub/imagemanager/images/file/Statistica/Statistici%20lunare/Evolutia%20valorii%20cotelor%20de%20CAS%202011.pdf

contribution limit imposed by law is not exceeded (Law 204/2006 regarding optional pensions, with subsequent changes and amendments). Moreover, to pillar III may contribute also employers, providing thus for actual benefits for their employees. The contribution to this pillar (pillar III) is stimulated by assuring through the Fiscal Code the facility of fiscal deductions of employee's and employer's contributions. In 2011, for contributions born by employers on behalf of their employees, these benefit from the exclusion from the calculation basis of the taxes of the contributions of social insurances (including the insurance contribution for work accidents and professional diseases), to the deductibility limit established by law, respectively the equivalent in Lei of the amount of 400 Euro yearly, for each participant. The own contribution of the employee to Pillar Iii is considered deductible on calculating the tax on wage earnings to the same limit.

The expenditures with pensions in Romania are lower as share in GDP than in the majority of EU member countries. For instance, according to the Eurostat statistics, in 2009 the expenditures on pensions[15] (last available data) represented 9,4% in GDP, close to the ones in Luxemburg, yet lower by 3,6 pp than the EU-27 average and by 6,6 pp lower than in Italy which recorded the highest value for this indicator.

Share of expenditures on pensions in GDP, for the years 2005, 2008 and 2009 (%)

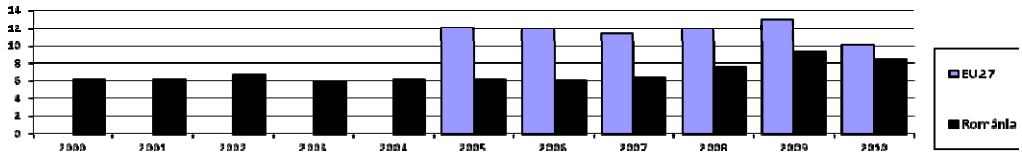
	2005	**2008**	**2009**
EU (27 countries)	12.15	12.05	13.07
Norway	7.97	7.64	8.79
Bulgaria	7.57	7.02	8.80
Romania	6.19	7.61	9.41
Luxembourg	9.57	8.30	9.45
Spain	:	9.26	10.10
Slovenia	10.33	9.63	10.89
Denmark	10.99	11.08	12.06
Belgium	11.16	11.32	12.14
Sweden (2004)	12.15	12.15	12.15
Switzerland (2008)	:	12.15	12.15
United Kingdom	10.76	11.35	12.53
Finland	11.18	10.80	12.57
Netherlands	12.54	12.01	12.83
Germany	13.37	12.32	13.14
Portugal	12.34	13.20	14.12
France	13.30	13.67	14.51
Austria	14.17	14.02	15.06
Italy	14.71	14.96	16.03

Source: http://epp.eurostat.ec.europa.eu/portal/page/portal/social_protection/data/main_tables

[15] The 'Pensions' aggregate comprises part of periodic cash benefits under the disability, old-age, survivors and unemployment functions. It is defined as the sum of the following social benefits: disability pension, early-retirement due to reduced capacity to work, old-age pension, anticipated old-age pension, partial pension, survivors' pension, early-retirement benefit for labour market reasons.

Under the aspect of their evolution in time, as of 2000 when the reform was initiated, the share of expenditures with pensions in GDP increased about 1,5 times from 6,11% to 9,41%, and more considerable in 2007.

Share of expenditures with pension in GDP (%)



Source: http://epp.eurostat.ec.europa.eu/portal/page/portal/social_protection/data/main_tables

The old-age social benefits as share in total social benefits[16] represent for Romania 47,4%, being exceeded only by Poland and Italy which denotes a **social insurance system centred on pensions.** Against the EU-27 average, the share of pension benefits is by about 8 pp higher, and against Ireland with the lowest share, it is over 26 pp. Due to this structure, **any imbalance in the public pensions system has a higher magnitude on the social insurance budget and the risk associated to individuals with social vulnerabilities increases.**

Share of old-age benefits in total social benefits, 2000-2009

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
EU27	:	:	:	:	:	38.97	39.02	38.89	39.69	38.97
Ireland	19.50	19.09	22.58	23.03	22.57	22.25	22.53	22.39	21.84	21.11
Iceland	28.55	27.66	28.07	27.74	28.02	28.60	28.63	22.62	22.33	21.22
Luxemburg	36.85	26.20	26.28	26.11	25.87	26.32	26.75	27.38	26.79	27.27
Norway	29.41	29.23	28.83	28.20	28.52	29.44	29.87	30.34	30.58	30.08
Spain	34.85	34.41	33.96	33.11	32.71	32.35	32.35	32.47	32.04	31.28
Belgium	33.33	33.70	33.42	32.60	32.43	32.36	32.99	32.23	32.72	32.68
Germany	32.95	33.38	33.30	33.61	34.30	34.46	34.78	34.87	34.65	33.11
Netherlands	37.05	36.35	35.98	35.42	36.54	37.37	35.20	36.12	35.82	35.18
Finland	31.85	32.64	33.00	33.22	33.25	33.65	34.26	34.96	34.61	35.34
Slovakia	32.17	33.21	33.37	35.45	36.99	39.08	38.48	38.27	37.14	36.78
Denmark	38.05	37.95	37.64	37.20	37.17	37.51	37.87	38.10	38.38	37.13
Cyprus	41.27	39.62	41.53	39.98	41.40	39.99	39.61	40.22	38.97	38.48
Slovenia	43.24	43.63	44.68	43.28	43.31	42.36	38.09	39.48	38.53	38.83
France	38.41	38.47	37.07	36.94	37.03	37.36	38.06	38.67	39.39	39.20
Hungary	35.76	36.67	37.63	35.90	36.64	36.50	36.35	37.80	39.38	39.63
Sweden	37.08	36.89	36.64	37.18	37.25	37.78	37.41	38.62	39.95	40.23
Lithuania	43.70	43.14	42.98	43.18	42.68	42.13	40.49	42.82	40.97	40.57

[16] Social benefits consist of transfers, in cash or in kind, by social protection schemes to households and individuals to relieve them of the burden of a defined set of risks or needs. The functions (or risks) are: sickness/healthcare, disability, old age, survivors, family/children, unemployment, housing, social exclusion not elsewhere classified.

Greece	46.39	48.10	47.15	47.44	47.38	47.76	43.24	43.57	42.43	41.35
Estonia	43.38	42.50	43.61	44.01	42.86	43.14	44.36	42.97	42.29	41.89
Czech R.	38.84	38.30	37.87	36.72	36.92	38.36	38.97	39.76	41.88	41.94
Austria	39.67	40.02	40.08	40.09	40.22	40.61	41.26	41.84	42.18	42.35
United Kingdom	44.43	42.44	41.69	41.26	41.21	41.74	41.20	38.17	42.79	42.62
Malta	39.76	41.76	40.70	39.95	39.51	41.05	42.08	42.35	42.49	42.92
Portugal	37.60	38.65	38.55	39.28	40.09	41.24	42.15	42.93	44.24	43.54
Latvia	55.82	53.75	53.90	50.66	48.37	46.32	44.58	43.78	43.67	45.21
Switzerland	47.31	47.03	45.03	44.01	44.46	44.13	44.55	45.64	45.98	:
Bulgaria	:	:	:	:	:	46.53	47.81	46.84	45.03	46.76
Romania	41.43	42.79	43.18	40.56	42.77	39.93	41.50	41.72	46.24	47.39
Poland	44.47	45.33	45.95	46.73	48.48	48.27	49.48	49.04	48.73	50.71
Italy	52.48	51.56	51.66	51.85	51.00	50.67	50.79	51.55	51.46	50.81

Source: http://epp.eurostat.ec.europa.eu/portal/page/portal/social_protection/data/main_tables

It should be noted that the share of old-age benefits increased from under 40% in 2005, to more than 47% in 2009 and more heightened during the crisis.

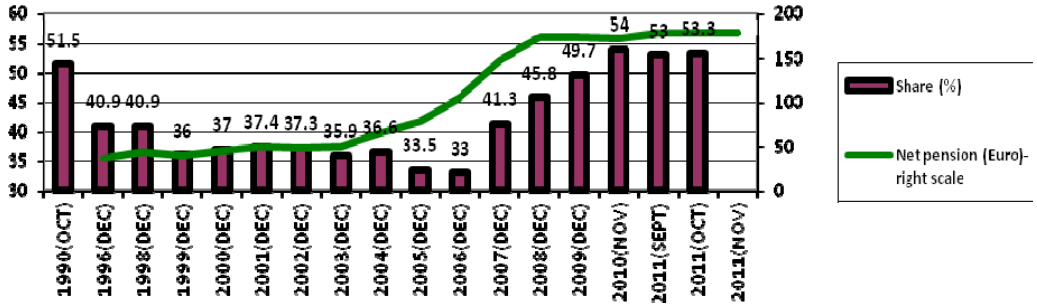
If we refer to absolute values per person in PPS, then we can nuance our previous findings with the following:

Romania allots for old-age benefits 27.66% from the EU-27 level in 2009, against only 17.72% in 2000

the highest growth within the EU was recorded, of over 3 times of the value per capita expressed in PPS, more marked after 2005

The public pension pillar ensures currently a net average level of the pension of less than 50% from the net wage at national level and the average pension is of about 178 Euros.

Net pension from public pillar (Euro) and share of pension of net average wage (%)



Source: http://www.cnpas.org/portal/media-type/html/language/ro/user/anon/page/default.psml/template/ generic?url=%2Fcontent%2Fcnpas%2Fstatistics.html&title=Indicatori+statistici+pilon+I

Taking into account the cost of living, in particular housing expenditures in the urban area to which are added the specific costs for the third age (health and specific services) it can be appreciated that the minimum pension (about 81 Euros/month) is insufficient for ensuring decent

In the last years Romania pursued the reform of the public pension system, unifying funds for different professional categories and building-up the compulsory private system and the optional one. The factors that triggered the shaping of the multi-tiered system were similar to the ones in other countries, respectively: life-span increase, respectively the pensioners live longer and benefit for a longer period from the public pension, the PAYG system being incapable of ensuring the obligations assumed towards the beneficiaries, with an economic dependency ratio in marked deterioration, the number of contributors to the public systems of social insurances decreasing and the public pensions no longer being able to ensure decent replacement rates, adequate for the pensioners.

Even though initiated in 2000, the reform of the pensions' system for developing pillar II – compulsory and private – was started 8 years later by feeding from initially paid contributions to the public pillar. The legal framework was also created for the occupational pensions. In parallel operated also the system of life insurances under the form of private pensions, until the implementation of compulsory private pensions, constituting the only form of insurance with capitalisation and payments (integrally or gradually) after fulfilment of the retirement age. **To the compulsory private system in the month of October 2011 contributed** within the system 5516038 individuals, with a fund of over 40,2 million Euros. Among contributors, 51,7% were men and the distribution on age groups indicated: 28,7% for up to 25 years of age, 41,5% with ages between 25and 35 years of age and 39,8% for those over 35 de years of age (CNPAS data)[17].

The increase of the economic dependency ratio of elderly persons due to demographic ageing and diminishment of the number of contributors to the system (lower entries on labour market and exits due to labour mobility and definitive migration) generated **deficits in fund's growth**. In order to ensure long-term sustainability the shift was made to a new restructuring stage of the system, first by recalculating pensions by introducing the system of determining the history of individual contributions and then by rethinking its build-up for the purpose of ensuring long-term sustainability. **The strategy in the field of pensions** provides for: balancing and strengthening the public pensions' system; diversifying the insurance resources of old-age incomes; creating insurance resources for labour accidents and professional diseases. The reform is still underway, and in parallel changes were brought to the law of pensions, the objectives for the period 2009-2012 established by CNPAS being: assuring the financial sustainability of the public pensions' system based on the principle of contribution and social solidarity; eliminating inequities and anomalies still existing in the public pension system; reaching a target of 45% from the gross average wage on economy of the pension point (in October 2011 it was of 36.5%) under the conditions of public pensions' system sustainability; ensuring a minimum guaranteed social pension that would add the pension of up to 350 Lei monthly for all pensioners with a pension quantum under this stipulated amount, financed from the state budget; eliminating inequities with respect to pensions for persons employed in the former labour categories I and II, as well as for special and exceptional labour conditions, in accordance with the provisions of Law no. 218/2000; enforcing the provisions of the new legislation regarding the public pensions' system for farmers[18].

The reform aims to key parameters of the pensions' system construction, respectively indexing pensions by inflation and not depending on the development of the average wage on economy, limiting discretionary increases of some pension categories, extending the taxation basis by including also some public officer employees who were excepted by the old system. The scheme of increasing the retirement age is continued, also the one of closing the gap and then equalizing the standard age between men and women, and relating the standard retirement age to the life expectancy at birth. In parallel, support programmes shall be developed

[17] http://www.cnpas.org/portal/media-type/html/language/ro/user/anon/page/contributions.psml/template/generic?url=%2Fcontent%2Fcnpas%2Fstatistics2.html&title=Indicatori+statistici+pilon+II

[18] http://www.cnpas.org/portal/media-type/html/language/ro/user/anon/page/ integration.psml/template /generic?url=%2Fcontent%2Fcnpas%2Fobjectives.html&title=Obiective

for sustaining poor elderly. ***The building-up of the compulsory private pillar is continued by the annual increase of the contribution to the fund.*** The target of the reform is to ensure a transfer rate pension-wage at the time of retirement of 45% on the background of ensuring (gradually) the sustainability of each pillar[19]. In the new memorandum signed with IMF are included as reform measures of the pension system: freezing for 2011 the value of the pension point and enforcing the reformed legislative framework in the field for ensuring the sustainability of the private pensions' pillar[20].

In conclusion, the reform of the pensions' system by leaving aside consideration about consistent participation to the private system is of less performance for the majority of future pensioners. If we refer to the fiscal deductibility for supplementary pension insurances provided for by law, we can appreciate that the minimum conditions are met for stimulating the additional insurance, yet the quantum of the additional contribution benefiting of fiscal deductibility is much too low as compared with the savings need for ensuring a financially comfortable wage-pension conversion. Moreover, the insurance risk is double: on one hand the risk of receiving a diminished pension or cessation of payments to pillar I, under conditions of chronic deficits of the PAYG fund; on the other hand, the market risks for private funds. Finally, the risk that the final aggregated pension is insufficient at the level of maximal contributions under the conditions of integrally making use of the fiscal facilities. Recent studies (AVIVA, 2011[21]) have shown that the savings need for a decent pension is proportional with the age, respectively the total period of contribution. The average yearly deficit of pension savings is of 3700 Euros/year for the persons from Romania who retire between 2011 and 2051(in Poland is of 3400, in the Czech Republic of 4600 and Hungary 1900), which is equivalent with about 300 Euros/month and a total amount of 40,2 billion Euros, the equivalent of 35% from GDP in 2009 If we consider the age of persons in 2010, the average deficit of savings/person is of 4800 Euros/year for those of 50 years of age, 2900 for individuals of 40 years of age, 1700 for those of 30 years and of only 1300 for the ones aged 20 years, respectively almost 120 Euros/month (for 11 months of savings per year). If we consider the deductibility limit of 15% at total monthly earnings it is obvious that the gross monthly income should be at least 800 Euros/month, an amount that is hardly accessible to a young graduate and not only, particularly that the average gross wage in October 2011 was of about 467 Euros.

In fact, any actuarial calculation taking into account DC or DB for contributors from Romania, by using the input data of the analysis based on: the maximum level of fiscal deductibility (400 Euros), the contribution limit to the private optional pension (15% from monthly earnings) leads us either to required amounts to be saved by the systems of public pensions that are hardly accessible for those with low and average incomes, or to insignificant complementary sums. Currently, such official estimates are inexistent and cannot be made in a systematic manner[22]. Such determinations were made by the experts already in the year 2005[23], and more recently by companies operating on

[19] IMF, Romania: Letter of intent and technical memorandum of understanding, 24 April 2009

[20] IMF, Romania: Letter of intent and technical memorandum of understanding, 10 March 2011

[21] Document-2011-09-22-7812507-0-raport-deficitul-pensii.pdf The study quantifies for the first time the savings deficit at Pan-European level. The analysis realised by Deloitte on Aviva commission quantifies the savings deficit for pensions in Europe and separately in the countries where Aviva operates, such as Romania. The savings deficit for pensions refers to the gap between the income individuals retiring in the period 2011 to 2051 will require for an adequate living standard on retirement and the estimated level of the pension.

[22] CSSPP opinion: Currently there is no law has been passed for pensions' payment, nor the secondary law applicable to it that contains provisions about the payment manner, including here also types of pensions, mortality tables, computation formula, etc. Thus, at present, we cannot realize any estimate about the yearly saved amount that could lead to a private pension of one unit. After the emergence of the applicable legislation to the payment of private pension we shall be able to make first scenarios that shall be made available to the large public.

[23] http://hermes-ir.lib.hit-u.ac.jp/rs/bitstream/10086/14248/1/pie_dp268.pdf Vasile. V, Zaman. Gh., Romania's pension system between present restrictions and future exigencies, p 19 "..Additionally, the 200 Euros/year deduction from personal incomes taxation for participating to the system could not be considered as an incentive because it

the private pensions' market (the AVIVA study)[24]. The future development of the private pensions' pillar and its value is determined by several factors among which the most important are the yield obtained in investing the assets and the level of cashed contributions.

Conclusions

One of the priorities of each modern state is to create a legal framework that would allow for organising a pension system as sustainable as possible and realistic which is capable of assuring for the citizens reaching the retirement age a decent and careless living standard as much as possible, even under the conditions of the existence of some performance pension systems both public and private, at the time of retirement a dramatic diminishment of income takes place yet without an according diminishment of the level of expenditures. As result, the living standard to which each citizen was accustomed is difficult, if not impossible, to maintain.

Elderly persons represent a human capital that is under-used at present from the perspective of active involvement/participation to community life and to sustaining the economic and social development at local level. The extension of the period of financial independence for elderly against public social assistance services can be realised both by ensuring comfortable incomes on exiting the labour market through diversified pension-type benefits, and by providing for the possibility of continuing the activity and completing pension incomes with ones achieved on the labour market.

The developments of the last years have highlighted the issues of the current system of old-age insurances and the vulnerability, in particular of the public pensions' system against conjectural developments of the economy.

The crisis has proved that: a) the present operational pension systems must be rethought, reanalysed, and improved in particular from the perspective of ensuring the financial sustainability; b) more efforts should be made in order to improve the efficiency and safety of the pension schemes that would provide elderly with means for decent living. The pension systems are faced with hard difficulties in fulfilling their "pension promises" due to increased unemployment, to recession and to the volatility of the financial market. EU Member-States are in various stages of (re)forming the insurance and social assistance systems, in particular the pensions' system. In Central and Eastern Europe, Romania was the most delayed country in the process of pensions' reform and shifting to the system of private pensions. The reform of the pensions' system in Romania began, practically, only in 2000 when the new pension law was passed (Law 19/2000) and enforced as of 2001. Up to the current year repeated revisions took place of the old pension law, the financial issues of the system were partially improved/solved by sequential measures, without a long-term strategy which deepened and created even (new) inequities within the system.

The demographic developments of the last decade, labour force mobility and informal employment sizes as well as the dynamics of the economic dependency rate impose a series of measures in the field of pensions' system reform and of ensuring old-age specific social assistance such as: increasing the pensioning age (65 years of age for both men and women); eliminating early-retirement age within the public system or, at least, limiting access and avoiding the facile issuing of

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assures a very small (completion) pension (a simple calculation shows us that under the conditions of a contribution within the limits of deductible sums until the fulfillment of the legal retirement age, the obtained additional pension is of 80 Euros/month for a person up to 35 years, 35 Euros/month for a person up to 45 years and of about 11 Euros if the age of entering into the occupational scheme is of 55 years). If we consider a decent additional pension of approximately 400 Euros per year, a beneficiary of 35 years should contribute about 800 Euros/year for 30 years, one of 45 years with 1800 Euros in 20 years, amounts that cannot be directed to these destinations just from work incomes!)"

[24] Document-2011-09-22-7812507-0-raport-deficitul-pensii.pdf and http://www.evz.ro/detalii/stiri/studiu-aviva-romanii-trebuie-sa-economiseasca-3700-de-euroan-pensie-decenta-906676.html#ixzz1bPvWENSI " In average, each Polish citizen must save yearly the amount of 3.400 Euros, respectively 4.600 Euros for each employee in the Czech Republic. The best placed are the employees from Hungary, who must save 1.900 Euros yearly", stated the chairmen of Aviva Life Insurances..

necessary approvals; attracting youth for registration with the optional pension funds next to compulsory private pensions for benefiting at old age from higher and more diversified incomes than the ones due according to the public pension system; the development of some retirement delaying programmes for elderly who show they are still apt of performance on the job, including by partial/flexible employment programmes, associated fiscal facilities, etc.; vocational re-training or improvement, and extending active life period as well as encouraging significant participation of elderly to society life, including by means of another vocational path, or in the system of social and/or community activities, etc.

Also for the future the policy in the matter of pensions shall remain a common concern for public authorities, social partners, the pensions' sector and the civil society at national and EU-level. A common platform for monitoring all aspects related to the policy and regulation in the matter of pensions in an integrated manner and for joining together all interested parties might contribute to obtaining and maintaining adequate, sustainable and safe pensions.

The crisis has shown the importance of the European approach of the pension systems, questioned the long-term sustainability of the PAYG-type public system, and proved the interdependency of the different pillars of the pension systems within each member state, but especially, the importance of common approaches at EU-level in the matter of solvency and social adequacy.

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ECONOMIC CRISIS AND THE COMPETITIVENESS OF TRANSNATIONAL COMPANIES

LIVIU RADU[*]
CARMEN RADU[**]

Abstract
In crisis situations, the competitiveness of transnational companies becomes a particularly complex concept, due to the fact that said business entities are continuously moving within the context of internationalization and increasing use of global strategies. Given the current economic context, one cannot merely assess the competitiveness level of any given transnational company from a static standpoint, depending on the turnover, sales volume or number of employees of said company, but such assessment needs to be made from a dynamic standpoint, in close connection with the internal and international business environment in which that company carries out its activity.

Keywords*: national competitiveness, transnational companies' competitiveness, competitive advantage, transnational level, economic crisis*

Introduction

The concept of competitiveness is similar to that of economic efficiency and reflects a conjuncture of the economic activity, determined by a certain consumption of resources for obtaining goods and services. This approach presents the competitiveness from the efficiency of distributing resources standpoint, bringing in the center of attention the existing relation between maximizing effects and minimizing the efforts made by economic agents. The production of goods and services reflects the competitiveness under the conditions of diminishing costs, while the production's distribution under competitiveness conditions must assure, on one hand, a concordance between the volume, structure and quality of goods and services and, on the other hand, the market's exigencies.

While studying competitiveness, this has been approached through the angle of competitive advantage, when the competitiveness on a national level and similar with the term of competition was taken in consideration, and when the competitiveness of an economic agent on an international plan was being analyzed. At the same time, more detailed approaches were expressed by Kirsy Hugues[1] who considers competitiveness to be a problem of relative, static or dynamic efficiency, as well as a reflection of firm's performances in the international commerce (moderated performances), either under the form of export mark shares, or under the form of import penetration degree.

In conclusion, competitiveness is the capacity of an economic agent, product or service, individual or activity, to be susceptible to support the competition with the others participants to the market. On each economic agent's level, more categories of competitiveness can be identified: global, financial, commercial, human, managerial, technical and organizational. On the economic agent's level, global competitiveness represents his potential and implies the accomplishment of a diagnosis or an analyzing inventory of the capacity it disposes of, namely that of the financial-economic forces it can mobilize and the firm's vulnerable points. In other words, competitiveness depends on the proper functioning of the economic agents' assembly of organizational components.

The analysis of competitiveness concepts and competitive advantage, the role of foreign investments and attenuation of economic crisis are subjects of permanent interest. Specialized literature has benefited in time of the analyses of multiple prestigious authors, such as John H.

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[1] Hugues Kirsty (1993), European Competitiveness, Cambridge University press, pg. 5

Dunning, William Northaus, Kirsty Hugues, Robert Solow, Gilbert Abraham – Frois, or Ngaire Woods. In the Romanian economic literature the special contribution of researchers Costea Munteanu, Alexandra Horobeț, Anda Mazilu, Vasile Dan, Liviu Voinea etc. are noticeable.

The present global crisis, initiated in 2008, determined a decrease in international production of goods and services offered by the 82.000 transnational companies and by their 810.000 branches that function on a global scale. Decreases in profit, withdrawals of capital, massive discharges, restructurings and bankruptcies were recorded on these companies' level.

The global crisis initiation was predicted and afterwards analyzed by Nouriel Roubini, the Nobel Prize for economy winner from 2008, Paul Krugman, Professor Joseph Stigliz and the controversial investor George Soros. Along with them international financial organisms such as the World Bank, European Central Bank and the International Monetary Fund, and trough competent voices such as Christine Lagarde, warn that the crisis situation has not yet been surpassed and, instead, the risk exists that it will gain new features and aggravate in 2012.

The present study proposes to analyze the challenges to which the transnational companies that wish to maintain a high competitiveness in the context of the actual crisis must answer to.

PAPER CONTENT

1. Conceptual analysis of the term competitiveness

The specialized literature (David Held, Anthony Mc Grew, David Goldblatt and Jonathan Perraton, 2004)[2], while analyzing the transnational companies' activity, considers that at the present time they compete on a global scale, remaining, however, anchored in the originating country's economic system and extracting their competitive advantage particularly from the national base, but applying global strategies in order to withstand the competition. To this extent, UNCTAD (2002) considers competition as being "the main locomotive" of competitiveness, by referring to the activity of those said companies, and delimits static competitiveness from the dynamic one. Static competitiveness highlights emphasizes price competitiveness, determining firms to compete on the basis of facilities. Conditions in which maintaining the competitiveness depends on the increase or decrease of fabrication costs. Simultaneously, dynamic competitiveness is associated with the changing nature of competition which does not only emphasize the connection between costs and prices but also the firm's ability to learn, to rapidly adapt to new market conditions and to innovate. Consequently, the lack of resources, insufficient technological capacities and the incapacity to adapt trough innovation can cause the firms considered competitive on internal scale, to lose the ability to answer to the international competition's exigencies.

Other approaches (Iuliana Ciochină, Alina Voiculeț, 2004)[3], define the term competitiveness through its characteristics: strategic competences: long term prediction and organizational competences: risk management.

The definition underlines especially the managerial competences, the adaptability of production and of transnational companies' marketing, on the host-countries' level.

Associated to a multinational corporation, the term of competitiveness suggests security, efficiency, quality, high productivity, adaptability, success, modern management, superior products, optimum costs. However, in order to consider a firm to be competitive, a rigorous analysis is required to be applied on the said firm as well as on its activity environment. A firm's competitiveness is mainly influenced by the capacity to understand and adapt as properly as possible to the surrounding world. These approaches along with classifying the corporations whose activity exceeds national

[2] Held David, Mc Grew Anthony, Goldblatt David and Perraton Jonathan (2004) – Global changes : politics, economy and culture, Polirom Publishing House, Iași

[3] Ciochină Iuliana, Voiculeț Alina (2004) – The firm's competitiveness from European perspective, paper sustained at the International Economic Conference - Lucian Blaga University, Sibiu, 2004

borders (established by Charles Hill in 1998)[4], empower us to consider a transnational company to be competitive under the conditions in which it can adapt its production and marketing offer to the local environment's conditions, which brings into foreground the commerce and its competitive advantage. To this extent, the companies' present tendency to globalize determines us to not neglect the aspects related to competition, analyzed through the experienced gained and valorized as a result to adaptability and innovation.

The study on competitive firms emphasized some of their similar characteristics but the audit of the firm's potential remains to be concretized in the list of factors or foundations of competitiveness as follows[5]:

The financial competitiveness can be evaluated by: the size of the profit, the capacity to auto finance, potential of financial capacity and potential to solvability.

The commercial competitiveness is given by: market share, turnover evolution and commercial notoriousness;

The technical competitiveness implies: the nature of equipment, technical advance and supply;

The managerial competitiveness involves: the leaders' profile, the capacity to lead and the collaborators' value;

The organizational competitiveness refers to: the form of organizational structure, the nature of decisions delegation and the rate of integrating individuals and services in the firm's objectives.

Thus, one might consider competitiveness to be the economic capacity of an enterprise to comply with an effective or potentially competition. Competitiveness can be evaluated in accordance to certain elements, such as: price, product quality, services post sales, flexibility and versatility of offer. Out of all these elements the most important ones are the price and quality of products. At the same time and according to a well-known definition from the American specialized literature (M. Porter – 1987)[6], the competitive advantage can be obtained: by reducing costs or by qualitative differentiation of products. In the fight for new markets, the firms must emphasize their qualities in order to win advantages ahead the competitors. This is one method of seeing competition, but a more detailed view must take in consideration the obtained results in an industrial competitive structure in the international market. A firm's direction is given by its own strategy, whilst the chances to succeed are given by competitive advantages. In order to increase an enterprise's competitiveness, to withstand the competition and exacerbate profits, the manager requires information regarding changes from the domain on a global scale, needs to know the tendencies on the international market and the perspectives of its evolution and also to detain information about the global competitors' programs. The managerial model is changing and the present manager must not limit to the strict business of its firm and just to knowing the evolution of business from the branches in the country in which he works. Transnational competitiveness is carried out by transnational companies, through complex managerial strategies, by effectuating strategic merges and alliances and promoting foreign direct investments.

2. The connection between national and transnational companies' competitiveness

According to certain experts' opinion[7], „there was a time when the nation state was regarded as being an economic force, primordial and capable to dictate the rules of the game in accordance to other economic agents. That period is long gone. Gradually, a transfer of power was produced by the

[4] Hill Charles (1998) - International Business: Competing in the Global Marketplace, McGraw-Hill Companies; 2nd edition (July 2, 1998)

[5] Dan Vasile – *Industrial competitive strategies and structures*, All Educational Publishing House, Bucharest, 1997

[6] Porter Michael (1987) – From competitive advantage to corporate strategy, Harvard Business. Review, no 3, 1987

[7] Strage S.(1997) – The Retreat of State, Cambridge University Press

following three coordinates: from the poorly industrialized countries to the strong ones; from states to markets and through this to transnational companies; part of the power gradually diminished, in the sense that no one carries it out." The same author also identifies the main causes at the base of this forces rapport: technological innovations promoted by transnational companies; high costs of new technologies that the said companies cannot sustain alone and not to mention the emphasis placed on the structural power to the detriment of the relational one.

The transnational companies' objectives are not always similar to the competitive objectives of every country in which these companies act. However, the governments of the host countries can, most of the times, encourage the STN arrival, trusting that those will contribute financially, humanly and technologically to the national economic and social competitiveness. Transnational companies have as well their own interest in maintaining some connections with the host countries' governments in order to avoid the enclosure of the awarded rights and freedoms. At the same time, another interest is to keep the inalienable image of the products and brands they represent by avoiding any inappropriate behavior on a national market that could have serious consequences on their competitiveness on all national markets in which they are present.

Consequently, all international agreements and treaties consider the following as being main responsibilities for the multinational corporations that are active in host countries: to contribute to the development of receiving economies; to protect the environment; to create new jobs; to maintain good relations with the employees; to assure a loyal competition; to take in consideration the consumer's norms of protection; to contribute to the removal of corruption and bureaucracy and to value the human rights. At the same time, the host country is interested in the transnational companies and autochthon firms to follow the national legislation and not violate to their own advantage the weaknesses of the legislative and administrative system even if it interposes in the economic activity.

The connection between the host countries' and the transnational companies' double competitiveness is emphasized by the main responsibilities established by the international forums (U.N.O. and O.E.C.D.)[8] for this companies. OECD creates a set of rules that should be followed by transnational companies in order to pursue the host countries' interest: firstly, they have to contribute to the economic, social and environmental progress; secondly, to encourage the local capacity for developing the enterprises' activities on local and foreign markets; thirdly, to encourage the development of human resources especially by assuring opportunities of development and facilitating the access of employees to courses for specializing one's carrier (training) and last but not least, to not involve in the local policy by respecting the human resource to its true value.

In short, one might consider the following as being particularly important in analyzing the competitiveness of transnational companies and of host countries:

The contribution of public incomes of the host countries. As it is well-known, public incomes are part of the most important sources of financing development projects. Consequently, the governments of host countries are interested that the transnational companies are respecting the engagements of paying debts to the state budget and are not using abusive practices in remigration of profits. The companies are, simultaneously, indebted to put, at the service of fiscal authorities, correct data and accounting financial documents which the authorities might solicit.

The collaboration with autochthon firms. The transnational companies must initiate and maintain close connections to national firms, thus aiding the increase of their competitiveness. This requires from the transnational companies tight, long term engagements of incorporating in the host country's economy

[8] In 1986, within the U.N.O., a Code of conduct of CMN was adopted and greeted with the universal need of regulating the conduct of relations between the states members of U.N.O. and the transnational corporations, and the Organization for Economic Co-operation and Development (OECD) established a guide for CMN in 1976.

The creation of jobs and increase of the autochthon work force's degree of training. Along with this, the transnational companies are invited to promote good relations with local firms and make considerable efforts to reduce the negative effects that might result in certain situations, like, for example, the effects of the present economic crisis.

The transfer of technology. Transnational companies contribute to the increase of the host countries' competitiveness by cooperating with autochthon firms as well as with local authorities. greet

As the transnational companies extend over national borders, the obligations assumed by them on the host countries' level and especially on the host economies level, extend also. From this point of view, Kofi Annan (1999)[9] considers that the assembly of industrial operations with a social impact on implemented communities, require valences with different sense and action, derived and reunited under the shape of norms, instruments and politics, that can exert successive shaping of the behavior of local consumers and, implicitly, in the image of products manufactured on regional plan, by the resident transnational companies.

To this extent, we present a few of the politics adopted by some countries for the functioning of transnational companies[10] on their territory. In the U.S.A. a politic of "open doors" is being promoted, simultaneously with blocking some acquisitions, protecting certain areas of activity and declining unwanted investments. In Japan an administrative surveillance is being applied while it is specialized in restrictions over remigration of profits and establishment of companies of joint-ventures type, monitoring the transnational companies' activities and the thorough analysis of foreign investments. In the European Union investments are approved under the condition they do not affect the activity of its own societies and for this purpose they are being carefully supervised.

The following are among the authors devoted to explaining competitiveness under the form of cost/benefit advantages: J. Dunning (1993)[11], R. Caves (1982)[12] and S. Vogel (1997)[13]. On this matter, the argument brought by J. Dunning is interesting: "the more a transnational company cares about its advantages over property, the smaller the probability it will renounce on the control over them".

The competitiveness of transnational companies on the levels of host country and mother country's economy can be studied through the standpoint of the alliances' strategies and of the management specific to these companies, as well as through the foreign direct investments (FDI) accomplished by them.

3. The influence of economic crisis on the investments of transnational companies

American economists consider that the source of crises[14] is the following context: "…markets have become too large, too complex and too dynamic to subject matter to the type of surveillance and regulation of the twentieth century. No wonder that this globalized financial mammoth surpasses the complete power of understanding of even the most sophisticated participants to the market." In order to have an image on the financial system from the beginning period of the global economic crisis and in order to connect to the above quote, we present a few statistical data: Among the 50 classified financial transnational companies, 9 of them are American with a capital of 8,260 billion dollars, 6 are English with a total capital of 6,780 billion, 5 are French with a capital of 6,360 billion dollars. Germany and Japan occupy the same position with 4 other financial transnational companies, and both have a total capital of approximately 4000 billion dollars.

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[9] Annan Kofi (1999) – A compact for the new century; New York; United Nations

[10] Bailey, D., Harte, G., Sugden, R.,- Transnationals and Governments, Routhledge, 1994

[11] Dunning J. (1993) – Multinational Enterprises and the Global Economy, Addison – Wesley.

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[14] Greenspan, Alan (2007) - The Age of Turbulence: Adventures in a New World. New York: Penguin Press

The erosion of the moral capital, necessary for the business environment, is also caused by some discoveries related to some corporations' corporatist frauds that are part of the 50 transnational companies on a global level. Morgan Stanley, Goldman Sachs Group Inc, Merrill Lynch % Company Inc, Citigroup Inc, Ubs Ag, Credit Suisse Group and Societe Generale are some of these transnational companies.

The changes produced nowadays in the global economy have reached such an extremely fast pace that we can expect the significant deceleration of the global economy's increase rhythm. Economists warned in 2010 that the assistance program does nothing more than delay the inevitable. Unfortunately, their predictions have been confirmed. Ireland avoided a banking crisis only by appealing to a loan of 85 billion Euros from the EU and IMF, and Portugal was forced to choose a similar solution by taking in loan 78 billion Euros. In Spain, the unemployment rate has exceeded 21%, the highest in the developed world, and Greece's public debt increased from 120% from GDP to 150% and in 2011 the state requested a new loan. Italy has already reached the point in which these states were when they requested emergency credits, from the standpoint of interests the markets required to finance the state. Volatility remains the defining word for Europe and the risk of public debt has been transferred to the banks since they have massively loaned the governments. Being integrated in a succession of consecutive phases and periods, these changes to which the international business environment has been complied to, imply an entire process of re-dimensioning and re-allocation of funds for the purpose of maintaining them on the parameters impose by the exigencies of global competitiveness[15].

The global financial and economic crisis strongly affected the evolution of international investing activities in 2008 by determining the notable decline of the foreign direct investments (FDI) flows, intercepted and generated on a global plan, after a cycle of four years of continuous increase. According to the estimations revised by UNCTAD, the value volume of the intercepted global FDI incomes had reduced to 15% in 2008, summing up to 1,659 billion USD, as opposed to the historical record from 2007, of 1,941 billion USD. The decline of FDI outcomes from 2008 was caused especially by the 29% collapse of the sales volume associated with trans-boundary fusions and acquisitions. The decrease of FDI outcomes between the period of 2008 and 2009 is the result of two major factors that affect internal market, such as international investments. Firs of all, the firms' capacity of investing was reduced by the decrease of access to financial resources, internally – due to the decline of corporative profits – as well as externally – as a result of a lesser availability and a higher cost of financing.

Second of all, the tendency to invest was negatively influenced by the economic perspectives especially in developed countries that are affected by the most severe recession of the post-war era. The impact of both factors is aggravated by the fact that at the beginning of the year 2009, a high level of perception over risk determined transnational companies to reduce their investments cost and programs, so that they will become more resistant to any deterioration of the business environment. All three major types of foreign direct investments (FDI of valorizing markets, FDI of valorizing resources, FDI of efficiency) will be affected by these factors, but in a different manor. The regression of foreign direct investments has especially affected the trans-boundaries fusions and acquisitions. The crisis's impact over the FDI differs in terms of region and sector. The developed countries have been the most affected until now, with a significant decrease of FDI outcomes in 2008, mainly because of the slow market's perspectives. The FDI outcomes continued to increase in the developing economies during 2008, however on a much slower rate than in the previous year. All developing regions, with the exception of West Asia, recorded in the year 2008 higher values of FDI incomes. Afterward, the crisis extended in size and turbulence on a large scale, thus being followed by financial markets that hit many developing and emergent economies. Emergent economies, such

[15] Crafts Nicholas (2000) – Globalization and Growth in the Twentieth Century, IMF Working Paper, WP-00-04, IMF, Washington D.C.

as Hungary, Iceland, Latvia and Ukraine needed to appeal to the International Monetary Fund (IMF) for assistance. From the beginning of 2009, this list has been extending for other countries, such as Indonesia, Pakistan and Romania. Subsequently, the crisis rapidly spread to sectors other than the financial one, with severe damage for real economy. The much more strict conditions of credit inevitably affected the companies' capacity to spend on factories and equipment, along with being able to make acquisitions.

Economic crisis has also impacted the activity of certain transnational companies operating in Romania: Nokia closed down its Jucu plant, Renault-Dacia reduced its production due to acute decrease of the demand on the internal and external market, Ford reduced its initially planned investments in Craiova, Kraft Foods and Colgate-Palmolive also closed down their plants in Romania.

The consumers trust has roughly decreased in many states of the world, reaching historical minimum first in the United States and later on in the European Union. Also large companies from many industries were severely affected by the decrease of sales. Beginning with the financial services, which were directly affected by the crisis, the shock waves hit many other industries, from extraction and fabrication industries to infrastructure services. The foreign direct investments were in 2010 of 2,596 billion Euros, with 25,6% less than in 2009 when they reached 3,48 billion Euros.

The World Bank's rapport from January 2012 considers that, in 2012, the global economy should be sustained by an 5,4% increase in the developing countries. In spite of this, the increase will only be of 1,4% in the countries strongly industrialized. The same rapport expresses that the progression of the volume for global economic exchanges had reduced to 6,6% in 2011 (in comparison to 12,4% in the year 2010, the year of global economy re-launch) and that in 2012 it will continue to drop, reaching only 4,7%.

Conclusions

In conclusion, the managerial actions, strategic management, mergers, acquisitions and alliances made by multinational companies all aim to one single objective – to increase organizational competitiveness in the context of increasingly competitive markets.

The transnational companies' competitiveness is a highly complex notion due to the fact that at present times, this type of economic agents represents entities that are in a continuous motion in the context of the internationalization process and that of changing to using global strategies. The transnational company is a complex system in which a permanent manifestation takes place regarding the contradiction between activities' flexibility and coordination. This contradiction has its origin in the very motion tendency of the firm abroad and from the permanent objective to extend its actions beyond the originating country's borders. Given the current economic context, one cannot merely assess the competitiveness level of any given transnational company from a static standpoint, depending on the turnover, sales volume or number of employees of said company, but such assessment needs to be made from a dynamic standpoint, in close connection with the internal and international business environment in which that company carries out its activity.

The business environment of a transnational company imposes the analysis of the manifestation mode of the existing competition between these entities in the national economic area. The competitiveness represents a competition between transnational companies with the aim of occupying new positions on market outlets. Regarding the multinational corporations' competitiveness, the most suitable description was given by G.A. Frois, who considers these enterprises should think globally, but act locally.

The economic crisis obviously influences transnational companies' competitiveness and, at the same time, their decreasing competitiveness determines the adjournment of surpassing the crisis situation and re-launching economic growth. In the last years, numerous transnational companies have drastically reduced their activity, from the foreign investments standpoint, as well as from

reducing production in accordance to the decreasing demand from individual and institutional consumers.

The austerity politics to which many governments were forced to resort to, have an impact on consumers (on incomes and their capacity to consume) and also on transnational companies that are no longer in resonance with them. Reducing major public investments is another loss for the transnational companies that beneficiated of state orders in multiple countries.

The economic crisis has reconfigured the positions of countries in the top of global competitiveness. As regards Romania, the Romanian economy has climbed 10 positions up in the top of global competitiveness over the period between 2007 and 2010 (from 74 out of 133 analyzed countries in 2997-2008 to 64 in 2009-2010)[16].

The European Committee is discussing today methodologies of co-sharing sovereign debts by emitting community obligations. France, and Germany especially, are opposing this. On one hand are the so-called PIGS states – Portugal, Italy, Greece and Spain – and on the other – Germany, Austria, Holland and Finland.

In this derogatory context, 2012 will unfortunately be an eminently electoral year and the following voting that will take place in 2012 may bring major changes or confirmations on a political level in many important countries, including countries that are great or regional powers, such as the USA, the Russian Federation, China and France, in smaller countries that are politically important through their resources and strategic positions hold, and in the Arab states (Egypt, Libya, possibly Syria or Iraq), Eastern Asia (Taiwan), the Euro zone or Eastern Europe and from the formal Soviet Union (Greece, Italy, Slovakia, Serbia, Romania, Ukraine, Georgia and Moldavian Republic), might decisively mark the geopolitical configuration of Europe and the rest of the world. Under these conditions it is highly unlikely for the said governments to establish radical reforms that could bring electoral losses. The lack of economic measures will reflect on transnational companies from the mother states as well as from host states.

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[16] World Economic Forum, The Global Competitiveness Report 2009-2010, p.266

THE ROLE OF THE INTERNATIONAL MONETARY FUND IN RESOLVING THE GLOBAL FINANCIAL CRISIS

MIHAI SPĂTARU-NEGURĂ*

Abstract

In 2008-2009, the global economy experienced the worst financial crisis since the Great Depression in the 1930s, as it has been characterized. We consider that the current global financial crisis is a major challenge for the International Monetary Fund („IMF" or the „Fund"). The IMF has emerged as a powerful institutional force and has provided recomendations and analyses that have served as the basis of official action on several fronts. This paper discusses the potential roles the Fund may have in resolving the current global financial crisis.

***Keywords**: International Monetary Fund, global, crisis, financial, economy.*

Introduction

When the subprime crisis struck in the US and especially when it spread to other advanced economies and pushed the global economy into recession, designing an effective policy response to the crisis became the number one priority for policymakers around the world.

The causes of economic and financial crises are varied and complex. Key factors can include weak domestic financial systems; large and persistent external or domestic imbalances (including current account deficits or fiscal deficits, or both); high levels of external and/or public debt; exchange rates fixed at inappropriate levels; spillovers of economic and financial crises from other countries; natural disasters; armed conflicts or large swings in the price of key commodities, such as food and fuel. Exogenous shocks**,** ranging from natural disasters to terms of trade or foreign demand shocks are common causes of economic distress. This is especially true in low-income countries, which have limited capacity to invest in disaster prevention, and are dependent on a narrow range of exports of mostly primary goods.

In the doctrine it was underlined that the current global financial crisis is testing the ability of the IMF in its role as the *central international institution for oversight of the global monetary system*[1]. However, the current financial crisis represents a great challenge for the IMF because it is wholly unequipped to provide by itself the necessary liquidity to the US and affected industrialized countries.

The International Monetary Fund is an organization of 187 member countries, working *to foster* global monetary cooperation, *secure* financial stability, *facilitate* international trade, *promote* high employment and sustainable economic growth, and *reduce* poverty around the world.

The IMF promotes international monetary cooperation and exchange rate stability, facilitates the balanced growth of international trade, and provides resources to help members in balance of payments difficulties or to assist with poverty reduction. The IMF works with other international organizations to promote growth and poverty reduction. It also interacts with think tanks, civil society, and the media on a daily basis.

It is a specialized agency of the United Nations but has its own charter, governing structure, and finances. Crucial aspect of the IMF's governance: nearly all decisions are made by consensus. Its members are represented through a quota system broadly based on their relative size in the global

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[1] Martin A. Weiss, *The Global Financial Crisis: The Role of the International Monetary Fund (IMF)*, CRS Report for Congress, Updated October 30, 2008, available at http://fpc.state.gov/documents/organization/112052.pdf;

economy. Upon joining, each member of the IMF is assigned a quota[2], based broadly on its relative size in the world economy. The IMF's membership agreed in May 2008 on a rebalancing of its quota system in order to reflect the changing global economic realities, especially the increased weight of major emerging markets in the global economy. A member's quota delineates basic aspects of its financial and organizational relationship with the IMF, including:

• ***subscriptions.*** A member's quota subscription determines the maximum amount of financial resources the member is obliged to provide to the IMF. A member must pay its subscription in full upon joining the IMF: up to 25 percent must be paid in the IMF's own currency, called Special Drawing Rights ("SDRs") or widely accepted currencies (such as the dollar, the euro, the yen, or pound sterling), while the rest is paid in the member's own currency.

• ***voting power.*** The quota largely determines a member's voting power in IMF decisions. Each IMF member has 250 basic votes plus one additional vote for each SDR 100,000 of quota. Accordingly, the US has 371,743 votes (16.77 percent of the total), and Palau has 281 votes (0.01 percent of the total). The newly agreed quota and voice reform will result in a significant shift in the representation of dynamic economies, many of which are emerging market countries, through a quota increase for 54 member countries. A tripling of the number of basic votes is also envisaged as a means to give poorer countries a greater say in running the institution.

• ***access to financing.*** The amount of financing a member can obtain from the IMF is based on its quota. Under Stand-By and Extended Arrangements, which are types of loans, a member can borrow up to 200 percent of its quota annually and 600 percent cumulatively. However, access may be higher in exceptional circumstances.

• ***SDR allocations.*** Allocations of SDRs, the IMF's unit of account, is used as an international reserve asset. A member's share of general SDR allocations is established in proportion to its quota. The most recent general allocation of SDRs took place in 2009.

This paper focuses on the the potential roles the Fund may have in resolving the current global financial crisis. My own work has been to critically examine the actions of IMF during the current crisis and the results obtained.

I have attempted to examine how the IMF reacted this past years and how it had adapted its policy.

Paper content

It is worth mentionning from the beginning that the role of the IMF has changed significantly since its founding in 1944, and as the global financial system has evolved over the decades, so has the IMF.

From 1946 to 1973, its main purpose was to manage the fixed system of international exchange rates agreed on at Bretton Woods, New Hampshire. The IMF monitored the macroeconomic and exchange rate policies of member countries and helped them overcome the balance of payments crises with short-term loans that helped bring currencies back in line with their determined value. This system ended in 1973 when the US floated its currency and introduced the modern system of floating exchange rates.

Nowadays, the IMF responsabilities and operations can be grouped into three areas:

a) *surveillance* – involves monitoring economic and financial developments and providing policy advice to member countries;

b) *lending* – entails the provision of financial resources under specified conditions to assist a country experiencing balance of payments difficulties; and

c) *technical assistance* – includes help on designing or improving the quality and effectiveness of domestic policy-making.

[2] Information available at http://www.imf.org/external/np/exr/facts/quotas.htm;

Through its economic surveillance, the IMF keeps track of the economic health of its member countries, alerting them to risks on the horizon and providing policy advice. It also lends to countries in difficulty, and provides technical assistance and training to help countries improve economic management. This work is backed by IMF research and statistics. Marked by massive movements of capital and abrupt shifts in comparative advantage, globalization affects countries' policy choices in many areas, including labor, trade, and tax policies. Helping a country benefit from globalization while avoiding potential downsides is an important task for the IMF. The global economic crisis has highlighted just how interconnected countries have become in today's world economy.

As mentioned before, the IMF has evolved along with the global economy throughout its 65-year history, allowing the organization to retain its central role within the international financial architecture. As the world economy struggles to restore growth and jobs after the worst crisis since the Great Depression, the IMF has emerged as a very different institution. During the crisis, it mobilized on many fronts to support its member countries. It increased its lending, used its cross-country experience to advice on policy solutions, supported global policy coordination, and reformed the way it makes decisions. The result is an institution that is more in tune with the needs of its 187 member countries[3]*:*

• **stepping up crisis lending.** The IMF responded quickly to the global economic crisis, with lending commitments reaching a record level of more than US$250 billion in 2010. This figure includes a sharp increase in concessional lending (that's to say, subsidized lending at rates below those being charged by the market) to the world's poorest nations;

• **greater lending flexibility.** The IMF has overhauled its lending framework to make it better suited to countries' individual needs. It is also working with other regional institutions to create a broader financial safety net, which could help prevent new crises;

• **providing analysis and advice.** The IMF's monitoring, forecasts, and policy advice, informed by a global perspective and by experience from previous crises, have been in high demand and have been used by the G-20[4].

• **drawing lessons from the crisis.** The IMF is contributing to the ongoing effort to draw lessons from the crisis for policy, regulation, and reform of the global financial architecture.

• **historic reform of governance.** The IMF's member countries also agreed to a significant increase in the voice of dynamic emerging and developing economies in the decision making of the institution, while preserving the voice of the low-income members.

As regards the IMF's new lending framework, as part of moves to support countries during the global economic crisis, the IMF is beefing up its lending capacity and has approved a major overhaul of how it lends money by offering higher amounts and tailoring loan terms to countries' varying strengths and circumstances. More recently, further reforms have been approved to improve the IMF's capacity to prevent crises. Mainly:

• doubling of member countries' access to IMF resources;

• streamlined approach aims to reduce stigma of borrowing

• new Flexible Credit Line (FCL) for countries *with robust policy frameworks and a strong track record in economic performance*[5]*;*

[3] Information available at http://www.imf.org/external/np/exr/facts/changing.htm;

[4] The G-20 represents about 90 percent of global gross national product, 80 percent of world trade (including trade within the European Union) as well as two-thirds of the world's population. The G-20 comprises Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Mexico, Russia, Saudi Arabia, South Africa, South Korea, Turkey, the United Kingdom, and the United States of America, plus the European Union, represented by the rotating Council presidency and the European Central Bank. The Managing Director of the International Monetary Fund and the President of the World Bank, plus the chairs of the International Monetary and Financial Committee and Development Committee of the IMF and World Bank, also participate in G-20 meetings;

• new Precautionary Credit Line (PCL)for countries that have *sound economic policies and fundamentals,* but are still facing vulnerabilities[6];

• reform does away with "hard" structural conditionality; starting May 1, 2009, structural performance criteria have been discontinued for all IMF loans, including for programs with low-income countries. Structural reforms will continue to be part of IMF-supported programs, but have become more focused on areas critical to a country's recovery. And the monitoring of these policies will be done in a way that reduces stigma, because countries will no longer need formal waivers if they fail to implement an agreed measure by a specific date.

• new focus on objectives rather than specific actions;

• increased focus on social spending and more concessional terms for low-income countries.

As regards **the flexibility and the decrease of the number of conditions**, we underline that the IMF-supported programs have been tailored to individual country circumstances and focus on the most immediate issues to resolve the crisis. Conditionality is now more tightly focused on core objectives. The number of structural conditions has decreased in many programs, and has been increasingly limited to the most critical measures. Hence, we mention that:

The May 2010 IMF-supported program in **Greece** is the largest financing package assembled for one country and represents a new level of coordination with international partners (the European Commission), is broad-based (addressing fiscal, financial and structural constraints), and represents a flexible application of IMF lending policies to mitigate systemic risk.

The September 2008 IMF-supported program in **Costa Rica** used expansionary fiscal policy to mitigate the adverse effects of the drop in private demand during 2009, including increases in the wage bill and infrastructure spending.

The April 2008 IMF-supported program in **Guatemala** sought a moderate fiscal stimulus to support domestic demand, financed with substantial external resources from multilateral institutions. Social spending was slated to increase by 0.6 percent of GDP, to help offset the effect of the crisis on the poorest people in society.

In **Pakistan**, the IMF and the authorities have worked to create fiscal space in the program for increased social safety net and security spending. Recently, in response to the devastating floods in July-August 2010, the IMF provided $451 million of Emergency Assistance (ENDA) to help the government provide food, shelter and health services for those affected by the disaster. This additional funding was disbursed quickly, and was not linked to any program-based conditionality or review. The program's macroeconomic framework will be adjusted to take into account the impact of the floods on growth, the balance of payments, and the budget deficit;

On May 4, 2009, the IMF Executive Board approved **Romania**'s request to conclude a standby arrangement for a period of two years, amounting to SDR 11.4 billion (approximately EUR 12.9 billion) and the release of the first tranche worth SDR 4.37 billion (approximately EUR 4.9 billion). From this arrangement were drawn 7 of the 8 installments provided, DST totaling 10.57 billion (about 11.9 billion euros). Regarding the 8th installment, it was considered, at the request of the Romanian authorities, to be preventive, and in the favorable macroeconomic context, it was not drawn. At its meeting on March 25, 2011, the IMF Executive Board approved the earlier termination of the previous agreement and has approved a new preventive Stand-By Arrangement with Romania, for a period of 24 months, amounting to SDR 3090.6 million (about 3.5 billion euros), representing 300% of Romania's IMF quota. The date of entry into force of this Act is March 31, 2011. At

[5] The FCL is a crisis prevention tool that offers disbursements that are not phased. There are no conditions to be met once a country has been approved for the facility. The FCL was further enhanced in August 2010 to make it more predictable and flexible. Colombia, Mexico, and Poland have been provided access over $100 billion;

[6] The PCL is also a new crisis-prevention tool that combines an initial disbursement once the country has been approved for the PCL without conditions, with further disbursements subject to focused conditions. In January 2011, Macedonia became the first country to access the PCL;

December 19, 2011, the IMF Executive Board completed the third review meeting of performance criteria assumed by Romania within that agreement, providing our country the fourth tranche of SDR 430 million. On August 7, 2009, the IMF approved the resolution on a new general allocation of SDRs totaling SDR 250 billion. Currently, the amount of cumulative SDR allocations related to Romania is SDR 984.8 million[7].

The IMF also emphasized on social protection:

• The IMF emphasizes protection of social and other priority spending, in line with countries' priorities as set out in their poverty reduction strategies. In the context of the IMF's new architecture for LIC lending facilities, increased emphasis is given to strengthening safeguards on social and other priority spending, including through explicit program targets where possible.

• **Social spending is being preserved or increased wherever possible.** For instance, under the IMF-supported program in **Tajikistan**, the authorities aim to raise social- and poverty-related spending from 7.3 percent of GDP in 2008 to 8.7 percent of GDP in 2009, and further to 10 percent of GDP by 2012. All IMF-supported programs in low-income countries are expected to include **floors on social and other priority spending**. **In Latvia, t**he IMF has been working with the authorities, the European Commission, and the World Bank to refine cost-cutting measures so they deliver the necessary adjustment while protecting the most vulnerable groups. These efforts have resulted in a comprehensive strategy to improve the social safety net at a cost expected to reach 0.6 percent of GDP in 2010. **In Jamaica,** spending on well-targeted social assistance programs will be increased by at least 25 percent in FY2010–11. This increase will benefit the school feeding program and the Program of Advancement through Health and Education (PATH), which provides conditional cash transfers to the poorest. **Structural reforms are designed in a way to protect the most vulnerable**. For instance, in **El Salvador**, the authorities eliminated the non-residential electricity subsidy, thereby creating fiscal space (of up to 0.3 percent of GDP) to increase social spending in 2009.

• The IMF is working closely with the World Bank and donors to **identify additional external financing for social protection** and to help countries promote social safety net reform.

The IMF is also helping the world's poorest and it has overhauled its concessional financing facilities to make them more flexible and address the diverse needs of low-income countries, as many are being hard hit by the global crisis. The reform allows the Fund to provide more effective short-term and emergency financial assistance. The new framework includes increased resources, a doubling of borrowing limits, zero interest rates until the end of 2011, and a new interest rate structure thereafter to ensure increased concessionality.

In response to the global financial crisis, the IMF undertook an unprecedented reform of its policies toward low-income countries. The IMF response was built around a sharp increase in its concessional lending to these countries - to around US $4 billion in 2009, an increase of about four times historical levels. In 2009 and 2010, the IMF committed new concessional lending to sub-Saharan Africa totaling about US $4 billion, compared to US $1.1 billion in 2008 and only about US $0.2 billion in 2007.

Additional resources—including from the sale of IMF gold—are expected to boost the Fund's concessional lending up to $17 billion through 2014. As a result of the reforms, IMF programs are

[7] In the analysis published on March 27, 2012 on its website, the IMF experts recognized that, the tough austerity measures adopted in 2010 could have been implemented gradually, taking into account Romania's low public debt. In the report it is emphasised that the austerity measures have delayed the recovery of Romania and that these measures have resulted in more pronounced pro-cyclical evolution, which has delayed the economic recovery. Looking back, it could be argued that adjustment could have been gradual, especially given the low public debt. For more informations regarding the errors of the IMF made in Romania, please visit http://www.imf.org/external/pubs/ft/scr/2012/cr1264.pdf;

now more flexible and tailored to the individual needs of LICs, with streamlined conditionality, higher concessionality and more emphasis on safeguarding social spending.

Stronger pre-crisis macroeconomic positions and a robust countercyclical policy response facilitated a rapid recovery in many low-income countries. This was also made possible by the sharply higher IMF financial support and increased flexibility on fiscal policy in IMF programs.

Partly because of the crisis, the IMF has generally factored in higher deficits and spending in 2008 and 2009, and has made financial assistance programs more flexible. For example, on average for all sub-Saharan Africa, fiscal deficits widened by about 2 percent of GDP in 2009.

The e*stablishment of* Post-Catastrophe Debt Relief (PCDR) Trust *allows the IMF to join international debt relief efforts for very poor countries that are hit by the most catastrophic of natural disasters. PCDR-financed debt relief amounted to SDR 178 million ($268 million) in 2010.*

Furthermore, at the April 2, 2009 Summit in London, leaders of the G-20 agreed to triple the IMF's lending capacity to $750 billion and enable it to inject extra liquidity into the world economy via a $250 billion allocation of SDRs.

But, the IMF has also an *important role in shaping post-crisis financial architecture*. In this regard:

- the IMF is closely working with governments and other international institutions to try and prevent future crises;
- steps are being taken to improve risk analysis, including by taking a cross-country perspective. Linkages between the real economy, the financial sector, and external stability, in the focus of an early-warning exercise carried out jointly with the Financial Stability Board. Work is also underway looking at financial interconnectedness across borders, and how financial and economic policies in one country can affect others;
- more attention to the effectiveness of the IMF's country surveillance is also key, requiring more even-handedness, clarity, and candor;
- the IMF has also provided advice on how to rethink global regulation and supervision of markets.

The IMF is working on several fronts to help its members combat the worldwide economic and financial crisis. The Fund is tracking economic and financial developments worldwide so that it can help policymakers with the latest forecasts and analysis of developments in financial markets. It is giving policy advice to countries and regions, and money to assist emerging market and low-income economies that have been hit by the crisis. And it is assisting the Group of 20 industrialized and emerging economies with recommendations to reshape the system of international regulation and governance.

The IMF's roles in the global financial crisis

1. Firefighter: providing financial assistance to countries that need it.

2. Coach and advisor: providing advice on how to get individual countries and the global financial system back to health.

3. Architect: providing recommendations on how to overhaul the global financial system.

IMF is considered to be **firefighter** for emerging economies because:

the IMF has provided loans and credit lines worth $174 billion to 23 emerging market countries: Ukraine, Hungary, Pakistan, Iceland, Latvia, Belarus, Mexico, Romania, Poland, Colombia, Serbia, Angola.

The Flexible Credit Line (FCL)[8] was designed to meet the increased demand for crisis-prevention and crisis-mitigation lending from countries with robust policy frameworks and very

[8]Information available at http://www.imf.org/external/np/exr/facts/fcl.htm;

strong track records in economic performance. To date, three countries, Poland, Mexico and Colombia, have accessed the FCL: due in part to the favorable market reaction, all three countries have so far not drawn FCL resources.

A key objective of the lending reform is to reduce the perceived stigma of borrowing from the IMF, and to encourage countries to ask for assistance before they face a full blown crisis; in addition, countries with very strong track records can apply for the FCL when faced with actual balance of payments pressures. The FCL works as a **renewable credit line**, which at the country's discretion could initially be for either one- or two-years with a review of eligibility after the first year. If a country decided to draw on the credit line, repayment should take place over a 3¼ to 5 year period.

There is **no cap on access to IMF resources**, and the need for resources will be assessed on a case-by-case basis.

The cost of borrowing under the FCL is the same as that under the Fund's traditional Stand-By Arrangement (SBA). If accessing Fund resources on a precautionary basis, countries pay a commitment fee that is refunded if they opt to draw on those resources. The commitment fee increases with the level of access available over a twelve month period, effectively ranging between 24 and 27 basis points for access between 500 and 1000 percent of quota, and higher above 1000 percent of quota.

As with other non-concessional IMF facilities, the cost of drawing under the FCL varies with the scale and duration of lending. The lending rate is tied to the IMF's market-related interest rate, known as the basic rate of charge, which is itself linked to the Special Drawing Rights (SDR) interest rate. Large loans, with credit outstanding above 300 percent of quota, carry a surcharge of 200 basis points. If credit outstanding remains above 300 percent of quota after three years, the surcharge rises to 300 basis points. The escalation of the surcharge is designed to discourage large and prolonged use of IMF resources. Currently, the effective interest rate under the FCL (or an SBA) for access between 500 and 1000 percent of quota—ranges between 2.2–2.8 percent, rising to about 2.6–3.5 percent after 3 years, and higher above 1000 percent of quota.[1] These interest rates exclude a flat 50 bps service charge, which is applied to all Fund disbursements.

The qualification criteria are the core of the FCL and serve to show the IMF's confidence in the qualifying member country's policies and ability to take corrective measures when needed. At the heart of the qualification process is an assessment that the member country:

- has very strong economic fundamentals and institutional policy frameworks;
- is implementing—and has a sustained track record of implementing—very strong policies;
- remains committed to maintaining such policies in the future.

The criteria used to assess a country's qualification for an FCL arrangement are:

- a sustainable external position;
- a capital account position dominated by private flows;
- a track record of access to international capital markets at favorable terms;
- a reserve position that is relatively comfortable when the FCL is requested on a precautionary basis;
- sound public finances, including a sustainable public debt position;
- low and stable inflation, in the context of a sound monetary and exchange rate policy framework;
- no bank solvency problems that pose systemic threats to banking system stability;
- effective financial sector supervision;
- data integrity and transparency.

the IMF has provided loans and credit lines to 29 low-income countries (LICs)[9]: Liberia, Kyrgyz Republic, Moldova, Haiti, Malawi, Nicaragua, Madagascar, Zambia, Afghanistan, Cote d'Ivoire, Ghana.

The global financial crisis is having a severe impact on LICs, with many facing a significant deterioration in their external positions. Loan demand in 2009 was strong—new lending reached SDR 2.5 billion (US$3.8 billion), compared to SDR 0.8 billion (US$1.2 billion) for 2008. In 2010, demand for IMF concessional financing remained elevated at SDR 1.2 billion (US$1.8 billion), as many LICs continued to face a difficult environment even as global demand began to recover.

Total projected demand for PRGT loans over the period 2009–2014 remains broadly consistent with the earlier estimates of SDR 11.3 billion (about US$17 billion). Latest projections point to demand of about SDR 2 billion for 2011. While the global outlook remains highly uncertain, demand over the medium term is likely to remain elevated at about SDR 1.5–2.0 billion annually. On this basis, the overall financing capacity needs for 2009–14 would remain at about SDR 11.3 billion, in line with the projections made at the time of the reform of the LIC facilities (Table 1). These projections take into account the doubling of access limits approved by the Executive Board in April 2009, and the implications of the new facilities architecture.

Table 1. Projections of Concessional Lending to LICs through 2014 1/

Commitments	Actual annual average	Actual	Actual			Total
	2000–08 2/	2009	2010	2011	2012–14	**2009–14**
In billions of SDR	0.7	2.5	1.2	1.4	6.3	**11.3**
In billions of US$ 3/	1.0	3.7	1.8	2.1	9.4	**17.0**
Memorandum item: Projections in July 2009						
In billions of SDR	0.7	2.7	2.7	1.5	4.5	**11.3**
In billions of US$ 3/	1.0	4.0	4.0	2.3	6.8	**17.0**

1/ May not add up due to rounding.
2/ Excluding the very high level of lending committed to Pakistan in the aftermath of 9/11, and to Liberia in 2008 following arrears clearance.
3/ Assuming exchange rate of US$1.5 per SDR.

[9] Information available at http://www.imf.org/external/np/exr/facts/concesslending.htm;

Table 2. PRGT Loan Resources Mobilization
(In billions of SDRs; as of end-February, 2011)

Target for loan resource mobilization	**10.8**
of which: initial target	9.0
liquidity buffer needed	1.8
Loan Resources Secured 1/	**7.7**
Additional resources required	**3.1**
Memorandum items:	
Loan resources pledged but not yet available	**2.2**

1/ Secured through Loan Agreements with Canada, Denmark, France, Korea, the Netherlands, Norway and Spain and through Note Purchase Agreements with China, Japan and the U.K.

Loan resources of about SDR 10.8 billion (US$16 billion) will need to be mobilized to meet projected demand over the medium term. As of end-August 2011, SDR 9.5 billion of loan resources had been secured. Given demand projections, it is urgent that additional loan resources be secured expeditiously.

Resources needed to fully subsidize the projected concessional lending are estimated at SDR 2.5 billion in end-2008 NPV terms, or US$4.7 billion in cash terms (Table 3).

Table 3. Subsidy Needs and Availability

	In billions of SDRs (end-2008 NPV terms)	In billions of US$ (cash terms) 1/
Estimated subsidy needs	**2.5**	**4.7**
Minus: available resources	1.0	1.9
Remaining needs	**1.5**	**2.8**

1/ Assuming an exchange rate of US$1.5 per SDR.

This would cover the projected lending of SDR 11.3 billion over the medium term, as well as the estimated cost of temporary interest relief being provided through end-2011, and reducing the concessional interest rates charged thereafter according to the new structure of interest rates. Taking into account the resources available in the PRGF ESF Trust, additional subsidy resources of about SDR 1.5 billion (US$2.8 billion in cash terms) will need to be mobilized.

On July 23, 2009, the Executive Board endorsed a financing package to ensure the necessary financing of the new LIC facilities architecture, involving the following elements (Table 4):

Table 4. Subsidy Needs and Possible Sources of Financing
(In billions of SDRs; end-2008 NPV terms)

Subsidy requirements	**2.5**
Minus: available resources	1.0
Remaining needs	**1.5**
Possible sources	
Transfer from PRGF-ESF Reserve Account	0.62
New bilateral contributions	0.2-0.4
Delaying PRGF-ESF reimbursement (for 3 years)	0.15-0.2
Gold sales resources 1/	0.5-0.6

1/ After assumed leakage of 10 percent of the distribution of gold sales.

In light of the critical role that bilateral subsidy contributions have played in past fund-raising exercises, the Executive Board agreed that such contributions should remain an important part of the new financing package. Recognizing the budget constraints facing many countries, the Board agreed to target additional bilateral subsidy contributions of SDR 0.2–0.4 billion (end-2008 NPV terms). As of the end of August 2011, SDR 155 million of subsidy resources had been secured.

To help meet the projected subsidy needs, it was agreed that for a period of three years starting in FY 2010, an amount equivalent to the expenses of operating the PRGF-ESF Trust would be transferred from the PRGF-ESF Trust Reserve Account to the new General Subsidy Account under the PRGT (see below). Based on current projections, this could generate subsidy resources of about SDR 0.15–0.2 billion.

There was broad support for using resources from the PRGF-ESF Reserve Account as part of the financing package. Staff's analysis indicated that it is feasible to make an allocation of Reserve Account resources of about SDR 0.62 billion (in end-2008 NPV terms) to help meet LIC subsidy needs and still leave sufficient resources in the Reserve Account to ensure its annual self-sustained subsidization capacity of about SDR 0.7 billion after 2014–15.

The Executive Board agreed that resources of SDR 0.5-0.6 billion (end-2008 NPV terms) linked to gold sales would be used for LIC subsidy financing. In this context, it was also agreed that the strategy would involve the use of windfall profits arising from gold sales at an average price in excess of US$850 per ounce in the first instance. This strategy would allow the corpus of the gold sales proceeds, and thus the Fund's ability to implement the new income model, to be preserved.

The Board noted that the strategy regarding the use of the resources linked to gold sales for financing subsidy needs will guide future Board decisions to be taken after the completion of the gold sales. These decisions will provide for the transfer of such resources from the Investment Account to the General Resources Account, to be followed by the distribution of an equivalent amount to members in proportion to quotas. Members would then be expected to allocate this distribution, or broadly equivalent amounts, as subsidy contributions to the PRGT.

The new financing framework that is consistent with the new architecture for LIC facilities was also approved. The framework increases flexibility of use of loan and subsidy resources, while preserving the scope for donors to earmark contributions for specific facilities. The key elements of the framework include: (i) consolidating all concessional financing instruments in the PRGT; (ii) establishing a General Loan Account (GLA) for all PRGT facilities, three Special Loan Accounts for specific facilities, and a single Reserve Account to provide security to lenders for all outstanding loans of the Trust; and (iii) establishing a General Subsidy Account (GSA) within the Trust to

receive and provide resources for the subsidization of loans under all facilities of the PRGT, and four special subsidy accounts for specific facilities. To achieve its purposes, the PRGT will provide loans under the new facilities as well as under any new lending facilities that may be established under the PRGT in the future. The new lending facilities are:

- the **Extended Credit Facility (ECF)** succeeds the Poverty Reduction and Growth Facility (PRGF) as the Fund's main tool for providing flexible medium-term support to low-income members with protracted balance of payments problems;
- the **Standby Credit Facility (SCF)** addresses short-term and precautionary balance of payments needs, similar to the Stand-By Arrangement (SBA); and
- the **Rapid Credit Facility (RCF)** provides rapid low-access with limited conditionality to meet urgent balance of payments needs.

IMF is considered to be **coach and advisor** because of its 3 level surveillance role:

- **Global**: World Economic Outlook and Global Financial Stability Report;
- **Regional**: Regional Economic Outlooks;
- **Bilateral**: regular checkups of countries, known as Article IV consultations (*country surveillance*).

Global surveillance entails reviews by the IMF's Executive Board of global economic trends and developments. The main reviews are based on the *World Economic Outlook* reports and the *Global Financial Stability Report*, which covers developments, prospects, and policy issues in international financial markets. Both reports are published twice a year, with updates being provided on a quarterly basis. In addition, the Executive Board holds more frequent informal discussions on world economic and market developments.

The IMF also has the option of holding multilateral consultations, involving smaller groups of countries , to foster debate and develop policy actions designed to address problems of global or regional importance. In 2006, multilateral consultations brought together China, euro area countries, Japan, Saudi Arabia, and the United States to discuss global economic imbalances.

When a country joins the IMF, it agrees to subject its economic and financial policies to the scrutiny of the international community. It also makes a commitment to pursue policies that are conducive to orderly economic growth and reasonable price stability, to avoid manipulating exchange rates for unfair competitive advantage, and to provide the IMF with data about its economy. The IMF's regular monitoring of economies and associated provision of policy advice is intended to identify weaknesses that are causing or could lead to financial or economic instability. This process is known as surveillance.

Regional surveillance involves examination by the IMF of policies pursued under currency unions—including the euro area, the West African Economic and Monetary Union, the Central African Economic and Monetary Community, and the Eastern Caribbean Currency Union. Regional economic outlook reports are also prepared to discuss economic developments and key policy issues in Asia Pacific, Europe, Middle East and Central Asia, Sub-Saharan Africa, and the Western Hemisphere.

Country surveillance is an ongoing process that culminates in regular (usually annual) comprehensive consultations with individual member countries, with discussions in between as needed. The consultations are known as "Article IV consultations" because they are required by Article IV of the IMF's Articles of Agreement. During an Article IV consultation, an IMF team of economists visits a country to assess economic and financial developments and discuss the country's economic and financial policies with government and central bank officials. IMF staff missions also often meet with parliamentarians and representatives of business, labor unions, and civil society.

The team reports its findings to IMF management and then presents them for discussion to the Executive Board, which represents all of the IMF's member countries. A summary of the Board's

views is subsequently transmitted to the country's government. In this way, the views of the global community and the lessons of international experience are brought to bear on national policies. Summaries of most discussions are released in Public Information Notices and are posted on the IMF's web site, as are most of the country reports prepared by the staff.

In June 2007 the IMF's Executive Board adopted a comprehensive policy statement on surveillance. The 2007 Decision on Bilateral Surveillance over Member's Policies, complements Article IV of the IMF's Articles of Agreement and introduces the concept of external stability as an organizing principle for bilateral surveillance. This means that the main focus of the discussions between the IMF and country officials is whether there are risks to the economy's domestic and external stability that would call for adjustments to that country's economic or financial policies.

IMF is considered to be an **architect** because:

- it improves surveillance of global economic developments and policies;
- it strebghtens economic policy coordination;
- it improves regulation and supervision of internationallya ctive financial institutions;
- it enhances financing arrangements.

In this difficult environment, the IMF is helping governments to protect and even increase social spending, including social assistance. In particular, the IMF is promoting measures to increase spending on, and improve the targeting of, social safety net programs that can mitigate the impact of the crisis on the most vulnerable in society. Below are some examples of how recent IMF-supported programs seek to protect social spending in a way that is both fiscally sustainable and cost-effective[10].

Armenia	**Protecting and better targeting social spending.** The program has aimed at mitigating the impact of the crisis on the poor. To this end, social spending rose from 5.8 percent of GDP in 2008 to 6.9 percent of GDP in 2010. Looking ahead, the program aims to protect social spending while at the same time improving the targeting of social safety nets. So as to allow the expansion of benefits to more eligible families.
Belarus	**Strengthening the social safety net.** To protect the most vulnerable people against the effects of economic shocks, the authorities increased in 2009 allowances for housing assistance for families with 3 or more children, noncash housing subsidies for low-income families, and unemployment assistance. The 2010 budget doubled targeted social assistance (TSA), as the authorities reformed this program to widen its scope and increase the average assistance for poor households. The government plans with technical assistance from the IMF to reform TSA in order to improve its effectiveness in view of restructuring and possible privatization of state-owned enterprises.
Bosnia and Herzegovina	**Protecting social spending.** The program aims to cushion the aftershocks of the global economic crisis and of the fiscal adjustment on vulnerable groups by avoiding cuts to pensions and reforming the social safety net. The rights-based benefits system is being overhauled with help from the World Bank to improve targeting and prevent abuses of eligibility criteria. Entity governments have adopted laws mandating means-testing and auditing of most civilian and war-related benefits, but implementation has been slow and the savings so far have been insufficient to allow increased support of the most vulnerable. Ongoing reform of the pension systems in both Entities aim at

[10] Information available at http://www.imf.org/external/np/exr/facts/protect.htm.

	putting them on a sustainable footing through parametric reform and proper screening of recipients of pensions given under special conditions.
Burundi	**Strengthening the social safety net.** Fiscal and monetary policy was eased in 2009 to help the economy adjust to the shocks from the global financial crisis. To offset the impact of this crisis on the poor, the IMF-supported program accommodated emergency spending on targeted social safety nets (approximately 1.5 percent of GDP). Such spending, financed by donor grants, was programmed for food security and school feeding programs and to assist the most vulnerable segments of the population and farmers. Notwithstanding a difficult budgetary situation, social spending increased from 15.1 percent of GDP in 2008 to 16.8 percent of GDP in 2009.
Costa Rica	**Higher social spending.** Fiscal policy under the IMF-supported program, which expired in July 2010, aimed at mitigating the adverse effects of the drop in private demand. The authorities used available fiscal space to increase spending in education, health and social protection. As a result, social spending increased by over 3 percentage points of GDP in 2009 and 2010, despite a substantial decline in fiscal revenues.
Dominican Republic	**Strengthening the social safety net.** Despite record high growth in the period 2003–08, poverty indicators are still weaker than before the financial crisis of 2003. As the global crisis unfolded, the poverty situation deteriorated further. An important element of the Stand-By Arrangement approved by the Executive Board in November 2009 is to strengthen the social safety net. The IMF-supported program made it possible to increase the conditional cash transfer program (Solidaridad) by 70,000 families in the last quarter of 2009, which is over 10 percent of the population living in conditions of extreme poverty, and increase the coverage of the program to about 85 percent of the poor. In addition, the program aims at achieving by end-2011 an increase in the coverage of poor families under the targeted electricity subsidy program BONOLUZ, from 50,000 in December 2010 to 250,000, and a further extension of the conditional cash transfer program by 60,000 additional families to 590,000. In addition, the authorities committed to increase social spending (mostly education and health) by 0.75 percent of GDP a year during 2010–12 (something that has proven a challenge in 2010 and 2011 because of the fiscal consequences of the oil shock).
El Salvador	**Better targeting and higher social spending.** The government's IMF-supported program seeks to place debt on a firm downward path while making space for priority social spending. Subsidies (transportation, water, electricity, and liquefied propane gas) have been targeted to low-income households, with the savings (0.4 percent of GDP) used to broaden health services in low-income areas, provide uniforms and meals to school children, and expand conditional cash transfers. To strengthen the social safety net, the minimum pension has been raised to equal the minimum wage.
Guatemala	**Higher social spending.** Social spending increased by 1.3 percent of GDP (from 4.4 percent of GDP in 2008 to 5.7 percent in 2010). The authorities' social protection policy focused on enhancing existing programs to offset the effect of the crisis on the poorest segments of the population. To address extreme poverty, emphasis was placed on four flagship government programs. A key conditional cash transfer program that was initiated in 2008 ("Mi familia progresa") was expanded to reach 0.3 percent of GDP in 2010 (from less than 0.1 percent of GDP in 2008).
Hungary	**Better targeting.** TThe fiscal strategy under the IMF-supported program, which expired in October 2010, aimed at protecting the poor and low-income earners from the impact of the global crisis. Measures included preserving the purchasing power of

	low-income civil servants despite the nominal freeze of the public sector wage bill, replacing a universal housing subsidy by a targeted scheme to help the needy have access to adequate housing, and canceling increases in disability pensions while increasing benefits for the poorest disabled, and temporarily guaranteeing mortgage payments for unemployed people. Active labor market policies have been used to maintain employment.
Iceland	**Higher social spending.** Automatic stabilizers were allowed to operate with few limits in 2009, which means Iceland's extensive social safety net helped to cushion the blow for the most vulnerable groups. The fiscal consolidation currently underway aims to ensure a gradual and orderly return to sustainable levels of borrowing while preserving Iceland's social welfare model. To this end, the 2010 and 2011 budgets—while entailing expenditure cuts in some areas—have also added new programs to deal with specific issues (for example, youth unemployment and overly indebted households). Engagement with social partners and consensus building have facilitated agreements on key budget issues, including a framework for household debt workouts and the recently concluded tripartite stability pact, which entailed a substantial increase in social benefits.
Jamaica	**Higher social spending.** Despite the overall need for fiscal consolidation, the IMF-supported Stand-By Arrangement has been designed to help mitigate the impact of economic adjustment on the most vulnerable through meaningful increases in social spending for targeted programs. Spending on well-targeted social assistance programs has been increased to around 40 percent in FY2010–11 (0.3 percent of GDP). This increase will benefit the school feeding program, which provides breakfast as well as lunches to children, and the Programme of Advancement through Health and Education (PATH), which provides conditional cash transfers to five categories within the poorest income groups. The government will also be pursuing efforts to expand the social safety net to assist people below the poverty line who do not qualify for PATH assistance.
Latvia	**Strengthening the social safety net.** The IMF has been working with the authorities as well as with the European Commission and the World Bank to refine cost-cutting measures to make sure they can deliver the necessary adjustment while protecting the most vulnerable groups. These efforts have resulted in a comprehensive strategy to improve the social safety net at a cost expected to reach 0.5 percent of GDP in 2011. Measures include an increase in the guaranteed minimum income by 8 percent for adults and 22 percent for children, the full coverage of health copayments for poor and needy people, the protection of schooling for 5 and 6-year-olds, and the support of unemployed people through an active labor market program (co-financed from the European Social Fund) with over 180,000 envisaged participants.
Mongolia	**Protect the poor from the burden of adjustment.** As the global economic crisis unfolded, the Mongolian economy was hit hard (especially by the sharp decline in copper prices). By early 2009, growth was stalling, international reserves were being rapidly depleted, and there was insufficient financing to meet the needs of the government. An 18-month Stand-by Arrangement was approved in April 2009 and successfully completed in October 2010. The main goal was to ensure that the economy quickly returned to a path of strong, sustained, and equitable growth, which it has—GDP growth was 6.4 percent in 2010. A key pillar of the program was to shield the poor from the impact of the 2009 recession. Despite significant budget cuts, social transfers were protected in 2009 and actually increased last year. The authorities submitted a social transfer reform law to parliament in 2010, which, however, has not yet been passed. The law would introduce a targeted poverty benefit that would

	strengthen the social safety net and increase the resources available to protect the poorest.
Pakistan	**Higher social spending and better targeting.** Strengthening the social safety net is a key priority under the program. The government is collaborating with the World Bank to develop specific measures to strengthen the social safety net and improve targeting to the poor. Cash transfers to poor households were targeted to increase from 0.2 percent of GDP in 2008–09 to 0.6 percent in 2009–10, but due to administrative capacity constraints, social spending in 2009–10 was lower than budgeted, at 0.4 percent of GDP, though still significantly higher than in 2008–09. The 2010–11 budget assumed zero nominal growth in cash transfers compared to the 2009–10 outcome, which would imply a decline from 0.4 percent of GDP to 0.3 percent of GDP. However, the authorities also provided a one-off cash transfer to each household affected by the July 2010 floods in an amount totaling 0.2 percent of GDP at the federal and provincial levels. In September 2010, the IMF provided $451 million (0.2 percent of GDP) in emergency assistance, to be directed to the country's budget, which helped finance urgent spending to help the population affected by the floods, especially the poor and the vulnerable groups in need of food, shelter, and medical assistance. Preliminary data suggest that actual cash transfers, excluding flood relief, fell somewhat short of the budgeted amount. The 2011/12 budget targets a 15 percent nominal increase in cash transfers, which would imply a small reduction as a percent of GDP, to 0.25 percent. Although no specific provision for flood relief has been made in the 2011/12 budget, under their commitment with donor agencies, the authorities plan to provide $100 million through re-allocation within the budget as part of the overall Citizen's Damage Compensation Program. An additional $480 million being provided by donors would bring total cash transfers in FY2011/12 to about 0.5 percent of GDP.
Romania	**Higher social spending and better targeting.** The IMF-supported program provides room for additional spending of RON 250 million (amounting to 0.05 percent of GDP) in 2009 and RON 500 million (0.1 percent of GDP) in 2010 to alleviate the immediate impact of the current crisis on the most vulnerable households. Overall social assistance has increased by RON 9.8 billion (1.9 percent of GDP) in 2009 and RON 4.7 billion in 2010 (about 1 percent of GDP). The government has recently taken steps to consolidate certain social benefits and fight fraudulent claims, and is initiating work on a comprehensive reform to develop a more streamlined and transparent, means-tested social assistance system. Recently, the government is also making efforts to limit gas price increases for households and set up mechanisms to minimize the impact of heating price increases on vulnerable households.
Serbia	**Protecting and better targeting social spending.** Social spending remained protected from budget cuts. Serbia has a well-developed social protection system with an increasing share of well-targeted social programs, and the 2011 budget provides for an increase in the allocation for those benefits.
Seychelles	**Better targeting.** The Stand-By Arrangement of late 2008 introduced a cash transfer program, aimed at protecting the most vulnerable segments of the population, replacing untargeted universal product subsidies. The targeted social assistance program has worked well and was a key element to the rapid macroeconomic stabilization, which reduced consumer price inflation to near zero since early 2009.
Tajikistan	**Higher social spending.** Under the IMF-supported program, the authorities raised social- and poverty-related spending from 7.3 percent of GDP in 2008 to 9.0 percent of GDP in 2010, and intend to further increase it to 9.1 percent of GDP in 2011. In 2009–10, the increase fell partly on transfers to households to help them deal with the

Ukraine	decline in disposable income on account of a 31 percent decline in remittances inflows during the global crisis, but also on strengthening Tajikistan's health and education systems. The authorities have also committed to reforming the agriculture sector with a view to creating employment opportunities and raising farmers' income potential. **Seeking more effective social protection.** Under the current IMF-supported program, existing social assistance programs in Ukraine are being expanded to protect the poorest households. Beginning 2011, the threshold for maximum utility costs as a percent of income for working families was lowered from 20 to 15 percent (and from 15 to 10 percent for pensioners). Amounts above this are covered by the state budget. This is expected to protect some 800,000 households (about 5 percent of total). The authorities are also undertaking a review of all existing programs, in consultation with the World Bank, with a view to improve their targeting and effectiveness (it is estimated that currently, only about 25 percent of overall social assistance is received by poor families).

Conclusions

As discussed before, the IMF's roles in the global financial crisis are **firefighter**, **coach and advisor**, **architect**.

But, the key role of the IMF is to identify contingent risks that threaten global economic and financial stability and to develop policy responses. With its mandate to promote economic and financial stability and its global membership, the IMF is uniquely placed to provide a forum for discussions on international economic issues and to help reach consensus on policy responses. For the Fund to be effective in this role, member countries must feel they have a stake and a voice. The transfer of at least 5 percent of voting power to underrepresented members by 2011, as agreed at the 2009 IMF annual meeting, is essential in this respect. Consideration should also be given to expanding the Fund's mandate to cover the capital account. But first, the Fund needs to distill the lessons of the crisis for its exchange rate advice.

Unfortunately, IMF is not the panaceum for the financial crisis. We withnesed the errors made by this institution in Romania, but we shouldn't forget also the errors made by the IMF in Argentina or in the Asian financial crisis. Moreover, the failure of the IMF strategy in Romania represents the topic of a future research.

However, the present activity of the IMF and the process of adapting this institution for the current crisis suggest that there is much to be talked about in the future.

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THE PUZZLE OF SIMULTANEOUS SAVINGS AND DEBTS

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Abstract

„Neither a borrower nor a lender be" recommends Shakespeare in Hamlet. The advice seems particularly interesting in nowadays society where a person can be easily found in both approximate situations, in the same time. It goes without saying that saving and borrowing do not describe mutually exclusive strategies of financial management and thus many people retain savings or carry on saving at the same time as having debts. We add to this fact a more pragmatically wisdom, the one of the economist Robert Solow -"We (economists) think of wealth as fungible; we think a dollar is a dollar. Why don't they (the others) do so?" (Solow, 1987) – and we naturally ask ourselves if the mechanism of having simultaneous savings and debts is a rational one, according to traditional economics.Making appeal to the emerging body of behavioral economics literature we reach to the mental accounting theory to see if it can explain savings inclination versus debt inclination. The main research question we want to explore is the following: if mental accounting prevents people from spending money from one „mental account" on goods belonging to another one, will people – after using all their money from a given account – be willing to go into debt to buy goods belonging to this account in a situation when they still have money in other accounts?

***Keywords**: mental accounting, savings, debts, behavioral economics.*

Introduction

This year I moved to a new place which needed lot of repairs in order to be habitable. After some thinking and some market research I have came up with a budget and started to plan the operation. Having a clear aversion to borrowing, I thought from the very beginning to use my savings in order the finance the project. However, discussing the situation with various groups of friends, more than once the following idea was advanced: why not take a small loan (more precisely an overdraft credit) for these specific expenditures and just keep my savings for vacations or other things? In the first instance I was quite surprised and confuse on hearing the alternative. It just seemed an unnecessary complication, given the fact that I already had the money. In the same time, something in the argument had an echo in me. Indeed, the perspective of an exotic trip would seem more feasible using my savings and not a loan, making also, by comparison, the perspective of a loan for house expenditures more reasonable. At the time, it was not enough to change my prudent and low-risk profile, thus I have proceeded in accordance with my way of doing things. Still, the thought stayed with me, making me wonder what kind of situations would make me switch towards the alternative, and of course, what determined my friends to suggest this.

As the story reveals, one important acknowledgement is that saving and borrowing do not describe mutually exclusive strategies of financial management. Also, it is usual for many people to retain savings or carry on saving at the same time as having debts (Livingstone & Lunt, 1993). At the first glance, this may seem an ordinary fact, especially in the contemporary period but if we to read it through the lens of standard economic theory an inconvenient immediately appears. To be precise, one of the basic rules of rational economic decision making is the following: do something only if the marginal utility you get from it exceeds the marginal cost of doing it. In our case, the problem is raised by the fact that usually the interest rate for loans is higher than the interest rate of savings. In other words, people fell more at ease to borrow while they maintain some savings, and they are

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willing to pay for this ease feeling a certain amount of money (mainly, the difference between the two interest rates, but also other commissions that may appear when contracting a loan).

The present study is a conceptual one and tries to envisage some potential explanations for the situations described above. Basu (2008) delves on the importance of this topic and proposes a behavioral model of simultaneous borrowing and saving, with time-inconsistent agents, showing, among others, that this strategy can lead to higher lifetime welfare than the conventional approach (of borrowing only when we do not dispose of other means). Taking it from here, we will further explore the concept of mental accounting on this choice, but also the impact of variables like the feeling of confidence, control and security on our decisions regarding savings and debts.

The paper has the following structure. We first review the emerging literature on mental accounting, savings and debts characteristics and dynamics, and discuss the implications for individual self-control. We then report on the extreme scenarios of over consumption and over borrowing, with some specific features on the Romanian society. The conclusions section sets the frame for a future experimental testing of the theoretical reasoning advanced through the manuscript.

Theoretical background

Mental accounting

A key concept of behavioral economics, mental accounting is the subject of consecrated research papers (Henderson and Peterson 1992; Kahneman and Tversky 1981; 1998; Prelec & Loewenstein, 1998; Thaler 1980, 1985, 1999) which have repeatedly shown how people refer to, evaluate and use in different ways resources based on the categories they belong or they have been assigned to. The implicit purpose of this cognitive mechanism is to keep track of expenses and to control consumption, allowing a diverse scale of labels for the accounts: similar goals, reasons, explicit purposes, similar purchase feature etc. In processual terms, there are even some analogies with the principles described in categorization, schema, and script theories.

A derived addition to the mental accounting theory is the mental budgeting construct. Heath and Soll (1996) state that consumers budget parts of their assets to separate mental accounts and then track expenses against the budgets. Furthermore, these expenses deplete the available reserves in the specific accounts and this leads to unlike future purchases. An important consequence of this process is the difficulty to correctly anticipate relevant consumption opportunities. Thus, it can be identified as one cause of over-consuming or under-consuming products from a given category.

In addition, the paper of Prelec and Lowenstein (1998) on the mental accounting of debts and savings is seminal for our discussion. Their article departs from the hypothesis that „acts of consumption and financial transactions call mental accounts to mind", and this structure is considered responsible for a certain state, of pleasure or of pain, determined by the position of the account. These types of mental accounts specific to a transaction can also exert a constraint for consumers to use the purchased goods and not go running for more appealing alternatives.

However, we need to be aware that people create mental accounts not only for spending. There is experimental evidence they do so also for time, in the attempt to balance their time across work and non-work activities (Rajagopal & Rha, 2009).

Another important fact is that the ambiguity that may me noticed around the system of mental accounting has be understood as a positive factor (Chema & Soma, 2006) for the desires of an individual, in the sense that it makes the whole process more malleable, leaving some space for „creative bookkeeping". In other words, there can appear breaches in the self-control system governed by mental accounts.

Account 1: Savings

Popular wisdom says that our savings are the best `umbrellas` for many types of `rainy days`. Thus, we should strive to accumulate them and be careful on how to spend them. Using the motive scale developed by Keynes (1936), this is a matter of precaution and it may easily stand as the most common explanation for contracting a loan and preserve savings for another rainy day. It is also confirmed by traditional theories that explain the savings-debts dynamic, under the label `the option value of savings`. Frequent examples illustrate the fact that under some risky circumstances or other types of emergencies an individual can make appeal to his savings promptly and comfortably. On the other hand, the manner in which we evaluate the gravity of a certain situation it is poorly documented. Assessing that it is the case to use savings or just postpone the action is more likely to be a subjective decision and not the result of an objective and rational line of thought. In this regard, time preferences are essential. More precisely, we refer to the degree in which individuals are likely to consider distant outcomes in choosing their present behavior. This insight can give us a sense of understanding on the type of financial decisions they will make and it was synthesized through the attribute `myopic` for describing the emphasis made by consumers on short-term benefits over long-term benefits (O'Donoghue & Rabin, 1999).

Moreover, behavioral research emphasizes the role of non-liquid savings as a self-control tool (Laibson et al., 2001). Agents conserve their assets for a delayed consumption in the future and prefer to borrow for their present consumption, usually with the help of financial products like overdrafts, debt credit cards and so on. The issues that are usually ignored are the advantages of paying cash: not paying any type of interest (interest which is omnipresent and multivariate, depending on the type of credit card) and having greater probabilities to get some better deals in terms of availability, logistics, delivery etc.

From the mental accounts basic assertion that an individual may value two identical monetary gains differently because they are coded and evaluated through two distinct mental accounts, it was also inferred that the same absolute saving made on an article seems to be more appealing the higher its relative value compared to the initial cost of the article, even in the conditions that the total sum paid for all purchases made remains the same (Moon et al., 1999).

Account 2: Debts

In the attempt of identifying a rationale for the existence of debts in the equation modeling our case, we also stopped at one statement of common sense frequently asserted by consumers: if I can pay off the amount borrowed over a short period of time, I will not disrupt my savings plans. From a behavioral economics point of view, this is a classical illustration of the cognitive bias called overconfidence effect. Due to a miscalibration of subjective probabilities, the individuals `sincerely believe they have expertise, act as experts and look like experts` (Kahneman, 2011). On an operational level, they underestimate future costs and over evaluate present benefits, unconsciously bounding their willpower. The logic applies perfectly to the activity of contracting loans even without a solid motivation, just by ignoring potential future credit obligations, information and transactions costs as additions to the pretty picture depicted in the present. To properly use the economic terminology, we speak of hyperbolic discounting of future costs.

In accordance with the findings on materialism – defined as „the centrality of possession and acquisition in consumers' lives" (Richins & Dawson, 1992) - the results of a study performed by Watson (1998) are pointing out to the following conclusion: people who are highly materialistic have more favorable attitudes toward spending as well as more favorable attitudes toward debt than people with low levels of materialism. What was not yet properly analyzed is the impact of such attitudes towards empirical actions like excessive debt.

From an emotional perspective, the discomfort provoked by being in debt or by having worrying thoughts of not being able to return the money is alleviated by the confidence state given by the existence of savings. However, if we turn to the reasons listed for savings, there is one that comes in a deep contradiction with the simultaneous debt-savings situations: the down-payment motive (Browning & Lusardi, 1996), which aims exactly at using savings for expensive and durable goods or other type payments.

On an operational note, Kilborne (2006) proposes that these behavioral insights may be used to improve the legislative framework concerning consumer debt and bankruptcy, preventing in this way a range of social problems associated with excessive consumer debt: job loss, medical disorders (both physical and psychological), divorces etc.

The „over" puzzle: over-consuming and over-borrowing

In the last couple of years, consumer credit has grown more and more, projecting itself into a positive aura of empowering consumers by increasing their possibilities to choose and finally by making them to live better through a leverage of future earning potential. Most analyses of consumption societies were made at the beginning on the US case and some western European countries, but the consumerist phenomenon has rapidly expanded to China, Middle East and Eastern Europe.

In Romania, before the start of financial crisis, in 2005 and 2006, the credits granted to the population were representing 34,5% from the governmental credit, the percentage registering an increase of 7 percentage points only in 10 months, compared with the 3.7 point in the all 2004 year. Moreover, the population credit has surpassed in value both production and investments credits of the firms. (National Bank of Romania, Report on credit tendencies, 2005). In these conditions, with a level of almost 15% of the GDP, the market for consumption credits in Romania is a leader in the region, considerably surpassing the average of 9.4% and even more developed neighboring countries like the Czech Republic, Poland or Turkey.

More recent data from the media (Business Magazin, 2010), confirm that 30% of the Romanians in the urban environment have loans: 37% for daily expenses, 25% for constructions and renovations, 11% for buying a house, 11% for buying a car, 8% for studies (personal ones or for their children), 3% for refinancing another loan, 3% for going on holiday, 2% for medical services or medicines. It is true that in the last year, the rate of loans has diminished for most of categories apart from housing loans, but also true is the difficulty to find data on the level of savings. The general assumption is that these savings are quite low but even in this case there still remains a problem of transparency. Another information promoted by the media is that Romanians do not compare bank offers. We also need to ask ourselves if this is a matter of ignorance or just a generalized feeling of mistrust

Within this clear context of over-borrowing, we reiterate our initial research question, searching for a potential pattern in our choice that makes us more eager for debts than for savings.

Consumption society may have overleaped the feedback of self-control imposed by mental accounts and, on the same basis of preserving the specific destination of an account, we assist at the refill of an account through loans, even if there are savings available for spending. Not crossing the line and spend them it is indeed a good measure of self-control. However, if the temptation is strong enough, and the financial sector allows, the account can be easily filled through credit, thus invalidating the initial control and indulging anyways into an irrational process of consumption.

Paraphrasing some research that states that in the absence of self-control devices, they may over consume vices and under consume virtues (Baumeister, 2002; Schelling, 1984), we may postulate an overconsumption of debts and an under consumption of savings. This characterization is made possible through the violation of the fungibility principle, largely assumed by economic theory. The principle simply implies that any unit of money is substitutable for another and that the composition of income is irrelevant for consumption. By contrast, both natural field experiments and

controlled laboratory ones (Abeler & Marklein, 2008; Frederick, 2005; Benjamin et al., 2006;) have shown that the principles fails to be validated for cognitive reasons. For example, there are findings pointing out that subjects equipped with higher mathematical and cognitive skills are more likely to behave in line with standard economic theory, whereas subjects revealing lower cognitive skills have the tendency to act in accordance with theories of bounded rational behavior.

Conclusions and further research

The paper was born from a personal inquiry: it will be better get loan and preserve my savings, in a given situation? From this point, a large span of questions arises: Should I use my savings to pay my debts? What role does play the nature/category of the good which is the object of savings or debts in making the financial decision? Do acquiring new debts while maintaining savings generate an individual feeling of security and/or a collective vicious circle of indebtedness?

With the help of mental accounting theory, we wanted to draw bring some new perspective on why we irrationally go simultaneously into debt and over consume in some areas. If mental accounting prevents people from spending money from one „mental account" on goods belonging to another one, will people - after using all their money from a given account – be willing to go into debt to buy goods belonging to this account in a situation when they still have money in other accounts? This is a problem that needs to be approach in an experimental manner because at least at a theoretical level there are some hints that point to a positive answer.

In our further work, we plan to test the following hypothesis: The subject will be more likely to decide to get a loan in a situation when goods belong to different categories, than when both goods belong to the same category? In addition, we are interested in exploring the causality between this behavior, consumption society and subjective well-being.

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GROWTH OF COLLECTIVE INTELLIGENCE BY LINKING KNOWLEDGE WORKERS THROUGH SOCIAL MEDIA

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Abstract

Collective intelligence can be defined, very broadly, as groups of individuals that do things collectively, and that seem to be intelligent. Collective intelligence has existed for ages. Families, tribes, companies, countries, etc., are all groups of individuals doing things collectively, and that seem to be intelligent. However, over the past two decades, the rise of the Internet has given upturn to new types of collective intelligence. Companies can take advantage from the so-called Web-enabled collective intelligence. Web-enabled collective intelligence is based on linking knowledge workers through social media. That means that companies can hire geographically dispersed knowledge workers and create so-called virtual teams of these knowledge workers (members of the virtual teams are connected only via the Internet and do not meet face to face). By providing an online social network, the companies can achieve significant growth of collective intelligence. But to create and use an online social network within a company in a really efficient way, the managers need to have a deep understanding of how such a system works.

Thus the purpose of this paper is to share the knowledge about effective use of social networks in companies. The main objectives of this paper are as follows: to introduce some good practices of the use of social media in companies, to analyze these practices and to generalize recommendations for a successful introduction and use of social media to increase collective intelligence of a company.

***Keywords**: collective intelligence, social media, knowledge, management, virtual team*

Introduction

This paper deals with collective intelligence in the era of Internet-based social media. This topic is worth our attention because if the company is able to use the potential of collective intelligence appropriately, it can achieve a strong competitive advantage. Collective intelligence can also be used for public benefit. In this paper we have tried to establish if there are some general rules how to use collective intelligence in favor of a certain project. The phenomenon of web-based collective intelligence is relatively new. The best theoretical background for this topic is created by the MIT Center for Collective Intelligence. The background publications on the subject of web-based collective intelligence are: *Inventing the Organizations of the 21st Century* by Thomas W. Malone, Robert Laubacher, and Michael S. Scott Morton,[1] *The Future of Work* by Thomas W. Malone,[2] *Democratizing Innovation* by Eric von Hippel,[3] or *Organizing Business Knowledge: The MIT Process Handbook* by Thomas W. Malone, Kevin Crowston, and George A. Herman[4]. The MIT Center for Collective Intelligence publishes working papers presenting the results of its research. These working papers are available at the website of the MIT Center for Collective Intelligence.[5]

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[5] "MIT Centre for Collective Intelligence – Publications", accessed November 19, 2011, http://cci.mit.edu/publications/index.html.

Some papers are also published in scientific journals such as MitSloan Management Review. To achieve our aim, i.e. to find some general guideline how to create a successful web-based collective intelligence network, we have analyzed six successful cases of the growth of collective intelligence and compared the concrete characteristics of the project with some general recommendations of the MIT Center for Collective Intelligence.

Collective intelligence has existed for as long as humans have. However, this traditional phenomenon is nowadays occurring in entirely new forms. Thanks to modern information and communication technologies (ICTs), particularly the Internet and Internet-based social media, large numbers of people around the world can work together in ways that were never possible before.[6] This possibility is a great opportunity but also a great challenge for the companies. The opportunity is strengthened by the fact that we live in the knowledge society and knowledge economy. That means that a growing ratio of products is based on knowledge and knowledge workers and their human capital are the most valuable sources of the companies which employ them. Since knowledge is intangible, it can be, at least in its explicit form, shared through ICTs. The companies can gather virtual teams of workers without having to take into account their geographical location, because the team members can communicate and cooperate via ICTs. Moreover, present-day companies can use collective intelligence of the crowd and take advantage of its collective intelligence. The crowd can be composed of employees, customers, experts, by the general public, etc. Thus, it is very important for the management of the companies to profoundly understand collective intelligence so the company can create and take advantage of these new possibilities.

Collective intelligence and Social Media

Not surprisingly, there are many definitions of collective intelligence. For the purposes of this paper we can use the definition by the MIT Center for collective intelligence. The experts from this center define collective intelligence as "Group(s) of individuals doing things collectively that seem intelligent."[7] Collective intelligence refers to harnessing the power of a large number of people to deal with a problem as a group. The idea is that a group of people can solve problems more efficiently and offer greater insight and a better answer than any one individual could provide. As mentioned above, these people can now cooperate via Internet-based social media. Social media refers to the ICT platforms designed for real-time social interaction.[8] The examples are wikis, discussion forums or blogs. Many platforms are available on public websites and are very popular, e.g. Facebook or LinkedIn. The companies can use also private sites, e.g. Jive, Yammer, Socialcast. Some of the platforms enable creating information and interaction for general audience, e g. Facebook, some are more specialized, e.g. LinkedIn enable professionals to create and share professional profiles and create professional networks. Enterprise social networks usually contain wikis, discussion forums, blogs, or enable sharing text and other files.

The managerial questions arise: Why should be the use of Internet-based social media efficient? Should the companies change the way of decision making and take into account the views of the crowd? And what are the key issues when designing collective intelligence platforms? Actually, these questions represent only a small part of the problems which the managers now have to solve. It is obvious, that current management models used in many organizations are obsolete, because they are based on bureaucratic hierarchies, on control and specialization and do not address the way knowledge workers work best. New innovative management practices must be implemented.

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[6] Malone, *The future of work*.

[7] "Handbook of Collective Intelligence", accessed January 10, 2012, http://scripts.mit.edu/~cci/HCI/index.php?title=What_is_collective_intelligence%3F.

[8] Rafiq Dossani, *Social Media and the Future of Business*, accessed October 5, 2011, http://www.wipro.com/Documents/insights/SOCIAL-MEDIA.PDF.

Management innovation is the most challenging innovation which the organizations have to go through, but it is also the most enduring source of business innovation.[9]

While making decisions, current hypercompetitive and fast-paced business requires very broad exploration of potential opportunities, accurate responses and short response times – all that at once. Thanks to the Internet and other ICTs we have access to data, but we have to explore the data, find the opportunities and finally make decisions. Unfortunately, as individual decision makers, we have certain limitations. It seems that our brain is not well equipped to deal with so many business problems of this day in an effective way.[10] The solution can be to use collective intelligence of others. Thanks to currently available ICTs it is not a problem to involve a large group of people in the decision-making process. However, "the wisdom of crowds" in corporate decision making can only be used if the managers are able to assess whether in a given case the use of collective intelligence is appropriate, possible and under what conditions.

Decision making is the essence of management. To make a decision to solve a problem the managers actually have a two-level task. First, they have to generate different alternatives of problem solution and second, they have to evaluate these alternatives and chose the optimum one as a solution to the problem. During the decision making process the individual can fall into several traps.[11] The most common traps are

- Anchoring trap – the propensity to give a disproportionate weight to the first information the decision maker receives
- Status quo – the tendency to stick to the status quo
- Sunk costs – the predisposition to continue an endeavor once an investment in the form of money, effort, or time has been made
- Framing trap – the propensity to be influenced by different reference points
- False assumptions – the proclivity to assume something is true without evidence to support it
- Missed signals – the penchant to ignore warning signs

Competition trap – the urge to win during a competitive challenge that blinds decision makers from seeing reality clearly

Collective intelligence can help mitigate the effects of these traps by bringing the diversity of viewpoints into the decision making process. Thanks to the use of the Internet and its specialized sites the companies can seek advice from the crowd.

Examples of successful growth of collective intelligence

In this part of the paper we have provide some examples of successful use of social media in favor of the growth of collective intelligence. Actually, it is a problem to claim that collective intelligence of a certain group of people is on a certain level or that it is increasing. Nevertheless, we can feel that if people create such a big thing such as e.g. Wikipedia, the new value or public knowledge arises. The MIT Center for Collective Intelligence examines the possibilities of measuring collective intelligence but there are no results yet.[12] However, if we extend the mentioned definition of collective intelligence we can assess if there is a growth of collective intelligence in the examples provided below. We have stated that collective intelligence can be defined as a group of individuals doing things collectively that seem intelligent. We can add that the group addresses new

[9] Gary Hamel, "The Management 2.0 Challenge. How Will You Reinvent Management in Your Organization?" *Harvard Business Review*, July 28, 2011.

[10] Eric Bonabeau, "Decisions 2.0: The Power of Collective Intelligence," *MIT Sloan Management Review.* (Winter 2009): 45-52.

[11] John S. Hammond, Ralph L. Keeney and Howard Raiffa, "The Hidden Traps in Decision-Making," *Harvard Business Review* (January 2006): 118-126.

[12] "Measuring collective intelligence" accessed January 12, 2012, http://cci.mit.edu/research/measuring.html.

or trying situations and that the group applies knowledge to adapt to a changing environment.[13] Thus, if we can see that these assumptions are fulfilled successfully, we can conclude that collective intelligence is growing. The first three examples are focused on public networking, the other three examples are focused on private corporate networks.

Wikipedia

The famous example of collective intelligence is Wikipedia (www.wikipedia.org). Wikipedia is a multilingual, web-based, free-content encyclopedia project based on an openly editable model. Wikipedia is written collaboratively by largely anonymous volunteers. Anyone with Internet access can write and make changes to Wikipedia articles. Since its creation in 2001, Wikipedia has grown rapidly into one of the largest reference websites, attracting 400 million unique visitors monthly. There are more than 82,000 active contributors working on more than 19,000,000 articles in more than 270 languages. Contributions cannot damage Wikipedia because the software allows easy reversal of mistakes and many experienced editors are watching to help and ensure that the edits are cumulative improvements.[14]

Stack Exchange

Stack Exchange (www.stackexchange.com) is a very interesting example of collective intelligence. Stack Exchange is a fast-growing network of nearly 80 question and answer sites on diverse topics from software programming to cooking. It is an expert knowledge exchange site. After someone asks a question, members of the community propose answers. Others vote on those answers. Very quickly, the answers with the most votes rise to the top. The questions and answers on Stack Exchange can be edited by anyone. The site is free and open to everyone. Registration is not necessary; however, registered users can collect reputation points when people vote up his/her answers. It means that Stack Exchange focuses on solution proposals and also on solution evaluation. Everything is done publicly.

InnoCentive

A more business-oriented but still public example is the web site InnoCentive, through which companies can post their problems (challenges) and solicit solutions. The winning solution receives a cash award.

Social networking in NASA

NASA is the first example from the corporate segment. They started social networking in 2008 claiming that new ideas and new solutions for their complex missions require input from a geographically dispersed community of knowledge workers. By providing an on-line social network, NASA created a collective intelligence and learning community for its knowledge workers.[15] According to NASA on-line networking accelerates communication and problem solving, captures an individual knowledge worker's know-how for reuse by many, creates peer-to-peer communication in context and deepens the understanding for decision making. Currently NASA is still developing its social media-based networking. For internal communication, NASA uses Yammer and some of the employees use ExplorerNet – an internal social networking tool.[16] Each user of ExplorerNet has an individual profile with contact information, they can add information about their expertise, past and

[13] "Handbook of Collective Intelligence".

[14] "Wikipedia: About", accessed December 10, 2011, http://en.wikipedia.org/wiki/Wikipedia:About.

[15] Celeste Merryman, *Findings from the NASAsphere Pilot*, accessed December 12, 2011, http://socialcast.s3.amazonaws.com/corporate/downloads/NASAsphereReportPublic.pdf.

[16] *In Talk. Social Media in NASA*. May/June 2011, accessed January 15, 2012 http://www.nasa.gov/pdf/542302main_ITTalk_May2011.pdf.

current project, etc. Each user is also given his/her own blog, wiki and discussion space. Communities are another component of ExplorerNet. The communities have wikis, discussion forums, community blog, polling and some project management functionality. Anyone can create a community at any time for any purpose. The communities can easily cooperate as virtual teams. The employees state that thanks to ExplorerNet they are able to cooperate at a much higher level than before.

Mutual Fun in Rite-Solutions

Rite-Solutions (www.ritesolutions.com) created a state-of-the-art "innovation engine" designed to provoke and align individual brilliance toward collective genius. The goal of the company was to connect people on an emotional level where all employees are entrusted with the future direction of the company, asked for their opinions, listened to, and rewarded for successful ideas. Rite-Solutions is a software/system engineering company. It is built on two fundamental beliefs:

- Nobody is as smart as everybody (good ideas are not bounded by an organizational structure, but can come from anyone, in any place, at any time)
- The hierarchical pyramid as a relevance structure is a relic of command and control conventional wisdom, more suited to controlling information flow than fostering innovation

In 2005 Rite-Solutions launched a collaborative stock market-based game with the aim of making the employee feel relevant to the success of the business in the most tangible way, and tapping their amazing intellectual bandwidth far beyond assigned job tasks. The name of the application is Mutual Fun.[17] The first step of the user is to complete a profile that details his/her work experience, expertise and capabilities, interests and curiosities. This is how users establish what they bring to the game table and ultimately allows other players to search for people who might be able to assist them in various areas of their innovative ideas based on profile information. Every person in the company gets an initial $10,000 to invest in their peers' "idea stocks." Players can float, advance and develop portfolios of ideas. Colleagues can make dollar investments in stocks, volunteer time or express interest. An algorithm dynamically derives individual stock values and a player's place on the leader board (from an individual's own idea stock values and activity in assisting, investing, and discussing their co-workers ideas). Inevitably, volunteer teams spring up around initiatives on Mutual Fun. The best ideas are realized by the company.

Some of the most valuable ideas come from the most unexpected places. A company administrator with no technical experience came up with an idea for using a bingo algorithm which Rite-Solutions had created for their casino clients to create a web-based educational tool. The inspiration came when this employee helped her daughter with a school project. That idea, "Win/Play/Learn" immediately caught the attention of some engineers, who developed her idea into a successful product. By 2011 Mutual Fun innovation game generated more than 50 innovative products, service and process ideas, 15 of which have been successfully launched and account for 20 % of the company's total revenue.

My Customer in Best Buy

Our last example is from the company Best Buy (www.bestbuy.com). Best Buy is an innovative consumer electronics retailer with over 1,500 retail locations across North America, Europe and Asia. The Company prides itself on the knowledge of its employees and unleashing the

[17] Jim Lavoie, *Nobody's as Smart as Everybody - Unleashing Individual Brilliance and Aligning Collective Genius*, accessed October 10, 2011, http://www.managementexchange.com/story/nobody%E2%80%99s-smart-everybody-unleashing-quiet-genius-inside-organization.

power of its people as part of its core philosophy and values.[18] Best Buy created the software platform "My Customer" to unleash the voice of its more than 100,000 frontline employees to share what they heard or learned from daily interactions with customers. The thought was that Best Buy can solve real problems that employees report in as close to real-time as possible. By processing data in the analytics, Best Buy can acquire early indicators of potential opportunities or issues that can be addressed by various business units throughout the company. The fact that any employee could participate in helping drive change was powerful in itself. The managers are still listening to the employees. My Customer is ingrained in normal business rhythms. Employee satisfaction directionally increased in correlation with the submissions provided. If leaders listen to what employees share, employees in turn feel good about their work and feel valued.

All the above-mentioned companies take advantage from the Web-enabled collective intelligence. All of them link knowledge workers or volunteers with certain knowledge through social media. In all examples groups of individuals do things collectively in a way which seem intelligent. We can state this because all the groups achieve useful results. Wikipedia is a broadly used encyclopedia, Stack Exchange helps people solve problems and achieve professional reputation; InnoCentive is a platform for gathering innovative problem solution, where people can meet companies and vice versa. NASA shifted the level of cooperation to a higher level, Rite-Solutions creates innovative products and Best Buy can immediately respond to customer needs. In these cases we can speak about collective intelligence without hesitation.

Another question is, if the groups of people in our examples address new or trying situations and if their knowledge is used to adapt to a changing environment. In Wikipedia new articles are written every day and many articles are reworked and updated. The content of the articles mirrors the changing environment. In Stack Exchange the experts answer the questions and the knowledge is captured in the application for future needs. The knowledge is used by the people to solve their job tasks or private issues. In any case, the knowledge is used to address a new or trying situation. In InnoCentive the companies directly go public with their problems (trying situations) and thanks to the knowledge of other people their problems are solved. NASA reported that thanks to social networking the communication and problem solving accelerates and the understanding for decision making is deeper than before. If we understand a problem and are able to find a solution, it means that we have adapted to a new situation. Rite-Solutions uses collective intelligence of its workers to create new business ideas and develop new products. If the new product is successful, it means that the company is able to react to the changing needs of its customers. The main idea of My Customer application in Best Buy is to solve the problems of the customers in real time. It means that Best Buy, thanks to My Customer, can address new or trying situations. In all these examples the characteristics of the growth of collective intelligence are fulfilled, and Web-based social networking triggers the growth of social intelligence.

General rules for successful social networking

The preceding examples are concrete cases of the growth of collective intelligence by linking people through social media. But another question arises: Are there any general rules for successful social networking in order to increase collective intelligence? Apparently, to many problems that the companies face, there is potentially a solution out there, however, far outside of the traditional places where management usualy search for it. Why don't more businesses use collective intelligence to solve their problems? It seems that they do not know how. Practice is still far ahead of theory in the field of collective intelligence and managers are not always willing to use the trial-and-error method. In this paper some successful projects are presented, but numerous projects have failed. The MIT

[18] Steve Wallin, *My Customer: One Voice is Noise, Many is a Chorus – Voice of the Customer through the Employee*, accessed October 14, 2011, http://www.managementexchange.com/story/my-customer-one-voice.

Center for Collective Intelligence identified a relatively small set of attributes which are present in successful collective intelligence systems.[19] Let's introduce these attributes and examine if there are present in our examples.

To build the kind of collective intelligence system suitable for the desired goal, managers have to ask four main questions:

What is being done?
Who is doing it?
Why are they doing it?
How it is being done?

In general, these questions have to be answered for any business activity. What often differs in case of the web-based collective intelligence are the answers.

The answer to *What* is the *mission*, *goal* or at a lower level *task*. As mentioned above, management as a decision making body consists of two steps: it is necessary to create possible solutions and to decide which of them will be realized.

The answers to *Who* are very interesting in case of collective intelligence. Traditionally the answer is the experts or managers inside the company. But in web-based collective intelligence systems activities can be taken by anyone in a large group. The group can be unlimited (like in case of Wikipedia, Stack Exchange or InnoCentive) or limited, e.g. to employees (like in NASA, Rite-Solutions or Best Buy).

Why is the question of motivation. Why do people take part in the activity? Examining the motivation of the contributors is a big and also interesting task. However, we can find three main incentives which make people participate in social networks. It can be money, love and glory.[20] Money is a traditional source of motivation. Love is a motivator which works well in social networks. People are motivated by their enjoyment of an activity or by the opportunity to socialize with others and by the feeling that they contribute to some large cause. Glory can also be an important motivator. People want to be recognized and appreciated by peers, experts or managers.

How refers to the procedure how to chose the best idea proposed by the contributors. (We do not deal with the technical solutions of web-based collective intelligence applications.) Usual group decision making methods such as voting, consensus, and averaging can be used there, sometimes contest is possible and also final individual decision can be made by the responsible person.

In table 1 the attributes *What, Who, Why* and *How* for the above mentioned examples are identified.

[19] Thomas W Malone, Robert Laubacher, Chrysanthos Dellarocas, "The Collective Intelligence Genome," *MitSloan Management Review*, (Spring 2010, Vol. 51, No.3): 21 – 31.

[20] "The Collective Intelligence Genome", 27.

Table 1: The *What*, *Who*, *Why* and *How* of the successful collective intelligence networks

Example	*What*	*Who*	*Why*	*How*
Wikipedia	Freely available full sum of human knowledge to all people in their own language[21]	Anyone	Love Glory	There is no need to make decisions. Public and editors can influence the content of the articles.
Stack Exchange	An expert knowledge exchange, network on diverse topics[22]	Anyone	Love Glory	Voting. The best answers are voted by the users.
InnoCentive	The world's largest problem solving marketplace, the open innovation and crowdsourcing pioneer that enables organizations to solve their key problems by connecting them to diverse sources of innovation[23]	Anyone	Love Glory Money	Individual decision. The company chooses the best solution and the author receives a financial award.
NASA	To foster an environment of creativity and innovative thinking[24]	The employees	Love Glory Efficient teamwork	Team decision making
Rite-Solutions	Create internal markets for ideas, cash & talent, depoliticize decision-making[25]	The employees	Love Glory Money	Voting. Some of the best ideas are founded by the company management – final managerial decision based on employee recommendation.
Best Buy	Create a democracy of information, enable communities of passion, expand the scope of employee autonomy[26]	The employees	Love Glory	Employees' immediate managers response to employee submissions, in more general topics top management is engaged.

[21] "Wikipedia: About", accessed December 10, 2011 http://en.wikipedia.org/wiki/Wikipedia:About.
[22] "Stack Exchange", accessed January 12, 2012, http://stackexchange.com/about.
[23] "InnoCentive", accessed January 13, 2012, http://www.innocentive.com/about-innocentive.
[24] James McClellan, *Beyond 140 Characters: Social Media@JSC* accessed January 14, 2012, http://www.nasa.gov/offices/ocio/ittalk/5-2011_SocialMediaAtJSC.html.
[25] Lavoie, *Nobody's as Smart as Everybody.*
[26] Wallin, *My Customer.*

As we can see all the networks have a very clear goal, the answer *What* is explicitly answered. Also the answer *Who* is clearly answered. It is necessary to give considerable thought to whether it is appropriate to ask the public to participate or to limit the network only to the employees or chosen experts. If a company invites the public, they can meet the people with knowledge and skills which they would not otherwise meet. But they also have to count on bigger danger of misuse or sabotage of the network. To cooperate with the people the company knows is better for the corporate security; however achievable knowledge and skills are smaller.

Before the company launches a collective intelligence network, they have to be sure as to the motivation of the participants to cooperate inside this network: *Why* should they participate? If there is no clear motivation, the project will sooner or later fail. In our examples the participants are highly motivated. It is surprising how many people love to contribute to Wikipedia or Stack Exchange. They do it for free, for their enjoyment or maybe for glory. If your answers in Stock Exchange are often voted for by other users, you start to be so-called guru and the employers can ask you for paid cooperation. But it seems that the main reason why people participate in Stack Exchange is the support and help to people who ask questions.

InnoCentive is an interesting corporate – public network. The participants can simply have fun when they suggest problem solutions, or they hope they will be recognized as experts and will be invited to some form of paid cooperation or they can even win the money promised by the company for the best problem solver.

NASA tried to create some up-to-dated communication tool for knowledge workers. The employees may like this tool, they can be recognized as experts but the main reason why to participate in the network is better, easier and faster cooperation inside the company. The networks used in NASA are efficient tools of knowledge management and help people work. In Rite-Solutions all the three motivators are interconnected. It is fun for the employees to participate, they can profile themselves as active experts and they can earn money because the system works as a stock market of ideas. If the idea is chosen for realization, it is fanatically supported by the management. Money is not the subject in Best Buy. The motivation for the employees is their engagement which is taken seriously by the managers. Employees feel that they are being listened to and that there is a response to their ideas which motivates them to continue to submit their ideas. The best of them are also recognized as high performers. As the network was created as a form of customer support, the increased satisfaction of customers makes the work more pleasant.

How represents the way collective intelligence will be used. *How* must be also clear, otherwise all the effort of the participants can be lost. In Wikipedia there is no need to decide a certain problem. In this case the participants cooperate in a surprisingly efficient way when creating and updating the articles. Also at Stack Exchange there is no need to decide which answer or question is the best one. However, the users can mark their favorite answers. Every user can decide which proposed solution is the best for his/her purpose. InnoCentive is a case of individual decision-making. Somebody in the company which posted the problem (challenge), has to choose a solution. In NASA the application serves for communication and for team work. Thus the decision is a matter of a team. In Rite-Solutions the management asks the employee to vote and they trust collective intelligence of their employees. In Best Buy the employees only post their experience, problems or ideas and mangers decide how to solve the situation.

We can conclude that in all the examples the answers to *What*, *Who*, *Why* and *How* are clear and known to all the participants. If people know, what is being done, that they are welcomed to participate, what the benefits they can achieve are, and how their contribution is used as a part of a bigger project, they are highly motivated. They are willing to share knowledge and become a part of a creative collective intelligence network.

Conclusion

The current management models inhibit the success of many companies. The companies which are able and willing to innovate their managerial methods achieve a strong competitive advantage. One of the big opportunities is the use of collective intelligence in decision making. Attainable collective intelligence is nowadays almost unlimited thanks to the Internet-based social networks. The use of collective intelligence can help companies solve their problems, to mitigate the effects of decision making traps, to overcome the individual brain limitations, etc.

We have introduced six examples of successfully growing collective intelligence, which is used in favor of the public or in favor of the companies. In many companies the use of collective intelligence is not yet on the agenda. The reason is that there are no general rules or guidelines how to build an efficient social network and how to take advantage of collective intelligence of the participants. There is always the danger, that instead of collective intelligence the company can tap into a collective madness. A lot of research has to be done before some general recommendation for building collective intelligence-based networks can be articulated. Moreover, it is very likely that the development of ICTs will be faster than research. So, what else can managers do than just look at examples and hope for inspiration and success? In this paper we have proved that well prepared answers to the common business questions *What, Who, Why* and *How* can support the success of a social network and to stimulate the growth of collective intelligence. There may be many combinations of *What, Who, Why* and *How*, but they always have to be carefully specified. Then the chance the project will be successful in the long-term increases. The use of social networking and collective intelligence is a big opportunity, it brings some risk but in any case it is an adventure.

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EXPORT PROMOTION POLICY, PREREQUISITE OF AN EFFICIENT NATIONAL FOREIGN TRADE STRATEGY

OCTAVIAN-LIVIU OLARU[1]

Abstract
The importance of international trade is widely recognized not only by the business sector, but also by governments. Governments all over the world have reviewed and streamlined their foreign trade strategies during the last decades. Nearly all countries have adopted special export promotion and development programmes. These programmes have focused on providing more efficient trade support services in areas such as trade information, financing, logistics, customs procedures and communications. Trade Promotion Organizations (TPOs) have a broad mandate to provide or coordinate trade support services in the above mentioned area.

Keywords: *foreign trade strategy, export promotion*

Introduction

In the context of globalization and increased competitiveness in the world market in general, and in Central and Eastern European countries, in particular, structural adjustment programmes and trade policy reforms are preconditions for economic growth and healthy trade performance. However, macroeconomic initiatives need to be complemented and supported at the microeconomic and operational level, in order to ensure a dynamic, outward-oriented and competitive business sector. Firstly, there is a need to improve the export supply response through institutional strengthening and enterprise-oriented assistance in areas such as product development and adaptation, trade finance, export quality management, export packaging, and better management of imported inputs. Secondly, efforts towards market expansion and diversification must be intensified, for example through the strengthening of business information networks.

Performance in international trade has become a synonym with international competitiveness for countries, regions and firms, alike. The successful conclusion of the Uruguay Round and the World Trade Organization setting up have reinforced the multilateral trading system and have intensified the level of competition in international markets. World trade has consistently outperformed GDP growth and is projected to expand twice as fast as world output in the following decade. In many ways, international trade has become the fast lane to economic growth and restructuring.

The importance of international trade is widely recognized not only by the business sector, but also by governments. Governments all over the world have reviewed and streamlined their trade policies during the last decades. Significantly, efforts have gone beyond the commercial policy framework. Nearly all countries have adopted special trade promotion and development programmes. These programmes have focused on providing more efficient trade support services in areas such as trade information, financing, logistics, customs procedures and communications.

A recent survey issued by the International Trade Centre UNCTAD/WTO estimated that the budgets for public trade promotion programmes, alone, amount to an average order of magnitude of 0.1% of national exports per year. This is equivalent to global expenditure on trade promotion of some US$ 10 billion for 2010. If one includes the budgets of non-commercial trade support services

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by non-governmental institutions such as chambers of commerce and industry associations, the amount would be significantly larger.

In spite of this considerable resource endowment of trade promotion programmes, these programmes need to be selective in terms of products, functions and/or markets. An equal distribution of trade promotion resources over all products, functions and markets would obviously not make sense, as resources would be spread to thinly to reach anywhere a critical mass.

Strategic Guidelines in Export Promotion Activity

Trade Promotion Organizations (TPOs) have a broad mandate to provide or coordinate trade support services in the above mentioned area.

A Trade Promotion Organization (TPO) is defined by the International Trade Centre UNCTAD/WTO from Geneva like a private or public institution with the main task to facilitate entry into foreign markets for a collective group of exporters and manufacturers of the home country. Governmental TPOs are those bodies set up by government as part of its infra-structure in order to facilitate foreign trade in general, but exports more in particular.

To the question "Why is necessary a TPO?" the answer is:

- To increase foreign exchange earnings.
- To reduce dependence upon a limited number of markets.
- To decrease trade deficits.
- To provide employment.

In practice, trade promotion activities are a function of several entities in any country. There is usually one central governmental export promotion body to provide the policy framework and mechanism for co-ordination and consultation among the various sectors or organizations involved in foreign trade. Such TPOs can be specialized in a few key functions or perform a broad range of services. The type and extent of their activities depend on the resources available to them, such as the experience of the organization, the quality of its work force, its network of linkages and financial resources. The TPO's ability to identify changing conditions and requirements of its primary clients – the exporters - and then adapt trade promotion services accordingly is more important than the variety of services offered. Typical TPO activities may be classified into four general categories:

- Identification of products and markets.
- Promotional activities abroad.
- Trade information services.
- Specialized support services.

Identification of products and markets. Most countries focus on strategies for export development and promotion, given the importance of national goals and their limited resources. A TPO has a significant role in laying the groundwork for an export promotion programme. The TPO can give invaluable assistance by doing the necessary studies to identify what products to promote and decide which markets offer the greatest opportunity for export growth. Moreover, the TPO could participate in designing and developing marketing strategies for specific sectors and products, incorporating into these strategies all recommended measures and actions for achieving export targets.

There are three steps in the methodology for product identification:

- Prepare the product-market framework.
- Determine export potential of local industries and make a pre-selection.
- Make a survey of the export supply.

Product–market framework. A useful and practical approach is to adopt the product-market framework for an export promotion programme. As the term suggests, each programme concentrates on a specific product or group of products. Activities are directed mainly at helping the specific sector or a selected group of companies to gain entry into certain markets. The product-market

framework means allocating resources to focused activities for maximum impact designed to achieve export targets. Three features of this approach are:

Products are identified for the purpose of designing a marketing strategy for a specific sector, including all necessary action and support activities that help generate or increase exports.

A programme based on the product-market framework can address specific concerns of the sector; particularly obstacles to export growth, and provide the basis for coordinated or co-operative actions, including joint export promotion and marketing activities.

The programme can help individual companies to develop their own marketing strategies and programmes and to identify specific areas where support or assistance is required.

Planning and implementing a programme with a product market framework could be done by a central export coordinating body, although institutions and organizations from both the public and private sectors might also participate.

The significant role of the TPO is to lay the groundwork in preparing the programme and to do the necessary studies to identify the products to be promoted in identified markets.

In many cases, a country do not have a clear idea of what products to promote in international markets. This leads to haphazard trade promotion efforts, often as a reaction to inquiries made by foreign buyers, with uncoordinated, ineffective export assistance. Identifying priority export products is necessary to maximize the impact of all activities and efforts aimed at achieving national export targets.

Selection of product sectors. Initial selection and determination of export supply capability are the first steps in the identification of export products. Identified products have to be matched with the results of corresponding market selection and identification activities in order to fully determine export potential. Product identification is a process of successive selection until the most promising products emerge. The process begins with preliminary research into national economic development. Policies and programmes set the priorities for product sectors and statistics on production, domestic consumption, exports need to be analyzed in order to determine the availability of an export supply.

A list of products should be made that could be matched with the demand potential in major importing countries. The initial analysis could be the basis for deleting certain products from this list. Then, the following types of products should be identified in order to give them priority ranking:

Products for which local raw materials are available and for which development could lead to high value added downstream activities.

Products that are produced predominantly by local companies.

Products subject to few restrictions, giving access to foreign markets.

Products that can make possible contributions to foreign exchange earnings.

Labor-intensive exportable products that will help alleviate employment problems.

The determination of the products to concentrate on for export has to be discussed at a governmental inter-agency level or committee. A TPO, together with ministries and agencies involved in industrial policy, foreign investment and economic planning and representatives from the private sector should sit on this committee to map out current and future export plans which will form the basis of the policies and programmes for priority product sectors.

Export readiness survey. After making a broad selection of export products, the next important step towards product identification is determining who are existing and potential exporters. This is done with an export readiness survey with the following objectives:

To identify and select exporters/manufacturers who could most effectively use trade promotion assistance and support, so that they could be successful lead participants in the drive for specific export markets.

To identify and select the most promising products in terms of sales and production capability in order to estimate the amount of production that can be exported in the short and medium term.

To identify the constraints companies face in exporting, and/or in increasing exports of the selected products.

To identify the type of assistance packages that will help companies become major exporters by increasing their sales and production capability in the short and medium term.

The suggested approach is to identify potential export companies, and then identify promising products. This approach is based on a strong belief that in the early stages of export promotion, the most able companies (rather than those most in need of assistance) can give the needed push for national exports.

These companies can be used as vehicles to generate export business growth and to support and reinforce this growth with suitable assistance programmes or services. This does not mean that a TPO should ignore the less able companies, which should also be assisted once the more able firms have secured a foothold in overseas markets.

The first step in this approach is to develop a list of potential export companies. Possible sources of information include the customs department, the central bank, other government agencies and trade/industry associations. The second step is to narrow down the list by using the information obtained from research and looking at the following criteria:

- Unique or strong products.
- Production capacity.
- Strong export capability.
- Financial capability.
- Management capability.
- Staff capability.
- Management motivation.

The third step is to use questionnaires and make visits to the selected companies in order to obtain more detailed data. It is important to prepare adequately for the site visits to the companies and the questionnaire. The staff assigned to do this fieldwork should be competent product/industry specialists. Their knowledge about the product/industry and their interviewing skills will be critical in gaining the confidence of the companies' respondents and gathering accurate information.

Promotional activities abroad. The main thrust of the export promotion and marketing efforts is to attract the attention of targeted markets abroad and to project the desired image for the country as a source of products. Trade promotion activities abroad are thus crucial functions for most TPOs. The availability of resources and international commercial representation will determine the extent of a TPO's activities abroad. The TPO can provide an invaluable service to exporters by intensifying its promotional efforts in selected foreign countries. Activities related to trade fairs, sellers missions, inviting foreign buyers to visit local manufacturing plants and facilitating subcontracting arrangements are some examples of a TPO's efforts. A TPO's overseas network of commercial representatives will play an important role in the planning and implementation of the overseas marketing programme. By being "on the ground," commercial representatives will be able to supplement information on characteristics of markets; competitors and market access issues. Such information is important when deciding how to enter these overseas markets.

Trade information services. The quality of business decisions depends on pertinent, reliable and timely information. Exporters need to stay current in their awareness and understanding of market developments and trade opportunities in order to maintain their positions or establish edges over their competition. A TPO should pay close attention to the trade information needs of exporters and have appropriate mechanisms for acquiring such information systematically and disseminating it in a timely way. Moreover, a TPO provides basic and useful support to the export community if it can facilitate contacts between foreign buyers and exporters.

Specialized support services. Specialized export services aim at providing exporters with skills in various foreign trade techniques, thus helping them to become more competitive in the international market. Training, advisory services and facilitation services, plus other forms of technical assistance, may be provided concerning export procedures and documentation, export

financing, packaging, costing, pricing and legal procedures. The range of assistance and services can be as wide and as varied as manufacturers and exporters may require. Of course, the TPO should focus on services for which it has the expertise and resources. Two different approaches may be considered:

- The "integrated approach", in which several special services and overall advice to client companies are provided by a group of trained staff; or
- The "specialist approach", in which such services are offered by a specific group of specialists.

Organizational requirements for TPOs

Certain basic conditions must be present for a trade promotion organization (TPO) to be effective, no matter what form the organization takes. Studies on experiences of TPOs show that the following conditions should be present:

- The organization's main role and field of action should be clearly defined commensurate with the authority, resources, and autonomy granted to the TPO. The definition will have an important influence on the structure of the organization.
- The organization should have a legal position within the overall governmental structure to provide it with the means and required authority to implement its task. There should be a close and logical relationship between the position and authority it is granted and the responsibilities it is assigned.
- The organization's corporate purpose should be clearly stated in order to minimize or avoid any confusion about its aims and any duties unrelated to its main objectives.
- Adequate human and financial resources must be available. The technical nature of the TPO means that it should also be given the necessary freedom to manage its staff adequately, despite limits resulting from civil service regulations and practices.
- The TPO must have support from the export community. Otherwise, it would be impossible for the TPO to start appropriate promotional and development activities.

All of the conditions listed are important, but the most relevant one is the TPO's autonomy to carry out its programme. Autonomy also implies that adequate funding is available and that the TPO is free to plan and manage its promotional programme and has enough access to be represented abroad and to request the services of specialists.

From a legal point of view, TPOs in countries around the world have a number of different forms. About one third of all trade promotion bodies have been formed as sections or departments of a ministry. These lack autonomy, because they are subject to various limitations. Within the public sector of various countries, a little more than 10 per cent of TPOs do not belong to any particular ministry. They may enjoy much more autonomy, but in many instances they are expected to perform functions that are not involved in export promotion. There are also a small number of private sectors TPOs, which are usually part of a chamber of commerce or an exporter association. One explanation for this small number is that there is a lack of adequate financing by the private sector for creating and supporting such promotional bodies.

The three forms of TPOs described above account for about 50 per cent of the total number of TPOs worldwide. The rest are so-called autonomous organizations, which are essentially public sector institutions that are financed entirely by the government.

In almost all cases the government provides financing through budgetary allocations or levies and duties. Such TPOs are treated as independent bodies. However, in actual practice, they might not always have the operational autonomy necessary and end up being restricted due to inadequate financing or unnecessary interference from the parent ministries.

Like most public sector institutions, almost all of the autonomous organizations are linked to a ministry. More than half are linked to the Ministry of Trade and/or Industry, while the rest are linked to a Ministry of Foreign Trade, Foreign Affairs, Economy or Finance.

Conclusions

In keeping with the experience of the EU countries in field of specific practices and techniques aiming to foster their international economic relationship, foreign trade promotion activity has to represent for Romania, one of the most important components of the national economy development strategy. This activity has to be developed in accordance with the provisions of the international agreements in which Romania is a signatory part, as well as with the international market rules and procedures. Within this framework, the promotion of the Romanian companies dealing with foreign trade activity by an adequate conceived system of governmental and non governmental TPOs is acquiring new dimensions, having to become one of the main pillars of the XXI century economic development of the country. This problem has to be taken into consideration by the Romanian governmental and non-governmental bodies, taking in view that each economic operator acting in the field of foreign trade should take big efforts in order to penetrate and maintain its position on a very competitive international market.

Actually, in Romania the approach of the above-mentioned problems is carried out by Romanian Trade Promotion Center, established at a governmental level, and a lot of institutions and organizations with responsibilities in the field like Romanian Chamber of Commerce and Industry, ROMEXPO, EXIMBANK, National Association of Exporters and Importers from Romania, professional and employers' associations, in supporting the activity of Romanian exporting companies.

Based on the EU countries experience in foreign trade promotion activity, as well as on a detailed analyze of local conditions, there is possible to identify some key elements for the success of a trade promotion system in Romania:

- There must be a clear definition of the responsibilities and functions of all institutions dealing with foreign trade, especially with regard to their role in policy making and the implementation of promotional activities. Whatever the responsibilities allocated to the TPO might be, it must be granted adequate authority that will enable it to carry them out.
- The TPO must have the necessary autonomy to carry out its programmes. This autonomy can be achieved within different schemes of supervision and control by higher authorities, but unnecessary interference should be avoided.
- They should provide a wide range of services as well as carry out activities intended to improve the export climate. The TPO cannot lose its perspective of being an institution to the service of the business community, and consequently should avoid a tendency to become an organization to the exclusive service of the government. It is essential that the TPO have the clear support of the export community and this community's confidence in its technical skills.
- The TPO must be responsible for the planning, implementation and management of certain basic activities such as market research, trade information services and a range of specific promotional and assistance actions. The services provided by the TPO must be relevant to the exporters, and their definition should be based on a clear identification of the exporters' needs.
- In contrast with that, the TPO must not be given the responsibility for administering or implementing functions especially control related ones, for which it is not adequately equipped, or which can be better administered and carried out by other institutions. Clear coordination mechanisms must be established among the various institutions in order to avoid operational difficulties and conflicts of interest.
- The TPO must have access to the services and facilities offered by the overseas representation system.

• TPO should be able to engage the services of specialized staff because of the nature of the services to be provided. Mechanisms should be established in order to guarantee continuity in the employment of qualified staff.

• The TPO cannot forget that in many instances the business sector must be pushed towards involvement with export activities, and consequently the entity should use its resources to lead the sector towards that end.

• In order to raise the volume of exports substantially, the TPO should focus on the future, i.e. on developing export trends, and not limit itself to the promotion of current products.

The above mentioned factors have to be taken into consideration by the Romanian decision makers in drawing up a national export strategy in the new national and international framework, after the Romania's accession within the European Union.

We are speaking about "a national export strategy" on purpose. We are not referring to a national trade policy. That means that Romanian governmental and non governmental bodies have to focus on the process by which our country will arrive at effective national strategies to support exports and competitiveness of the business sector. While traditional trade promotion services remain relevant, they are no longer sufficient to promote exports and competitiveness. Trade information, missions, exhibitions, generic publicity and commercial representation abroad are not enough to generate export success. National export strategy that confines him to these operational programmes is, in our view, unlikely to meet the challenges that Romania has now to face.

Being aware of both the importance of the promotion activity in attaining the strategically objective of growing efficient exports and the fact that the high costs implied by the export promotion activities could be prohibitive for many Romanian exporting companies, especially for SMEs, the governmental decisions makers together with the Romanian business community, have to take a lot of measures looking for redressing this situation.

A trade promotion strategy designed and implemented in isolation from other economic and commercial initiatives in Romania is unlikely to succeed. Creating a national export strategy is by definition a national issue involving all relevant players, having to be treated as a national, interdisciplinary and multi-sectoral imperative. A solid national export strategy has to include the effective participation of the ministries of economy, finance and industry as well as experienced exporters.

For a national export strategy to be effective, strong linkages with other economic and developmental strategy initiatives are required. Strategy makers must look beyond existing export capacity and work towards ensuring that new export capacities are generated.

Promoting export-oriented foreign direct investment must go in tandem with promoting exports in the international market place.

Developing higher value-added export performance must be directly supported through, for example, developing strong backward linkages in industry and forward linkages in agriculture. Romanian strategy makers must look at "on-shore" domestic production issues, as well as "off-shore" market development issues when developing their future responses.

For a strategy to work, the private sector — perhaps the key player in implementing export strategy — has to be fully involved and committed to the overall process. The private sector has to "buy in" and feel responsible for the success or failure of the strategy. There must be a real and effective partnership between the public and private business sector.

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NEW RELATIONS BETWEEN NATURAL RESOURCES AND INDUSTRY IN A GLOBALIZED WORLD ECONOMY

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Abstract
Natural resources are not homogeneous in nature, having certain features in the productive process that require grouping them into different categories by different criteria. Consequently, natural resources cannot be addressed all at once, but only distinctly, according to relevant criteria selected based on the proposed goals. Changing approaches based resources (materials) to the knowledge, from quantity to quality, from mass products to new concepts of higher added value, follows a development that is based on eco-efficiency and sustainable products and services. In this respect, integrated research will become key factors towards global processing.

Keywords: *economy, mining industry, natural resources market, property rights regime, total economic value*

Introduction

The knowledge of the crisis and the clear economic value of resources may impose a series of initial constraints as short-term relatively high costs, but in the same time, such effective increases may also provide incentives for economic innovations necessary to any problem which may arise in times of crisis. Optimistic predictions are often supported by old innovations responsible for the lack of raw materials and energy.

The modern industrial economy lies in a remarkable number of options which require compliance with environmental and natural resource exploitation. The technological changes generating new substitutes increase the productivity of the old ones. The way of improving these processes include:

1. Increase production per unit of resources entered into the economic process, for example, the decrease in the amount of coal needed to generate a kWh.
2. The discovery of new metals, synthetic fibers, plastics, etc.
3. Productivity growth in mining processes.
4. Productivity growth in extraction processes and discovery of resources.
5. Develop techniques for waste reuse and recyclable materials.
6. Develop techniques for deep mining or other abundant resources.

One of the major effects of these technological developments is the reduction of economic dependence on some expensive resources and a progressive widening of the range of raw materials used. Limiting the analysis to the crisis of these natural resources used as raw materials in the production process, we notice that they impose higher economic costs as their degree of depletion increases. This automatically requires increased fund allocation for innovation. The conventional

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approach is generally optimistic about the ability of the economic system to overcome such constraints of the long-term natural resources crisis in a globalized economy.

Each great discovery, from fire to nuclear energy, had good and bad parts. It depends on how it was used by humans, for or against themselves. Even the process of industrialization in itself had positive and negative aspects. It all depends on how it is done, for what purpose and how it is integrated into the social and economic structures of the respective company.

Each time something new appeared there were the **optimists**, who saw in change new opportunities for progress and the **pessimists**, who feared apparent or unexpected incidents may arise from the new created context. In reality, mankind has permanently faced slow or abrupt changes, evolving or obsolete, deeper or more superficial, but it eventually found all the resources and ability to solve these problems.

Today, for example, there are many arguments supporting the thesis that even major crisis, such as energy or raw materials, accelerate progress, forcing people to search for new "ways" in the development of new "breakthroughs", in finding new options. Every time the "costs" of such an impact are higher. Also, one has to find a new approach to these problems in their broader context, economic, social, technological, cultural and ideological. Thus, either we would not understand them or we will partially understand their meanings, and solutions would not be other than partial. There are many signals indicating that we can only go one way, that of "knowing more about the least." The too narrow view of the specialist, the "tunnel" vision, may turn into a handicap of understanding interdependencies. The attempt of a more precise evaluation on phenomena or processes with high specialization arise "barriers" in the way of noticing and handling complexity. We are in a period when we equally need integrative synthesis, holistic visions. From this point of view, the problems regarding the mineral resources depletion acquire special significance. Therefore, it is worth reflecting on the idea that as earth is finite so are its resources. This is obviously true, but the error presented as irrefutable proof of the final catastrophe is to take the finite for exhaustible. With very few exceptions, the huge volume of earth's mineral resources is not lost by extraction and use, but it continues to form an integral part of the planet's resources. They can be temporarily incorporated in inputs or consumer goods, they can be chemically combined with other elements, and however they remain indestructible.

New technologies have proven their capacity to find ways to extract resources from various geological formations. Also, through them, we can recover materials that have already been used once or several times.

However, the gloomy forecasts on the depletion of mineral resources have drawn the attention of the contemporary world by even urging economic slowdown.

Actual Content

The increasing demand for metals, directly influenced by the industrialization processes, together with the continuous reduction of the amount of metal obtained from the mining, determined and will determine the increase of mining production. In fact, in recent years at world level was recorded a trend of continuous decrease in the content of useful substances from ore mining and an increase in the size of mining mass extracted to obtain the same amount of metal which leads to higher material and energy costs. Therefore, the main restriction in metal consumption shall be in the future the "energy cost", as total energy consumed to produce one ton of metal, from ore extraction to obtaining the basic metals (steel, aluminum and electric copper, lead and refined zinc, etc.). This cost increases rapidly as the content of metal from the mining mass extracted decreases.

The decreased useful content form the exploited deposits also involve special technologies for the recovery of a larger quantity of metals from the extracted mining mass subject to processing, which in turn leads to a considerable increase in investment, energy and production costs and raise special problems of environmental protection. Therefore, in the past few years, special attention is

paid to the recovery and reuse of metals, which besides bringing energy savings help in conserving the world's metal resources.

Under these conditions, the dependence on the demand of metals at the economic development level is reduced. One important aspect these days is to save mineral resources, particularly the defective ones, to recycle and reuse them and to raise awareness of recovery. In fact, structural modification occurring in the global economy, the emergence and development of new industries with low consumption of metals, but with high volume of human resources, entail new economic policy guidelines of the states.

Also, subject to structural changes taking place in the world economy, new guidelines appear in the metal demand. Currently, we are witnessing a new phenomenon which manifests itself in a growing number of countries, namely, the gradual reduction of dependence of the industrial development on the natural resources. In countries where raw materials and energy is reduced gradually, depending on either the accelerated development of processing industries, or the stagnation or reduction of internal reserves, the share of imports in total consumption of resources is becoming greater. Illustrative of this case are Japan, the U.S. and some European countries, which cover most metal needs from imports.

New geological discoveries shall continue to enrich the picture of mineral reserves in the world, providing global demand for certain resources still remaining a difficult problem of the contemporary world due to more or less economic reasons. Newly discovered deposits generally have harder extraction conditions, being located in less accessible locations or having lower contents of useful substances, which require new technologies for the recovery of useful substances.

The increased dependence of national industries on the world commodity market may lead to imbalances and disruptions in the global economy. Given the policies of the developing countries, owning mineral resources, of protecting their own raw material base and developing processing industries to exploit the local natural riches, special importance is given to restructuration and reorientation of their economies towards top branches, with low energy and material consumption.

Despite the policy of reducing specific consumption due to the introduction in production of technical progress, the demand is reduced. At world level, both now and in the medium and short term forecasts global demand for metals, especially the base ones, is satisfied, although certain disorders may appear due to postponement of some projects, lack of funds or because of the diminishing absorption capacity of the volume of metal production by the industry. The problem of ensuring metal resources may not represent a problem even on longer term. The current situation does not allow precise answers to the question: how long the earth reserves can keep up with the rapid growth and demand for mineral exploitation?

Along with the global economic development, the new procurement possibilities for resources from different parts of the world, the countries' dependence on the world market is becoming increasingly important.

Natural availability of the different metal resources, their geographical distribution and geopolitics, the cost of their extraction and preparation, the energy consumption, transport etc., give a perfect overview on how these resources are placed according to the level of economic development. In the future we believe this proportion shall be decisively influenced by energy and extraction costs, mainly due to the transition to ores with lower useful content, with high degree of impurities and more difficult operating conditions.

The development of national economies based on an intense industrialization process from many countries in the world economic system had led, as we stated earlier, to a growing demand for metals, tempered in recent years by the economic crisis. Whether they dispose or not of metal reserves, in their economic development process and industrialization, most countries have given special attention to metallurgy, as priority industry field ensuring the conversion of resources in raw materials necessary for other industries.

Industrial developed countries, which have reserves of metal resources (such as: U.S.A., Australia, Canada, Sweden, etc.), search, first to protect their national heritage and then to exploit as much as they can these resources. For example, the U.S.A, a bauxite importing country, despite its high quality reserves, in order to protect them undertakes extensive research to extract alumina using different substitutes like: clay, kaolin etc.

Although these procedures to obtain aluminum need more energy than through conventional processes, from bauxite, in order to reduce the dependence of these resources on the world market the countries allocate substantial funds for research in this area. Also, both by using the most advanced technologies for extracting and processing metals and by the policy of restructuring industries towards increasing those fields with low consumption, superior capitalization of metals and bigger profits are aimed.

Industrial developed countries, which do not have metal resources (such as: Japan, Italy, Switzerland, etc.) or have insufficient amounts, orient their production towards high efficiency and low cost fields. Through the high processed products these countries offer for sale on the world market, they cover the necessary expenses for importing resources. Japan is quite a convincing example, if we take into account this country has low natural reserves of metals, but is one of the biggest metal consumers. In the same time, it offers high-tech products at reasonable prices on the world market.

The developing countries, with metal resources, orient their economic policy on the one hard to develop the national first processing industry (primarily), and on the other hand to market these resources on the world market at reasonable prices. However, these countries in order to cover domestic demand for superior manufactured products have to export considerable quantities of ores.

In the new economic conditions, favored by the development of transports and capital and technology transfers, covering the need for raw materials is partly or entirely based on imported resources.

For most non-energy mineral resources, the known reserves are concentrated in certain regions or countries which represent, in fact, the most important manufacturing regions. These attract large capital investments in order to exploit these deposits. Also, the mining activities, provided with adequate social and economic infrastructure, stimulate research and development of mining on the same territories or in neighboring regions, more accessible and which offer greater economic benefits. As such, the interrelations between the three activities of research, prospecting and extraction, stimulate development, with influences both from the exploitation of mineral reserves and from the extension of exploitation, mainly in countries with tradition. These processes were slowed with the onset of the world economic crisis. Economic decrease in industrialized countries has led to lower imports and hence the appearance of commodity price fluctuations on the world markets. Therefore, the operating activities of mineral deposits and the various industrial manufacturing processes are not as closely related as before; the non-ferrous metal industry and the metal industry, for example, develop independently from the place of extraction of the respective resources.

The close dependence between the metallurgical and the processing industries, one the one hand, and the mineral resources, on the other hand, was present since the beginnings of industrial development. This dependence was gradually reduced with the change of industrial centers and gradual depletion of rich reserves from the consuming regions, as well as the penetration of technological progress in all areas including transportation.

Changes occurring worldwide in terms of minerals supply sources supporting the industry development and the transition from self-consumption of raw materials to importers, especially over long distances, have caused many economic and technological changes. Thus, import of raw materials began to be the basis for development of certain industries in more and more countries.

Despite efforts to find new perimeters and widening the geographical area of operation, the extraction of minerals remains concentrated in a relatively small number of countries. Taken as a whole, the world's mineral production is concentrated in proportion of 70-75% in 12 countries, of

which approx. 50% are developing countries. By increasing the mining capacity also the export availabilities have increased, thus creating the premises for more intense trade in this area. The ore trade flows are extended from regional and neighboring level, to large and very large distances.

Seven major producing countries (Australia, Brazil, Canada, Sweden, Russia, India and China) export more than half the world production of iron ore. It is worth mentioning that two of the seven major countries exporting metal ores decreased their production especially after 1990. Thus, the former USSR, by subdividing in independent countries, has lost its status as large producer of iron ore. In addition to Russia states such as Ukraine, Latvia, Belarus have emerged, leading to redistribution of power in the extraction and export of minerals. But Russia remains a worldwide major producer and exporter of iron ore.

Sweden, adopting a series of regulations for environmental protection, decreased both the iron ore production and the metallurgical production, considered as heavily polluting and energy-consuming.

Expanding minerals international trade has been possible due to the introduction of new technologies of concentration, agglomeration and transportation over long distances. To ensure efficient transportation from the extraction location to the consumer, a special importance was given on the quality of the ore. For example, by increasing the content of iron from 51% to 62% transportation costs of useful content are reduced with 20%. Moreover, the shipping, auto and rail capacity increased, in order to reduce long distance transport costs.

Economic development and the use of advanced primary processing technologies determined a new global division of mineral production. Thus, an increasing share of world production of mineral raw material is processed in developed countries and a relatively small amount in the developing countries, which own significant non-energy mineral resource deposits. For example, only 10% of the total production of extracted bauxite is processed and converted into alumina in the countries where it is extracted from. In the case of iron ore and manganese the part which is processed in the countries of origin is of approx. 15-30% for zinc, approx. 50% for lead and approx. 70% for nickel. On average, developing countries process locally only 30% of the extracted ores, the remaining 70% being processed in the importing countries. A special case is China which, in recent years, has experienced a strong economic growth, and reached to impact on the price of raw materials worldwide.

The big differences between countries and regions, as well as between minerals in the different levels of processing, depend on a series of factors such as: the necessary of investment and the investment power of the countries; the degree of integration of production in the respective industries; the level of required technologies and the specific energy consumption; energy capacity of the respective countries; the size and evolution of demand etc. These factors have certain mobility, an evolution according to the technical progress and level of economic development of the countries, to the pace of this development, as well as to the stability and political and economic interests of these countries and the international organizations in those areas.

The countries with mineral raw materials tend, through their economic development programs, to capitalize their natural riches by developing the respective industries, processing such wealth and gradually restricting exports of raw materials.

Achieving these goals shall be possible if the mineral processing expands and intensifies, which will influence the global trade restructuring in terms of goods flows on groups of countries and, in particular, flows of metallurgical goods. Moreover, the balance of international trade with metallurgical goods reflects the effects of the development level of some countries, but also the restructuring necessary in the world economy and in the trade relations between countries.

Increasingly strong is the desire of many developing countries, producers of natural resources, to move to industrialization by extending the processing of minerals extracted. At the same time, some developed importing countries build in the developing countries industrial units of extraction and primary processing of natural resources in order to obtain intermediates, especially

through direct investment and providing long-term loans repayable in products. This support may be explained by the fact that the developed countries are interested in ensuring their supply of raw materials, while avoiding the expansion on their territories of heavily polluting and energy-intensive processes. Therefore, by the high processing of intermediates imported from the developing countries, the countries with tradition in metallurgy may obtain many economic, environmental and energy advantages.

The customs tariff system is used, frequently, by the developed countries, on the one hand to stimulate the developing countries to export raw minerals, and on the other hand to stop them – from the economic point of view – from exporting manufactured goods. Thus, tariffs increase with the transition to higher stages of processing.

The industrial development increases the demand for mineral resources. Even if we reduce the specific consumption, the recycling of materials and the use of substitutes, the demand for non-energy mineral resources shall experience significant growth, without taking into account the real possibilities to satisfy such need. Therefore, on the one hand the exploitable reserves have a certain evolution based on the research activity and geologic exploration, like that of ore extraction, and on the other hand the possibilities of expanding the supply with mineral raw materials are more and more limited.

Conclusions

It would be wrong to believe that these facts are just situational, and it would also be wrong not to notice that behind them are much deeper economic and social reasons. However, as time passes it becomes increasingly clear that it is not just about solving some practical, economic, financial, monetary, technological problems or problems regarding the economic restructuring policies or the industry, even though these are urgent and inevitable. There are "deep currents of change" which forecast changes in much wider areas, in concepts, in values mainly due to the global crisis and the global problems arising from it. Therefore, together with the immediate restructuring of fields such as industry, technology, raw materials, energy etc., it is necessary to better clarify the directions of change in multiple areas. Access to energy and raw materials is essential for a developing world. Also, the access to technologies is extremely important in a globalizing world, in order to stop the depletion of these.

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RELEVANCE OF CORPORATE GOVERNANCE MODELS IN COMPANIES DEVELOPMENT, IN CONTEXT OF THE GLOBAL CRISIS

LUMINIȚA CECILIA CRENICEAN*

Abstract
Although the existing confusion regarding the concept of corporate governance persists, its role on sustainable maximize corporate values and providing high performance is undeniable.
Moreover, the test of a corporate governance effectiveness model is the measurement in which it succeed to achieve the main objective, namely, that the company's perspective to maximize value to shareholders.
In the economic crisis, it requires that by those systems in which companies are managed and controlled has to interact directly with social responsibility and business ethics held by those entities. It is expected that corporate managers have an efficient economic behavior, different from that of members of governments and economic decline that records do not meet current socio-economic situation.

Keywords*: model, corporate governance, company, social responsibility, business ethics*

Introduction

Although they are related, business management, corporate responsibility and corporate governance should not be confused. All components of corporate governance, consisting in norms, rules and codes are important for successful market economies.

Corporate governance can be defined in a variety of ways, but generally refers at the mechanisms by which a business enterprise organizes it process of management, control and direction. Over the past decade, interest in the role that corporate governance plays in economies, and particularly in capital markets, has increased in the European Union and its Member States.

Important European changes, such as: adoption of the unique currency, economic globalization, the complex process of privatization and, more important of all, the free flow of capital, goods, services and people across EU borders increased the interest of investors and issuers in understanding the role of corporate governance in arising their business, in lowering the barriers in development of the unique European market.

The main contribution of this paper is to bring together the several different literatures on corporate governance, finance, law, institutions and development so as to examine recently available empirical evidence concerning corporate governance, competition and influence of economic crisis in emerging markets.

An analysis of available data has highlighted that some emerging economies have become relevant players in the global economy - and even more so in selected regional and national contexts - and that some EMNCs[1] may by now claim the status of real "global players." The motivations for the corporate decision to internationalize via overseas investment are largely similar to those of OECD to seek market access, resources, and capabilities and justify the gamble of operating in foreign territories rather than exporting from the home country. Nonetheless, the international business environment has changed, product cycles are shorter, time-to-market imperatives faster, regionalism and economic liberalization processes more widespread, and network alliances of increasing importance, and firms are pushed to internationalize via direct investment much earlier in their lifecycle.

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[1] Enterprises have amassed sufficient capital, knowledge and know-how to invest abroad on their own and earn the status of emerging multinationals (EMNCs),
http://www.oecd.org/document/33/0,3746,en_2649_33731_36223265_1_1_1_1,00.html

Important cases of failure occurred in corporate governance have bring to attention areas of particular concern in the field, giving to those interested important cases to study, for the development and refinement of corporate governance standards. Developed industries and complex business forms arising lately pointed to severe conflicts of interest by brokers and analysts, underpinning the introduction of principle V.F. covering the provision of advice and analysis into the Principles.

The Enron/Worldcom failures pointed to issues with respect to auditor and audit committee independence and to deficiencies in accounting standards. The Parmalat and Ahold cases in Europe also provided important corporate governance lessons leading to actions by international regulatory institutions such as IOSCO[2] [www.iosco.org] and by national authorities. In the above cases, corporate governance deficiencies may not have been causal in a strict sense. Rather, they facilitated or did not prevent practices that resulted in poor performance.

1. Diversity in models of corporate governance - culture, ownership and law

Depending on their cultural inheritance and especially the legal provisions, in UE Member States appears a higher diversity in corporate governance codes of practices, structures and types of applying. This rich diversity complicates corporate governance comparisons between nations. The codes that have been registered in Member States in the last years express similarities which worth mention: they reveal that as reliance on equity financing increases and shareholdings broaden in Europe, a common understanding is emerging of the role that corporate governance plays in the modern European corporation.

Nowadays, specific academic literature regarding corporate governance focuses on the impact of national and business-culture on corporate governance systems. It is to mention here co-operative relationships and consensus and market processes in their corporate governance frameworks.

Mostly known differences in the EU Member States which applies corporate governance rules, models and codes are those arisen in Germany and United Kingdom, typical examples of differences in culture.

Often characterized as more market-oriented, The United Kingdom is, with a higher value placed on competition, differently based from Germany which is often characterized as traditionally valuing co-operation and consensus. The German emphasis on co-operation and consensus has been pointed to as underpinning the role of employee co-determination and works councils within the German corporation, and the rights given employees of certain sized companies to information about the economic and financial situation of the company and major plans for organizational changes, such as mergers.

The degree to which Member States have relied on equity markets for corporate finance has also varied significantly throughout EU Member States, although in all Member States equity financing appears to be gaining in importance. For example, in the Netherlands, bank lending has been a far more important source of financing, traditionally, than the stock markets. With less traditional reliance on equity markets for financing, shareholding has been fairly concentrated.

In this case of common interests, despite the main differences existing in corporate governance way of applying, important are international institutional investors which apply the same tests of security and rate of return in every business they are interested in. Therefore, they could be considered a real decisional force for governance convergence, a force which could change for better or for the worse the process of clear corporate governance. Convergence of this kind is getting to obtain new corporate governance standards, since these investors look for the same levels of board effectiveness, transparency, accountability, and financial probity no matter where they investment is placed.

[2] https://www.iosco.org/webmeth_pub/index.cfm

The downside is that they may thereby overlook opportunities in countries where their investment could earn both an acceptable return and make a considerable contribution to that country's development; in effect, where their investment could be socially and economically most productive.

2. Relevant changes in corporate governance during the economic crises. New models requirements

The financial crisis revealed severe shortcomings in corporate governance. When most needed, existing standards failed to provide the checks and balances that companies need in order to cultivate sound business practices.

In 2008, the OECD launched an ambitious action plan to develop a set of recommendations for improvements in priority areas such as remuneration, risk management, board practices and the exercise of shareholder rights. These recommendations also address how the implementation of already-agreed standards can be improved. This work was published in 3 phases[3] [www.oecd.org]: Corporate governance lessons from the financial crisis - a first overview of corporate governance shortcomings and the resulting challenges; corporate governance and the financial crisis: key findings and main messages -follow-up analysis providing the basis for the recommendations; conclusions and emerging good practices to enhance implementation of the Principles - recommendations to help companies and governments to overcome corporate governance weaknesses and support a more effective implementation of the OECD Principles on Corporate Governance.

The crisis that struck in 2008 forced governments to take unprecedented action to shore up financial systems. As economic recovery takes hold, governments will want to withdraw from these extraordinary measures to support financial markets and institutions. This will be a complex task. Correct timing is crucial. Stepping back too soon could risk undoing gains in financial stabilization and economic recovery. It is also important to have structural reforms in place so that markets and institutions operate in a renewed environment with better incentives.

The crisis has highlighted pervasive principal-agent problems which need to be corrected by improvements to corporate governance. Two issues stand out. First, CEOs and other top executives, notably including those charged with credit risk assessment and management, are rarely controlling shareholders of large financial institutions. They are shareholders' agents who have all too often failed to act in shareholders' interests.

The high exposure of shareholders' funds to risk and the very high levels of compensation unrelated to performance, paid out of shareholders' funds, point to the need to ensure better accountability for management decisions to the principals, *i.e.* the shareholders. This requires clear reporting responsibility and accountability of the CEO and management team to the Board of Directors.

The management should not controlled the all activity of the company, that's why The Board must be independent and motivated to act in the interests of shareholders. The "originate-to-distribute" business model that has increasingly replaced the traditional "originate-to-hold" model has allowed too many decisions to be taken by people or institutions rewarded for completing a transaction, *i.e.* by collecting a fee, commission or bonus, while transferring the risk to someone else.

Even many of the investors who make the capital allocation decisions on which the chain of transactions depends, *e.g.* hedge funds, pension funds and insurance companies, are themselves merely agents for the ultimate risk holders. These include pensioners, insurance policyholders, mutual fund owners and hedge fund investors who are not in a position to influence decisions. If the Board is acting effectively on behalf of the shareholders, it will align key executive and board

[3] http://www.oecd.org/document/48/0,3746,en_2649_34813_42192368_1_1_1_1,00.html

remuneration with the longer-term interests of the company and its shareholders (aligned with OECD Principles of Corporate Governance and the FSB Principles for Sound Compensation Practices).

Commission and other staff compensation are best left to management and regulatory intervention should be avoided. However, recognition of income from fees received from outside parties for origination of assets that will have an extended life should depend on the ultimate performance of the assets. Such fees would include those for underwriting bonds, originating loans and establishing CDOs. Ideally, they could be put in escrow and drawn over the life of the loan. At minimum, even if the fees are fully paid up front, recognition of the revenues and associated income can be deferred over the life of the asset much as interest on a standard mortgage is spread over its life.

Complex and fast changing of political and economical situation during the actual crisis has revealed the new landscape for corporate governance, new keys to act in those circumstances.

Some of the key elements in corporate governance arisen are leading to the question if those companies are prepared for the requirements of new governance guidance. A short list of the most recent developments and new board responsibilities in the corporate governance will refer to:

- the board is responsible for determining the nature and extent of the risks it is willing to take in achieving its strategic objectives;
- enhanced role for the senior independent director and, of course, more emphasis on the role of chairman, not ignoring the role of managers;
- diversity, including gender, to be taken into account for new board appointments;
- proposing, at every 3-5 years, an external evaluation of the board;
- an annual report in which to be specified every way of improvement of the corporate governance model applied.
- further guidance on the design of performance-related remuneration, taking in account challenging performance criteria, excluding any form of payment or reward for non-performance managerial activities;

3. The primordial role of internal audit to a successful model in corporate governance

The current economic crisis has led many investors to raise serious concerns about the accountability and responsiveness of some companies and boards of directors to the interests of shareholders, and has resulted in a loss of investor confidence. During this recession, the leadership at some of the nation's most renowned companies took too many risks and too much in salary, while their shareholders had too little say. By creating a large public demand for reforms, the current crisis offers another opportunity to improve governance arrangement.

Corporate governance is a combination of processes and organizational structures implemented by the Board of Directors to inform, direct, manage, and monitor the organization's resources, strategies and policies towards the achievement of the organizations objectives. The internal auditor is often considered one of the "five pillars" of corporate governance, the other pillars being the Board of Directors, management, audit committee and the external auditor.

Recent events have highlighted the critical role of boards of directors in promoting good corporate governance. In particular, boards are being charged with ultimate responsibility for the effectiveness of their organization's internal control systems. An effective internal audit function plays a key role in assisting the board to discharge its governance responsibilities.

A primary focus area of internal auditing relating to corporate governance structures is helping the Audit Committee inside the Board of Directors perform its responsibilities effectively[4]. This may include reporting critical internal control deficiencies, informing the Audit Committee

[4] Suciu A., Morariu G., Stoian F., Internal Audit and Corporate Governance, University Publishing House, Bucharest, 2008, pp.185-190

privately on the capabilities of key managers, suggesting questions or topics for the Audit Committee's meeting agendas and coordinating carefully with the external auditor and management to ensure the Audit Committee receives effective information.

Corporate governance includes structures that govern together relations between those who invest resources and those who monitor and manage business in that country. These relations are both formal, defined by rules and regulations as well as informal, materialized in business practice, ethical codes, etc. In such approach, transparencies in relationship with investors, as well as the quality of financial reports addressed to them, are primordial factors that may significantly influence the decision of undertaking a certain level of risks associated to financial investments.

Through the review of an audit procedure is to ensure that the committee has sufficient authority and resources to perform its duties. The membership of the committee is being verified to ensure that members have the necessary skills and experience, the size of the committee is appropriate and members are independent from management. Further considered the individual meetings to ensure papers are distributed in advance, members attend every meeting where possible, and new board members receive sufficient induction to the committee. Particularly, audit is interested in highlighting the Strategy Committee's role in relation to strategic planning; ensuring members are informed of main strategic targets and corporate planning process.

The success of implementing corporate governance depends upon reliability allocated to corporate operators, being required cooperation and responsibility. In nowadays crisis business climate, corporate governance has become a reality, taking in account the fact that it assures a certain level of reliability, requested for an adequate functioning of a market economy, lowering the informational risk and the cost of capital, as well as efficiently resources consumption. The importance of corporate governance for Financial Investment Companies has led to specific regulations inspired from national law system as well as implementing the standards regarding auditing, their main role concretizing in specific ways to communicate between auditors and officials in order to gain principal aspects of the financial aspects[5].

Conclusions

In the present situation of an unbalancing economic crisis, corporate governance must promote transparent and efficient markets, must comply with rules and regulations, clearly segregating responsibilities between regulators and operating entities.

From this approach, Financial Investment Companies must adopt clear and transparent corporate governance structures, establishing adequate functions, abilities and responsibilities for management and the Board of directors. Furthermore, in their annually report, Financial Investment Companies must insert special paragraphs to describe relevant events related to corporate governance, as well as explications to inadequate application of recommendations from the Bucharest Stock Exchange Corporate Governance Code[6].

Relations between issuers of securities and investors should remain clear and transparent; this should be a fundamental requirement for promoting an adequate level of informational efficiency for Romanian stock market. Therefore, specific laws and regulations require Financial Investment Companies to respond at investors' informational needs by reporting all the significant changes and events that may cause relevant changes in the field (changes in control possession or in managerial structures, changes in stock prices, financial condition depreciation, etc.).

Of a main importance in having a functional corporate governance nowadays is to verify, periodically, all those sources of information that could influence actual status of the company, these include interim reports, Board of directors' reports, audit or reviewing reports, changes in rights

[5] http://www.pakistaneconomist.com/issue2002/issue22/f&m3.html

[6] Danescu, T., Spatacean, Ovidiu. *Corporate Governance- Applied principles for companies listed on a regulated capital market*, Financial Audit Magazine of August, 2008, edited by Romanian Financial Auditors Chamber

attached to securities, litigious events or bankruptcy procedures initiation, off-balance sheet with significant impact upon financial condition.

As such, corporate governance structures should assure correct and operating dissemination of all material aspects related to Financial Investment Companies, including financial statements, property rights and governance policies.

Dissemination and transparency respond to reporting requirements applied to Financial Investment Companies, related to relevant aspects, such are: financial and operational results, development strategies, management objectives and philosophy, property rights and voting rights of shareholders, remuneration policies regarding management and the Board of directors, transactions involving related parties, risks and uncertainties with significant impact upon entities, etc.

Disclosure and presentation of financial and non-financial information should comply with high quality financial reporting standards and dissemination tools should provide equal, efficient and operative access to all users, especially investors. Information produced by financial reporting system should be subject of internal audit process, in an independent, objective and professional manner, to assure management and Board of directors that financial statements reflect in all material aspects, a true and fair view of financial position and performances. Internal auditors should also test the efficiency and reliability of internal controls, in aspects that may have relevant impact upon financial statements.

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A STUDY REGARDING THE LEVEL OF TRUST THE YOUNG ROMANIAN CONSUMER HAS IN PAID MEDIA AS OPPOSED TO THAT IN EARNED MEDIA

MIHAIL-CRISTIAN DIȚOIU*

Abstract

Along with the evolution of the Internet and with its growing capacity to impose itself on the population, the consumer has become stronger through the simplification of access to information. Thus, 24 hours out of 24 hours, Internet users from all around the world are searching for relevant information about the product they desire. This is also the reason why organizations are striving to be as present as ever in the online medium, interacting with their consumers, monitoring the information dissipated by them on the Internet about their products, and measuring the effects they have produced. The media available to an organization is represented by: paid media, owned media and earned media. The problem that is raised is that of a correct management by the marketers so that the investment in one type of media will also pursue the conversion in another type of media, thus resulting, through the help of consumers, a chain. When a consumer wants to buy a product, he needs relevant information in order to make a decision. The information about the product is analyzed based on source credibility, which is seen as a perception of the degree of the consumer's trust. The present study tries to investigate the level of trust the young Romanian consumer has in paid media and earned media during the buying process. The study is conducted on a group of young Romanian people, with ages ranging from 18 to 24 years, from urban backgrounds. In order to observe if there exists a difference in the perception of media based on the type of medium the subject finds himself in, the survey has been conducted online, as well as offline.

Keywords: *level of trust, paid media, owned media, earned media, buying process*

Introduction

At a time when the consumer is bombarded with advertisement messages from everywhere, his level of trust in the information he is receiving is dropping. Positioning itself in the area of values-based communication, the present study is an exploratory investigation of the level of trust young Romanians have in two types of media during the purchasing process. Thus the marketers should plan media in time and they should allocate the budgets by choosing the proper information channel in which the consumer trusts and by achieving the conversion from one type of media to another trough the use of a continual communication that runs both ways.

The entire decisional process of buying contains the following five stages: the emergence of an unfulfilled need, the search for information and the identification of alternatives, the mental evaluation of alternatives, the result of this evaluation and the post-buying evaluation[1]. As Kotler[2] observes, these stages take place in sequencing. During the first phase the buyer observes a problem or an unsatisfied need, the marketer's role being to identify the conditions that bring about certain needs and to develop the strategies that catch the consumer's attention. In the second step the consumer searches for more information about the product and for alternatives, the marketer's job becoming that of tracking the sources of information accessed by the consumer, as well as keeping trace of the relative influence that these sources have on him. We may affirm that in the third stage –

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[1] Iacob Catoiu and Nicolae Teodorescu, *Comportamentul consumatorului,* 2nd ed. (Bucuresti: Uranus, 2004), 34-42.

[2] Philip Kotler and Kevin Lane Keller, *Managementul marketingului,* 5th ed. trans. Cosmin Crisan and Smaranda Nistor (USA: Teora USA LLC, 2008), 287-300.

of evaluating the identified variety of products - there is no universal process that is used by all the consumers, but that these assessments are often based on the consumer's convictions and attitudes. The fourth step leads to the materialization of all the prior phases by making the decision to buy. The last stage - the post-buying behavior - reminds the marketers that the purchasing process has not yet been finished and that they need to have as goal the consumer's satisfaction, as well as the post-purchasing undertakings or the usages the acquired product can gain.

Analyzing things based on distribution, paid media represents that which the organization pays in order to obtain the channels, owned media refers to the owned channels, and earned media - the consumers become the channels[3]. Paid media is distributed on a limited number of channels, while earned media - on an unlimited number of channels[4]. In terms of its online aspect, earned media is now stable, everlasting, being at the same time a huge factor of influence. Even if earned media presupposes the allocation of money, its orientation is more in terms of management, than acquisition: the design of an editorial schedule, monitoring and the analysis of the results[5]. Earned media becomes an effect of paid or owned media, thus resulting in a media chain in which the consumer is a missionary[6].

The framework

The exploratory investigation was undertaken from December 2011 to January 2012 on a group of 300 young people, with ages ranging from 18 to 24 years, coming from an urban background. The sampling was done non-probabilistically by applying the snowball method and by using the questionnaire as a means of collecting data. Half of the research was conducted through the use of the Internet by questioning online a number of 150 young people, and the other half was carried out offline/in a traditional style on a number of 150 young people.

As for the level of trust the subjects have in paid and earned media, the following scale was used: 1 = total lack of trust; 2 = high degree of distrust; 3 = moderate degree of distrust; 4 = low degree of distrust; 5 =neutral (neither distrust nor trust); 6 =low degree of trust; 7 = moderate degree of trust; 8 = high degree of trust; 9 = absolute trust.

During the process of purchasing the consumer is influenced by the sources of information. The basis of all this information is the organization, which reaches the consumer through the help of the media. There are three types of media available to the organization: paid media, owned media, and earned media.

In the study "Rethinking paid, earned and owned media: New rules for marketing performance" from "Initiative" we have the following things defined: paid media as the advertisement space acquired from TV, print, online, etc.; owned media as the space of communicating the brand directly to the consumer, without intermediates, an example from this point of view being a company website; earned media - as the space controlled by the consumer, such as word-of-mouth, testimonials, etc. By reading the study put forward by those from "Initiative" it appears that 43% of all consumers buy a brand after they have previously checked it out on the Internet. They have also reached the conclusion that there is no unique formula for success regarding the three types of media, hence while consumers from Australia trust paid media, those from Spain

[3] Sean Corcoran, "Defining Earned, Owned And Paid Media," *Forrester* (blog), December 16, 2009, http://blogs.forrester.com/interactive_marketing/2009/12/defining-earned-owned-and-paid-media.html.

[4] Gil Rudawsky, "Earned media vs. paid media: A 7-point list of benefits," *Ragan's Pr Daily Europe* (blog), September 29, 2011,

http://www.prdaily.eu/mediarelationsEU/Articles/Earned_media_vs_paid_media_A_7point_list_of_benefi_9635.aspx.

[5] Greg Shove, "The new PEO media model," *iMedia Connection* (blog), June 22, 2011, http://www.imediaconnection.com/content/29345.asp.

[6] Lauren Drell, "How Social Media Is Changing Paid, Earned & Owned Media," *Mashable Business* (blog), June 23, 2011, http://mashable.com/2011/06/23/paid-earned-owned-media/.

have trust in a mix of owned media and earned media. Romania was not included in the sampling of the survey from "Initiative". At the end of the study they observed that paid and owned media have influenced half of the activity in earned media[7].

Within the boundaries of the present study that has as target Romanian youths two types of media have been taken into consideration: paid media and earned media. Owned media has been considered as being part of paid media because the organization must pay for both of them, and the consumers see them as commercial sources, while earned media can at best be influenced with the help of paid media. Because it cannot be fully controlled by the organization, the consumers define earned media as an independent source. The research conducted online and offline has lead to results.

The consumer's interest in buying a product is triggered in a higher degree by earned media (64%) than paid media (36%) in the online research, while in the offline research earned media has reached a percentage of 54%, and paid media of 46%.

The stage in which the consumer seeks information about the product that triggered his purchasing interest presents the following distribution of trust as a function of the number of appearances of the grade that designates his level of trust. In Diagrams 1 and 2 we can observe that in the online survey the most frequent mark is 7 for both types of media and that in the offline survey, the most frequent marks are 7 for paid media, and 6 for earned media. These two sets of repartition indicate the direction and the intensity of the consumer's trust in paid and earned media. The point which resumes the intensity of the sample's image is the weighted arithmetic mean of all the opinions, this mean being: for paid media 5,46 (online questionnaires) and 5,91 (offline questionnaires); for earned media 6,73 (online questionnaires) and 5,90 (offline questionnaires).

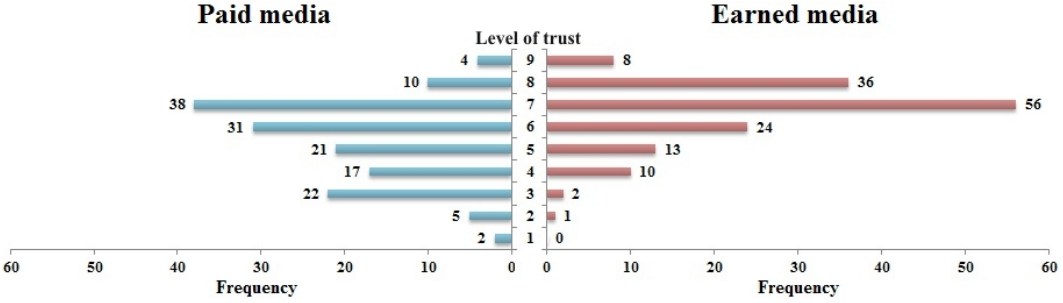

Diagram 1. The distribution of the consumer's trust in paid and earned media as a function of the frequency of the grade attributed to the level of trust during the stage of searching for information - online survey

[7] Initiative. "Rethinking paid, earned and owned media: New rules for marketing performance, " news release, September 6, 2011, http://initiativeblog.ro/wp-content/uploads/2011/09/06.09.2011-Press-Release-Initiative-Launches-Paid-Earned-Owned-Media.pdf.

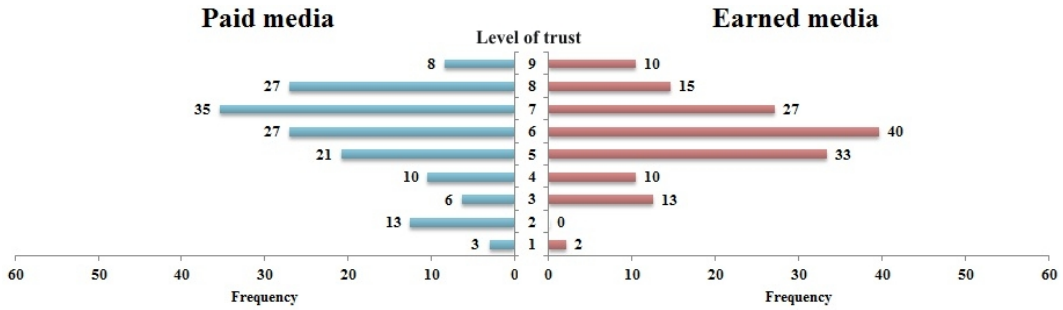

Diagram 2. The distribution of the consumer's trust in paid and earned media as a function of the frequency of the grade attributed to the level of trust during the stage of searching for information - offline survey

During the process of evaluating the identified alternatives for the product, but before reaching the stage of developing the intention to buy and before making this decision, the consumer's level of trust presents the following distribution:

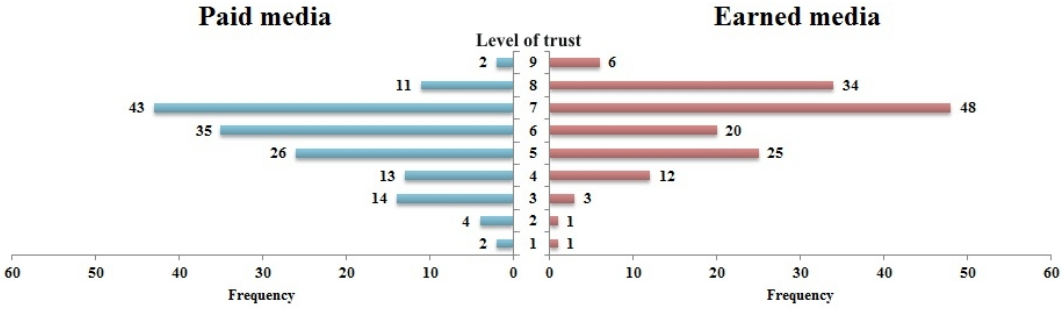

Diagram 3. The distribution of the consumer's level of trust in paid and earned media as a function of the frequency of the mark attributed to the level of trust during the stage of evaluating the alternatives for the product - online survey

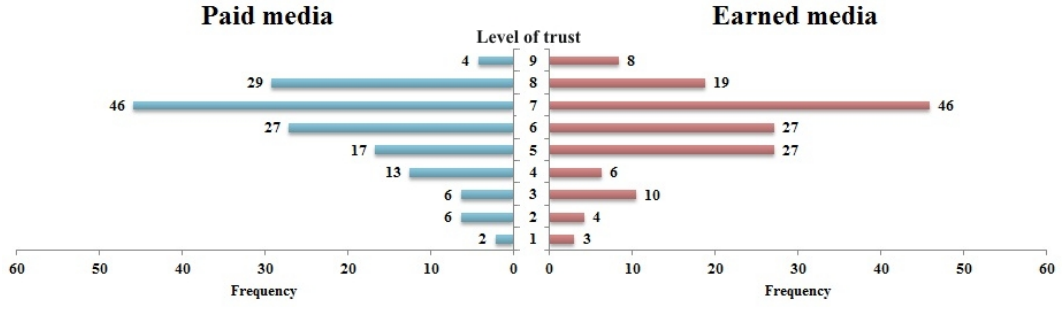

Diagram 4. The distribution of the consumer's trust in paid and earned media as a function of the frequency of the mark attributed to the level of trust during the stage of evaluating the alternatives for the product - offline survey

Diagrams 3 and 4 show us that the most frequent mark attributed to the level of trust in both types of media is 7, in online surveys and in offline ones, as well. The weighted arythmetic mean for the paid media is 5,67 (online surveys) and 6,14 (offline surveys), and for earned media – 6,45 (online media) and 6,05 (offline surveys).

When the consumer places himself in the stage of making the finale decision to buy, the distribution of his level of trust in media is the following:

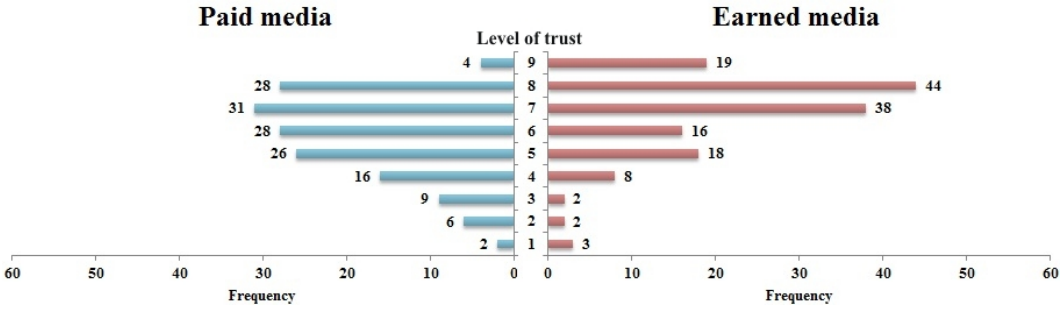

Diagram 5. The distribution of the consumer's trust in paid and earned media as a function of the frequency of the mark attributed to the level of trust during the stage of taking the final decision to buy - online survey

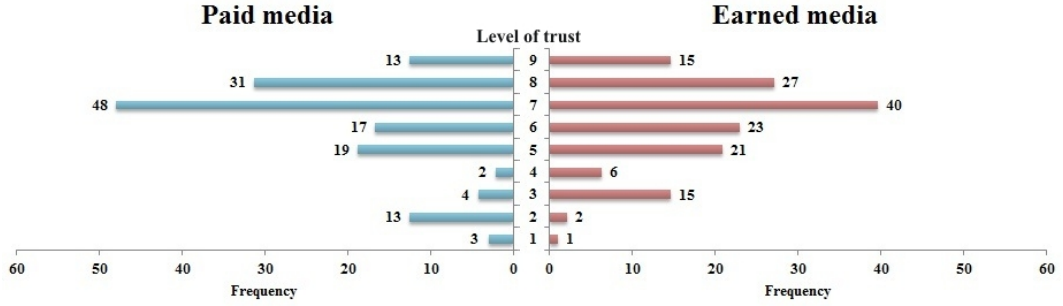

Diagram 6. The distribution of the consumer's trust in paid and earned media as a function of the frequency of the mark attributed to the level of trust during the stage of taking the finale decision to buy - offline survey

According to Diagram 5, in the case of the online survey, the most frequent grade attributed to the consumer's level of trust in paid media is 7, and in the case of earned media - 8. According to Diagram 6, in the case of the offline survey the most frequent grade for both types of media is 7. By calculating the weighted arithmetic mean we obtain for paid media the value 5,87 (online survey) and 6,31 (offline survey), and for earned media - 6,80 (online survey) and 6,32 (offline survey).

Once the decision to buy has been made, the process is not finished, and we thus enter the stage pertaining to the post-buying behavior. For example, the consumer's satisfaction is one of the indicators that should be analyzed by marketers. As for the type of media, which establishes for the consumer a horizon of expectations regarding the bought product that are closer to his perceptions of

the acquired product's performance, the percentages are the following: during the online survey, paid media 33%, and earned media 67%; during the offline survey, paid media 49%, and earned media 51%.

To this post-buying stage is also linked the satisfaction or non-satisfaction of the consumer regarding the purchased product. From the online survey results that, when the consumer is content with the product, he will recommend it to other people he knows. The percentage of people who have indicated that they recommend the product is of 49%. When the consumer is dissatisfied with the product, he will no longer buy it, 36% of the subjects choosing not to buy the product again. The rest of the post-purchasing actions from the online survey are presented in Tables 1 and 2.

Table 1.

The manifestation of satisfaction – online survey	
Recommends	49%
Reiterates the purchase	17%
Becomes a loyal costumer	10%
Uses with pleasure	9%
Gives a good review	8%
Is happy	7%

Table 2.

The manifestation of dissatisfaction – online survey	
Doesn't buy any more	36%
Gives negative publicity	23%
Doesn't recommend	17%
Files a complaint	12%
Returns product	9%
Is angry	3%

Table 3.

The manifestation of satisfaction – offline survey	
Recommends	61%
Reiterates the purchase	23%
Becomes a loyal costumer	9%
Uses with pleasure	5%
Gives a good review	2%
Is happy	0%

Table 4.

The manifestation of dissatisfaction – offline survey	
Doesn't buy any more	30%
Gives negative publicity	30%
Doesn't recommend	27%
Files a complaint	7%
Returns product	5%
Is angry	1%

Table 3 and Table 4 show us the post-buying actions of the consumer when he is content with the purchased product or when he is dissatisfied, according to the offline survey. When they are satisfied with what they have bought the percentage of consumers that recommend the product is 61%. Taking into consideration the hierarchy there nevertheless appears a change from the online survey, in a situation of dissatisfaction, when, according to the acquired percentages, the first positions are represented by the following actions: doesn't buy any more (30%) or gives negative publicity (30%).

Overall: the source of good information during the buying process is represented by earned media (Diagrams 7 and 8).

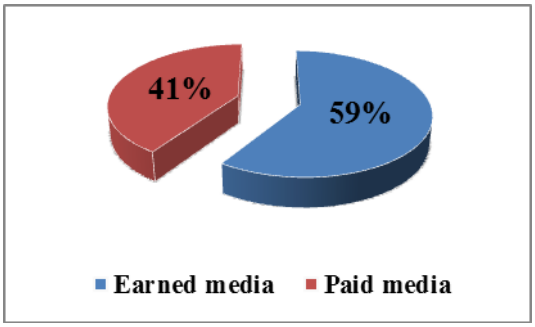

Diagram 7. Media as a source of good information during the buying process - online survey

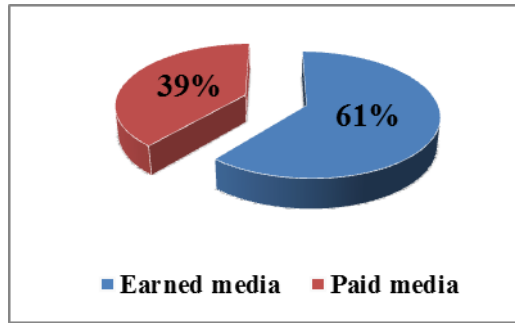

Diagram 8. Media as a source of good information during the buying process - offline survey

At the end of the research the consumers' opinions have been analyzed in the case of a touristic product. When the consumer chooses his vacation destination based on the trust he has on the quality of the information from those two types of media, the results from the online survey places paid media at 37% and earned media at 63%, and from the offline questionnaire paid media gains 44% and earned media 56%. When the question arises whether to purchase a vacation or not, the consumer is influenced in a much higher degree by earned media because we have the following percentages: 59%, according to the online questionnaire, and 51% in the case of the offline questionnaire. Paid media influences 41% of the subjects according to the online questionnaire and a percentage of 49% in the case of the offline questionnaire.

Conclusions

It becomes more obvious by the minute that the consumer's behavior is changing as a result of introducing the Internet and of the emergence of online social networks which are in the benefit of earned media. The access to information about the products, as well as their online purchasing are now facilitated.

The present research has strived to study the level of trust the young Romanian consumer has in paid and earned media during the buying process. In all the five stages pertaining to the buying process earned media has obtained from an overall point of view a higher credibility score than paid media. During the online research, throughout every stage of the buying process, the level of credibility in earned media is higher than in the case of the offline research regarding the same type of media. In what regards the offline research, throughout every stage of the purchasing process, the credibility of paid media is higher than in the case of the online research regarding the same type of media.

The consumer's post-buying actions materialize in accordance to the subjects when they are satisfied about the bought product: recommendations, the reiteration of the purchase, loyalty, using the product with pleasure, giving good reviews, or obtaining a state of well-being. In both the online and offline surveys the most common among satisfied consumers is the recommending of the product to other people known. In what regards the consumer's post-purchasing actions when he is dissatisfied, these are the following: failing to re-purchase the product, negative publicity, the lack of recommendation, filing a complaint, returning the product, or a state of unhappiness. According to the online research the consumer's dissatisfaction with the product he has just purchased impels him

not to buy it again. The offline research establishes that two of the most frequent actions the consumer takes when he is discontent are to give negative publicity and not to buy the product.

Marketers should take into consideration the fact that earned media represents an alternative in an environment which is overwhelmed with the organization's messages toward the consumers, and they should bring to use the credibility of this independent source. It has always been known about how high an efficiency recommendation has in influencing the consumer during the buying process. The Internet and the social networks are very helpful nowadays in the dissemination of this type of recommendation, and thus they lead to earned media. But it is up to the marketer to choose the best media mix, based on, for example, as this study has shown, the stage in which the consumer finds himself during the purchasing process and the type of medium he habituates in that particular moment. The media strategies and planning must also be interested in the conversion from paid media to earned media, as well as in the opposite type of conversion, the consumer being their main area of focus. By shifting the focus during the purchasing process on the satisfaction of the consumer, more earned media would be generated, thus having a higher level of credibility as a source of information, in spite of the fact that this information is not always as accurate as it should be. Earned media can sometimes function as a guaranty of the choice. In order to obtain correct information it is high time that owned media appeared as a support for earned media, and that paid media represented the link between owned media and earned media.

Research should be continued so as to identify the sources that generate earned media, to obtain the optimum mix of media and to trace the influence of earned media in the context of different categories of products, target-groups and the environments in which these groups can be found. Another research direction could be towards transforming consumers into brand ambassadors through earned media.

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FROM STRESS TO MOBBING

CĂTĂLINA BONCIU[*]
GHEORGHIȚA CĂPRĂRESCU[**]

Abstract
The currently specific problem at work is chronic fatigue, a syndrome characterized by physiological and emotional exhaustion and often generated (through permanent frustration) by the position with a too much or too low volume of work. First of all, the treatment of stress, of burnout or in countering resilience, is preventive and consists in gaining a better resistance.
In simpler words, fighting against those phenomena is maintaining personal health. "Health is a fully favorable condition, physically, mentally and socially, and not merely the absence of disease or infirmity"[1]. Later it was added that health is the "capacity to lead a socially and economically productive life."
But, when the general concern is to destroy the balance, whatever that may mean – the balance of the active body or the body "ready to leave the system", balance of knowledge, individual and collective mental equilibrium, functional balance of economy, balance of the bio-system… - we must not remain indifferent. It occurs frequently a phenomenon which is a relatively unknown concept for the Romanian economy – the mobbing or bullying.

Keywords: *stress, burnout, resilience, mobbing, management of stress/burnout/resilience and combating mobbing*

Introduction

From the second half of 2007 I wrote about the fundamental changes which began to occur on the labor market. In fact, the evolution of economy cannot take place without the human factor to adapt to those always changing requirements. The times we live now are much different from what people have experienced or imagined for the future. More specifically, individuals are not mentally prepared for the changes in the social disposition, economic system, life and work conditions... If it is relatively easy to adapt the skills, abilities, professional competences to new jobs, is not the same with the people's psychological preparation to work in stressful conditions. Employers remain subject of immediate profit, but few think that the level of fulfillment of this mission depends mostly on the physical and mental quality of their employees. The more restrictive the legal conditions the lower the investments in the human factor, in the professional development techniques, but especially in preserving or improving their health. It seems that the general concern is to destroy the balance, whatever that may mean – the active body or the body "ready to leave the system", balance of knowledge, individual and collective mental equilibrium, functional balance of economy, balance of the bio-system… Therefore, how can survival and continuation, especially in conditions of performance, be preserved? According to the primary laws: who has days will escape?! According to nepotism laws: who is related to … or who belongs to the group …?! In the spirit of Christian laws: who loves his neighbor as himself and do everything he can to help, support, promote?! The problem of the imbalances in the individual's body, whether at work or in family or society, in the context of the economic crisis or the reorganization of the economic activity, is a subject frequently brought into the public's attention [2].

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It is true that it is not the world leaders who show concern for the fate of the workers. For some time, there is said that the planet's current population exceeds its level of affordability. Various studies, presented staggering conclusions, announced with temper or slipped discreetly, starting from the crisis (in different forms of manifestation) and reaching to subsequent decimations of the population (by means of apparent recovery and modernization).

What should actually raise real signs of concern among employers and managers? Completely voluntarily are not included in the analysis those who "master" us, economically and politically, seen or not seen…

1. The scientific concepts as well as the causes of the phenomena they explain.
2. The general and specific manifestations in the current transition towards a new economic order.
3. The management of all physical phenomena disturbing the physical and psychical equilibrium of the person exposed to transition.
4. What could be done to diminish the negative consequences of these phenomena with negative impact on individuals?

In life, the events we live are not happening at random. There are rare the situations when one cannot reveal the causes. A well scientifically and spiritually trained person, with sufficient attention to everything around him, can logically and emotionally interpret, can relate in time and space, and more than that, he can act as he considers more fit, not as it is directed, manipulated or coerced, forced.

Actual Content

Starting from this premise, what is fundamental for a businessman with a long term vision is to form a professional and loyal team, well trained and ready to change qualification if needed, with willingness to climb the career ladder, with a strong sense of responsibility and duty. Such people bring value to the business, are valuable themselves, and bring value to others in the team. Why? Because they have skills, abilities, competences.

Skills are mental and physical attributes, based on specific functional structures, which lead the person to successfully accomplish a certain activity. As they are reflected in the activity's quality, they show the human's possibilities. The skills are based on hereditary predispositions, but emerge only during activities, under the influence of the environment and the education. Higher forms of manifestation are: vocation (when the individual has a special inclination towards a particular activity), talent (creative development of complex skills) and genius (the highest level of development involved in an activity of historical significance – is rarely encountered among workers). The professional skill is seen as a juxtaposition of simple skills, being conditioned by knowledge, interests and aptitudes. The consummation of the professional skill takes place when the general or intellectual skills (intelligence, memory, observation, attention) are accompanied by one or more specific skills (technical or mechanical, psychomotor, sensory, organizational or management, etc.).

Skills are completed by *mental abilities* (verbal understanding, word fluency, ability to count, resonance, inductance, memory, perceptual speed and other special skills) and *physical abilities* [3]. *Ability* is defined according to the Romanian Explanatory Dictionary as skills, cunning, adroitness, dexterity, quality of being shrewd, skill to do something.

The *professional competence* is the ability to perform activities required at the workplace at the quality level specified in the occupational standard [4]. Professional skills are acquired through: initiation, qualification, training, specialization, retraining:

Initiation - acquiring the minimum knowledge, skills and abilities necessary to perform an activity.

Qualification - acquiring a set of skills that enable a person to perform a specific activity or profession.

Training - developing the professional skills within the same qualification.

Specialization - acquiring knowledge and skills in a small area of coverage of an occupation.

Requalification - acquiring skills which are specific to other occupations or professions, different from those previously acquired.

Most workers, after fulfilling all the steps in developing and/or acquiring the skills, abilities, competences needed, could not enjoy the results of the effort made for their professional investment.

The present prolonged crisis psychologically marked the workers, stressed them, some more, some less. There are neurotic, depressive employees, employees with identity crises, which receive treatment. But most of them do not even realize what is going on with them, let alone the fact that they would not have the sufficient financial resources for specialized treatment.

The insistence to work under stress turns into burnout. Later, the employers, noticing the employees lack of response to harsh work conditions, being content with their apathy or even rejoicing that they managed to instill terror among the employees, can impose permanent stressful working conditions.

Are any of those interested in the health of their subordinates? Generally, no. If course, if asked, they all pretend to be worried and involved, but, in reality, protection happens only at individual level. However, irrespective of the actions of the employer or of the manager, each individual has the obligation to maintain his health and work capacity in the normal parameters, through his own efforts, without expecting too much from others.

Literature review

According to the Romanian Explanatory Dictionary, stress is the name given to any environmental factor (or combination of factors) causing abnormal body reaction. Stress is an adverse effect of the human body produced by an environmental factor.

The Oxford Dictionary translates the word "stress" as a condition of care, with energetic physical and mental implications. Stress is also a condition or circumstance (not always negative), which can disrupt the normal physiological and psychological functioning of an individual.

There is not a universally accepted definition of stress; many scholars have considered the phenomenon as being the sum of "external and internal conditions creating stressful situations" [5], or "symptoms experienced as a result of the existence of stressful conditions."

Arnold şi Feldman [6] define stress as "the reactions of the individuals to new or threatening environmental factors" and William and Huber (also 1986) define it as "physical and mental reaction to environmental conditions extended beyond the individual's adaptive capacity."

In the publication "Gestalt Therapy Verbatim (1969), Pearls [7] suggests a more general interpretations, in which stress is a manifestation of thinking about the future.

French, Kast and Rosenzweig [8] highlight the idea that stress is not necessarily negative. "The term stress can be considered neutral, while distress and eustress terms can be used to define the negative effects and respectively the positive effects." The authors propose a model that characterizes the optimal level of stress in relation to its effects on performance. What goes beyond the optimal threshold leads to poor performance and "burnout", and what is under the optimal threshold leads to a decreased performance and generates the "rust-out" (:rusting". i.e. a trivialization of performance and creativity).

The "father" of the stress concept is Hans Hugo Bruno Selye. He believes that stress is the individual's adaptation syndrome to the environmental aggressions, through tenseness, tension, coercion, force, strain. Hans Slye defines stress as the totality of the human body reactions to the external action of certain causative agents (physical, chemical, biological and psychological), consisting of morpho-functional changes, frequently endocrine. In the case of a long-term stress agent the general syndrome of adaptation involves a stage evolution. Selye [9] was the first author

who described the stages of the human body in threatening situations. His model, "the general adaptive syndrome" defines three phases: alarm reaction stage (preparation for a possible emergency by slowing digestion, increased heart rate, blood vessel dilation, increased blood pressure and respiratory rate), the stage of resistance (continued stress lead to resistance, the body get accustomed to the effects of the stressful factor) and the exhaustive stage (as the adaptive energetic resources are consumed, the alarm reaction symptom reappears and distress manifests as illness).

The concept of burnout was set in 1969 by H.B. Bradley, in his article "Community-based Treatment for young adult offenders." Burnout was first defined as a particular stress, strictly related to work. This term has been repeated by the psychoanalyst Herbert J. Freudenberger (1974), then by psychologist Christina Maslach (1976), where burnout was the manifestation of professional wear and tear.

The definition of mobbing is rooted in the English verb "to mob" (to criticize, to confront, to attack someone). There has been written about mobbing since 1963, when Konrad Lorenz described the manifestations of rabbits and geese when a fox appeared. Later, in 1969, the concept was extended to human society by the Swedish Dr. Peter-Paul Heinemann, who studied violence on groups of children [10].

The Swedish psychologist Heinz Leymann consolidated the concept in the world of specialists with his work "Mobbing", published in 1993, paving the way for German and Scandinavian researchers. He identified about forty components of aggression, which, if repeated at least once a week for six months, represent mobbing. That is, a conflict that degenerates.

The psychiatrist and psychoanalyst Marie-France Hirigoyen has introduced the term "le harcelèment moral" in the French literature, through her book "Le harcelèment moral – La violence perverse au quotidien" (1998). Continuing her studies and research, her second book "Malaise dans le travail" (2001) brought together a growing number of workers which were found in situations similar to those presented in the book. "Moral harassment is an abusive conduct manifested in particular by behavior, words, actions, gestures, writings which can have negative impact on the personality, dignity or physical or mental integrity of a person, endangering his/her work or degrading the social environment." In other words, the person aggressed is unable, psychologically, to withstand the onset of a conflict or to assume an open conflict, less damaging. [11].

Theoretical background

1. Stress

In management, the concept of stress was borrowed from medicine, where it is perceived as a reactive state of the body subject to a sudden action, and the etymology has to be searched in English, where stress means treadmill. In medical language, stress is defined as a disruption of the body and the homeostasis. This mind-body application occurs when you must deal with continual changes occurring in life. A state of stress appears relatively normal.

Doctors have identified multiple sources of aggression on the body, each representing stressors: trauma, emotional shock, surgery, poisoning, cold and generally, the constraints of daily life (noise, multiple phone calls, urban transport, etc.) In more specific terms, aggression triggers at brain level (pituitary) an "alarm reaction" that stimulates the secretion of adrenocorticotropic hormone and adrenocortical hormones. They change the subject's psycho-physiological balance and provoke tachycardia, respiratory hyperventilation and arterial vasoconstriction. When stress is kept within the normal limits, it plays a positive role, improving resilience to pressure. Not the same thing happens when aggression is very intense or too extended in time.

Still in medicine, stress-related disorders are treated at levels such as the neurovegetative factors, endocrine or tissue, with individual customization.

The most common symptom is stomach ulcer – a repeated stimulus leads to the contraction of the arterial network irrigating the stomach mucous. If the stress is not eliminated, ischemia occurs,

i.e. causing circulatory failure or deterioration or necrosis of the tissues. The next step is bleedings or stomach perforation.

Stress-related diseases can appear at cardiovascular level (myocardial infarction, hypertensions), digestive level (transit disorders, colitis, ulcers), at skin level (rash, alopecia or hair loss), endocrine level (chronic adrenal insufficiency) and at gynecological level (ovulation disorders and/or menstruation flow).

Stress can be the source of pains and neurovegetative ailments (heart palpitation, syncope), rebel fatigue, depression, insomnia, anorexia and even mental confusion.

Recent studies talk about the dangerous physical changes attributed to prolonged exposure to stress. A report made in New York showed an increase of twenty grams of the heart muscle at persons exposed to stress situations. This "growth of the left ventricle of the heart is present, many times, as an incipient form of a coronary heart disease and a heart attack" (Pieper, 1990). Also, the "Omni" magazine (1991) published a series of experiments made on animals in order to examine the effects of prolonged stress. Researchers have discovered that there is a loss of neurons in the hippocampus region, a phenomenon likely to occur also in the case of human subjects.

Why did I start with the medical approach of stress? Precisely to understand the gravity of the phenomenon. Before explaining the manifestations of organizational stress, everyone should pay more attention to the serious consequences on our body's health.

In other words, there is a potential for the occurrence of stress. The stressed person cannot manage the imbalance between the individual capacities and the personal resources, and the difference between the rewards and costs of achieving a certain goal is substantial (ibid). The personal level of stress is therefore dependent on the self-perception of the personal skills, self-confidence and fear of failure.

As the work environment often implies new situations, stress is unavoidable, and reactions to stress are individualized, depending on perceptions, emotions, attitudes and personal changes of the human resources.

Stress appears as an adaptive individual response to a conscious or unconscious threat, a subjective phenomenon, not as an objective response to the environmental factors. The level of stress caused by a certain situations depends on the way that situation is interpreted, not only by the contextual conditions. In other words, stress is a relative phenomenon.

In addition, focusing on a somewhat distant horizon, creating expectations for the future and appreciating the difference between their ideals and the present situations, individuals begin to feel anxiety. When this anxiety is released on one task, one can speak of eustress, positive and motivating stress. But when anxiety does not leas to mobilization, we are dealing with distress, negative and harmful stress.

Ivancevich and Matteson [12] made the connection between the customs of the primitive people, with responses like "fight or run" in order to survive and the inertia of the human nervous system to respond now, in the same way, to environmental stress factors, even though the environment is radically different. Reitz [13] strengthens and supports the idea that individuals in modern societies often substitute the fight or run option with psychological reactions, such as negativism, the expression of boredom, irritability, nervousness in front of unimportant problems, but also with feelings of persecution, apathy, resignation, fantasy, amnesia, lack of concentration and impossibility to take decisions.

The stress present for a short time represented a useful tool in the survival of humankind. But extended for a longer period of time, stress leads to continuous and increased adaptive efforts. When it comes to work, the negative effect of stress on the physical and emotional health is important. Williams and Huber (1986) presents a comprehensive list of stress symptoms: constant fatigue, low energy levels, headaches, intestinal problems, chronic respiratory problems, sweating limbs, dizziness, increased blood pressure, constant inner tension, insomnia, temperamental crisis, hyperventilation, irritability, restlessness, inability to concentrate, aggressiveness, chronic worry,

anxiety, inability to relax, feeling of inadequacy, increased self-defense, dependence on painkillers, alcohol and tobacco abuse." Moreover, stressful jobs expose people to serious diseases: managers subject to high levels of stress are twice more prone to heart attacks than those at lower level of stress [14].

2. Burnout

Excessive stress at work is not an isolated or negligible problem. The "burnout" phenomenon is already a constant presence in the life of most employees. In such situations, work-related stress leads to lower productivity levels and the emergence of personal health problems [15].

Burnout is a popular term for mental or physical energy depletion after a period of chronic, unrelieved job-related stress characterized sometimes by physical illness. The person suffering from burnout may lose concern or respect for other people and often has cynical, dehumanized perceptions of people, labeling them in a derogatory manner. Causes of burnout often include stressful, even dangerous, work environments; lack of support; lack of respectful relationships; low pay scales compared with other's salaries; shift changes and long work hours; pressure from the responsibility of providing continuous high levels of work over long periods; and frustration and disillusionment resulting from the difference between job realities and job expectations [16].

Burnout is the syndrome of total exhaustion. That is, a higher stage of the evolutionary scale of discomfort. Burnout is a disease characterized by a set of signs, symptoms and behavioral changes at workplace; general pain, lack of attention, insomnia, irritability, anxiety, fatigue and psychological distress, lack of work motivation.

In some cases one can observe also morphological, functional or biochemical changes, that can lead to a wrong diagnosis. In such a state of fatigue, burnout is included among the psychosocial risk occupational diseases, as a subsequent exposure to permanent and prolonged stress. Expressed in a cynical way, burnout means: "dead by work overload."

Burnout is the current specific situation at work, of chronic fatigue syndrome, characterized by physiological and emotional exhaustion. The causes must be sought in the chronic frustration given by the workplace, on one side, and the work volume, on the other side. Therefore, it is not a surprise that persons having the burnout symptoms are all the more: increased consumption of alcohol, coffee and even drugs, depression, decreased self-esteem, pessimism and accentuated feeling of loneliness, absenteeism, tiredness and irritability, muscle tension and stomach problems, loss of sense of humor and strong sense of guilt.

In the current organizational context, employees may experience positive stress, perceived as a pleasant challenge, of limited duration. This helps them concentrate and perform well. The main condition is the short time of manifestation. However, conversion to negative stress, as an intermediary step to burnout, is made on account of a continuous pressure exerted on the respective subject, when they are obliged to act in ways not compatible to their real competences, skills, time and resources.

In 1980, Freudenberger et Richelson in "Burnout: The High Cost of High Achievement", p. 145, defined burnout as "a state of frustration, depression and chronic fatigue caused by dedication to a cause, a life model or a relationship that fails in producing the expected results, leading to reduced involvement and non-completion of work tasks."

Generally, people do not realize when they go through the stress stages to reach burnout: frustration, anxiety, depression.

Frustration is deep discontent, felt by the individual when something or someone comes in the way of attaining a goal. When kept within certain limits, frustration has beneficial effects: customizes behavior and pushes towards progress and energy mobilization in solving emerging problems. The consequences of frustration are positive only when frustration is intermittent and when the individual has the opportunities to solve the problems. When these lack, frustration becomes an emotional state of mind which may take aggressive forms such as protest, violence,

sabotage or in extremis, apathy and isolation. When frustration comes by surprise and is considered as having unjust causes, it manifests as aggression.

Anxiety is the reaction to a physical or psychological anticipated threat, unlike fear (a response to present danger). Both occur on the lack of defense against possible danger. Anxiety appears in an organization because of the employees' vulnerability in front of decisions which are not in their favor: frequent changes of routine, internal competition, when persons can lose their position or reputation, ambiguity of tasks, job insecurity, mistrust and continuous and hostile surveillance. The personal factors, such as illness, family problems, alienation from a group, too high ambitions, also have an important role in the installation of frustration. Moderate anxiety motivates, sharpens the senses and increases innovation, being the source for interesting solutions to problems and tasks. But when it becomes chronic and exceeds certain limits, the subjects are no longer thinking rationally. Some even start to get help and courage from alcohol, tobacco and drugs. The worst is that people manifesting anxiety, especially men, do not recognize their status (which they consider a sign of weakness), thereby delay discussions on this problem and other's attempts to help them.

Depression is also an emotional state experienced by everyone at some point, following an illness, of a prolonged effort or an unfortunate event. At these times, depression for a limited period is beneficial because the body functions slow down, defending it in front of excessive energy consumption in order to adapt. Normally, depressions disappear after short periods of time. Energy, appetite for life, optimism return and normal life is resumed. But for some depression becomes a permanent state. They are becoming increasingly apathetic and isolate, they are not sleeping well (they get up after one hour or two of sleep), no longer have appetite, are undecided, negligent about their appearance, they find it hard to focus, they feel guilty and helpless, they no longer enjoy life. All this affects their ability to work, their family and social relations, leading to abuse of medicine, alcohol and drugs.

3. Resilience

"At some point, everyone experiences stress. The term was used to describe a variety of negative feelings are reactions that accompany threatening or challenging situations. Thus, not all forms of stress are negative. A certain amount of stress is necessary for our survival. Reaction to stress maximizes energy production to prepare the body to cope with such situations" [17].

Those who managed to maintain themselves in relatively normal operating conditions respond to another managerial and psychological concept – resilience.

Resilience is defined as a dynamic process that individuals exhibit positive behavioral adaptation when they encounter important adversity, trauma, tragedy, threats, or even significant sources of stress:

- good outcomes regardless of high/risk status;
- constant competence under stress;
- recovery from trauma;
- using from challenges for growth that makes future hardships more tolerable.

In the past two years, words such as *layoffs, unemployed* and *restructuring* are also known by children. The so-called "survivors" of these events positively answered to the resilience phenomenon, to the recent economic and financial changes.

The price paid by those who leave a company which undergoes a restructuring process is far too high. The consequences for the survivors are also, significant and serious. The employees' confidence and moral often suffers as the volume of work increases and job insecurity become more pressing. Over half of these survivors are extremely stressed at work, suffer of fatigue due to reduction of personnel and present the risk f no longer being apt for work. However there are cases of survivors who consider this an opportunity for personal development [18].

Reduction of personnel seems to cause stress both to managers and those who manage to keep their jobs. Managers may feel threatened because, according to the American model – where growth equals success, the opposite may indicate a failure, at least in perception. Whether it is an inefficient or poor management, managers that implement staff reductions say they themselves feel a certain degree of insecurity at the work place. Managers are thus faced with a diminished importance in the organization – the image and their status is affected. Moreover, their responsibility of communicating the layoffs decision to the employees leaving the company is generating stress and anxiety in itself [19].

Employees, survivors of such changes may come to feel the stress at a very high level, mainly because of a mixture of guilt and insecurity. They often feel guilty, especially in front of their colleagues leaving the company. Then, exposure to the departure of those colleagues causes the perception of a threat: losing their job, demotion and income reduction (ibidem).

As a concept, the reduction of personnel is not equivalent to the decline of the organization, as it aims growth in efficiency, productivity and competitiveness. The survivors of this process may contribute or hinder this goal. Everything depends on the reactions and behaviors they adopt. The classification of survivors can be made in a sociologic frame of reference EVLN – exit, voice, loyalty, neglect (Hischman, 1970, Farell, 1983), according to types of behavior constructive/destructive and active/passive (MISHRA, SPREITZER, 1998). By juxtaposing the two dimensions, we can classify survivors in:

- *Constructive* – do not perceive restructuring as threatening and are willing to cooperate with management in order to implement it. Example: employees work unpaid overtime to help the organization overcome the transition period.
- *Destructive* – just the opposite; they feel the change as threatening and become uncooperative. Example: the surviving employees stock or block in their department resources which could be used in other departments;
- *Active* – express confidence that they can cope with the restructuring, are assertive. Example: employees offer to identify the jobs that need to be restructured or, by contrast, organize protests against restructuring.
- *Passive* – do not trust their ability to cope with the reorganization process, do not have initiative.

Example: employees wait for their superiors to identify the jobs to be restructured.

4. Mobbing

Mobbing is a communication interrupted by a conflict between colleagues or between superiors and the staff at the workplace, where the concerned individual is systematically dominated and often attacked, directly or indirectly, by one or more persons (at least once a week) and over a long period of time (min. six months) with the purpose to expel him/her from the working life and what makes him/her feel discriminated against.

There is a so called "list of the 45" [20] which clearly lists the behaviors and actions resulting from mobbing:

a) Effects on the victims' possibilities to communicate adequately (10):

- Management gives the victim no possibility to communicate;
- The victim is constantly interrupted;
- The victim is silenced by colleagues;
- The victim is verbally attacked;
- The victim is permanently criticized about his/her work ;
- The private life of the victim is continuously commented (negatively);
- The victim is terrorized via phone;
- The victim is orally threatened;

- The victim receives written threats;
- The victim is denied eye contact, by derogatory glances or gestures, through allusions, without being directly spoken.

b) Effects on the victims' possibilities to maintain social contacts (5):
- The colleagues do not talk with the victim;
- He/she is denied conversation;
- The victim is isolated from the colleagues, being moved as far away as possible;
- The colleagues are forbidden to talk with the victim;
- He/she is completely ignored.

c) Effects on the victims' possibilities to maintain his personal reputation (15):
- The victim is calumniated;
- Rumors are spread;
- The victim is ridiculed;
- The victim is suspected to suffer from a mental illness;
- It is intended to force the victim to submit to a psychiatric examination;
- Colleagues make fun of a handicap of the victim;
- They imitate walking, way of talking or gestures, in order to laugh at him/her;
- They attack the political and religious views of the victim;
- They publicly despise the victim's privacy;
- They laugh of the victim's ethnic heritage;
- The victim is forced to do tasks that shake his/her confidence;
- The victim's work is appreciated in an incorrect and offensive way;
- They question the victim's decisions;
- They use obscene words or other calumnious expressions;
- The victim is made verbal sexual offers.

d) Effects on the victims' occupational situation:
- The victim is not given work assignments;
- The victim is stopped from completing their work assignments;
- The victim is given meaningless work assignments,
- The victim is given work tasks which are not suitable for his/her qualification;
- The victim permanently receives new tasks;
- The victim is given offensive tasks;
- The victim is given tasks which are not proper for their own qualification, in order to discredit him/her.

e) Effects on the victims' physical health:
- The victim is given dangerous work assignments;
- The victim is threatened with physical attacks;
- The victim is aggressed physically, to be given a lesson;
- The victim is physically aggressed;
- The victim is caused financial damages;
- The victim is caused physical damages in privacy or at work;
- The victim is sexually aggressed.

In most cases, mobbing appears in a stressed body, in a person physically and morally weakened. Mobbing is likely to appear when the organizational climate favors the splitting of the working team, when individuals, separated from the group, become vulnerable. The phenomenon degenerates in:

I – daily conflicts, unnecessary but common;

II – psychological terror, mobbing installed because the victim did not participate in the resolution of previous conflicts;

III – bad management of the destructive personnel, often too late for the victim and only on the recommendation of colleagues' representatives;

IV – exclusion from the working life, not because of physical and social problems, but because of the misfortune of being "chosen" for such a position.

It is clear that there are well planned scenarios by which the victim is forced to resign or retire earlier. And these are the situations with a happy end, because the gravity of the phenomenon is revealed by many call centers and therapy clinics, where victims seek help, either just advice or medical, psychotherapeutic help. I met a large number of medics and psychiatrists, who have tried, for at least ten years, to help suffering people, victims of mobbing. The effects of their work cannot be neglected, but satisfactions (if it can be named as such in this context) are always minimal. Why? Because the percentage of psychological and moral relief and comfort of individuals subject to mobbing (and who, no doubt, are made ill on the long run) is not at all high, any person recovered is a huge success for the therapists.

People are different, not everyone has the ability to acknowledge mobbing. They do not know how to react in their own favor, they have no courage to oppose, or to ask help from their superiors. Often, they do not know their rights, they have no idea where to turn, what help to ask. In our country, unlike France, Belgium, Germany, the Netherlands, Sweden, Norway, the United Kingdom… the phenomenon is ignored by legislation, and the EU laws, which naturally should be appropriated by any state of the European Union, are totally ignored.

Conclusions

Stress at work is responsible for millions of working days unused each year and millions of days of sick leave. So the figures for human and material (money) losses are significant since many companies do not realize how much stress at work affects life and the economic progress.

First of all, the treatment of stress, of burnout or in counter resilience, is preventive and consists in gaining a better resistance.

The holistic combat of stress is made through a healthy way of life, by maintaining a perfect equilibrium between work and life style, with the help of:

- Education (strengthen self-esteem, positive thinking); in all its forms: in family, formal, informal and non-formal;
- Energetic rehabilitation (healthy food; exposure to natural light and fresh air; exercises in open air; respecting the sleeping hours…)
- Adopting a preventive behavior: diminish/eliminate smoking, alcohol, avoiding crowded placed or with a high degree of risk, use seat belt while driving, helmet on motorcycle, knee pads and armrests while practicing certain sports, using protection gloves while gardening…

Alimentation has to be made of substances necessary to the daily consumption: carbohydrates (50-55%), proteins (15-20%), unsaturated fats, fibers, vitamins, minerals and a lot of water (2l/day), vegetables, fruits and cereals (over 60% of the daily menu); as many fresh, natural aliments as possible, no additives or preservatives.

Water, which is considered "the source of life" is an main component of the human body (present in almost 75 pc) has structural role and role in the fluid equilibrium; lubricant and emollient; thermostat; washing, conditioning, transport and solubilization agent, with an important role in digestion (forming saliva); prophylactic and curative factor – hydrotherapy.

Light was defined over time as: photons, wave flow, complex of electromagnetic radiations, UV radiations (A – long, B – medium, C – short), visible (40% of those reaching Earth) and infrared (caloric), cosmic radiations, γ, X rays, and so on. The effects of light are: it is photochemical and photosensitive (heatstroke, rash…), bactericidal, physiological and psychological of colors,

biochemical and metabolic, it has effects on blood, circulatory, respiratory, digestive systems, on the endocrine and on the nervous system, on the skin…

The fresh air, even though invisible it is vital, more than physically necessary (to the life of plants and animals) and through the negative ions favors the effect of aerotherapeutics and diminishes those of pollution (smoking)…

Exercises in open air and physical exercises are recommended, such as:

- walking every day and jogging as much as possible;
- renouncing at the comfort of the elevator, the car (for the bicycle), the escalators…;
- walks in lunch breaks or between activities;
- rediscover the gym or the sports in parks with special gym arrangements;
- dance classes;
- trips on touristic routes;
- climbing on high mountains;
- practice any physical activity.

Self-determination and respecting the sleeping hours has to respect the three equal parts: 8hrs work + 8hrs other activities + 8hrs of sleep. Even in the case of insomnia the body has to remain in an horizontal position in bed, with eyes closed, and it is recommended 2hrs of sleep or rest in bed in the afternoons. Rest is called the universal force of our existence, a proper behavior factor, but also a remedy with extended utility.

The causes of exhaustion are: long hours work or physical effort – hypotonic fatigue, long term work or intellectual effort – hypertonic fatigue, insufficient sleep. Sleep is defined as the organism's rejuvenation period, characterized by interrupting the state of wakefulness.

According to the simple people, it is recommendable to draw a "map of life", as a diagnosis analysis of what is healthy and recommended to be preserved (raw a little processed food, water consumption in large quantities, respect and time for one's self, happiness and passion in life) and what is harmfully and has to be eliminated (alcohol, smoking, drugs in any way – medicines, plants, coffee – in excess), and what is not yet part of one's behavior, to be adopted.

Maybe the easiest way to apply in the treatment of stress, burnout and resilience, has to start from a few advices:

- Nothing, except respecting the laws, is compulsory, but recommendable.
- "You don't have to, it's good to…"
- Life lived intensely, alertly, with preoccupations, shortcomings and worries impede people to think about themselves, about their aspirations, their ideals…
- Self-forgetting leads to exhaustion, illness or extra pounds, motivation, energy or the joy of living disappear.
- The most recent recommendation encourages the change in the existential paradigm by adopting a new approach of the phenomena's causality and effects and existential simplification (reduction in the number of daily needs – from 11.000 of the modern man).

The incredible regenerative capacity of the organism can be met by a series of complementary therapies:

- Therapies for a better way of life: naturopathy, relaxation, visualization, meditation…
- Therapies for wellbeing: Alexander technique, Tai Chi, Chi Kung…
- Natural therapies: homeopathy, natural medicine…
- Touch therapies: massage, shiatsu, aromatherapy, reflexology…
- Art therapy: dance, color, painting, music, sculpture…
- Manipulation therapy: palm-therapy, osteopathy…
- Mental therapies: healing, psychotherapy, hypnotherapy…
- Eastern therapies: Ayurveda, Chinese traditional medicine, acupuncture…

Adopt a healthy way of life, in harmony with nature, can influence genetically a person. "Healthier life, rawer and vegetarian food, intense exercise and continuous love stimulate the development of brain cells, disabling genes that generate diseases, transforming them in benefic ones." (dr. Dean Ornish, president and founder of the Preventive Medicine Research Institute in Sausalito, California, during the latest TED Conference in Monterey).

Regarding mobbing, its impact on an individual has long-term consequences and infinitely more devastating than stress or its higher forms – burnout and resilience – because, the moral subjugation of the individual is more destructive, both for him/herself and the society.

Managing a mobbing situation is more complicated and costly than preventing it. People subject to bullying have certain manifestations, at least on three levels [21]:

- Psychopathological: reactions to anxiety, fear and avoidance; apathy; concentration problems; depression; changing mood; flashbacks; hypertension; insecurity; insomnia; intrusive thoughts; irritability; lack of initiative; melancholy; recurrent nightmares;
- Psychosomatic: asthma attacks; hypertension; tachycardia; arrhythmia; heart diseases; dermatitis; hair loss; headaches; muscle and stomach aches; even ulcers; loss of balance...
- Behavioral: hetero-aggressive and self-aggression reactions; eating disorders; increasing frequency of drinking, smoking, drugs; avoiding friends and social isolation; physical discomfort and illness; self-isolation from social engagements; detachment from family ties, from commitments/responsibilities; intolerance to family problems; violence and worsening school performance of children; sexual dysfunctions; marital problems and divorce; loss of join projects, friends; difficulty in qualifying for other jobs or engage in job search; litigations; loss of income; health expenses ...

Losses are considerable both for the employers and the community/society.

In the first case employers engage additional costs related to retirement; repeated transfers and staff replacement costs; absenteeism due to sickness; growing number of people unable to work, as well as the total number of employees; increased costs of training new personnel and workplace integration; costs for labor disputes; loss of qualified personnel; damage to company image; decrease in number of clients; reduced competitiveness and product quality; reduced individual and group productivity; reduced motivation, satisfaction and creativity; organizational climate damage.

In the latter case, the whole society becomes a victim because of the increased pressure on the general wellness, with various consequences, depending on the national health system and social services: costs due to early retirement; high costs for the disabled/work incapacity; high costs with unemployment; medical costs and possible hospitalizations; loss of human resources, more painful when it comes to efficient/productive employees.

If the main concern today is strictly related to money, either as income or costs, mobbing is one important aspect that has to be brought into discussion, not necessary the impact of mobbing on the victim, but especially in respect to the behavior of the community. In most cases considered delightful by those fond of conflicts and scandals, it is lost sight of the consequences of the victim's manifestations on his/her colleagues. Some enjoy, participate directly, as aggressive characters, morally threatening. Others, more fearful, with a weak personality or training keep distance from the victim, without realizing that in a near of distant future they will take his/her place. And then the skills, abilities, talent or vocation, competences, experience or seniority will not matter.

Therefore, if this reminiscent animal behavior found in the reactions of certain workers is understood, why not establish a system to protect potential victims?

As we are witnessing in the recent years a massive loss of rights won by workers in several hundred years, the only viable recommendation is to keep one's mental state in perfect condition, to provide oneself with a solid cultural and educational baggage, capable of allowing an easy integration in the work team and more flexibility in interpersonal relations.

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CONSUMER OPINIONS TOWARDS ONLINE MARKETING COMMUNICATION AND ADVERTISING ON SOCIAL NETWORKS

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Abstract
On the Internet, a medium that has already proven its effectiveness in marketing activities, changes take place with astonishing speed. The recent explosion of social networking applications and their number of users has captured the marketers' attention. Companies have started to rethink their relationships with consumers and adapt to the new online world. In this virtual world of social networks the public is the key element. Consumers perceive the social network as a personal space where they control the content. They decide on their own what they want to see and share with others. Thus, in order to manage marketing communications effectively, marketers must know the consumers' opinions towards their presence in social networks.

Keywords*: online marketing, online advertising, social networks, Social Media, marketing research*

Introduction

Knowing that, currently, social networks, blogs, forums and sharing sites are the main centers of interest for Internet users, marketers have started to rethink their online communication strategies and adjust to the new trend. Many companies are realizing that having a website and making it visible and easy to find through search engines (SEO) is simply not enough anymore. Nowadays it is vital that their online presence includes a Social Media component on sites like Facebook, Google+, Hi5, MySpace or Twitter.

The specialists' opinion, expressed by the American research firm MarketingSherpa, is that "Social Media moved from the notion of *novelty* to the one of *necessity*, and it should be perceived as an integrated element of the business communication strategy."[1]

Analyzing the maturing of this field, MarketingSherpa also noticed that most marketers, who use Social Media tools, relied themselves more on intuition and did not outline a precise plan to conduct and measure the success of their campaigns. Thus, the effectiveness of the online marketing activities was usually affected.

This situation may be the consequence of the fact that, in general, commercial messages posted on social networks belong to less known brands or companies, with little experience in promoting their products/services. Another explanation may be the fact that many companies didn't study well enough the consumer opinions and behaviour towards online marketing and advertising before implementing their campaigns on such a highly humanized channel like Social Media.

Therefore this paper aims to underline the significance of knowing and studying the consumer perceptions, attitudes and opinions before trying to engage their attention with specific online marketing tools.

The importance of this research stems from the fact that many small Romanian companies still need guidance in interacting with consumers on the Internet and taking full advantage of all the opportunities the online medium offers.

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Thus, with the help of an exploratory research, this paper will outline the features, online social activity and opinions of social networks users in Bucharest. These findings may provide some guidelines on how to implement efficient marketing campaigns through social networking applications.

Content

About online marketing and Social Media

In essence, "online marketing involves using the Internet to communicate directly personalized, interactively and at a long distance in order to achieve the relational and/or transactional objectives of the organization."[2]

Online marketing activities mainly consist of four categories of actions:[3]

- creating company identities through corporate websites,
- placing online advertisements (especially banners) on different sites,
- participating in group discussions (forums, newsgroups), virtual communities, electronic newsletters, to increase awareness and interest among some well-defined consumer segments,
- using the e-mail as a direct channel of communication with consumers.

The third category primarily focuses on Social Media, which is a virtual space divided into five categories: social networks, blogs and microblogging platforms, wikis, forums and sharing communities (for audio and video content). Amongst all, until now, the social networks proved the most efficient in capturing the user's attention and their potential is far greater than any other application.

A social network can be defined as "an application that expands and gains consistency by means of human interaction, usually an interaction between groups that share the same interests, that come from the same cultural or geographical region or groups formed on a specific criterium."[4] In other words, virtual social networks are a form of public space, led by the concept *"users with common interests/needs"*. A social network is a place where the passion for a common interest, the need for affiliation or for personal development, or even the need to share life experiences, brings people together.

A social network generally has the following features:

- it is built around a regional particularity, local culture, a specific function or dominant traits of its members;
- aims mostly at aspects of work and personal life;
- attracts mainly members of a certain age, depending on their interest.

On this basis, online marketing developed a new facet, that of the communicational campaigns created using well known references about consumers. Based on the information provided by users on their profile pages, marketers can target a specific audience, defined by age, gender, preferences, hobbies or even by the groups of which they are members.

Beside this aspect, online marketing through social networks has other advantages such as:

- the consumers' personal data can be easily obtained; this helps to establish specific market segments and user typologies;
- it is based on online conversations, dialogues, grants freedom of expression and encourages the direct involvement of the consumer;
- offers direct, rapid feedback from users;
- companies can create their own communication channels with target groups, through newsletter or blogs;

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[3] Philip Kotler et al., *Principles of Marketing - European Third Edition,* (London: Prentice Hall, 2002), 801

[4] Marius Mailat Blog, *Listă rețele sociale România*, January 28, 2009, www.submitsuite.ro/blog/

- the fans can promote themselves a message or a brand;
- the enthusiastic consumers can become "ambassadors" or promoters of brands;
- consumers can influence each other by creating homogeneous groups where they may get together and exchange opinions or pieces of advice;
- events that receive attention and create a certain „buzz" form the basis of viral marking, which is an essential element for success on social networks.

Being aware of all the advantages and opportunities that online marketing offers, companies may decide to start communicating on the Internet. After doing that, they should take into account that implementing a promotion through social networks requires, above all, rigorous organization and planning in order for the results to be maximized.

Companies should also take into consideration that, on social networks, the public is the key element. They perceive the social network as a personal space in which power and control over the content is in their hands. Due to these characteristics, implementing a Social Media campaign must be creative, transparent and perfectly adapted to this environment.

Extending companies' presence on these platforms which have a large number of users should be a natural thing since brands should be always heading where they future audience is.

The benefits are obvious when taking into account the fact that two thirds of the world's Internet users constantly use social networks, which overcame e-mail in the top of online activities. The time spent on these social networks has been growing three times faster than the time spent online in general.

An estimated number of 1.2 billion persons are using Social Media applications and nearly 20% of overall time spent online is spent on social networking sites.

According to The Nielsen Company's study, published at the end of January 2010, global consumers spent, on average, more than five and a half hours on social networking sites like Facebook and Twitter in December 2009. The study showed an 82% increase from the same month of 2008 when users spent just over three hours on social networks.

In Europe, a demographic analysis of time spent on social networking sites in five countries (France, Germany, Italy, Spain and United Kingdom) revealed that women spent significantly more time on social networks than men across all age groups, during April 2011. Women aged between 15-24 years were the most engaged audience as they spent 8.4 hours on social networking sites, followed by 45-54 years old women with 5.5 hours, which is double the time spent by men, in the same age group, during the month.

In addition, the overall traffic to social networking sites has grown over the last four years. Specifically, two thirds of online visitors spend their time on social networks and blogs, placing them ahead of other online forms of engagement and interaction including games and instant messaging.

In our country the situation is different. Until recently, companies in Romania took little notice of social networks as potential marketing goals destinations. The reason was the fact that the number of customers who had membership accounts on such platforms was not large and only a small part of the public was deemed relevant by companies that were using the Internet to advertise.

However things began to change. The phenomenon of social networks has been growing in our country especially during the last two years and has been gradually arousing interest among companies keen on promoting.

With an impressive number of over six million Romanians who use social networks (out of over 7.4 million Internet users in our country) and for whom signing in on sites like Hi5, Facebook, MySpace, Twitter and LinkedIn has become routine, social networks have become more attractive for companies in Romania who have started to see this as new means of promotion worth investing into. For example, in 2012 there are 4.161.340 Facebook users in Romania and 26.87% of them live in Bucharest.

Industry experts say that during recent years advertisers have become less reluctant as before when it came to placing their ads on these platforms. At the moment, all big Romanian companies advertise on Social Media.[5]

In this context, the companies efforts must be sustained by researches and studies meant to create an overview of the present situation.

The methodology used within research

The current study was based on a quantitative research conducted among a small group of Bucharest inhabitants, active members of different social networks.

The data collection method used for this research was the survey and an online self-managed questionnaire was used as a research instrument. The questionnaire consisted of 20 closed questions, with choice offered answers, all ranked by research objectives. The introductory section of the questionnaire aimed to reveal the habits of using social networking platforms, the main section of the questionnaire centered on the actual consumer opinions towards Social Media marketing, and the final part's purpose was to identify the socio-demographic characteristics of the respondents.

The measurement scales used were generally non-metric, nominal and ordinal (for Likert scale), and metric scales, interval (for responses using semantic differential).

Given that this research has an exploratory character, the final size of sample was set at 200 persons. The target group of the study consisted of Bucharest residents, aged between 18-35, selected using the non-random (nonprobability) method of snowball sampling. Snowball sampling relies on referrals from initial subjects to generate additional subjects and it was used because the snowball chain can be obtained easily when using social networks.

The main research results and their implications

The research results showed that Facebook is the social network where most of the respondents own an user account (27.8% of responses), followed by Hi5 with 21.6%, Youtube with 14.7%, Neogen (9.2%), LinkedIn (7 %) and Twitter (6.6%).

Regarding the frequency of using social networks, 55% of the respondents said they sign in daily or almost daily, 25% of them sign in several times a week and 20% several times a month or less frequently than once a month. For 60% of the respondents the average time spent on social networks on a regular day is less than an hour and the locations used to access social networks are in order: from home (67.4%), from work (20.8%), from school/college (2.8%) and only 9% of respondents said they are using a mobile platform or a mobile phone to log in on a social network.

The purpose why users access social networks is keeping in touch with friends or acquaintances (32.9%), followed by entertainment (30.6% of responses). Only 4.2% of respondents showed interest in using social networks to take advantage of special offers, contests or promotions for various products/services.

In terms of categories that users link to on social networks, the highest percentage was assembled by clubs/bars/restaurants pages with 21.1% of responses, followed by products or services (20.5%), private parties and events (13.7%) and celebrities (12.6%).

Other results, regarding aspects of Social Media marketing, showed that almost half of respondents (49%) rarely seek for advertisements within these platforms.

Regarding the frequency of advertising messages' occurrence on the social networks, opinions are divided between the 54% of Internet users who believe that ads appear in an acceptable number and the 46% who believe that they occur too often. Analysing the responses according to the

[5] Anca Arsene-Bărbulescu, „*Tot mai mulţi români sunt pe reţelele sociale iar reclamele îi urmează"*, Business Magazin, 29 martie 2010, accesed May 15, 2010, http://www.businessmagazin.ro/business-hi-tech/new-media/tot-mai-multi-romani-sunt-pe-retelele-sociale-iar-reclamele-ii-urmeaza-5779806

division by gender, the research shows that women tend to believe that commercial messages appear in an acceptable number, while most men say they appear too often.

About banner ads, most respondents (33%) stated that it's quite disturbing when they appear in their browsing windows, 88% tending to ignore and close them. In the case of men, the responses indicate a more pronounced disturbance regarding the emergence of banners, unlike the women who are less disturbed by their appearance.

Another result shows that respondents tend to agree with the idea that promoting products through social networks is useful. This is shown by the high percentage of responses: 41% of respondents agree and only 11% disagree.

The results for the idea that the promotional methods used on social networks are too aggressive, show that 34% of people agree, 38% are indifferent and 16% disagree.

For most respondents (38%) the element of the greatest importance for the success of promotional campaigns through social networks is the originality, followed by a consistent and well transmitted message (for 25%), interactivity (16%), attractive design (15%) and animation (with only 6% of responses).

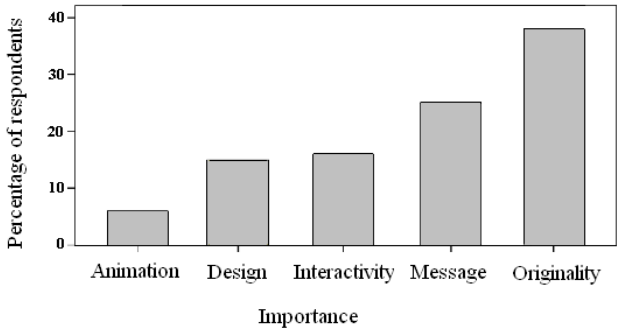

Figure 1. Important elements for the success of promotional campaigns

For more than 50% of the Social Media users the brand, the company name and the company characteristics are also very important for capturing their attention.

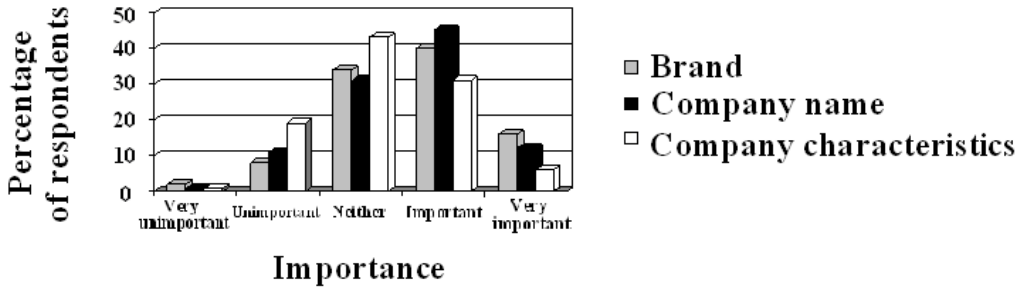

Figure 2. The extent to which brand, company name and company characteristics influences the respondents

The purchase of a product as a result of experiencing a form of online advertising through social networks was achieved by only 16% of respondents who said they had purchased clothing or accessories (sunglasses, jewelry), electronics (cell phones, cameras, laptops), IT products (software and hardware) or flight tickets.

Knowing all the results we can next present a series of conclusions, suggestions and recommendations for marketers in order to manage marketing communications more effectively.

As an exploratory research, conducted on a small sample of respondents, the limits within the research are obvious, but we can shape some conclusions regarding the characteristics of social network users.

The first important conclusion that emerges from the research is that Internet users in Bucharest are more and more open towards social networking platforms and spend a lot of time surfing them. Most users are young, educated and are middle-income employees. The respondents own on average 2.73 membership accounts on social networks, which means that a typical user has accounts on at least two different social platforms.

The fact that more consumers sign in every day on one or more social networks is essential in creating a successful online marketing campaign, because in this way their visibility and contact will be ensured among a large number of Internet users.

Another interesting conclusion is that almost all respondents aged between 18 and 25 have a Facebook account and the purpose for using the network is entertainment (games, quizzes, music, videos etc.), which shapes the typical Facebook user as being a young, dynamic, modern person, eager for information and entertainment.

Most respondents aged between 26 and 35 and all the respondents who have corporate leadership or decision making positions have a Twitter account, which may confirm the idea that the members of this site are opinion leaders or aspirational models, mature professional people, who have an important point of view to share with others.

The research revealed another important finding, namely that users agree to the idea that promoting products or services through social networks can be useful and that advertisements appear in an acceptable number within these platforms. The study also shows that women tend to be more open and tolerant than men in these aspects.

On the other hand, the Internet user's sensitivity towards traditional forms of online advertising is gradually decreasing. This is revealed by the very high percentage of respondents who have the tendency of ignoring and closing the advertising banners displayed when browsing on social networks.

In this context, user's interest and attention should be captured by new promotional methods. According to this research, the solution for a successful promotional campaign in the future could be originality combined with a consistent and well communicated message.

The content is the key element according to experts' opinions too. Companies interested in the promotion must come up with content of interest to grab the public's attention. Consumers have become reluctant to brands because of the aggressive publicity and assault of a huge number of promotional banners in recent years. So a more original content could be the right solution, and in social networks, this solution is extremely convenient and easy to implement. The organization's goal is to find an interesting subject of discussion for users and people will create content and interact.

On this basis, advertising on blogs can be a segment of increasingly success. Being addressed to a well established segment and not for mass exposure, it has the advantage that in this way consumers can get involved, can offer suggestions and other users are able to see their daily comments posted on blogs.

Another solution to capture the consumer attention, could be the adaptation to user requirements and features. Instead of using the traditional *push* marketing messages, companies could use *pull* messages as:

- interruptive messages (animated banners, display ads, overlay ads, video banners, pre-roll videos);
- involving activities (affiliate marketing, contests, promotions, viral marketing);
- participative branding (blogs, forums, online questions);
- applied actions (sponsored applications, custom tools);

- conversational messages (topics related to brands, products or services).

Another highlighted result of the research is that, although not in large numbers, respondents access social networks through mobile phones as well. However, the international trend shows that more and more users use the mobile Internet, and according to the comScore M: Metrics study "in Europe accessing social networking sites on mobile phone is the fourth most popular activity after e-mail, music and photos."[6]

Currently there are only four social networks that can be accessed from a mobile phone: Facebook, Google+, MySpace and Twitter. In August 2009, 65 million Facebook members (almost one third of users), have accessed the website from a mobile phone, four times more than the same period in 2008, and in 2010 their number has exceeded 100 million persons. In addition, people who have accessed the site from their mobile phones were almost 50% more active than those not using mobile Internet.

In Romania, mobile service companies did not fail to meet users demand. Thus, Vodafone has partnered with Facebook to launch 0.facebook.com. This is an optimized, faster and easier version of m.facebook.com page, which lets you use Facebook Mobile free of charge for data traffic.

Mobile phone as media channel comes with many advantages for Social Media because it is part of the personal things that the user always has with him, always in operation and involves strong participation from consumers. Through them, companies have guaranteed their message's visibility virtually wherever and whenever. Mobile advertising began in 2008 and grew significantly in 2009 with more than 85% invested budgets and 50% more advertising.

Another conclusion outlined by research is that online advertising on social networks can be useful especially for electronic devices (laptops, cameras, mobile phones, computer products), which are the products that most respondents have purchased after viewing an ad.

Having known all this data, we can say that in the future the development of marketing on social networks has all the opportunities and reasons to keep on growing in our country.

Conclusions

The recent development of what is called Web 2.0 was an important step in expanding ways to communicate on the Internet. Consisting of applications such as social networks, blogs, forums or sharing content sites, the Web 2.0 differs from the previous 1.0 versions in that it changes people's relationship with information and media, encourages and provides more niche platforms for users to discuss about their hobbies or interests.

It is worth noting again that, although social networks are proving to be a core partner in the promotional and communication activities for the companies interested to take by surprise the audience, yet looking at them like a saving solution meant to produce miraculous results in a short time, is an exaggeration. The Web is not the ideal way to successfully promote and communicate, because its facilities will not make a poor advertisement to be successful and does not guarantee the sale of unsuitable products.

Providing it has access to all sources of information, a company is able to reap the full benefits of promoting through social networks, while minimizing the disadvantages, and the Internet may prove to be the most convenient form of action for the company in its quest for alternative marketing solutions.

Since the research had an exploratory character, with obvious limits, and because the Internet is a changing environment, the current research could be improved in the future. A larger and representative sample of users, a more complex set of questions or maybe a qualitative research are all possible ways of getting an in-depth insight onto the subject. By applying all these measures of improvement, the research may very well grow into a useful and powerful tool for marketers in the near future.

[6] Ed Flower, *„Când Social Media întâlneşte telefonul mobil",* OnMedia, February 2010, 10

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IMPORTANCE OF COMMUNICATION IN ORGANIZATIONAL INTELLIGENCE DEVELOPMENT IN THE CONTEXT OF GLOBAL CRISIS

MANOELA POPESCU*

Abstract

It is now clear that different ways to generate, integrate and apply knowledge within organizations varies accordingly, at least, with the human factor, regardless privileged modalities of interactions between the firm and the environment.

In the current context, of the global economic crisis, communication and communicative behavior are sometimes improperly used in explaining institutional deficits. However, the role of communication in generating the appearance and development of intelligence organizational context (organizational context, technological and linguistic) and at the determinants and co-factors of organizational intelligence (organizational learning, leadership, organizational culture, management) is major. Besides that, generating knowledge in organizational framework is achieved through communication.

Keywords*: communication, global crisis, organizational intelligence, leadership, organizational culture*

Introduction

The literature reveals many definitions and theories on organizational intelligence concept (monolithic theories, factorial theories, hierarchical structures theories, evolutionary theories and qualitative). Organizational intelligence has always been defined in terms of intelligence, personal intelligence, emotional intelligence, collective intelligence.

Intelligence, the abstract specific human concept (according to some experts) can be simply defined as "the ability to understand easily and well, to refer to what is essential, to resolve situations and new problems based on previous experience" (DEX), although they find it difficult to define. Reported at the organizational level, intelligence became a complex concept, determined by many variables. Representing a real and potential fact, intelligence could be considered and addressed as a process or phenomenon, skill or ability. Obviously, intelligence can be defined so as a mental organizational attribute (in psychology), but also behavioral one.

Over time the concept of intelligence has received several definitions, being investigated from different perspectives, many science bringing their contribution to its development. These sciences can be listed: psychology, management, anthropology, biology, communication, etc.

The fact is that in 1969 John McCarthy and Patrick J. Hayes defines the intelligence of an entity in closely connection to the existence of an appropriate model of the world, to help it respond to a variety of questions, with the necessary information procured from the outside world and to conduct certain activities to achieve objectives, taking account of its possibilities. Obviously, nowadays are several studies on models that underlie the emergence and development of organizational intelligence: social, structural, systemic, etc.

In the context of the global crisis and the knowledge-based economy in which the individual is a carrier of culture, knowledge, being creator and innovator, the model that can be addressed in studying the emergence and development of organizational intelligence is an integrated social model. This model not only explains the emergence and manifestation of organizational intelligence impact on company profitability growth in the current context, but may be the basis for demonstrating the

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importance of communication in the development of organizational intelligence. This is because through communication can be created a certain context in which to could be generated a certain capacity of the entity to generate, integrate and apply knowledge. Also, communication is the essence of the event co-factors and determinants of organizational intelligence. Central axis of the appearance, manifestation and development of organizational intelligence is individual. He may have a verbal/linguistic intelligence, logical/mathematical, visual/spatial, bodily/kinesthetic, musical/rhythmic, interpersonal, intrapersonal, and naturalistic emotional as Gardner's theory of multiple intelligences (*Frames of Mind: The Theory of Multiple Intelligences 1993*). Intelligence entity manifested in a certain context, which is having the following dimensions: *the organizational dimension, technological dimension, the cultural and linguistic dimension.* All entities have a certain amount of absorption and a tendency of forgetting, absolutely necessary for the renewal of knowledge and organizational learning efficiency. Of course, management and leadership entity is responsible for organizational effectiveness, processes and activities, the default communication process.

1. Communication and dimensions of organizational intelligence development context

It should be noted that all four dimensions of the context in which intelligence appears, manifests and evolves are determined by communication. Competitive entity has a synergy of the composing elements necessary to achieve performance in a highly competitive environment. Communication is one that ensures that invisible thread that unites people and that determine synergistic explosion.

Thus, *the organizational context* concerns a framework different from a specific organizational system, structure and communication, open, dynamic and adaptable. Which means that changes occur in the system, voluntary or involuntary, resulting in a process of generating knowledge and new skills to solve problems and carry out activities. Members of the organization form a dynamic system, evolving under the effect of three forces: individual impulses, indirect impulses transmitted by the actions of other members, internal changes and changes caused by management decisions external environment organization.

Any entity supports multiple types of changes throughout its existence. In fact, some organizations are open systems that take their inputs from the external environment becomes part of them and send them into the environment as system outputs. If the environment is changing, organization is in change. Change can be defined in terms of field of action, respectively as *operational and organizational change*. Operational change refers only to individuals, roles and values, and organizational change concerns all procedural changes within the organization.

In the current context, organizations need to initiate change processes to meet market demand, offering added value, increase value to shareholders or to execute the mission and purpose for which they were created. Also, organizations must implement any change processes to maintain organizational stability, but also to support economic growth and sustainable development.

It could certainly say that all organizations are faced with *internal and external sources of pressure for change*. As such, managers must recognize the changing environment elements which require modification of the organization. In other words, if the inputs are modified and changes in output occur. *For output changes occur are necessarily modification with cultural implication in inside organizations.* These changes may be the targets and strategies, technological level, the organizational structure, the phases and processes of work and not least the members of the organization and involves changes in knowledge and processes to generate new knowledge.

Changing organizational structure involves not only changes in the organization but also the attitudes of employees. Individual stations need identity and meaning. Structural changes include changes in rules, policies and procedures. The members of the changes are made both in terms of hiring fresh labor, and in the development of attitudes and abilities of former employees. Always any change in an organization must begin with its members, by developing the necessary skills and

positive attitudes. Changing the culture is changing between the individual and changing mental organization. Change process involves a series of organizational events taking place over time.

Also, one of the most important effects of *organizations is their endogenous dynamics*. This means that organizational contexts can boast different aspects: structural, individual, psychological, moral, material, etc.

Changing organizational context can be also defined as innovative as it involves changes at the individual level, procedural or organizational. Innovation is treated in the literature as to define the phase of creativity[1] unique organization of mental processes into the association of personality skills to obtain new and original. *At company level, innovation is present as redesign their organizational structures, depending on the magnitude of the specific functional requirements of each stage of their maturation and development.* In this perspective, social innovation is the main source of creativity and decision decisive factor of change and development.

Planned and ongoing efforts to change organizations to be more intelligent, efficient and more humane is called *organizational development*[2]. It uses behavior to induce a culture of organizational self-examination and willingness to change. Put an emphasis on interpersonal and group processes acknowledging that change affects everyone in the organization and that their cooperation is needed to implement the new cultural configurations. If the organizational development is being institutionalized, continuous availability for review and further changes become components of organization culture. The term cultural development applies only to the extent in which the development of means or methods of implementation of content organization culture or spiritual development takes place the organization's members, who contribute to culture change.

Organizational development seeks to change cultural norms and roles so that the organization is aware of itself and be ready to adapt. This method of changing the organization by changing the organizational culture was successful only in so far as to take into account the "personality organization" and its members, trust, cooperation and open expression of feelings of those who compose it. It is true that the organizational culture itself is never perfect, but nascent; it must ensure reconciliation but his spirit materializations social subjects to become a strong culture and a success factor for the organization.

In the process of organizational change, communicating the organization has a greater success rate than others. This is because communicating organization has some specific features: it is open to communicate with the outside, issuing, receiving messages that making up an interactive process, is flexible, evolutionary (value on innovation), is responsible (transmits ethical and responsible information, ideas, opinions, etc..), is dynamic (grows through communication) and has a purpose (to create a structure in which to express formal communication, organized to achieve the high performance). Communicational organization requires organic structures, flexible and participatory management.

Communication is essential in planned organizational change, i.e. organizational development. In this respect, the most important organizational development strategies are: teamwork training, feedback surveys (among employees), total quality management, re-engineering. Obviously, lack of communication or inadequate communication process leads to inefficient implementation of planned changes.

Besides generating knowledge organizational framework is achieved through communication as the most important aspect of any process is *information and communication is how this can be achieved*.

Linguistic context. Only with communication (broadcast reception/verbal) can accumulate human social experience (speaking, writing, reading); people can cooperate only communicating

[1] Bâtlan, I. *Introduction to the history and philosophy of culture*, Bucharest: Didactic and Pedagogic, RA, 1993, p. 33

[2] Johns, G. *Organizational Behavior* , Bucharest: Economic Publishing House, 1998, p. 532

between them through activities, they can try to generalize and to increase dowry of the previous generations in the field of science, technology, art, culture, architecture, medicine, etc.

Cultural context. *Organization is not just a technical response to technical and economic problems faced, but also a cultural tool to tackle human structure and regularization of cooperation conflict participants*[3].

Known is that people shape culturally the society (and organizations which are voluntary or less voluntary), leaving at the same time, shaped by it. Moreover, people use their culture as a means of interpreting reality tool socio-economic life and understanding of the world (other cultures, other individuals, etc.).

Certainly, organizational culture consists of shared records that directs the behavior of individuals in the organization culture that is designed and built through a systemic process-oriented education and training of all personnel engaged in an endeavor to solve two of the most important problems of organization: learning algorithms and integration of the individual.

When people came in firms, entering with unique sets of skills, interests and attitudes, they want to maintain their individual identity and self-esteem by maintaining their unique qualities and build what is on them. On the other hand, they are interested to know "*how things are done in business*", all its ins and outs and use their unique qualities, but in a manner acceptable to their colleagues and superiors.

Culture is formed continuously in the sense that there is constantly some kind of learning, based on the organization's relationship with the external environment and internal management problems.

Also, dynamic culture of an organization can be explained in terms of continuity and discontinuity phenomena that characterize them in their dynamics. Note that within an organization, both phenomena occur. Thus, in the evolution of culture are highlighted two processes: one to create new values, another use of the existing values, which are included in the organizational culture as "cultural goods" made in previous periods. This makes the transition from one stage of development of a society in which an organization operates at a different stage of development (example Central and Eastern European countries in their transition from communism to capitalism), the continuity of culture that organizations is done by taking the values of national culture and the assimilation of cultural values of other countries. The phenomenon of continuity and discontinuity that are not homogeneous phenomena, they are not done in the same way, the same means, with the same intensity in the plane of the elements of organization culture and, of course, not at the same time, the same cultural elements.

Technological context. Technology concept involves a multitude of definitions. Of these, the most comprehensive one that seems to be "systematized knowledge of all human activities, making use of results of scientific research, experiments, calculations and projects, as well as tools, machinery, small, all the processes (methods, recipes, rules) and material resources (tools, machinery) used for the purpose of employment, in industrial practice, technology means only the procedures used"[4]. Also, an explicit definition is that the technology is seen as "a system of knowledge and means that allow specific categories of activities to achieve objectives"[5]. This means that the technology "works as a cybernetic system, in a hierarchical system comes into interconnection"[6] and the use of knowledge and means in order to achieve the objectives are obtained

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[3] Buzărnescu, Stefan. *Introduction to organizational sociology and management*, Bucharest: Didactic and Pedagogic, RA, 1995, pp. 66-68

[4] Ministry of Research and Technology - *Innovation and Privatization Policy Sector*, Bucharest, 1994

[5] Cojocaru, G. *New aspects of technology transfer. Synthesis documentary*, Bucharest: INID, 1991

[6] Hutu, CA. *Organizational culture and technology transfer*, Bucharest: Publishing House, 1999, p. 44

in accordance with the rules of structured systems and reasoning systems and performance evaluation mechanisms.

Here should be specified the fact that the technology is nothing in itself, but only in relation to its integration in an organization. The effects of technology on a company are reflected in how her organization: organizational structure, decision-making characteristics necessary level of education and training, configuration and characteristics of the communication and transmission of data and information, setting standards of performance etc.

External technology transfer is the process technology or elements thereof, used in a given organizational context, are reviewed and integrated into a new organizational context, in a new technology or an existing technology system. Internal transfer of technology is, in fact, the process of communicating knowledge organized in order to create products, processes and new or improved services.

Many models used (communication, cyber or mixed) to transfer technology and know-how support, explicitly or implicitly, and the influence of conceptual differences, contextual and perceptual between source and receiver, and various disturbances that occur during the process, the barriers for carrying out performance under the transfer process. Whether the source and receiver are part of the same company or not, is very important given context as the source and receiver, concepts, perceptions, ways of communication, etc., of both components of the model. But concepts, beliefs, perceptions, values, etc. are elements of company culture. In other words, *culture is one that can reduce or eliminate barriers to efficiency of transfer of technology and know-how*.

Moreover, the organizational context (degree of innovation, uncertainty, ability to lead change) represents a category of factors with a significant impact in all stages of transfer. The organizational context is higher when the transfer of technology and know-how will be more difficult. So, in receiving commercial firms, "having" culture based on "high context" communication, the transfer of technology and know-how to achieve it, will hit more obstacles than if commercial firms would had a culture of "low context".

Stages of adaptation and acceptance are the most influenced and determined by the culture of an organization. Attitudes and beliefs of organization members on technology and knowledge that lead to intentions, intentions, in turn, leads to actual behavior, evidenced by their use voluntarily.

2. The role of communication in improving organizational learning processes

Organizations are open systems, cognitive entities connected with the external environment and internal environment. Entities, whether physical or legal, present different ways to adapt to environmental changes, even ways to generate changes in their environment action, developing specific learning processes. Learning involves the accumulation of new knowledge and skills, based on experience. Among the most popular theories of learning is associative learning (classical conditioning) and instrumental learning (operant conditioning)[7].

Pavlov's classical conditioning theory[8] of learning explains the association between stimulus and response. Instrumental learning involves the existence of an event that increases or reduces the likelihood of that behavior to be repeated. Organizational culture must be addressed in a perspective emphasizing changes that facilitate partial or total[9], dynamic process which occurs because of the

[7] Mitchell, T., Dowling, P., Kabanoff, B., Larson, J., *People in organization – an introduction to organizational behaviour in Australia*, McGraw-Hill Book Company Australia, Pty Limited, 1988, pp. 18-30; Luthans, F., Kreitner, R., „Learning theory", în *Contemporary readings in organizational behavior*, Third Edition, McGraw-Hill Book Company, 1981

[8] Tucicov-Bogdan, A., *General Psychology and Social Psychology*, Volume II., , Bucharest: Didactic and Pedagogic Publishing House, 1973, pp. 78-83

[9] Nicolescu, O. coordinator., *Systems, methods and techniques of organization management*, Bucharest: Publishing House, 2000, p. 513

internal integration and external adaptation[10] and as a result of the impact of different types of cultures, especially in the globalized markets.

Inside entities arise two major processes in the development of intelligence: the process of socialization and integration process. By internal integrating culture system provides stability and acts as a filter field that helps to focus attention on certain segments of the environmental impact on the company.

If it is envisaged that *socialization* is a process of transfer psychosocial assimilation of attitudes, values, concepts or specific behavior patterns of a group or community, for training, adaptation and social integration of people, it may be that *socialization is an interactive process of communication*. This is supposing the double approach of individual development and social influences, personal way that reception and interpretation of social messages and variable dynamic content entity and social influences.

Socializing employees can achieve maximum efficiency while using certain communication tools, such events for employees: team-building activities, briefings, meetings with certain individuals' representative of a certain behavior.

Compliance with rules, rules, and values is made through a *learning process*, which is based on communication. In fact, people attitudes and socio-economic conduct are essentially the result of cultural learning, a consequence of assimilation law-like patterns, rules and requirements of the community through communication. Also, integration in the primary task group, defined as a process of gradual assimilation behaviors and integrating environmental behaviors is achieved through communication.

At the organizational level, the integration processes and socialization are based on *relations of influence*. Generally, influence means to determine other to comply. Of course, influence, even in the extreme form of persuasion cannot be effective unless accepted by the receiver. If we start with the definition of the concept of influence of Parsons ("*determines the other's decisions to act in a certain way because he feels that it is a good thing for him, and not that through non-conformation would violate certain obligations*") is obviously that the influence of co-orientation is the result of transmitter and receiver in the communication process. In fact, in the communication process partners are often the relationship of influence. In this sense, any entity may achieve compliance with another (or influencing it or manipulating it) through a process of positive communication, logical and reasoned.

Professional integration can be approached from the perspective of four dimensions: cognitive, relational, cultural and informational; thus communication process is seen as a process of influence on three key levels: normative, cognitive and social. The regulatory approaches, the communication process (influence) creates, strengthen and imposes values to organizational members. From cognitive perspective, through the communication process (influence) information are properly used, from the organization and beyond, for effective professional integration. From social perspective, relations of influence (communication relations) are playing a major role in the establishment, maintaining roles, statuses, or rather the power and authority.

Therefore, there are a few situations in which one of the persons involved in communication may not be in a relation in which wishes to exercise some influence over the other or others, it can say that the influence has three directly observable functions at the organizational level: *creation of rules* (identifying and sustaining influence norms that give cohesion group / entity and determine positive behaviors), *individual socialization* (relations of influence (communication) are the essence of the rules learning process learning, principles, operating modes, behaviors, etc., (knowing the ways and social standards is achieved through communication) and *social control* (influence helps social groups to maintain the integrity and allows them to provide and channel the behavior of its members. It thus strengthens the individual's dependence on the social system).

[10] Schein, E. H., Organizational culture, American Psychologist, 1990

In the process of organizational learning are important roles that organizational members are willing to play, according to the specific activities. Adapting to the requirements of each individual internal and external environment involves a first stage of organizational learning. Many entities decide to make changes more or less large, and these changes are based on learning processes, achieved through effective communication. In fact, in *all phases of change oriented toward individual or organization*, there is a learning process.

Leadership contributes to the development of organizational intelligence in that it stimulates organizational learning and development of effective relationships. Leadership requires certain interpersonal and intrapersonal skills, resulting in organizational development. After 1900, many researchers began to study people in hopes of identifying leadership traits that turn them into successful leaders. H. Kelleher[11] is one who has made a list of traits associated with effective leadership. Such traits, *personal characteristics of individual features including physical, intellectual ability and personality, can be considered: intelligence, energy, confidence, domineering spirit, motivation to lead, emotional stability, honesty and integrity, need for achievement.* In determining these traits to measure their employees and many companies use personality tests and "scales of assessment (appraisal)" when making hiring and promotion decisions.

Also, at the organizational level, leadership is one who can develop creative organizational and professional development. Obviously, effective leadership requires effective communication, interpersonal communication because the people are able to generate insights and ideas, by exploring areas little explored by each individual separately. Of course, people must be willing to communicate empathy, active listening and willing to develop effective relationships.

3. The integrated social development of organizational intelligence

Developed as a reaction to the knowledge economy, where innovation is more important than the production, that model emphasizes people and their knowledge. Also, considering the intelligence entities as something that they have by inheritance, but also as something that can be through learning is a basic assumption of the model. It is obvious that some people have interpersonal skills and/or intrapersonal. They develop a friendly relationship inventory, given that they can relate easily with others. Of course, others can learn how to develop positive relationships with other entities. Evolve, through qualitative and quantitative leap, the result of learning in a specific cultural context, can occur in all aspects of the development entity.

Entities with an organic structure can develop such models. An organic structure allows the generation and development of interpersonal relationships through communication, and developing a strong organizational culture. It is known that any entity has a certain culture, which can be defined from several perspectives and guidelines. Successful entities that have demonstrated a strong culture, positive, adaptive strategy directly relate to high organizational performance. Also, these entities have successfully developed culture based on cultural differences and systems; the focus is on value, knowledge, innovation, creativity and learning.

Model characteristics are:

- flexible organizational structure,;
- high degree of creativity in their activities;
- high degree of cooperation between sub-entity, based on teamwork. If the entity is an individual, it is clear that intelligence is a prerequisite for the development of good health, although there were times when just physical problems have generated a development of some kind of intelligence (emotional intelligence, naturalist, music, etc.);
- proactive environmental approach;

[11] Lord, R. C., DeVader, C. L., & Alliger, G. M., „A meta-analysis of the relationship between personality traits and leadership perceptions: An application of validity generalization procedures", Journal of Applied Psychology, 71 (1986): pp. 402-410

- diversification and flexibility in tasks and views;
- effective leadership and strategic management participation;
- entity based on knowledge, innovation and creativity;
- transparency in disseminating information and knowledge;
- the individual is most important for the organization and the focus on human capital development through training and personal development;
- philosophy, mission and vision of the organization are based on people;
- entity is socially responsible and ethical behavior is;
- individuals are properly motivated performance, creativity and innovation;
- communication is strategic, with a communication strategy and policy in this area.

Integrator aspect of the model aims, in fact, to address communication from the systemic perspective and also the entity view as a system. Systemic view of communication reveals cognitive, emotional and behavioral complexity. *Systemic approach to communication* not only trying to make sense of actions within the entity or to provide all important communication, which coordinates its components in a precise meaning, but to exploit and capitalize elements of communication process, revealing interdependencies and internal connections communication, generating synergies and complex structures needed to develop intelligence entity, especially in the current context. *Communication system* essentially provides mutual comprehension of at least two people. The school developed semiotic, structural models of communication bring forward a systemic approach as a prerequisite for the development of communication entities. The communication is developing not only the personalities of individuals but also socio-economic entities, regardless of the context of occurrence, although bear influence that context.

Also, this model of development of organizational intelligence shows that the individual is the bearer of culture, abilities, skills, experiences and, especially, generating innovation and creation. Innovative and creative spirit, man is the difference between success and failure of various businesses.

Conclusions

Development of organizational intelligence is more complex than individual or collective one, but it can be addressed as development of intelligence entities (and individuals) to identify general and specific determinants, in which event it has a major role communicating. Is obvious its importance in the development of individual intelligence: man evolves through communication, regardless of context. But the context in which entities arise is created through communication. The individual is one who communicates voluntarily or involuntarily and thereby, on the one hand, expand their skills and communication skills, and on the other hand, change their behavior positively or negatively. Presentation of a development model of intelligence entities, from the idea that intelligence entities is "inherited and learned" not only give broad field reflections on the impact of communication on intelligence entities, but also the mathematical relations that can be identified and analyzed in this perspective.

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THE ASSESSMENT OF RISKS THAT THREATEN A PROJECT

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Abstract
A project consists of a number of interrelated tasks whose aim is to produce a specific result. A project risk analysis consists of analyzing schedule, cost risk, quality of the final product etc. A cost risk analysis consists of looking at the various costs associated with a project, their uncertainties and any risks or opportunities that may affect these costs. The distributions of cost are added up in a risk analysis to determine the uncertainty in the total cost of the project. A schedule risk analysis looks at the time required to complete the various tasks associated with a project, and the interrelationship between these tasks.
In this paper we want to study the various risks associated with the project. We start this study with the assumption that a project's cost and duration are linked together and also cost elements and schedule durations are correlated. The normal uncertainties in the cost items are modeled by continuous distributions like the Pert or triangular distribution. For project schedule modeling the most flexible environment is spreadsheet. We are interested in building blocks that typically make up a schedule risk analysis (also a cost risk analysis) and then show how these elements are combined to produce a realistic model. In the same time we want implement software tools for run Monte Carlo simulations on standard project planning applications.

Keywords*: feedback loops, cascading risks, portfolios of risks, sensitivity analysis, Monte Carlo simulations, critical path analysis, ModelRisk software*

Introduction

A project consists of a number of interrelated tasks, whose aim is to produce a certain result. Typically, a risk analysis on the achievement of a project implies the analysis of the risk regarding the plan of the project and its cost. In some cases the analysis may also include other aspects, such as for instance the quality of the final product. Risk may be defined as the possibility of the emergence of an event that affects the achievement of technical or cost objectives, or of project terms. The risk is aleatory, unpredictable, may be favorable, yet most of the times is unfavorable and thus, under these circumstances the analysis and prevention of risks should be an utmost preoccupation for project managers.

In this paper one intends to identify the risks that may appear during the execution of a project, as well as to identify techniques and methodologies of dealing with these risks. Since the risk is usually tackled statistically and since the statistical results are better only if the statistical distributions used are closer to the distribution of real data, one emphasized here the creation of new statistical distributions that would fulfill this requirement.

With this aim in view the team leaded by the author of this article created a library of programs, named ***DistriRisk*** which is based on the following four methods of creating new distributions: **the composition method, the „Rejection Sampling" (RS) method, the „Importance Resampling" (IR) method** and **the Metropolis – Hastings (MH) algorithm.** Using the random generation of numbers, one also created a program for the generation of beta distribution, applicable in the Monte Carlo method. All these new distributions are to be included in the pack of programs ModelRisk developed by the company VOSE Consulting with its European headquarters in Belgium.

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This paper also suggests another way to calculate the cost of a project by applying the central limit theorem. Since the ordinance of a project is a simulation based on a privileged scenario for each task, we hereby suggest the use of the Monte-Carlo method, which allows the exploitation of several ordinances, combining different scenarios for the tasks of the project, and leading to a probabilistic analysis of certain information, such as the duration of the project or the probability for a task to be difficult to achieve.

In the future we intend to develop a sampling algorithm based on **the Latin hypercube** method, which will provide a sampling method that **seems** to be random but **guarantees** the reproduction of the input distribution with greater efficiency that the one provided by the Monte Carlo method.

Once this methodology is certified, we will try together with the specialists of the company VOSE Consulting to tackle the quantitative calculation of risk, as well as the possibility to model it, so as to evaluate as many projects as possible.

The risks of a project

The risks corresponding to the main stages of a project are the following: the analysis of the needs, preparing the project and the execution of a project.

The analysis of the needs. There are four categories of risks that should be taken into account before launching a project: - the risk of competition; - the risk of market (the commercial situation);- commercial risks (the manufacture of the product, the relation cost / quality); - technological risks.

The factors that may increase the risk could be the following: - the inexistence or the incomplete previous research in the field of the project; - a need formulated in a wrong way; - functions or restrictions unspecified by the user; - functions, whose complexity is inadequately assessed when analyzing need, one also noticing an under-estimate of the level of difficulty that requires expensive resources; - non-negotiable functions, imposing thus highly restrictive objectives from a technical point of view or when it comes to price or terms, choosing some functional performances without being in fact imposed by the needs; - not knowing norms and regulations imposed on certain products.

Preparing the project. These analyses and conception considerations exert an important effect in the stage of the execution of the project. *In the second stage the following risks may be mentioned:*

- various flaws and constant hesitations in the first version of the project, to which one may add an incomplete and less competent technical documentation;
- under-estimating the complexity of the methods and conception procedures (programs, automatization microcontrollers), which leads to too little time spent for the learning of working techniques;
- difficulties in defining and planning the stages mentioned in the program;
- the wrong assessment of the availability and performance of resources used; generally, there is the tendency to over - estimate performances and to under-dimension costs, being too optimist in what regards the terms;
- if we also take into consideration the subcontracting of certain stages to specialized companies, the dimensioning of the performances of resources is an extremely laborious and risky action;
- the generation of conflicts in using available resources. The resources are limited and most of the times they should be used simultaneously in various activities. Under these circumstances, neglecting critical activities may lead to delay.

The execution of the project. The risks here are related to various flaws in the identification and analysis of critical information (delayed diagnosis, wrong diagnosis, improper answers).

According to the method AMDEC (the analysis of the defecting ways and their effects) a rational perception of the risk is done according to the following typology:

- identifying the flaws and weak points before they occur may be more or less precise and tardy, depending on the case.

A controlled procedure in a favorable organizational context may generate good results. Practically, *a good piece of information* travels *in a favorable moment* towards *a responsible actor;*

- the diagnosis of the cause – there are statistical methods which may provide data, according to which one may decide ensuring measures against diagnosis errors*;*

- prognosticated analysis of effect – appears when the effect is not yet evident or will be achieved on long term, and cannot be yet mentioned.

Emphasizing a risk in the management of a project

A project is defined by price objectives, performance objectives and terms objectives. Each category of objectives has its own risk issues, which make up the object of specific research:

- *The analysis of the risk to exceed the cost of the project* is usually done during its execution, appealing to techniques of financial and accounting control; the analysis of this type of risks may be also done in the stage of defining the project, appealing to the qualitative risk analysis.

- *The analysis of the risk of the failure to comply with performances* is an issue for technicians and its approach should focus on the technical fields to which it is related. Becoming aware of certain technical risks may be facilitated by the qualitative risk analysis.

- *The analysis of the risk of the failure to comply with terms*; its insufficiencies lead to its completion by approaching the risk from a qualitative point of view.

- *The quantitative approach* does not provide the decisive factor with information meant to guide one in action, this being oriented towards the quantification of the dispersion of results for an objective such as duration or price.

- *The qualitative approach* – the intuition of the leader, as well as good knowledge of the company and its environment have always played an essential role. A formal approach structures the reason with the help of control lists, which allow a fast and significant diagnosis.

This emphasis of the risk may be done either when defining the project (or the in-depth periodic re-examination of the project), as well as during the execution of the project, even if one does not use the same methods.

The quantitative risk analysis

The risk specific to this category is the failure to comply with terms and with the initially allocated budget.

A. The quantitative approach of the risk of not complying with terms.

The quantitative approach of the risk is done in a classical way, using statistical distributions. Of course, nowadays there simulation methods that are far richer in possibilities and information. This thing is a result of the use of computing techniques and implies highly sophisticated software.

The statistical methods[1] used for the management of the working time is based on the two classical distributions, i.e.:

- the empirical statistical distribution;
- the theoretical statistical distribution (beta, normal, triangular etc.).

Usually distributive methods are used. *These are based on the following principles*:

- the duration of each task in a project is considered random;
- one uses especially the Beta statistical distribution;

[1] Creangă Camelia**,** Darabonț Doru, Ionescu Dan, Kovacs Ștefan, *Metodologii pentru aprecierea riscului la locul de muncă – ARLM*; The Office for documentary information for industry, research and management (*Oficiul de informare documentară pentru industrie, cercetare, management – ICTCM*), Bucureşti, 2001, p. 134

- one determines the parameters of this distribution starting from the extreme values A and B that the duration of the execution may take, and from the most probable value M_0 of the duration of execution.

Therefore one should come up with answers to the following three questions:

1. Which is the minimum duration (time)? – parameter A;
2. Which is the maximum duration (time)? – parameter B;
3. Which is the most probable duration (time)? – parameter M_0.

Once the parameters A, B, and M_0 are known, one may calculate the average mean and the variation of this random duration (time):

$$\mathbf{E}(t) = \frac{\mathbf{A} + \mathbf{B} + 4\mathbf{M}_0}{6}; \quad \mathbf{V}(t) = \left(\frac{\mathbf{B} - \mathbf{A}}{6}\right)^2$$

- one determines the critical path of the project placed in a concrete situation, after which making use of the average times, one emphasizes the critical stages that cannot be delayed;

- the duration of the project is considered to be the sum of the durations (times) of the tasks of the critical path previously identified. This is a simplifying hypothesis;

- we use the central limit theorem in order to approximate the law of distribution of the probability of the project's execution schedule, using the approximation with continuity corrections for the Beta distribution. In other words we do, with the help of the corrections mentioned above, the normal approximation for the Beta distribution, with which the distribution of the project's execution schedule was configured;

- knowing the law of the probability distribution of the execution schedule of a project allows the calculation of trust intervals or of the probability for a schedule to be exceeded.

In order to generate a random variable with beta distribution we shall use two independent generations for the random variables with gama distribution, as can be noticed in the source code of the program that implements this generating way:

```
program rndbeta
    write(*,20)
 20 format(' ','introduce values for ix, iy, alpha, beta, n')
 read(*,*) ix, iy, alpha, beta, n
    do 100 i = 1, n
            ix = ix + i
            do 200 j = 1, n
                    iy = iy + j
                            call betarnd (ix,iy,alpha,beta,rn)
                            write(*,*) ix, iy, rn
 200                Continue
 100 Continue
 end
    subroutine betarnd(ix,iy,alpha,beta,rn)
c Input: ix, iy - seeds
c alpha : form parameter
c beta : scala parameter
c Output: rn
 call gammarnd(ix,iy,alpha,1.0,rn1)
    call gammarnd(ix,iy,beta ,1.0,rn2)
    rn = rn1 / (rn1+rn2)
```

```
      return
      end
subroutine gammarnd(ix,iy,alpha,beta,rn)
c Input: ix, iy - seeds
c alpha : form parameter
c beta : scala parameter
c Output: rn
 rn = 0.0
      Do 1 i = 1, nint(alpha)
 call exprnd(ix,iy,beta,rn1)
 1   rn = rn + rn1
      return
      end
subroutine exprnd(ix,iy,beta,rn)
c Input: ix, iy - seeds
c beta: parameter
c Output: rn
 call urnd(ix,iy,rn1)
      rn = -beta * log(rn1)
      return
      end
subroutine urnd(ix,iy,rn)
 1   kx = ix / 53668
      ix = 40014 * (ix – kx * 53668) – kx * 12211
      if(ix .lt. 0) ix = ix + 2147483563
      ky = iy / 52774
      iy = 40692 * (iy – ky * 52774) – ky * 3791
      if(iy .lt. 0) iy = iy + 2147483399
      rn = ix - iy
      if(rn .lt. 1.) rn = rn + 2147483562
      rn = rn * 4.656613e-10
      if(rn .le. 0.) go to 1
      return
      end
```

ix and iy are the seeds, whereas rn is a random number between 0 and 1.

B. The analysis by simulation, using the Monte Carlo method [2]

The Monte Carlo method starts from the so-called "what – if" scenarios. The "what – if" scenarios are based on **the deterministic modeling**. This type of modeling implies the use of a single "well guessed" estimation for each variable, with the purpose of determining the results (effects) of the model. In practice, one varies the parameters of the model, thus slightly modifying the "well guessed" estimations, in order to determine the degree to which the effects **in reality** vary from those calculated by using the model. This thing can be done by selecting various combinations for each input variable. These various combinations of the possible values around the best guess, are known as the "what – if" scenarios. The model is quite often "stressed", since the variables (parameters) take values, so that they represent highly realistic scenarios.

[2] Boris Constantin, *Utilizarea calculatorului în analiza statistică*, vol.1, Editura Tehnopress, Iaşi, 2010, p. 130-165

For instance, let us consider the following simple problem: the sum of the costs for five articles. As values to be used in a "what – if" analysis, we may choose the following three points: the minimum, the best guess and the maximum. Since we have five costs (one for each article) and three values for each article, we therefore have $3^5 = 243$ possible combinations that may be generated during the analysis. Obviously this set of scenarios is far too large for a practical application. The process also suffers from two further drawbacks:

1. for each variable one uses only three values, even though in practice these values may be in large number;

2. one conducts no analysis whatsoever in what regards the probability of the emergence of the value that represents the best guess in comparison to the probability of the emergence of the minimum, respectively maximum values.

We may stress the model by raising the minimum value of the cost, so as to obtain the best scenario, or by raising the maximum value of the cost, so as to obtain the worst scenario. By doing so, we usually obtain an unrealistically great number of values that provide however no real image of the model. There is only one exception, i.e. when the scenario is still acceptable.

The quantitative risk analysis (QRA), which uses the Monte Carlo simulation, one of the most important modeling techniques, is similar to the "what if" scenarios, which generate a number of possible scenarios. Basically, one simulates scenarios for each possible value that may be taken by the variables of the model, after which these scenarios are weighted by their probability of emergence. QRA makes this thing by modeling each variable that appears in the model by means of a **probability distribution**.

In other words, the structure of a QRA model is very similar to that of a deterministic model where the variables are no longer simple values, but are represented by probability distribution functions. The objective of QRA is to calculate the combined impact of the uncertainty from the parameters of the model, with the purpose of determining an uncertainty distribution of the possible effects of the model.

The Monte Carlo method implies the random sampling of each probability distribution within a model, so as to generate hundreds or even thousands of scenarios, called **iterations** or **attempts**.

Each probability distribution is sampled in such a way so as to reproduce the shape of the distribution.

Therefore, the distribution of the values calculated for the results of the model reflect the probability of the values that may appear.

The Monte Carlo simulation provides lots of advantages, among which the most important are the following:

- the distributions of the variables of the model need not be approximated in any way;
- the correlations and other inter - dependencies among variables may be modeled;
- the level of mathematics necessary to use this simulation is basic knowledge;
- determining the distribution of the results obtained after the simulation is done entirely by the computer;
- the programs necessary to do this are commercially available;
- one may at any time include more complex mathematical notions (powers, logarithms, IF structures etc.);
- the Monte Carlo simulation is widely acknowledged as a valid method, so that the results obtained by using it are more likely to be accepted;
- the behavior of the model may be more easily investigated;
- a model may be changed really fast, the new results thus obtained being easily comparable to the results obtained by using previous methods.

The Monte Carlo simulation method may reach at least in practice any level of precision required, by the simple increase of the number of iterations. The only limitations are imposed by the

number of random numbers that may be produced by using a generator of random numbers and by the time necessary for a computer to generate them.

For most of the problems in practice these limitations are irrelevant or may be easily surpassed by structuring the model into several sections.

In order to generate random samples for the input distributions of a model, one starts from a random variable X and a number p, which fulfill the condition $0 < p < 1$. We define **the quantile of order p** of the random variable X, or of its distribution function F, **the number** x_p with the following characteristics:

$$P(X \leq x_p) \geq p$$
$$P(X \geq x_p) \geq 1 - p$$

For p = 0.25 or 0.75 one obtains a **quartile** of X, and for p = 0.5 a **median line** of X. For instance, if X is distributed N(0,1) and p = 0.1, 0.2, 0.3, 0.4, 0.5, 0.6, 0.7, 0.8, 0.9, by interpolation, symmetry and considering the tables of normal distribution, we determine the **deciles**: $x_{0.1} = -1.282$, $x_{0.2} = -0.842$, $x_{0.3} = -0.524$, $x_{0.4} = -0.253$, $x_{0.5} = 0$, $x_{0.6} = 0.253$, $x_{0.7} = 0.524$, $x_{0.8} = 0.842$, $x_{0.9} = 1.282$. The values of the quantiles for conveniently chosen values of p allow us to have a representation on the distribution function.

Knowing them gives us a clue on the way in which the probability unit is distributed above the real line. If F(x) is a monotone continuous function, the quantile x_p is the single solution of the equation:

$$F(x_p) = p$$

If F(x) is continuous and $p' > p$, then: $P\{x_p \leq x \leq x_{p'}\} = p - p'$. The quantiles may be calculated with the help of the **quantile function,** or as it is also known, **the inverse distribution function**. Let us choose the random variable X characterized by the distribution function F(x):

$$\alpha = \mathbf{P}\{\mathbf{X} < \mathbf{x}\} = \mathbf{F}(\mathbf{x}).$$

The inverse function

$$\mathbf{x} = \mathbf{F}^{-1}(\mathbf{x}) = \mathbf{G}(\alpha) = \mathbf{G}(\mathbf{F}(\mathbf{x}))$$

is called **the quantile function**: $x = G(\alpha)$ is that number for which with the probability α, the random variable has a value that does not exceed this number. In other words, if the cumulative distribution function F(x) gives us the probability P for the variable X to be higher than or equal to x ($F(x) = P(X \leq x)$), the inverse function allows us to answer the following question: which is the value of F(x) for a given value of x?. The concept of inverse function is that concept used in the generation of random samples starting from each distribution that appears in a risk analysis.

In order to **generate** a random sample for a probability distribution, one should generate a random number α between 0 and 1. This value is then introduced in the equation $x = G(\alpha)$ in order to determine the value that should be generated for the distribution. The random number α is usually generated starting from the uniform distribution (0,1) in order to ensure an equal opportunity for an x to be generated in any series of percentiles. The concept of the inverse function is used in almost all sampling methods. In practice, in the case of some probability distributions one may not determine an equation for G(F(x)), and this is when we appeal to numerical methods.

There are various packs of programs which may used in this respect, such as ModelRisk, @RISK, Crystal Ball etc. The ModelRisk pack uses the method of inverse function for the entire

family of more than 70 single-varied distributions, also allowing the user to control the way in which the distribution is sampled via the so-called "U parameter". For example:

Normal(mu, sigma, U)

where mu and sigma are the mean value and respectively the standard deviation of the normal distribution;

Normal(mu, sigma, 0.9)

returns the 90th percentile of the distribution;

Normal(mu, sigma) or Normal(mu, sigma, RiskUniform(0,1))

for the users of the @RISK pack, or

Normal(mu, sigma, CB.Uniform(0,1))

for the users of the Crystal Ball pack etc. returns the random samples from the distributions controlled by ModelRisk, @RISK or Crystal Ball.

If the random variable is continuous and one has the probability α (the generated random number), $x = G(\alpha)$ may be found out by solving the usually transcendent equation in a numerical way:

$$\alpha - \int_{-\infty}^{x} f(t)\,dt = 0$$

The survival function, written down as S(x) is defined as the probability for the random variable to have a value greater than or equal to x.

The inverse function of the survival function, also known as **the probability function**, written down as $Z(\alpha)$, represents that value that the random variable exceeds with the probability α:

$$x = Z(\alpha) = Z(S(x))$$
$$P\{X > Z(\alpha)\} = \alpha$$

i.e. $Z(\alpha) = G(1 - \alpha)$

where G is the inverse function of the distribution function and S is the survival function. In the case of a continuous random variable, with the probability density f(t), the value x, also known as **critical point** may be found out by solving the transcendent equation:

$$1 - \alpha - \int_{-\infty}^{x} f(t)\,dt = 0$$

The critical point is that point of the axis t that has the abscissa x. The function $Z(\alpha)$, the inverse function of the survival function, is one of mostly used statistical functions; for this function there is in the specialty literature the greatest number of tabled values.

From the relation $Z(\alpha) = G(1 - \alpha)$, it results that the values of the probability function (the inverse survival function) may be obtained with the help of the quantile function, in which $\alpha \to 1-\alpha$.

The risk function, also known as **the intensity of death**, is written down as h(x) and is defined as the relation between probability density and the survival function in the point x:

$$\mathbf{h(x) = \frac{f(x)}{S(x)} = \frac{f(x)}{1 - F(x)}}$$

In the case of a discrete random variable, the risk function is defined in the following way:

$$\mathbf{h\,(\,x\,)\;=\;\frac{f\,(\,x\;+\;1\,)}{1\;-\;F\,(\,x\,)}}\;;\;\text{x whole number}$$

The cumulative risk function, written down as H(x) is defined as an integral from the risk function:

$$\mathbf{H(x) = \int_{-\infty}^{x} h(u)du}$$

The following relations exist:

$$\mathbf{H\,(\,x\,)\;=\;-\;\ln(\,1\;-\;F\,(\,x\,))}$$
$$\mathbf{S\,(\,x\,)\;=\;1\;-\;F\,(\,x\,)\;=\;\exp(\;-H\,(\,x\,))}$$

In many statistical applications (building trust intervals, searching for critical fields for verification criteria of statistical hypotheses) one should find out the so-called **critical points in percentages** or the **percentage critical points**. In order to do this, in the equation $1-\alpha-\int_{-\infty}^{x} \mathbf{f(t)dt} = 0$, one expresses the probability α in percentages Q, i.e. $\alpha = 0.01Q$. The critical point in percentage is defined as the root x of the equation:

$$\mathbf{1\;-\;\int_{-\infty}^{x} f\,(\,t\,)\,dt\;\;=\;\;0\,.\,01\;Q}$$

The critical point x is the abscissa for which the shaded area represents Q percentages of the entire area under the probability density curve (= with 1).

The Monte Carlo method uses as sampling method precisely the method described above. The Monte Carlo sampling fulfils the most exigent needs of a natural random sampling method. It is extremely useful when one tries to obtain a model that should imitate a random sampling coming from a certain population or when we wish to conduct statistical experiments.

The random feature of the sampling of the Monte Carlo method refers to the fact that we may have **over-** or **under-**samplings on various pieces of the distribution, which does not give us faith that we could correctly reproduce (model) the shape of the input distribution. This aspect may be removed by considerably increasing the number of iterations done.

For most of the analyses regarding risk modeling, this random feature of the Monte Carlo sampling is not relevant. We are far more concerned to see whether **the model** reproduces the distributions determined (chosen) by us for its inputs. Therefore, why spend so much time and effort to find these correct distributions? The answer to this question has been recently provided by the sampling method named **Latin hypercube**, which provides a sampling method that **seems** to be

random but **guarantees** the reproduction of the input distribution with far greater efficiency than the one provided by the Monte Carlo method.

The qualitative risk analysis of not complying with terms

The limits of the quantitative analysis lead to a qualitative approach, as well, thus facilitating the understanding of the causes of delays and subsequently a better way to prevent them.[3]

Chronologically speaking, the management of a project has a preparation stage, in which the work to be done is technically defined, based on a certain number of work hypotheses, and a simple ordinance by an achievement stage, during which the programming is applied.

The problems encountered during the execution lead quite often to a revision of the project analysis and thus to a coming-back towards the preparation stage. This type of analysis may be applied in a series of categories of risks presented in the following paragraphs of the paper.

The risks in the stage of project elaboration

In this moment of the stage, the responsible person of the project, as well as the team define the activities to be executed, conditioned by inner and outer factors and by the resources applied in this purpose. These risks may be re-grouped into four categories.

A. The internal risks when defining the project specifications

In the preliminary stages of the project, the information cannot always be very precise, defining a certain number of fundamental characteristics [4] (the list of tasks that need to be achieved, the duration periods of various tasks, the human and material resources necessary for each task, the quality criteria).

The reasons that generate these imprecisions may be the following:

- the existence of future tasks, whose exact content depends on the decisions made during previous activities that are not yet executed;
- the incomplete analysis of tasks, due to time crisis, of partial information of appealing to a temporization logic;
- the existence of various possible technical scenarios that the analysis did not intend to tackle in the research done;
- an under-assessment of the activities and what should be executed, the absence of previous experience for certain types of tasks (the inexistence of fabrication, package or control series);
- an under-assessment of the new difficulties determined by the simultaneous execution of several tasks;
- postponing to designate the responsible persons with the execution of certain tasks;
-vagueness in defining objectives of the project (quality, quantity, tolerance, durability, reliability, maintenance);
- modifying the content of the project depending on the human or material resources available;
- modifying the content of the project and the responsible persons during the execution of a task or a project.

This list should be completed before initiating the project. This process is not always possible, even unwanted due to the excessive delay caused by the search for complementary information.

The incoherence of the functional data sheets of the project

The data sheet of a project specifies the main objectives and means, but nothing guarantees the coherence between the objectives proposed and the means that can only result from the iterative

[3] Walliser, B., *Systemes et modeles. Introduction critique a l'analyse des systemes*, Economica, Paris, 1977, p. 166

[4] Opran Constantin**;** Stan Sergiu, *Managementul proiectelor,* Editura comunicare.ro, Bucureşti, 2004, p. 44

evolution between the various parts of the project. In this stage competence and honesty should prevail.

The paymasters of the project are tempted to abuse of their position so as to excessively limit the means, in relation to the objectives assigned; on the other hand, the responsible person with the execution of tasks would like to have some time and space to get ready for possible execution difficulties and to be able to comply with their arrangements.

The exchange of information may be ”distorted” from both sides, the objective of transparency being outside the power of perception, the information having nothing but a technical role and the denaturized effects of this informational transaction being only limited and not eliminated. [5]

Among the possible causes of informational incoherence in the datasheets one may mention the following:

- the date of the project finalization is too optimist (too close in time);
- the budget for the project is insufficient;
- the desired quality specifications are too ambitious;
- the technical performances of resources are over-estimated, therefore an unrealistic succession.

Technical and industrialization risks

These refer to the companies organized on project management. Under these circumstances the following cases may be emphasized [6]:

- under-estimating the complexity of the product or its innovating character may lead to a wrong perception of the difficulties at the level of the project coordination;
- choosing a new manufacturing method relies on the hypotheses regarding the development time and the performance of the method, which in turn condition the objectives of price (cost), terms and quality; these performances may not be reached if one does not mobilize more resources;
- the possible appearance of a new manufacturing method or a new technique during the execution of a project could lead to abandoning an already known technical solution, possibly partly done, if the new method diminishes the cost, increases the reliability or improves other performances;
- the anteriority relations between the tasks may double their technical connections: the specifications of a task take shape in the manufacturing of a product with precise technical characteristics; otherwise, the content itself of the guarantee task for the use of a product should be revised even taking into account additional costs and delays;
- combining several verified solutions may lead to problems difficult to predict.

The weak capacity to manage the development and tracing of projects

The organizational context of the project may or may not favor the appearance of realistic hypotheses and conditions the efficiency of the continuation of the execution. It is a factor that may lead either to the increase or decrease of risks exposed.

Tackling the organization of a project is justified by a certain number of advantages, with the help of which one may better manage time and costs; furthermore, one may also see beneficial effects in what regards the level of knowledge gained.

This means looking for alternatives from the class of specific problems and writing them under a transmissible form adequate to the limitation of the emergence of certain errors.

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[5] Alexander Carol, *Operational Risk, Regulation, Analysis and Management,* Prentice Hall, Finanacial Times, Pearson Education Limited, London, UK, 2003, p. 276

[6] Carroll Tery, WEBB Mark, *The risk factor. How to make risk management work for you in strategic planning and enterprise*, Take That Ltd., England, 2001, p. 194

In the absence of all collective reflections on this field, the capitalization is individual and reveals the expertise of the responsible persons, and transmitting the skill is difficult and tributary to the individual and the circumstances. A too fast rotation of the personnel is a major obstacle in gaining experience.[7]

The procedures of elaborating the project may lead to the emphasis of certain lacks or their explanation with the help of grids. The analysis of risks may seem useless to those who chasing for immediate results prefer to come up with an action plan without wondering about its fundamentals.

The procedures used for the elaboration of a project may limit the exchanges of information and commitments, and thus when establishing an ordinance with infinite capacity, assuming that all resources are available, the emphasis of possible conflicts that might appear at the request of using the same resources at the same moment, coming from various tasks of the project or from other projects, differ.

The procedures to continue the execution of the project may increase or decrease the effects of certain risks. The absence of formal procedures leads to a tardy detection of problems, and the correction actions taken under the pressure of emergency may not be the best (the compromises from technical validations of components transfer the risk towards the final characteristics of the product) [8].

A continuous activity is done by periodical update of work hypotheses, since the control of the project's progress may be done in comparison to a realistic technical recommendation and not to an initial recommendation lacking in significance and supported by out-of-date information and data.

The rigor implied by these updates represents the cost paid so as to be able to manage possible technical and financial deviations. The conflicts between the departments involved in the project appear inevitable. The procedures to solve or mediate these conflicts may be inexistent or may not be suited to the situation, which leads to more specific risks.

B. External risks in defining specifications

Anticipating the demand is mandatory for the launching of new products. This implies prognoses, as well as a certain level of risk: the norms that the product should comply with may change and may lead to regulated risks. Such errors may have serious consequences in specifying the resources required, with implications in delays and costly corrective actions.[9]

Unpredictable change of the environment is rather rare, but the following two risks may appear:

- the enforcement of new regulations in a certain field may be unsafe; a new law (such as pollution norms) has to be enforced, but the precise enforcement date is still unknown;
- the relative ignoring of the exact content of the future regulation.

In order to limit these types of risk, one may prefer adopting expensive technical solutions, which provide better reactivity, or maintaining restrictive specifications for the products.

Risks connected to use of resources

The risks connected to the use of resources focus on defining the resources required and their forecasted availability.

C. Risks connected to defining the resources requested

[7] Lupu Ramona Ana, Daniela Coman, *Managementul proiectelor*, Editura INFOREC, Bucureşti, 2000, p. 217

[8] Prunea, Petru *Riscul în activitatea economică*, Editura Economică, Bucureşti, 2003, p. 25

[9] ***, *Dicţionar de managementul proiectelor;* AFITEP, Asociaţia Franceză de Managementul Proiectelor; translation from French into Romanian, Ion Năftănăilă; Editura Tehnică, Bucureşti, 2001, p. 251

The legal environment does not condition only the specifications of products, but also the use of personnel and equipment resources, thus generating regulated risks regarding the resources, the variables also according to the country in which the manufacturing process is ensured.

These restrictions may be internal (internal regulations, provisions), quite predictable, and external (laws, reports), less predictable, that are imposed upon the company: [10]

- *in what regards the personnel* the hypotheses on the environment susceptible to change may cause a modification of the personnel registries, referring to: the paragraphs imposing the duration of work (paid leave, weekly duration of work, permanent team), collective agreements, interior regulations of order;

- *in what regards the equipment* the following restrictions are to be taken into consideration at the level of the company (complying with security and safety norms) and at the level of the impact of their use on the environment (limitation of chemical, thermal, sonic pollution).[11]

The hypotheses regarding the defining of resources required may turn out to be ungrounded because of:

- ignoring the exact resources, human and material,

- ignoring their mobilization and the capacity of the execution of work required in a certain period of time.

An underestimation of the complexity of a task may require more complex resources than the ones forecasted:

- the incoherence between resources: the introduction of a new machine may have as a consequence a prior formation (or recruit) of operators, as well as an adaptation of technology and maintenance;

- the problems are bound to appear if these incidents are not brought to a minimum level.

Risks regarding the availability of resources required

Programming the project imposes special attention given to various mobilized resources, the productive potential available and the way to solve possible conflicts. A wrong definition of the productive potential may be determined by:

- ignoring the performances of certain resources (newly acquired machines, new operators) or of their reliability;

- the bad emphasis of the continuous improvement in using resources (the Kaizen approach in Japanese management);

- under-estimating the period of knowing the new resources (employing a new operator or machine may not become immediately operational);

- the bad emphasis of organizational issues (problems of coordinating the mobilization of resources).

D. Risks in the stage of project execution

During the execution of the project, unfavorable events (be they forecasted or not) may compromise the objectives of the project, and the notion of risk has a specific meaning.

The reaction of those responsible with the adaptation to a new situation may be more or less adequate, this changing the hypotheses of the labor of programming and the risks continue afterwards, as well. The risks during the stage of project execution are related to: the tardy detection of the problem, wrong diagnosis and inadequate reaction.[12]

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[10] Budica, Ilie, Mitrache, Marius, *Metode specifice de asumare a riscului în deciziile manageriale,* în: Revista Finanțe publice și contabilitate, v. 17, nr. 5, 2006, pp. 55-57

[11] Bibu Nicolae, Claudiu Brandas – *Managementul prin proiecte*, Editura Mirton, Timișoara, 2000, p. 118

[12] *** *Manual de Managementul Proiectelor,* Guvernul României, Departamentul pentru Integrare Europeană, București, 2008, p. 117

The risk of late detection

In order to have a good diagnosis, the operator should dispose rapidly of good information and should obtain timely and adequate protection against flaws and deviations. Making use of necessary information varies according to risk: the external information regarding the surrounding technical and economic environment is relatively comfortable but often quite expensive; the internal information necessary is usually available but rarely adequate, on good support and in the right place.[13]

An active and non-passive attitude in front of information is a mandatory condition of a good reactivity. The problem of defining data to follow and the quality of the information available depends on the regularity of daily check-ups, and the emergency of other obligations is often invoked so as to differentiate certain daily check-ups; this behavior is the cause of the delays in identifying problems, which in their turn maintain the "pressure" on the operationalization of the project.

The risk of the wrong diagnosis [14]

The analysis of partial information may lead to the over or under-estimation of a problem. A diagnosis may be wrong because the phenomenon we fear does not have the degree perceived. At the same time, the error of the diagnosis may lead to the interpretation of facts:

- more possible causes may have the same effect, the cause retained being the wrong one;
- we may focus on an apparent cause, without looking for a remedy for profound causes;
- the mental representation of reality by actors (the inadequate use of the model of complete costs) always has deviations and may lead to wrong hypotheses of causal relations and consequently a false diagnosis in what regards the origin or the consequences of the problem detected.

A wrong diagnosis may lead to an inadequate answer, but a good diagnosis does not necessarily require adequate answers.

The risk of the inadequate answers

Once the diagnosis is formulated, the answer chosen may be inadequate. This phenomenon occurs if the diagnosis is justified by a local logic, because this tackles the problem only partially (the predominance from the point of view of the service performed or quite on the contrary, from the point of view of the management of projects) or does nothing else but temporize (the predominance of a budget or short-term argument), thus postponing solutions that need to be adopted, but which generate conflicts.

Another objectionable answer to the problem identified is the creation of new rules (procedures) that aim at the prevention of the reappearance of a problem with a slight chance of repeating itself, thus leading to the progressive suffocation of the system. [15]

The risk regarding the cost of the project

A risk analysis regarding the cost starts from a document, in which the various working packs contained by the project are mentioned and detailed. Each pack is then divided into a series of quantities estimating the quantity of work necessary for their achievement. Each pack is associated to an item of cost, which may also have an element of uncertainty.

These elements of uncertainty may be discreet events (of risk or opportunity), which may change the sizes of costs and are modeled by continuous distributions, such as the PERT distribution

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[13] Bowman, Wiliam Archibald, *Căi de îmbunătățire a activității unei companii printr-o abordare bazată pe risc*, în: Audit financiar, v. 5, nr. 4, 2007, pp. 9-12

[14] Butler Cormac, *Mastering Value at Risc; A step-by-step guide to understanding andapplying VaR;* Financial Times, Prentice Hall; London, United Kingdom, 2001, p. 17

[15] Kieffer, J.P., *Les systemes de production, leur conception et leur exploatation*, Edition Dunod, Paris,1997, p. 153

or the triangular distribution. We shall use here the triangular distribution, because it is highly popular in risk analysis. This distribution allows a good modeling when the minimum and maximum values of a variable, as well as its mode (the most probable value) can be estimated.

For instance let us assume that the body of a ship consists of 562 boards, and each of these boards should be clinched in its right position. Each board is clinched by a workman. The head engineer assesses that a board should be clinched the fastest in 3 hours and 45 minutes and the slowest in 5 hours and 30 minutes. The most probable value of the clinching time is thus 4 hours and 15 minutes. Clinching each board is paid with 50 lei per hour. The total cost for the entire process of clinching can be thus modeled:

Cost = 562 * Triangle (3.75, 4.25, 5.5) * 50

Having a number of 1000 simulations, one notices that we have quite a lot of values close to 3.75 and 5.5 respectively, which cannot be accepted because this means that the workmen work either too fast, or too slow. The problem appears because the triangular distribution models the uncertainties starting from the mean value of the working time for the 562 boards.

The easiest way to remedy this failure is to model each board in part. We thus obtain a column with 562 Triangle (3.75, 4.25, 5.5) distributions that we add and then multiply by 50. Even though the result is correct, the method is basically impossible to apply into practice because we would have to use a very large number of cells. In this case we shall use an aggregate model created by the company Vose Consulting and implemented in the pack ModelRisk:

VoseAggregateMC(562, VoseTriangleObject(3.75, 4.25, 5.5))

We would also like to suggest another way to solve the problem mentioned above, i.e. by applying the central limit theorem. We start from the fact hat the average mean μ and the standard deviation σ of the Triangle(3.75, 4.25, 5.5) distribution are:

$$\mu = 4.5$$

$$\sigma = 0.368$$

Therefore, considering the fact that we have 562 items, the distribution hours – total persons for the entire technological process is the following:

$$\text{hours – total persons} = \text{Normal}(4.5 \times 562, 0.368 \times \sqrt{562}) =$$
$$= \text{Normal}(2529, 8.724)$$

Therefore, the total cost for the clinching of all boards is estimated to be:

Cost = Normal(2529, 8.724) x 50

Conclusions

We consider that this paper sets the methodological and scientific bases necessary for tackling the quantitative and qualitative study of risks which may appear during a project. Generating new distributions, different from the ones used nowadays, and finalizing the algorithm for the sampling method known as the Latin square will allow in the future a much more **precise** statistical analysis of risk phenomena. The inclusion of the new distributions in the ModelRisk pack of the Vose company, specialized in risk analyses, will allow the authors to take part in **real** risk analyses together with the specialists of this company.

In the future one wishes to tackle the risks that may appear during very large projects, in which their number may be of thousands. In such a case each risk should be associated to a certain probability of appearance and a PERT – type distribution should reflect the size of that risk. We believe that in the near future the change of the organizational culture regarding the qualitative and quantitative analysis of risks of any kind should become of utmost importance.

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ASPECTS REGARDING NEUROMARKETING SPECIFIC RESEARCH METHODS

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Abstract
Information is one of the most important resources that a company must posses. Some informations are hidden deep in the black box - the mind of the consumer. Neuromarketing helps us find what is inside of the black box without troubling the consumer with questions that he doesn't want to answer or that he can't answer. Today because of an extensive research in mapping cortical and subcortical activity in association with behaviors and thoughts, the confidence in neurological data is growing. Thanks to discoveries in perceptual sciences we can identify the parts of the brain that are responsible for the phenomena that we experience daily. For all those interested in information obtained through neuromarketing techniques it becomes evident that there are corresponding neural substrates of consumer decision making process and these substrates can be observed, measured, and possibly manipulated. The following paper reveals some important aspects of the use of neuromarketing in studying consumer behavior by presenting the concepts, methods and techniques used under this sophisticated name, the limitations and advantages of using neuromarketing techniques and the importance of this type of information in decision making process at a company level.

Keywords: *marketing reseach, neuromarketing, consumer behavior, observation, neurosience*

Introduction

Companies have always wanted to get inside consumers skulls, in the so-called "black box" in order to predict as accurately as possible how the latter will react to the stimuli in the market, from prices to offers and advertisements, in order to extract as much as possible out of their pockets. In the past, marketing was based only on a relatively crude measurement of what causes the consumer to buy, using to this end, surveys, the focus group or the observation based on the measurements of eye movements and the degree of sweating (the more excited the subjects are about something the greater is the tendency to sweat) to read the thoughts and feelings of consumers. The reality is that approximately 90% of consumers' buying behavior is unconscious and we cannot really accurately explain their preferences or their most likely purchasing decisions.

Typically, specialists in consumer behavior tend to divide the consumption decisions in two areas: emotional decisions and rational decisions[1]. Emerging academic fields such as behavioral economics taught us that there are also forces that are neither rational nor emotional. Unlike emotions - which can be identified through projective techniques - instincts are factors that most people are not aware of. They occur in the absence of thought. We often see consumers who make these types of instinctive choices, such as, for example, in the situation where they choose from the shelves a particular brand of soft drink or bag of chips without knowing exactly why they chose that brand.

Under these conditions, the traditional studies performed are of questionable value. In the case where companies pour millions of dollars or euros in a promotion that may or may not reach its target, we realize that it is time for a paradigm shift.

What is neuromarketing?

Currently, researchers are trying and succeeding to go directly to the decision maker - namely the brain. This action led to a controversial new field called neuromarketing, combining neuroscience, marketing and technology. Considered by some marketing researchers as the most

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[1] Harries, S., Davies, S., 2010, *Neuromarketing Mad Scientists Meet „Mad Men"?*, DRAFTFCB, http://www.draftfcb.com/content/engage/pdf/Engage_Neuromarketing.pdf

important progress in the field, neuromarketing has been at the same time, rejected by skeptical neurologists as being closer to a pseudo-scientific fraud. Many experts point out that our current exploration and vision on the human brain is probably as complete or as accurate as a map of the world in the sixteenth century.

While the first use of fMRI (Functional Magnetic Resonance Imaging) as a marketing tool has been reported in the late 90s by Gerry Zaltman, a professor at Harvard, the term "neuromarketing" was invented by Professor Ale Smidts, considered the father of neuromarketing and a Nobel Prize winner for Economic Sciences, in 2002, while the first neuromarketing conference was held in 2004 at Baylor College of Medicine in Houston. Also, in the development of this area, an important threshold was exceeded in June 2001 with the creation of the first American neuromarketing company in Atlanta, located not far from Coca-Cola headquarters: Brighthouse Institute, led by marketing expert Joe Reyman.

Neuromarketing has recently entered our country by a LAB Romania initiative which has offered its services to the Romanian market since 2009. The first products that used neuromarketing in our country were those of the premium range, but with a large volume of sales, like luxury cars. Communication specialists argue that the market in Romania is not yet ready for neuromarketing, so that local firms will allocate resources to this activity in the near future.

The term neuromarketing designates techniques to identify brain mechanisms in order to understand consumer behavior, in order to improve marketing strategies.

Neuromarketing is an undisguised observation technique based on the techniques resulted from neuroscience, used for a better identification and understanding of brain mechanisms underlying consumer behavior, in view of increasing the effectiveness of the commercial activities of the companies. In other words, neuromarketing is that the domain of marketing studying sensory, motor, cognitive and affective responses recorded by the human brain when it is subjected to external stimuli (when the consumer sees an ad, eats a chocolate bar, drinks a glass of Coca-Cola). This calls for the technology of magnetic resonance imaging transfer technology used to detect brain tumors, but at the same time, allows the identification of the way the brain receives, processes and interprets the various images that are submitted. There are many cases where aspects of consumer behavior cannot be articulated verbally or in writing no matter how skilled is the interviewer or how cooperative is the subject, since these aspects operate below the consciousness level of the individual. In other cases, the very act of acquiring information may interfere with the perception that scientists are trying to measure.

The premise of using this technique is that consumer purchase decisions are made in seconds in the subconscious, the emotional side of the brain and that by understanding what we like, we do not like, what we want, what causes us fear or boredom, etc., as shown when watching our brain responses to stimuli can design products and marketing communications to better meet the unmet needs of the market and determine purchase.

Neuromarketing specific methods

Brainwave recording devices have been available for decades, the difference being that new technologies can now more accurately identify which brain regions are active when people respond to products, when they make brand-level choices or when they are exposed to advertisements.

Brain imaging techniques currently used in neuromarketing are[2]:

• *EEG (electroencephalography)* – it records brain wave changes produced by the cortex, reflecting the positive or negative emotions produced at that moment. The technique has an excellent temporal resolution of 1/1000 of a second being non-invasive, rapid, inexpensive and the records can be obtained in a natural environment. But the results thus obtained are not reliable because the device

[2] Lewis, D., Bridger, D., 2005, *Market Researchers make Increasing use of Brain Imaging*, ACNR, Volume 5, No 3, July/August 2005

is very sensitive to the movements of those around, to neon lights, to the electromagnetic waves, or to head movements. Moreover, it only records surface brain activity, while the decision-making mechanism requires the activity of deeper parts of the brain. Although some experts may claim otherwise, it is generally accepted that this technique allows a little over just measuring the interest. While this may be helpful in understanding those aspects of communication that attract attention, it does not allow us to identify emotional reactions. EEG technology has the advantage of being a relatively discreet investigation and allows the subjects of the investigation to enjoy some freedom of movement.

• *fMRI (functional magnetic resonance imaging)* that measures oxygen consumption in various tissues of the brain. This imaging technique has been used to date to investigate the impact of brand perception on consumer preferences, to evaluate videos and television advertising, the study of buying decision process and even to investigate the likely impact of electoral advertising during the presidential elections. The biggest drawback of this technique is that the device needed to perform imaging cannot be transported. Therefore, it introduces a distortion, because it does not take into account the concrete conditions in which the shopping is done and thus, it does not measure the environmental influences.

• *QEEG (quantitative analysis of the frequency of the electroencephalography)* used for the analysis of viewers' response to television advertising and other forms of advertising, the exploring of the effects of watching happy or sad facial expressions, exploring the mental states of motorists who must drive under time pressure or examining how people react to an unexpected "free road". The QEEG technique is simpler to use and less expensive, also allowing to make records in a wide range of natural environments. QEEG can be used in combination with qualitative research methods thus providing a better understanding of consumer choices which could not be uncovered otherwise.

• *MEG (magnetoencephalogram).* An example of a situation where this technique was used is the one for the measurement of the purchase decision-making process in a "virtual" supermarket. The authors of the study reported that the right parietal cortex became active only when consumers were faced with a preferred brand and concluded that this region was involved in conscious decision making regarding the choices for purchase. The main drawback of this technique is similar to the fMRI technique, i.e. the technology for performing them is not particularly convenient in terms of its use. It "ties" both the researcher and the subject of the investigation to an immovable machine having a high operating cost and which, moreover, requires positioning the subject's head inside a very large machine.

• *ECoG (electrocorticography).*

• *PET (positron emission tomography)* measures blood flow and the intensity of metabolism in the brain.

Of the aforementioned techniques, fMRI captured the most interest among marketing researchers and enjoyed the most extensive advertising in the general interest and marketing press.

Facial coding techniques are used in support of brain imaging techniques, electromyographies (EMG) to measure the activity of primary facial muscles (zygomatic / orbicular) that may reflect the conscious or unconscious expression of emotions, following the gaze direction (indicating areas of focus of the eyes) and the recording of variations in the galvanic skin response (GSR) showing whether the product attracted interest from the consumer.

Currently, brain scanning is coming increasingly closer to the home of the subjects, by using wireless devices that allow monitoring of emotions even when the subject is in the comfortable environment of his home. In order to perform a study of neuromarketing the specialists recommend using a preselected number of people between 30 and 100, chosen by product or area.

Neuromarketing's pros and cons

One of the most praised aspects of neuromarketing methods is that they are devoid of subjectivity and bias from the participants. For example, when asking a subject to state what he thinks about a certain brand, the person's response will be colored by a complex network of contextual biases and tangential cognitive factors. The promise of neuromarketing is that we can all bypass these confounding factors to get at the heart of the matter – the real representation of the brand. Unfortunately, while this is true to some extent, an entirely new set of confounding factors is introduced during the analysis of neuromarketing data. While many neuromarketing measures are indeed more objective than verbal reports, the data thus obtained does not remain unfiltered. While the signals are not filtered by the consciousness of the research subject, a great deal of manipulation and filtering of the data is performed by the researcher. This introduces the potential for error, but through a different path.

In the studies performed, neuromarketers study the reaction (reactions) of the brain to some stimuli such as appearance, smell, descriptive language (aspect mainly used in the food industry), a chain of events or a story, or the association made between a celebrity and a certain brand (such as can be seen in the sports, perfumes and clothing industry). Biometric sensors are often used to monitor brain activity before, during and after exposure to various stimuli through various neuromarketing techniques. This is done in order to detect processes that have led to certain decisions and to identify that part of the brain that implemented those processes. Biometric sensors use, along with the imaging techniques described above, physiological sensors that monitor heart rate, breathing and skin response.

In this area, however, it is one thing to be able to see what parts of the brain become active in response to a stimulus and it is something else to interpret what this means or what to do with the information obtained. Thus, neuromarketing studies indicate increasingly more towards various "centers known" in the brain. The knowledge about these so-called "known centers" are often sketchy and the demands on their function are often motivated by speculation rather than by a known fact.

Neuromarketing practice is not without criticism or problems. First, consumer advocates argue that neuromarketers exploit people to change their behavior towards the purchase of products / services that they do not need and which lead to the creation of unhealthy and irresponsible addictions and desires. Second, neuromarketing still suffers from a problem that it is trying to overcome – the artificiality of marketing research. Brain activity recorded in a laboratory may not equate with brain behavior at the mall where the purchase decision is taken. Third, neuromarketing studies are not common to the B2B field, probably because of the fact that the customer buying process tends to be lengthy and involves many people so that these decisions can be very difficult to measure in a reliable manner. Fourth, the present cost of these studies is prohibitive for many companies.

We must also be aware when we consider making a research through this technique that neuromarketing has limitations:

- neuromarketing is still only an adjunct, a technique complementary to traditional techniques - not a substitute for them[3]. The results obtained in neuromarketing studies are translated into specific marketing language, so that the information is used by those who know all the elements of the marketing mix, providing a significant amount of additional information, but not just any information about consumer behavior. On the other hand, the results generated by neuromarketing studies are, at the moment, far too broad and subject to interpretation, to be useful individually.
- The second limit is represented by the price and the technology. According to specialists, neuromarketing is now accessible to more than one hundred companies worldwide. These include Coca-Cola, K-Mart, Delta Airlines, Levi Strauss, Alcatel. One can however estimate that the real

[3] Page, G., 2006, *Neuromarketing: Beyond the Buzz*, Millward Brown's Pov, april 2006, www.millwardbrown.com

demand for such equipment used in applications other than medical will lead to a rapid reduction in both cost and size of the equipment, a situation that we approach with small steps.

5. The role of neuromarketing

Neuromarketing shows a very important fact, namely that, as a rule, decisions are taken by the consumer at a mental, emotional and instinctive level[4]. Through brain imaging, marketers seek to capture the rapid commands[5] set up by the brain for efficient and rapid analysis in the evaluation of the alternatives within the purchasing decision-making process. To save time, the brain does not always go through the entire list of risks, benefits and value judgments. Whenever possible, it is based on some "quick keys" that are based on experience and the benefits of stored information.

The results obtained through neuromarketing have been used so far in the following areas of interest:

- Increasing brand preference;
- Improving advertisements retention**;**
- Maximizing the impact of advertising;
- Improvement of TV commercials**;**
- Optimization of media budgets by admastering (shortening the time for broadcasting the spot);
- Optimization of production budgets by testing the spot in the production process.
- Making the branding operational;
- Testing the products before their market launch.

Rezultatele Neuromarketing research results can be surprising. In Buyology [6], Martin Lindstrom presents the results of a study organized by him and conducted during three years. Among its conclusions, we mention:

- the warning labels on cigarette packs stimulate a brain area associated with lust - despite the fact that the subjects of the study said they considered the warnings on the packages to be effective;
- the images of dominant brands such as iPod, stimulated the same part of the brain normally activated by religious symbols;
- a picture of a Mini Cooper activated that part of the brain that responds to faces

Neuromarketing can also be used in psychological and theoretical applications, the examples in this regard being represented by the assessment of the neurological responses during presidential speeches and movie trailers in order to improve the way both are presented to the public.

Using brain imaging techniques will never allow marketing professionals to find the "Holy Grail" of marketing research, the "buy button" - a mythical region of the brain that should only be stimulated so that consumers feel compelled to purchase a product even if they do not want to do so. This button will not be found because it does not exist! Neuromarketing offers, from a realistic point of view, the prospect of a better understanding of how the brain responds to a wide variety of everyday situations. In addition to great commercial value, neuromarketing offers the opportunity to increase our knowledge of brain function among a non-clinical population, to the extent to which there is an expansion of strong medical technologies in a new and challenging research area.

Neuromarketing specific technology can help minimize negative effects. However, it can help maximize positive aspects, as it requires creativity and a holistic view of the person, considering it a real human being. What neuromarketing can really do is to improve the way companies create

[4] Boricean, V., 2009, *Brief History of Neuromarketing*, The International Conference on Economics and Administration, Faculty of Administration and Business, University of Bucharest, Romania ICEA – FAA Bucharest, 14-15th November 2009, http://conference.faa.ro

[5] Park, A., 2007, *The Brain: Marketing To Your Mind*, Time Magazine, 19 January 2007, retrieved from http://www.time.com/time/magazine/article/0,9171,1580370-3,00.html

[6] Lindstrom, M., 2011, *Buyology*, Publica Publishing House, ISBN 978-973-1931-59-3

products and promote them, so as to make them more interesting, attractive and valuable for consumers. Or, as Joey Rieman said in "The New Scientist": "The objective of neuromarketing is to change the behavior of the companies, not the behavior of the consumers!"

Conclusions

The immediate application of neuroscience in marketing requires companies to act carefully and to detach scientific substance from promotional deception. In the long run, neuromarketing will be more welcome, from a social point of view, in terms of applications that focus on products and causes with a clear social benefit - applications such as road safety messages or convincing people to quit smoking or to resist the over-eating trend.

Currently, many companies invest in technology and neuromarketing studies and books, and neuromarketing blogs on neuromarketing are given more attention and legitimacy. The recent investment of research company Nielsen in the research "NeuroFocus' increased the influence and credibility of neuromarketing. However, the field is young and like the Wild West many people outside the marketing area expressed concern about the reliability and ethics of neuromarketing.

Neuromarketing is a developing discipline, which in time will give us new insights into human behavior. Unfortunately, at present there are little published research articles in this field. Current debate on neuromarketing is reduced to a few key points:

- pragmatic realities related to the business environment often require science to adapt. For the use of measurement techniques specific to neuromarketing, the solution that is measurable, effective and provides valid results in an acceptable margin of error is the winning solution;
- for neuromarketing to become a common technique in marketing research, it is necessary for the necessary devices to become mobile in order to allow observations in the real world.
- neuromarketing can help understand the differences between what consumers say and what they do, but it should be applied on a large enough sample for this technique to express the behavior of consumers;
- hybrid models can increase efficiency. If you combine the techniques of eye tracking and EEG with a prediction on the market, you get better results. But if you combine sensory testing models with biometric measurements, you will get high depth results.

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ETHNOMARKETING - A NEW PARADIGM THAT REFLECTS MARKETING'S CONCERN FOR THE CULTURAL DIMENSION OF THE MARKET

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Abstract
Culture has often been regarded as one of the main determinants of consumer behavior and of the symbolism acquired by certain products. It is well known that states are composed of many subcultures and that cultural diversity is an ever-present topic. Culture has invaded the entire current range of business, its presence is seen everywhere, and marketing makes no exception.
In this context and considering culture as an important factor that conducts and guides the entrepreneurial success, the following paper reveals some important concepts, characteristics and principles of ethnomarketing for a better exploitation of market opportunities, especially on its consumer behavior dimension.

Keywords: *marketing, culture, subculture, ethno marketing, marketing research*

Introduction

Culture offers people a significant context in which they can meet, think and face the world. The way we perceive the world around us, the way we think and act, our norms and values are determined by the culture in which we live and which we consider to be normal. It is a system that we learn and that is passed on from generation to generation. Culture can be represented as a collection of elements such as language, buildings, religion, clothing, cuisine etc. On the other hand, as part of a culture, subcultures are groups of people who have value systems based on common experiences of life. Even a group of World of Warcraft fans in a society form their little subculture. Subcultures are also, among others, ethnic minorities. Spanish speakers in the United States of America represent a subculture, a rather significant ethnic group. To the same extent Hungarian speakers in Romania are an ethnic group or a subculture. Different cultures have a simultaneous influence upon one another. Ethnic groups create cultural diversity in that they actively contribute and change the culture of the society they belong to.

Culture has often been regarded as one of the main determinant factors of consumer behavior and of the symbolism acquired for certain products. It is also well known that states are composed of numerous subcultures and cultural diversity is an ever-present topic. Culture has invaded the entire current range of business, its presence is seen everywhere: on the market, on which are reflected the three levels of culture (artifacts and conduct, values and beliefs, and the world which lies at their basis) and also inside the organization dominated by certain cultural patterns throughout the life of the enterprise. In these conditions there is has been a growing interest, for the past 20 years, for the cross-cultural differences between different ethnic groups and their implications for the marketing strategy developed at the level of the organization, using culture and ethnicity as segmentation criteria.

It should be emphasized that, in practice, small and medium enterprises in particular are faced with the need to include culture the process of design, implementation and control of marketing activities.

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The concept of ethno-marketing

Ethno-marketing involves the recognition of culture as the framework and essence determining contemporary business and consumer behavior analysis, the decisions of the organization and the dynamics of the market on which the company acts from the point of view of cultural dimensions. In other words, ethno-marketing is a differentiated marketing in the light of the cultural origin of the target groups, the cultural minorities living in a country being addressed through a tailored marketing mix. In this context, are taken into account the contributions of anthropology and ethnography that characterize consumer cultures. Ethnography, the science that classifies the peoples of the world, studying their composition, origin and spread, follows the development of their material and spiritual culture, etc., has now become the method allowing the acquiring of understanding of the values, behaviors and other specific components of culture. The goal of the ethnographic method used in ethno-marketing is to penetrate inside the symbolic and social universe of the persons investigated to decipher their perceptions, attitudes, habits, values and way of life and, thus, to better understand their actions and motivations[1]. On the other hand, cultural and social anthropology is most often used in marketing as it examines cultural facts that influence the behavior of individuals.

Ethno-marketing is not a new idea, having emerged in 1920 as a concept in the U.S. („ethnic marketing") in an attempt to address migrant Asians and Latin Americans. The basic principle of ethno-marketing at the time was that for minorities specific means of marketing should be used, their stimulation being achieved through different methods.

Two reasons led to the increasing importance of ethno-marketing. First, ethnic groups have become larger and have gained greater purchasing power, which led to the increase in their attractiveness. Secondly, the marketing field has become increasingly advanced which means, among other things, a concentration of attention on ever-smaller market segments. In recent years, minority consumer market segmentation has become increasingly complex and sophisticated. Thanks to new tools and state-of-the-art techniques of data processing, such as, for example, data-mining, brands are now able to reach niche segments of consumers that have become increasingly narrow[2].

Ethno-marketing , this new paradigm in marketing, was conceptualized as the social process in which, in terms of human groups, are designed and implemented three main functions of marketing: understanding consumers, to winning customers (buyers) and retaining customers.

The four epistemological foundations of ethno-marketing are[3]:

ethnicity - a concept of individual and group identity adopting differences in color, language, religion or attributes related to common origin. Many researchers state that the basis of ethnicity is the self-identification of members mediated by the perception of others.

ethno-consumerism understood as the study of social group or cultural group consumption, using categories of behavior and thinking that are rooted in the cultural component. Ethno-consumerism is based on the basic cultural categories of a particular culture and studies the actions, practices, words, thoughts, language, institutions and interconnections between these categories. Ethno-consumerism forces the researcher to observe a particular person not as an individual but as a cultural being, belonging to a culture, subculture or having another affiliation group;

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[1] Chirade, A., Guezais, C., Marzouk, S., 2008, *The Ethno-marketing*, course notes MOI (International Operational Marketing), University of Paris X, 1/17.04.2008,
http://christophe.benavent.free.fr/IMG/pdf/MOI_2008_Ethnomarketing.pdf

[2] Pauwels, M.C., 2006, *Marketers as Innovators: how ethnic marketing revisits ethnicity*, LISA e-journal, Vol. IV - n°1/2006: Driving Innovation in Anglo-Saxon Economies: Comparative Perspectives, p. 234-254, Electronic ISSN 1762-6153, http://lisa.revues.org/2293

[3] Morales, D.P., 2005, *Ethnomarketing, the cultural dimension of marketing*, paper accepted for presentation at the 2004 Academy of Marketing Science Cultural Perspectives on Marketing Conference held at the *Universidad de las Américas* Campus in Puebla, Mexico, published in Pensamiento y Gestión, N°18, Universidad del Norte, pp. 177-206, ISSN 1657-6276, http://ciruelo.uninorte.edu.co/pdf/pensamiento_gestion/18/7_Ethnomarketing.pdf

the cultural dimensions of markets, namely those markets where the objects, rules and stakeholders acquire a meaning related to a particular culture;

the market-oriented organizational culture where marketing has a predominant role representing the core of any strategy of an enterprise. Trying to create or run a market-oriented organizational culture involves efforts towards integrating the concept of marketing as an element always present in each functional unit that makes up the organization. This means that in order to be successful, a market-oriented organization must build long term relationships, by implementing the strategies that enable the transformation of potential consumers into loyal customers, one of the key postulates of the concept of marketing. In order to achieve this state of customer loyalty, an organization must have extensive knowledge about customer needs during the various times when the organization builds its exchange relationships: before (pre-transactional exchange), during (transactional exchange) and after (post-transactional exchange) the execution of the process. A market-oriented organizational culture is defined as a set of behaviors, myths, rites, rituals, symbols, beliefs, assumptions, and especially values that allow the organization to place the customer at the heart of its activities, to know the present and future competition, to properly co-ordinate its internal activities, to take decisions in a long term perspective and to have a profitability in accordance with its own previously determined plans and needs.

Ethno-marketing specific actions in a company

Basically, ethno-marketing is a specific way to address the market, on the basis of other segmentation criteria, designed to aim for those niches represented by people from different ethnic backgrounds[4]. It is designed as a type of marketing applied to homogeneous ethnic groups under a great cultural diversity that characterizes the current cultures.

Formulating the assumptions underpinning ethno-marketing, these can be stated as follows:

- the conception and practice of marketing are included in the relativistic scientific paradigm, in open, not complementary, opposition with the positivist paradigm dominant in the current marketing schools. In other words, marketing as a discipline has a contextual nature and the validity of its truth depends entirely on the environmental conditions detected, analyzed and interpreted. The essence of any context is completely determined by dominant cultural models and schemas.
- products - goods, services and ideas, bear great symbolic meaning;
- anthropology, with its most recognized method, ethnography, represents the social science best able to understand, conquer, and keep the market participant agents;
- marketing research must be supported by different methodologies in which the consumer can be contemplated in natural circumstances. One may use for this purpose, among other data compilation techniques, techniques of observation of the subjects, in-depth interviews, mystery client technique, audio and video recordings etc.;
- consumer phenomena that form the symbolic meanings, rather than functional meanings, should be the starting point of any marketing effort;
- any undertaking must have a clear and strong market-oriented organizational culture in order to create superior values for the customer;
- the process of identifying market segments should be conducted in accordance with a symbolic approach;
- consumers belong to different market segments at the same time in terms of a particular product category;
- organizational communication must ensure that it targets a specific market segment;

[4] Van der Schaaf, C., 2008, *Ethno marketing is slightly crude*, The issue, Erasmus University Rotterdam, http://www.eur.nl/english/news/the_issue/issuearchive/2008/issue_2008_26/

- substantial efforts should be made by the company to build effective and dynamic market information systems;
- marketing audits should become a routine in any organization.

The continuous support towards consumer sovereignty is one of the key postulates that ethno-marketing recognizes; this first feature is linked to the need to understand consumers. Consumer profiles, consumption trends, tastes and preferences should be deeply known. Based on the contemplation of consumer phenomena, expressions, contexts and rituals, is it possible to know consumers, their categorization, their quantification and, especially, the drafting of future marketing strategies and of the programs to be implemented in order to meet the their deepest aspirations.

Culture shapes (most often unconsciously) every human behavior, including consumer behavior. Multiple cultural elements - language, religion, values and symbols - different from one culture to another can exert a strong influence on consumer behavior. Individual consumption is closely linked to culture on several levels: the connotations of a specific language, the postures, gestures and contacts between individuals, color perception, etc. Any decision to purchase is the result of a complex process in which occur, to some degree, the symbolism and the irrational. The activity of ethno-marketers is to remove from the shadow that part which motivates the decision and which is influenced by the cultural factor.

Consumer understanding must be translated into clear and convincing explanations of human complexity. With this information, it is possible to transform potential customers into loyal customers, the final target of all organizational efforts on the market. Thus, different types of consumption inherent in this period will have to be made visible and consumer motivations emphasized by the ethno-marketing approach which shall have to be designed to address human groups, ethnic groups. For example, the profane and the sacred consumption must be clearly defined in order to discover whether the profane or the sacred prevailed in some social circles. Consumption must also be defined in terms of processes of imitating public persons, located in the upper layers of society that many potential customers perform. Also, the materialism considered to be typical of this age will be taken into consideration, given its remarkable influence in purchasing a certain type of products (luxury goods, vehicles, jewelry)

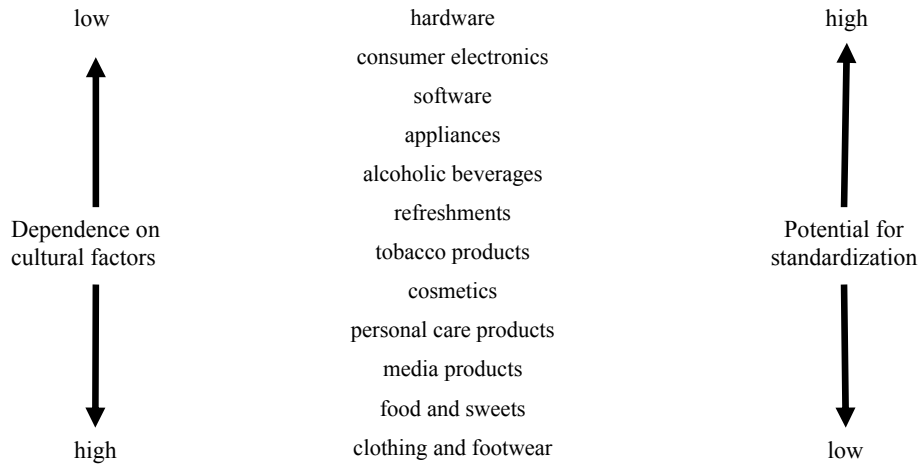
Possessions now represent a way to reaffirm the personality for many consumers. For these consumers life revolves around the value of things that can be purchased and through these things they are aspire to be perceived as successful people and therefore worthy of being emulated. Similarly, consumption rituals must be identified in terms of artifacts used, texts learned and repeated faithfully, roles to be fulfilled with the audience to which is destined the role which is executed. It is also indispensable to find the connection between cultural values and terminal values, through which consumers try to materialize their consumption objectives, and those product attributes that consumers assume that they can meet their expectations.

The process of study, analysis and interpretation of current environmental realities of the market in order to provide solutions to identified needs, involves more or less focusing on the cultural environment. In this context, cultural circumstances could only be approximated by appealing to specific ethnographic methods of cultural anthropology, in order to discover the symbolic world that lies hidden behind business actions and decisions of each community studied. Ethnography sets not only the context and subjective meaning of the experience of a group of people, but it also explains the cultural significance of this experience in a comparative and interpretive manner.

In other words, ethno-marketing breaks the traditional view of the marketing imposing the classical approach to the marketing mix (4Ps: product, price, placement, promotion) in thousands of fragments. Acting under the old marketing concept brought great damage, equally to both the business and academic environment in an attempt to reduce marketing processes to a universal formula with superficial variations on the four main components, without giving sufficient attention to radical adjustments related to the current competitive environment.

Regarding product policy, it is recommended that before applying the principles of ethno-marketing , the organization checks the convenience degree of its products because the products have varying degrees of dependence on the cultural factor (see figure 1).

Figure 1. *Products' dependency on the cultural factor*



Source: adaptation from Waldeck, B., von Gosen, C., *Ethno marketing in Germany*, paper presented at the 1st International Conference on Strategic Development of the Baltic Sea Region (BSR), Tallinn, Estonia, 25-27 February 2007, http://ikarus.e-technik.fh-kiel.de/bsn42/fileadmin/bsn_ftp/Waldeck_Paper_Ethno_Marketing_6-E.pdf

Thus, standardization, to which reference is made in the above figure refers to the fact that a product may be sold in different markets without realizing any changes due to cultural reasons. The dependence on cultural factors is in a close relationship with tradition. Products dependent on this factor have a long tradition and are thus part of the cultural identity of individuals. For example, clothing and food products are visible features of a culture; through them, a differentiation can be achieved from one culture to another. The products that are not dependent on cultural factors satisfy the same needs irrespective of the cultures manifested in that country.

In ethno-marketing , particular attention should be paid to cultural influences on brand names and packaging design. In this context, the brand name must meet three conditions: to be easy to pronounce, to have a positive significance and, last but not least, it must sound good. These are also the characteristics that distinguish languages from one another.

The brand name should be understood and easily pronounced by the target group. Also, more important than phonetics (pronunciation) is semantics (meaning and associations). The brand name must not lead to negative associations with the target group. This can happen with brand names that have various meanings in other languages. For example, Unilever has named one of its soaps "Le Sancy", a phrase that means in some Asian dialects “death upon you ", an association that was certainly not intended. A third feature of the language - morphology - provides information about word length and the fact that, in a language, short or long words are preferred, and thus are preferred short or long brand names.

On the other hand, when it comes to design and product packaging, heed should be paid to selected colors and / or symbols that should not cause any negative association with the target group due to the cultural context.

The service offered to customers represents, as we know, a component of the product policy. Customers often seek to obtain product information before purchase (commercial service). They require leaflets and after sales service. In ethno-marketing, these services should be provided in the native language of the target group. Most times, it is very important to satisfy the information needs of the target group because, otherwise, the organization's marketing efforts will remain unsuccessful.

Another component of the marketing mix, the promotional policy, offers a variety of possibilities in the form of advertising, advertising in print, websites, promotions, etc. that can support the application of the ethno-marketing vision. As we can imagine, is very important to adapt the communication campaigns to the needs of the targeted ethnic group. In addition to caring for the language used, in the communication activity other elements of cultural features must be used, such as symbols, colors and music. The key to achieving a genuine relationship goes beyond simply using specific language and images used in advertising, being designed to build trust and take seriously the clients from minority groups. A promotional campaign designed specifically for the foreign client in his language does not only prevent distortions due to negative associations made only after translation, but also makes the customer feel adequately addressed, it shows him that he is important for the company. Some ethnic groups living in our country understand the advertising done in Romanian, but there is a difference between the perception of publicity and its internalization. Ethnic minorities in a society feel strongly affiliated to their own culture and the language is a key identification feature. Thus, advertising in Romanian is perceived, but advertising in their native language stirs up emotions.

In ethno-marketing, the distribution policy is particularly important in the field of services. Banking and insurance services mainly involve conducting extensive advisory activities, being fully substantiated the need for their staff to learn more languages in order to provide this service to target ethnic groups. On the other hand, most often, in Romania the vast majority of distributors do not take into account the differences existing in the behavior of consumers who are part of ethnic groups of interest, therefore, their members have created their own distribution channels. Due to the sales force's lack of knowledge regarding foreign languages, foreigners prefer to buy goods they need from the so-called "ethnic stores" because in them they feel understood and can make themselves understood. This psychological barrier can be overcome, as mentioned above, by hiring people to speak the language of the target ethnic group. The role of the communities is also important in this case. People like to buy things where they can meet with friends, so that once created, the positive experiences in the store will lead to loyalty.

Pricing policy does not have the same importance on the realm of ethno-marketing as the other policies of the marketing mix. From this point of view, three factors influenced by the cultural component and which can provide information on how potential customers will react to the price are: the role of money in a society, that price as key- stimulus and the acceptance of the price by customers.

The role of money varies in different cultural areas. Money could be a taboo topic which is not discussed in public. For a given target group moderation could be a sign of poverty and for another group for a sign of cleverness. These attitudes are different from one society to another and they provide information about people's attitudes toward money.

Price is also a key stimulus for a product. Often, the price of a product is associated with its quality even if this combination is not always appropriate. The extent to which the price is a key stimulus for a product is influenced by cultural factors.

Customer acceptance of a price is strongly influenced by the cultural factor. How much is the customer prepared to pay for a product depends on the importance of that product in a given society in a given ethnic group. The same product can enjoy a different importance in different cultures.

In ethno-marketing, we must keep in mind that most likely, customers have different attitudes toward money, and therefore they will react differently and unexpectedly to price policy measures, such as, for example, discounts or coupons.

Ethno-marketing is, as we have seen, a concentration of the efforts of the company on ethnic or cultural minorities in a country through a marketing tailored to their needs. A problem that can arise in applying the principles of ethno-marketing arising from the issue of segmented marketing and refers to the economically necessary dimension of a market segment. Ethnic groups are often only a small percentage of the total population of a country. Profitability should be possible with any target group. However, in many countries, ethno-marketing is not an option due to lack the necessary size of the ethnic groups concerned. On the other hand, market segmentation also means the determination of a segment profile. In ethno-marketing, the drafting of the consumer profile may be a risk. Given that cultural characteristics are difficult to identify, the wrong or superficial knowledge about the attributes and needs of a segment can lead to insufficient communication with the target group.

The issues of ethno-marketing in Romania

The issue of ethno-marketing is important for our country because of the large number of Hungarian and Roma minorities and the possibilities of transforming them into targets of the business activity. We offer you the official statistics regarding the ethnic structure of the Romanian population:

Nationality	**2002 Census**	**%**
Romanian	19.409.400	89,5%
Hungarian	1.434.377	6,6%
Gypsy	535.250	2,5%
German	60.088	0,28%
Ukrainian	61.353	0,28%
Russian	36.397	0,17%
Turks	32.596	0,15%
Tatars	24.137	0,11%
Serbs	22.518	0,10%
Croatian	6.786	under 0,10%
Slovenian	175	under 0,10%
Slovaks	17.199	under 0,10%
Bulgarian	8.025	under 0,10%
Hebrew	5.870	under 0,10%
Czech	3.938	under 0,10%
Polish	3.671	under 0,10%
Greek	6.513	under 0,10%
Armenians	1.780	under 0,10%
Ruthenians	257	under 0,10%
Italian	3.331	under 0,10%
Albanian	477	under 0,10%
Macedonian, slavs etc.	695	under 0,10%
Total	21.698.181	

Source: *"Minorities in transition - Report on public policies in the field of national and ethnic minorities in Romania*", January 2005, Ethno-cultural Diversity Resource Center, http://www.edrc.ro/docs/docs/minoritati_in_tranzitie.pdf

On the other hand, in 2009, 80,000 foreign citizens lived in Romania, of which 54,000 were citizens from outside the European Union, and 24,000 were nationals of EU countries, according to the Romanian Immigration Office (RIO)[5]. In a population of 21,469,959 inhabitants[6] this means a rate of 0.4%. Accurately recording the exact number of foreign citizens in Romania is not easy. We still have no answer to questions such as: With the registered number of foreigners do we cover only the persons with foreign citizenship or do we also include persons with dual citizenship? But what about people who naturalized and only have a Romanian passport? Are they recorded in the statistics as persons with Romanian citizenship, although they preserve the culture of their home country?

Although there are a few Romanian organizations that have implemented ethno-marketing in their strategies, most did not do this. For many companies the concept of ethno-marketing can lead to the first mover advantage in winning the confidence of members of ethnic groups. It is clear that, in the future, in the context of globalization, the concept of ethno-marketing will gain importance in the future with the increase in the foreign population of Romania and of Europe.

Conclusions

To conclude, we reiterate the idea expressing the fact that ethno-marketing represents the principle according to which organizations take into account the needs of ethnic groups and thus target group members feel respected and integrated into the host society. Related to this, in 1979, Herbert Gans introduced the notion of "symbolic ethnicity" a low-level identification based on symbolic structures that represent nostalgia for traditions and which do not involve an intense commitment. Recent marketing research has confirmed this idea. Consumers are now turning more and more to products not only for what they do, but for what they mean. Symbolic significance is more important than mere utility. Because ethnic identity is now something chosen, rather than pre-established, individuals tend to swing between several identities. Thus, we must realize that ethnicity is now most often in the eye of the beholder.

On the other hand, in the current conditions of globalization, we see that talking about ethnicity and addressing a particular ethnic group, in particular through ethno-marketing, is difficult and complicated. Indeed, due to the multiple streams of migrants, ethnic groups were mixed and can be found hidden around the world. Thus, targeting a particular ethnic group is almost the same as finding a needle in the haystack. This is not an issue to be neglected. It is therefore necessary that each organization assesses its opportunities and its capacities of fruition, through an extensive analysis, in the cultural context in which they operate.

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SUSTAINABILITY AND COMPANY'S CORPORATE SOCIAL RESPONSIBILITY NEED[1]

MONICA VIOLETA ACHIM [*]
SORIN NICOLAE BORLEA[**]

Abstract

The company is a living organism, is an entity and its analysis should be made taking into account the whole system. The company is a dynamic environment, which has as a mainly aims to add value for all participants in the economic life.

In the organizations, the achievement of the concept of sustainable development is achieved through the concept of societal responsibility of the organizations. For this scope we need to use the term introduced by Elkington namely "The Triple Bottom Line" which involve economic prosperity, environmental compliance and improve social cohesion. [11]. So, "The Triple Bottom Line" can be defined as an approach for measuring the overall performance of an organization according to its triple contribution to the three aspects mentioned above.

The new conceptual framework change radically the final aim of a company because it is not anymore maximizing the value of shares held by shareholders, but it is maximizing value for all stakeholders, where shareholders are just another category of stakeholders.

Sustainable development and globalization require new performance standards that exceed the economic field, for both national company and international ones. As a consequence, these standards must be integrated into the company's development strategy, to ensure sustainability of activities carried, by the harmonization of economic, social and environmental objectives.

Keywords: *sustainable development, corporate social responsibility, company, economical, social and performances environmental.*

Jel Classification: D00, D20, D30, D40, D60

Introduction

The idea that a company has obligations exceeding its economic role is not new. Not infrequently, history shows that organizations producing goods and services were involved in political action, social and / or military, in addition to core activities. Studies have shown that during the nineteenth century, the company has seen a rapid evolution. It is not surprising therefore that in the mid-twentieth century, the corporate social responsibility (CSR) is an object of analysis of some American experts in business management, giving in particular Peter Drucker. In 1970, the economist Milton Friedmann drew the effective value of the corporate social responsibility as being to achieve a profit within the rules of ethics and societal laws. [3]. Moreover, the financial performance does not necessarily provide a firm future because a business can not develop in a world that fails. Voltaire said: "We are not good at anything, when we are good only for ourselves."

In brief, the role of corporate social responsibility might run within 4 main areas of interest as a matrix called "corporate social responsibility matrix", as follows:

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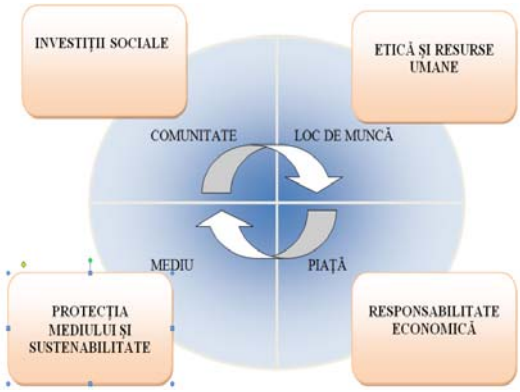
FIGURE no. 1 CSR MATRIX



Source: Pintea, 2011

The social responsibility means [13] managing a business in a socially responsible manner so that business:

- ✓ To promote **ethical practices** in employment policy and take an interest in **improving working conditions;**
- ✓ To be involved in building of a **local community** and to disclose their actions in this regard;
- ✓ To invest in building of **social infrastructure;**
- ✓ To contribute to maintaining a clean **environment**, to its protection and **sustainability;**
- ✓ To contribute at **economic development**, broadly, through the activities undertaken.

1. Marks regarding the origins and evolutions of the corporate responsibility concept

The theme of corporate social responsibility has gained a real size only in the early 90's, with a significant acceleration to 2000. The debate on corporate social responsibility concept fits into the global debate on the future of the planet (in the economic, social and environment) around the concept of "sustainable development" formalized by United Nations in 1992, at the World Summit in Rio. The Sustainable Development theme was initiated in 1970 along with publishing of the first report of the Club of Rome entitled "The Limits of Growth"

The Brundtland report (1987), sustainable development is defined as "the current generation capacity to meet the needs of the present without compromising the ability of future generations to meet their own needs".

If before 2000 sustainable development was a theme addressed in macro-economic terms, today it is discussed mainly in terms of micro-economic, at the companies' levels. The sustainable development issue is mainly referring to the large multinational corporations, given the turnover and presence in all countries including those in which human rights or the fight against corruption is not a priority for governments. Sustainable development applied to the corporations and economic entities in general has resulted in the concept of "corporate social responsibility".

Corporate social responsibility (CSR) as a concept is mentioned for the first time in Lisbon (2000). In July 2001 the Commission published the Green Paper "Promoting a European framework for corporate social responsibility", whereby public authorities at all levels, namely: international organizations, enterprises, social partners and all interested persons, are called to are called to "express their opinion on the manner in which to build a partnership to establish a new framework to

promote corporate social responsibility, taking into account the interests of both companies and the various parties involved ".

Concretely, European Commission in "Green Paper" defining the concept of social responsibility as "the voluntary integration by companies of social and environmental concerns in their economic activity and the relationship with interest groups". From this definition emerge three fundamental principles:

- Voluntary action of companies;
- Triple approach: economic, social and environmental;
- Align to the corporate interest groups (eng. "stakeholders").
- From this level was launched the concept of "Best Practice" in areas such as:
- lifelong learning;
- work organization;
- equality;
- social inclusion.

2000 Lisbon Agenda calls for the involvement of companies in achieving the targets set for the future of Europe, in anticipation of 2013. In the new economic and social space of the beginning of XXI century, the company / firm is the most dynamic force of the new institutions of market economy [12]. Effectiveness companies will no longer be measured only in terms of economic performance, which are directly influenced by the s social and environmental approach. Operation in long-term competitiveness in the context of an increasingly globalize economy challenge the company to develop strategies and policies to ensure the business **transformation in an environmentally and socially responsible business.**

The European Commission Communication of 03.23.2006 "Making Europe a pole of excellence in corporate social responsibility" emphasize the fact that corporate social responsibility (CSR) "become a more and more important concept in the world". European Commission's 2006 Communication is also a basis for achieving the objectives set by the Lisbon Agenda for the period 2007 to 2013.

2. Factors that have led to need for social responsibility

The current interest for CSR is the result of a set of factors that are contributing to increased attention to RSE, such as:

Globalization - with important consequences for cross-border trade of multinationals and world-class supply networks - raises, in the CSR, many more concerns, mainly in practical human resource management, environmental protection, health and safety.

Multinational companies based in developed countries, but producing and buying materials raw in/from developing countries, use the enterprises from these countries as sub-suppliers of material resources and cheap labor. The involvement of multinational companies in developing welfare policy, environmental protection and workers rights in developing countries is expression of their responsible behavior, but also a challenge to reduce pressures in countries of origin of multinationals, by reducing the cost competition. [9].

Thus, globalization is an accelerated process of economic integration, whose consequences are reflected on sustainable development and that call for the big companies to introduce of social corrective in their work.

Increase **the frequency of cycles of growth and economic decline** after the Second World War, culminating in **the great financial scandals of the early 21 century.**

General climate of trust in the predictability of economic events that characterized the growth period after World War II, was replaced in the last 30 years by an increase in the frequency of cycles

of growth and economic decline, which contributes to create an impression of uncertainty, unfavorable corporations.

Early 21st century was tumultuous in terms of global financial and economic life, which is shaken by multiple financial scandals generated by bankruptcies of a large corporations that have occurred since 2001 (energy group Enron Corporation) and continuing with 2002 (WorldCom, Qwest Communications, Adelphi, Global Crossing, Nortel, Parmalat).

Series bankruptcy crisis started with the spectacular giant energy group Enron Corporation, WorldCom will (most significant bankruptcy in U.S. history), Tyco International, Qwest, Xerox, Lehman Brothers, American suite, Vivendi Universal, Ahold and Parmalat in Europe. [4].

In this context, corporations are forced to restructure in depth how to act, become unsatisfactory to investors and shareholders whose number is growing. The role of multinational companies is now a complex one these are players with full responsibilities in the social landscape.

Shift from physical production-centered economic model based on exploitation, pursuing individual interests, towards the **sustainable development model, centered on intangible assets**, focusing on quality of life, resource conservation, the interests of society as a whole.

Just as the welfare of a country is no longer measured only by GDP but also in terms of education, health, freedom of expression, the income distribution, in the same way the state of an economic entity is no longer assessed solely by financial results. Much of the company's capital is founded today more on people's intelligence and less on infrastructure. It's about image, mark, about the shift from quantity to quality.

Increased transparency of the economic environment along with **global increased of information flows** through development of new technologies and especially TIC. Information about unethical attitudes of a company can be known not only at home, allowing more rapid intervention parties.

The evolution of information technologies, that can exchange information in real time at low cost has enabled a growing number of people have access to information and ask for more transparency in the conduct of business. Consumer type passive receiver (*consumer-client)* gives way to an active subject who wants to critically consume (*consumer-citizen*) who wants to know which are the social costs of the products and services they consume. [2].

Increasing the role of opinion society in landscape view of economic life

Opinion society is characterized by so-called phenomenon NIMBY (from engl. "Not In My BackYard") [10].

This phenomenon refers to the opposition shown to the projects of common interest that may affect human life's quality. The phenomenon is characterized by a local aspect of reactions such as local reaction to the installation of a factory, to a new infrastructure, etc.. It is characterized by individualism, a high community spirit and includes claims population to participate directly, actively, to make decisions. NIMBY phenomenon reveals extensive implications in democratic societies: finding a balance between private and general interests, which is possible only through transparency and open discussion with social actors.

Last but not least, public opinion greatly influences the attractiveness of the company, ability to attract human resources. Human resource managers found that the younger generation is very sensitive in terms of corporate values and they take it into account as criteria in choosing a job. In case of less attractive sectors where recruitment is difficult, any defamation that could stain the corporate reputation is a fundamental risk

The above is added the great social and economic disparities world, the warming of the planet phenomenon, more frequent periods of financial and political instability.

The balance between developing new global economic structure and people's expectations is a first contributing factor of the global trend towards a greater awareness of Social Responsibility, primarily for large companies , usually and then for domestic enterprises, including SME's.

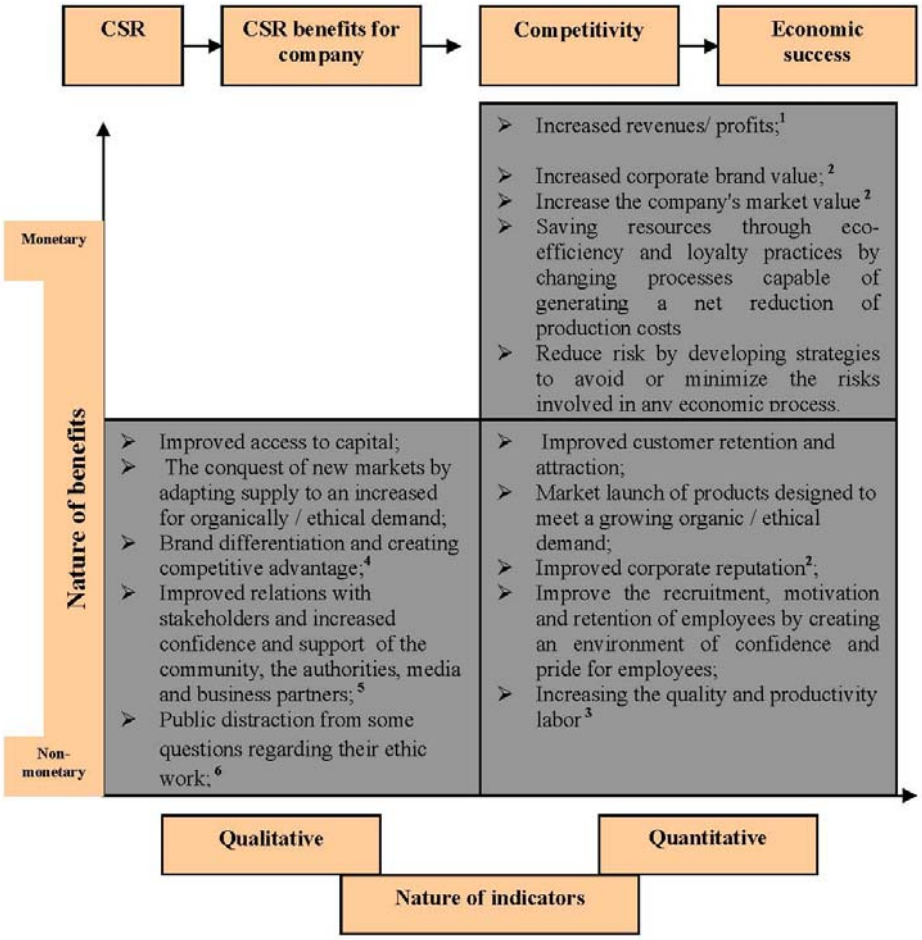
In the new economic and social space of the beginning of XXI century, the company / enterprise has become the most dynamic force of the new institutions of market economy. [12]

United Nations Global Pact, - through its 10 principles based on fundamental documents, calls the enterprises, on their leaders, to adopt, to promote and to be granted a human rights, labor standards, the environment and fight against corruption fundamental values set. In this context more and more European companies have promoted strategies on corporate social responsibility (CSR) as response to social, economic and environmental pressures. Strategies aim was to send a signal to everyone involved with these companies interacts.

3. CSR benefits for companies

The benefits of defining and implementing a corporate social responsibility (CSR) strategy, for the company, may vary depending on the area and the local or global community in which company operates. However, in all cases, The benefits of such implementations are appearing on medium and long term (over 3-5 years). Exceptions are companies whose brand is already known in the community or target market.

Figura No. 2 CSR BENEFITS FOR COMPANY



Source: adapting after Weber, 2008

[1] First of all, among the effects of implementation CSR in companies, there are traced the financial effects (quantitative and monetary), in areas as: increase income, decrease costs and increase profits. Numerous scientific studies come to support this hypothesis:

A study of IBE (Institute for Business Ethics) has shown, by calculating financial and corporate responsibility indicators, that 'ethical' companies generated a net superior value added and a profits on average 18% higher than other companies [20];

Moreover, a large number of analysis and empirical studies analyzing the effect of environmental performance on financial performance (Lapalnte & Lano, 1994, Lano et al., 1998, Konar & Cohen, 2001, Khanna & Damon, 1999) and theoretical results indicate either a positive or negative connection. Konar and Cohen (2001) have shown significant positive effect of good environmental performance, measured by toxic emissions on the value of intangible assets of firms.

Similarly, Austin et al. (1999) demonstrated that good environmental performance, expressed through various measures (eg. toxic emissions) positively influence the rates of return on equity. In accordance with the above-mentioned studies, Hart and Ahuja (1996) showed that the degrease of emission level results in a better financial performance, based on accounting information for a period of two years and Filbeck and Gorman (2004) by comparing for a period of three years the revenues to the penalties related to the environment, show a positive link between financial and environmental performance.

A study conducted in 1997 by DePaul University - Chicago found that those companies that have defined a social involvement towards the ethical principles strategy have financial benefits (based on the annual sales / revenues) more better than companies that do not involve themselves in this direction .[21]

A study over a period of 11 years conducted by Harvard University found that companies that act as social partners in the market had a growth rate of 4 times and 8 times higher when increasing the number of employees were compared with companies that are focused only on their business and profit.. [21].

[2] A survey conducted in year 2000 by the prestigious company Burson-Marsteller in three most important European markets: Britain, Germain and France attends to the followings results [18].

- 66 % of opinion leaders were interviewed strongly agreed that business involment in the community will matter greatly in the future;

- 64 % of opinion leaders surveyed were strongly agree that a company's reputation will affect their decisions as legislators, decision factors, journalists and investors;

- 42 % of opinion leaders were interviewed strongly agreed that corporate social responsibility will influence a company's share price in the future.

[3] Experts from Business for Social Responsibility said that "the company's efforts to improve working conditions, reducing environmental impact and increase employee involvement in decision making, most often leads to **increased productivity and reduced error rate.** "For example, companies that invest in improving working conditions and good practice with providers often reveals that decreases the number of scrap or raw material that is damaged and can not lead to a quality product that is sold.

[4] In this increasingly crowded market, companies seek to define **new competitive advantages** that could separate from the competition in the consumer's mind. Studies conducted in European countries showed that a reputation for integrity and business practices represents an important image capital in defining competitive advantage. Moreover, the chances of winning EU funds increase substantially by respecting what the Council of Europe has defined as corporate social involvement

[5] Types strategies and initiatives CSR help the company **to increase confidence and support** of the community, the authorities, media and business partners. Community will be significantly more favorable towards a brand which are perceive as involved in its development or in improve their living conditions. Authorities are always interested in identifying the partners which participate in sustainable development of the community but also to help lower the budget financial effort to improve living conditions of a community. The media is the basic support to popularize CSR strategies. Many companies want their brands association with a strong brand and therefore CSR initiatives contribute greatly to increasing the visibility and thus the power of a brand.

[6] Corporations can use CSR profile programs in an effort **to divert public attention** from some ethical questions targeting their activities. Examples of such companies are in the areas of cigarette manufacturers and in companies which produce environmentally hazardous waste.

Conclusions

The adoption of social responsibility in business occurs in response to strong economic pressures, social, legislative push corporate activity, the industrial revolutions that marked the world economy, culminating with the economic crises. Corporate social responsibility (CSR) is in fact a complementary and effective agreement between business and society in which they operate. CSR is

defined by how businesses align their values and expectations with the needs and requirements of the society where we include - not only customers or investors, but also their employees, suppliers, community, legislators, special interest groups, with other words, society as a whole. CSR is in fact, the extent to which business is committed to match the expectations of society. CSR is a concept very generous, and has begun to change the world we live. Society today is interested in both the financial performance of companies and the way they do their business. In this context, an increasing number of companies adopt, as part of organizational culture and business strategy, the corporate social responsibility.

CSR's key points include business management, supply chain, environmental protection standards on relationships with employees, and the community that we are part, human rights and social equity. CSR is not merely the fulfillment of a debt against the society; it can bring a real competitive advantage. Thus, through an effective social responsibility, companies can benefit from these advantages: optimization of opportunities of access to capital, improving brand image, increase sales, attract, retain, motivate and develop employees, improve decision making, improve risk management and reduce costs.

The approach of corporate governance to ensure maximum satisfaction on social needs, must address the following participants in economic life (stakeholders)

- *Corporate Governance*, achieving social objectives should be applied first at the level of corporate governance structures by: ensuring the independence of directors and managers at different organizational levels, respect shareholder rights, transparency of information, an efficient, transparent and independent internal audit and control system.
- *Customers:* the link cost-effectiveness-satisfaction, correct and timely information, ethics and balanced contractual relationships;
- *Employees*: jobs, work motivation (bonuses, promotion), health and safety conditions at work;
- *Creditors:* timely payment of credit and interest rates;
- *Providers:* ethical and fair contractual relationship;
- *State:* timely payment of state taxes and fees, environmental protection, respect for law;
- *General public:* creation of new jobs, local market development, healthy environment, sponsorships.

In conclusion, we can assess corporate social responsibility as "an obligation freely assumed by a firm, beyond the legal obligations or restrictions imposed by economic, to pursue long term goals are for the benefit of society" [14].

The advantages of CSR have been seen and will be taken increasingly on the future by more and more companies which are interested in a long-term strategy and an investment that brings benefits not only the image and confidence level but also at sales, all leading to the identity of a smart and healthy organization.

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INVESTMENT IDEAS IN A VOLATILE ENVIRONMENT - A STUDY CASE FOR THE 2012 SOCIETY

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Abstract
The year 2011 has proven to be a highly volatile year, especially if we take into account the Eurozone crisis. Even so, the year 2011 has proved to be a year in which great opportunities were created, as well.
Our article "Investment Ideas in a Volatile Environment - A Study Case for the 2012 Society" starts by presenting both the strong and the weak points of the year 2011, in terms of assets markets and net results, continuing with the general outlook of the year 2012 and putting a strong emphasis on the investment ideas for 2012.
In our study we are going to describe the opportunities that exist in the year 2012, providing answers to questions such as: what equities should investors focus on, what changes can be predicted in terms of foreign exchange market, what will the evolution of the commodities be like, how will the evolution of different types of currencies look like.

Keywords: *investments, volatile environment, economic crisis, emerging markets, value, global turmoil.*

Introduction

In our opinion the issues concerning the investment process should be more present in our plans, perspectives and minds, especially in times of crisis than in times of wealth and growth. It is our belief that the best opportunities arise during the recession and during the crises period than otherwise.

Starting from this particular assumption, our paper focuses, in the first part on the literature review concerning the terms "investment", "investing", "asset", and how should investment decisions best function. The paper continues with the investigation of the decisions that were taken in 2011, in terms of investments, market development and financial perspectives. Furthermore, we have stated that a volatile environment is a place in which individuals should take more risks, find better opportunities and invest accordingly. That is the main reason why, after closely investigating the marketplace, in terms of economic, financial, and accounting perspectives, we have presented fields in which is better to invest in during the year 2012.

What is the field that the paper covers?

The paper covers the field of investments, and takes into consideration the evolution of the year 2011 in terms of economic perspectives. Also, the paper refers to the new opportunities that the year 2012 brings with it, in terms of economic, financial and accounting views.

What is the importance of the subject chosen and what are its main objectives?

The subject that we have chosen in terms of debate is extremely important and keeps its validity in all times and places. Its objectives are to show the relevance of the terms investment, investing and assents, than to describe the pros and cons of the year 2011 in terms of investments, and to show to possible investors which are the key points of the year 2012 and its strong parts.

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What are the methods and means that we are going to use in order to conduct our study?

Our study presents in a critical manner the issues on investment, investing and assets, in turbulent times, such as the times of crisis. The article is a theoretical inquiry in this respect.

Which is the state of research in the field and in terms of literature review?

The subject of investments is an extremely complex one, and there are a lot of studies in this matter. What makes this paper extremely useful for academics and researchers is the comparison between the years 2011 and 2012 in the matter of investments, and the key points in which one should invest in during the year 2012, aspects which are clearly presented and explained. Moreover, the literature review part that comes next will underline the importance of investment in nowadays society.

Literature review

Our belief, in our position of research economists, is that nowadays one of the most important and interesting phenomenon is being represented by the way investment decisions are being taken. Investment, as a complex and all mighty fact represents at present the sacrifice that individuals make for future benefits. While deciding upon what one should invest in, each one of us has in mind different aspects, according to the knowledge that one has, interests, expectations, and so on. Of course, the investment decisions are influenced by their fundamental factors, but the aspects that we have in mind while investing are not really easily determined and quantifiable. For example, another factor is the biasness of any investor to their investment, biasness that depends on the cognition and emotions, because some investors use them as heuristic for the investment decision instead of fundamentals, as stated in their work by Amir and Ganzach (1998), Pompian (2006), Peltonen et.al (2009), Kuzmina (2010).

Our research is based on the terms "investment", "investing", "asset", and due to this fact we consider that it is very good to start our inquiry with the explanation of these terms and what we mean when we use them here.

The first term that we stop at is the term "investment". According to the site www.investopedia.com, an investment is an asset or item that is purchased with the hope that it will generate income or that will be appreciated in the future. Taking into consideration the economic sense of an investment, we might say that it is the purchase of goods that are not consumed today but are used in the future to create wealth. The term investment is also used in the field of finance, where an investment is a monetary asset purchased with the idea that the asset will provide income in the future or appreciate and be sold at a higher price.

In order to be clearer, we will refer to some examples, as follows www.investopedia.com:

A situation that refers to the building of a factory used to produce goods and the investment one makes by going to college or university are both examples of investments in the economic sense.

A situation in which we refer to the purchase of bonds, stocks or real estate property, is in fact the financial sense investments include.

We would like to emphasize the fact that the expressions "making an investment" and "speculating" are different in terms of meaning. In this particular matter, investing usually involves the creation of wealth whereas speculating is often a zero-sum game; wealth is not created. Another defining characteristic is the one referring to speculators, who are often making informed decisions, speculation cannot usually be categorized as traditional investing.

The second term that we consider very important in our research process is "investing". According to www.investopedia.com, "investing" is the act of committing money or capital to an endeavor (a business, project, real estate, etc.) with the expectation of obtaining an additional income or profit. "Investing" also can include the amount of time you put into the study of a prospective company, especially since time is money. Good investing refers not only to the simple process of putting some money into an economic process and wait for results; it refers to investing them properly and wisely.

The third term to which we refer to in our paper is "asset". According to the same source quoted above (www.investopedia.com), the term "asset" has to possible meanings, such as:

A resource with economic value that an individual, corporation or country owns or controls with the expectation that it will provide future benefit.

A balance sheet item representing what a firm owns.

In this matter, the term "asset" focuses on the following issues:

Assets are bought to increase the value of a firm or benefit the firm's operations. You can think of an asset as something that can generate cash flow, regardless of whether it's a company's manufacturing equipment or an individual's rental apartment.

In the context of accounting, assets are either current or fixed (non-current). Current means that the asset will be consumed within one year. Generally, this includes things like cash, accounts receivable and inventory. Fixed assets are those that are expected to keep providing benefit for more than one year, such as equipment, buildings and real estate.

Investing in times of economic crisis – an economic perspective

Firstly our intent, at the beginning of this part of our article, is to present first both the strong and the weak points of the year 2011, in terms of assets markets and net results (*see, in this matter, Table no. 1: "The year's 2011 economic evolution – pros and cons"*). We consider extremely important to shortly review the year's 2011 economic evolution, because we feel very confident that the crisis, in some ways, also created opportunities for investors, in general. Starting from these ideas, the year 2011 turned out to be a highly volatile year, particularly because of the Eurozone crisis. We consider that the asset markets performed reasonably well during some months, but there were also saw some big dips, especially in August 2011. Moreover, the net result of that did create opportunity in the sense that stock markets are now at levels that do seem to offer value.

Table no. 1: "The year's 2011 economic evolution – pros and cons"

The year's 2011 economic evolution, in terms of assets markets and net results	
Weak Points	**Strong Points**
The great uncertainty brought by the Eurozone crisis.	The Euro crisis is just a part of the global crisis, but it is generally known that all the crisis have brought also good aspects as well.
The potential turmoil in the Middle East.	The currency fluctuation provides new perspectives of investment, on long term.
Furthermore, the American market will continue to grow, but at a slow rate.	In the case in which Euro goes down, the investments can focus on the US dollar, causing benefits on that market.
Moreover, emerging markets will continue to	The emergent markets offer new perspectives

grow but at a slow rate.	in terms of economic, financial, accounting market.
By contrast, peripheral Europe will remain rather weak.	Some countries in Europe, such as Germany, which has a strong economy, maintain her privileged statue no matter what.
The effect of that on a market where both stocks and many credits start the year at fairly reasonable valuations means opportunity exists but it is likely to be volatile.	The investments should be done in terms of prudent decisions and in strong countries or regions.

Source: the authors

In terms of erratic investor behavior, it is for sure correct if we state the fact that the year 2011 has been a period of a lot of uncertainty and the data presented in the table above strengthens all these ideas (*see, in this matter, Table no. 1: "The year's 2011 economic evolution – pros and cons"*).

Nowadays, due to this ongoing uncertainty, planning the investment strategies in this challenging environment is a must, and furthermore, our article presents some top investment ideas for 2012, that could prove very useful.

Secondly, another main interest for us concerning this article referred to some top investment ideas for the year 2012 (https://infocus.credit-suisse.com) (*see, in this matter, Table no. 2: "Key investment ideas for 2012"*).

Table no. 2: "Key investment ideas for 2012"

Key investment ideas for 2012	
The fixed income sector	
The first investment idea	Refers to investing in a diversified basket of core corporates, which are those companies with credit that looks attractive at the current price. Here, specialists usually recommend 70 percent of investment grade names and 30 percent top high yield issuers, in order to have the right combination.
The second investment idea	Takes into account emerging market semi or quasi-government bonds. In this matter, some examples could be: less risky ones are the Korean bonds; more risky are the Chinese, Indonesian and Russian bonds.
The equities sector	
The third investment idea	Takes into consideration the high dividend stocks which are favored in 2012. At this particular point, there are some good quality corporate names which are typically supported by substantial cash on the balance sheet and good potential to keep growing.
The fourth investment idea	Puts an accent on having some covered call writing strategies, which are option strategies where investors get a premium in respect of a stock that they currently hold. Also, another solution is that they can also be implemented through investing in funds or structured products.
The currency market sector: the foreign exchange market	
The fifth investment idea	Takes into consideration the perspectives of diversifying the traditional currencies into Asian currencies and the

	Yen, which could go even stronger.
The sixth investment idea	Refers to enlarging furthermore the currencies investment option, and start focusing also on the Chinese Renminbi, which does tend to trend upwards and is becoming easier to invest in over time.
The commodity market	
The seventh investment idea	Highlights the great potential that lies nowadays on value commodities, those commodities where the price has fallen to a level that looks attractive. An example is the one of some of the industrial metals such as copper. Investing in gold is clearly a good opportunity for investment, especially in uncertain times.
The real estate sector	
The eight investment idea	Takes into account the real estate perspective of investing in order to generate income. In this area specialists tend to recommend either exposure via collective investments where the price has come down a bit or, for specialist investors who have access to direct real estate investments, commercial opportunities exist in some markets including Australia, Singapore, parts of the US, parts of Latin America, as well as parts of Germany and France.

Source: the authors

Conclusions

In terms of conclusions, we have imagined to possible scenarios, with two possible settings in respect to solutions:

Scenario no. 1: The Eurozone crisis goes out of control: In the context in which the Eurozone crises really were to go out of control, then the euro would weaken a lot more than any scenario made until now. In consideration to this, some new and more interesting options would suggest to invest on the dollar or Yen. In this context, also buying Australian dollar long-dated sovereign bonds would prove to be a very good idea because if things do go wrong the world economy will be bad, commodity prices will come down and while that is bad for the Australian economy, it is good for Australian bonds. The recommended solution would be the one of hedging those into US dollars.

Scenario no. 2: The Eurozone crisis goes better, or anyway as predicted: In the case of a better evolution of the Euro crisis bonds and in the case in which high debt countries were to perform well, than it would be recommended to invest in Italian and Spanish bonds, for example.

Our study is useful both to academics and researchers, but also has its limitations, concerning the economic, financial and accounting field. We would suggest in the future, as a perspective for further investigation and research, to take each of the points recommended above as investment opportunities, and see their real value at the end of the year 2012, or at the beginning of the year 2013.

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THE BONUS-MALUS SYSTEM MODELLING USING THE TRANSITION MATRIX

SANDRA TEODORESCU*

Abstract

The motor insurance is an important branch of non-life insurance in many countries; in some of them, coming first in total premium income category (in Romania, for example).

The Bonus-Malus system implementation is one of the solutions chosen by the insurance companies in order to increase the efficiency in the motor insurance domain. This system has been recently introduced by the Romanian insurers as well.

In this paper I present the means for modelling the bonus-malus system using the transition matrix.

Keywords: *Bonus-Malus, system, Romanian Bonus-Malus system, transition matrix, motor insurance.*

Introduction

One of the most important problems in the Romanian insurance market is the increase in damages.

Car insurance is part of the general insurances activity and has an important share in terms of revenues, in the specific markets from Romania and from abroad. Even more, it is estimated that over 75% of the paid damages by the Romanian insurance companies are caused by the motor segment.

Dominating the portfolio of most of the composite insurance or of the general insurance companies, with increased rates which have maintained above 25%, in the last 5 years, the auto insurance can be denominated, without any doubt, a running "engine" for the Romanian insurance market. Its dominating position leads to a higher risk of market destabilization.

In Romania, the auto insurance segment has the largest market share (57%), setting the market trend and having a constant increase, against a background of:

- increase in the number of cars;
- increase in the auto park value;
- increase in the number of car accidents;
- increase of the damages rate;
- increase of the repair tariffs;
- the road infrastructure is the same.

The traffic indiscipline, the increased tariffs of the auto services, the emergence of more and more refined methods of defrauding the insurance companies and the climatic conditions that undergo a continuous change exert a great influence over the damages amount of the Motor Hull insurance segment.

Against this background, the necessity to modify the calculation system of the individual level of the bonus for the Motor Hull insurance emerged, considering the fact that the driver is the guilty party for causing an accident in most of the cases, and not the car. Thus, in setting a bonus one should consider the insured person profile: age, legal status, residence locality, driver's license duration, destination, the frequency and manner of car usage and also the driver's conduct in traffic. At the same time, one should not overlook the car features: the brand, the model, the original value, age, technical features (power, cylindrical capacity etc.), the additional gear and the safety systems.

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With the renewal of the auto park, the number of Motor Hull policies concluded by the insurance companies increases, as well.

The majority of the companies that subscribe to the Motor Hull policy are in search of new solutions to limit the effect of the damages dualities. Some of the solutions chosen by the insurance companies in order to cut costs on the auto segment are the deductible franchise, the implementation of the Bonus-Malus system (reward and punishment) and the use of independent systems of the costs calculation.

Definitions and remarks

Definition 1.

The Bonus-Malus system can be defined as an auto insurance system which requires the payment of a more substantial premium by the ones who are affected by damages, and a premium reduction for those who do not have undesired road events.

Malus (penalization) represents the fraction between the bonus collected by the insurer for a year of Motor Hull and the total paid or due to be paid (for damages which are about to be solved) damages by the insurer in that year. Depending on the value of that fraction, the bonus for the next year will increase up to 50%.

Bonus (reward) represents the decrease of the premium with percentages between 0- 50% and is granted for consecutive years of damage free Motor Hull.

Remark 1.

The Malus can be simple or, in many cases, a few times higher than the value of the insurance premium, depending on the insurance companies established criteria.

Another definition of the Bonus-Malus system, this time in mathematical terms, is presented below [4].

Let`s assume that, for a certain type of insurance, there is a number of rating levels J, numbered from 1 to J. In the first year of the insurance, any policy is placed in a starting level j. A policy remains in a certain rating level over a period of an insurance year. For the i class, the insurance premium will be P(i).

If a policy that is in the i rating level had during the course of the year r damages, then at the end of the year it will be transfered into the C (i,r) rating level. The C function defines transitions rules from one rating level to the other for the Bonus-Malus system. The rating levels have the following property: if k>1 then the k level is „better", having a smaller premium, so $P(k) \le P(i)$.

So, the principal purpose of this system is that the „good" risks arrive in the high levels (of Bonus), and the „bad" risks in the lower levels (of Malus).

Definition 2.

In conclusion the Bonus-Malus system can be defined by the triplet (C,i,P), made up by the bonus elements. The (C,j) pair forms the bonus rules. The bonus elements must verify the conditions:

the P function is decreasing

the C(i,r) function is increasing in i (for a fixed r) and decreasing in r (for a fixed i).

Below are presented definitions and some basic properties of Markov chains. The purpose of these definitions is to model the Bonus-Malus system.

Definition 3.

A stochastic process $X = \{X_t, t \in \mathbf{N}\}$ in discrete time is called a (first order) Markov chain if

$$P\left(X_{t+1} = j \middle| X_t = i,\ X_{t-1} = i_{t-1},\ ..., X_0 = i_0\right) = P\left(X_{t+1} = j \middle| X_t = i\right)$$

for all $j, i, i_{t-1}, ..., i_0 \in E$, where E is the state space of the Markov chain.

The probability

$$p_{ij}(t) = P\left(X_{t+1} = j \middle| X_t = i\right) \tag{1}$$

is called (one step) transition probability. The matrix

$$P(t) = \left(p_{ij}(t)\right) \tag{2}$$

is called transition matrix or matrix of transition probabilities. It is a stochastic matrix, since all rows sum to one.

The probabilities

$$p_{ij}^{(r)}(t) = P\left(X_{t+r} = j \middle| X_t = i\right) \tag{3}$$

are called r-step transition probabilities, in particular, $p_{ij}(t) \equiv p_{ij}^{(1)}(t)$. Similarly, the matrix

$$P^{(r)}(t) = \left(p_{ij}^{(r)}(t)\right) \tag{4}$$

is called r- step transition matrix.

Remark 2.

The probability (1) could be translate in insurance terms thus: the probability of the insured placed in the i rating level, in the t year, to pass into the j rating level, the next year.

The probability (4) could be translate in insurance terms thus: the probability of the insured that was placed in the i rating level, in the t year, to pass after r years, into the j rating level.

Definition 4.

In probability theory and statistics, the Poisson distribution is a discrete probability distribution that expresses the probability of a number of events occurring in a fixed period of time if these events occur with a known average rate and independently of the time since the last event. Such a variable represents the number of damages during the validity of the policy , wich in non-life insurance is equal or less than one year.

If $N \square\ Poisson(\lambda),\ \lambda > 0$, then

$$p_x = P(N = x) = e^{-\lambda}\frac{\lambda^x}{x!}, \quad x \in \mathbf{N} \tag{5}$$

The Poisson distribution is often used in practice, in case of the frequency of damages, thanks both to its simplicity and to its good properties such as aditivity: if $N_i \sim Poisson(\lambda_i), i = 1,2$, are independent, then $N_1 + N_2 \sim Poisson(\lambda_1 + \lambda_2)$.

Definition 5.

The process $N(t)$ is a Poisson process if for some intensity $\lambda > 0$, the increments of the process have the following property:

$$N(t+r) - N(t) \sim \text{Poisson}(\lambda r) \tag{6}$$

for all $t > 0, r > 0$ and each history $N(s), s \le t$.

As a result, a Poisson process has the following properties:

as increments are independent: if the intervals $(t_i, t_i + r_i), i = 1,2,...$, are disjoint, then the increments $N(t_i + r_i) - N(t_i)$ are independent;

the increments are stationary: $N(t+r) - N(t)$ is $\text{Poisson}(\lambda r)$ distributed for every value of *t*.

Remark 3.

Frequently a Poisson distribution is used to model the transition probabilities within a Bonus-Malus system [1]. To be more specific, the Poisson distribution describes the number of claims for an individual and the transition probabilities are determined from this claim frequency distribution. Hence, the number of claims in each year is a $\text{Poisson}(\lambda)$ variable and the probability of a year with one or more claims equals $p = 1 - e^{-\lambda}$.

Some examples of a Bonus-Malus system. The Romanian Model.

The Bonus-Malus system determines a total different conduct from the actual behavior of the Romanian insured. The percentage of the Motor Hull insured that were compensated in the course of a year, in our country is over 50%, the damages ranging between minor scratches and broken rear mirrors.

In the countries where the Bonus-Malus system has been developed, this type of damages are usually solved by the insured on his expenses, in order to maintain the Bonus-Malus scoring and not to fall, implicitly, in a superior risk category. And the increase of the rating level is much more expensive than a simple repairment.

Every country has his own Bonus-Malus system, the wheel having been reinvented quite a few times. First, a basic premium is determined using rating factors like weight, catalogue price or capacity of the car, type of use of the care (privately or for the business) and of course the type of coverage (Motor Hull Insurance, Motor TPL Insurance or a mixture). This is the premium that

drivers without a known claims history have to pay. The bonus and malus for good and bad claims experience are implemented through the use of a so-called Bonus-Malus scale.

One ascends one step, getting a greater bonus, after a claim-free year, and descends one or several steps after having filed one or more claims.

There are different rating factors and a different Bonus-Malus scale for different countries [3].

The Romanian Model. The transition matrix.

The Bonus-Malus scale, including the percentages of the basic premium to be paid and the transitions made after 0,1 or more claims, is depicted in Tabel 1. In principle new insureds enter at the step with premium rate (adjustment coefficient) 100%. This is only one Bonus-Malus model used by Romanian insurance companies.

Table no. 1

Transitions rules and premium rates for one the Romanian Bonus-Malus system

Rating level (class)	Premium rate (percentage)	New Bonus-Malus step after claims							
		0	1	2	3	4	5	6	≥ 7
0	250	1	0	0	0	0	0	0	0
1	170	2	0	0	0	0	0	0	0
2	130	3	1	1	0	0	0	0	0
3	110	5	2	2	1	0	0	0	0
4	100	5	3	2	1	0	0	0	0
5	95	6	4	3	2	1	0	0	0
6	90	7	5	4	2	1	0	0	0
7	80	8	6	5	4	2	1	0	0
8	70	8	8	6	5	4	2	1	0

Using the relations (1) and (5) we have:

$$p_{ij}(t) = \{k\} = p_k = \frac{\lambda^k}{k!} e^{-\lambda} \tag{7}$$

or

$$p_{ij}(t) = \{k, k+1, \ldots\} = \sum_{l=k}^{\infty} p_l \tag{8}$$

For example:

$$p_{53}(t) = \{2\} = p_2 = \frac{\lambda^2}{2!} e^{-\lambda} \quad p_{50}(t) = \{5, 6, 7, \ldots\} = \sum_{l=5}^{\infty} p_l$$

;

.

Then, the transition matrix (2) , accordingly to the Romanian model, is:

$$P(t) = \left(p_{ij}(t)\right)_{i,j=\overline{0,8}}$$

.

Consequently, the transition matrix could be presented as follows (table no. 2):

Table no. 2

Transition matrix for the Romanian Bonus-Malus system

i / j	0	1	2	3	4	5	6	7	8
0	{1,2,3…}	{0}	.	.	.	.	.	.	.
1	{1,2,3…}	.	{0}	.	.	.	.	.	.
2	{3,4,5…}	{1,2}	.	{0}	.	.	.	.	.
3	{4,5,6…}	.	{1,2}	.	.	{0}	.	.	.
4	{4,5,6…}	{3}	{2}	{1}	.	{0}	.	.	.
5	{5,6,7…}	{4}	{3}	{2}	{1}	.	{0}	.	.
6	{5,6,7…}	{4}	{3}	.	{2}	{1}	.	{0}	.
7	{6,7…}	{5}	{4}	.	{3}	{2}	{1}	.	{0}
8	$\{\geq 7\}$	{6}	{5}	.	{4}	{3}	{2}	.	{0,1}

where . = 0.

Conclusions

The ultimate goal of a Bonus-Malus system is to make everyone pay a premium which is as near as possible the expected value of his yearly claims.

The Bonus-Malus system is the powerful instrument to assess individual risk. Note that for the transitions in the Bonus-Malus system, only the number of claims filed counts, not their size. Although it is clear that a Bonus-Malus system based on claim sizes is possible, such systems are hardly ever used with car insurance.

In conclusion, the basic characteristics of Bonus-Malus system are:

classification according to claims experience (period: 1 year);

number of classes and period required to reach maximum bonus

beginner's class

reclassification at renewal.

As to the reduction of the duality, cooperation between insurers is necessary, in the sense of creating a common database or multilateral agreements, for Bonus-Malus system implementation and the tariffs depending on the risk profile.

By applying the Bonus-Malus system the company assumes the risk of losing many clients disadvantaged by the significant increase of the rate premium, in the next period, but the favorable results will appear on a long or medium term.

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PROBLEMS FOR THE ACCOUNTING OF POLITICAL PARTIES IN KNOWLEDGE SOCIETY

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Abstract

The society needs good reports from the accounting of political parties. The public power, including the Government, depends on the kind of financing of political parties. The improvement of the control of resources used by the parties accounting is very important. The paper presents the tools for the accounting of political parties in knowledge society. The paper contains the author's opinion on current issues of political party accounting. Arguments are presented against some recent proposals to amend the regulations, arguments in favor of concrete solutions and the analysis of the correlation between accounting expertise and the political parties accounting in the knowledge society.

Keywords: *accounting, reports, finances, main solutions to improve accounting of political parties in the knowledge society, political parties.*

Introduction

The domain covered by the paper

Communication is part of both accounting and finance. The problem of financing political parties, including election campaigns, is part of finance. The problems of political party funding are analyzed from the perspective of the information that is or should be provided by accounting. This in turn comes in contact with another borderline discipline, the accounting expertise. Likelihood of litigation relating to the funding of political parties and electoral campaigns is quite high because it is often wanted for the problems of funding a party to be used as a political weapon by opposing political parties.

The importance of studying the problem presented in the paper

The issue of financing and the accounting of political parties is related to a number of important issues of the knowledge society: who and with what means does the government lead, who is behind those who have gained political power and who supports the opposition (which want to take the power). The quality of public management depends very much, especially in the knowledge society, of the quality of those who have power and their ability to respect the transparency in money management, including in the struggle to win political power.

The objectives considered by this scientific paper

The study aims to bring in debate current issues specific to the knowledge society, related to the informational control regarding the accounting of political parties.

How the study responds to the paper's objectives

Modern accounting aims, among others, „to cast a real light upon income and expenditure" [1]. For this reason the income of political parties is in close relationship with both their administration activity and with the level or form of expenses. In the study there are put into question the proposals usually formulated in an informal setting by the civil society, an essential element in the knowledge society, or by practitioners. All these aims at transparently determining revenues, expenditures and financial position of political parties. Some proposals are not appropriate for the objectives. Others would bring added knowledge of the real financial situation of political parties. We presented pro or against arguments for each one, as applicable. We also considered the role of accounting expertise in improving information financial flows of political parties.

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[1] Dumitru Voina, *General accounting course* (Bucharest: Academiei Publishing House, 1944), 7

To answer questions on financing political parties, as for many other problems of life, society disposes of accounting tools. They were very much improved in the knowledge society. There is a true reflex of citizens in knowledge society to find answers from accounting to problems where money is involved.

The level of knowledge in the presented paper

Accounting for political parties is still in an applicative and empirical research phase. When theoretical references are made to the financial statements of political parties, they are presented as a specific form of association[2]. In other countries studies of political parties accounting are also rare and occur in response to either changes in legislation[3] or to major problems of democracy related to the lack of public control over financing political parties or election campaigns[4].

Inadequate solutions in terms of the accounting law proposed by public authorities or by non-governmental organizations

Public opinion in Romania has put pressure on public authorities for improving the reporting method of revenue and expenditure of political parties, seen as an essential element of the democratic process. In a bid to increase transparency of financing political parties and electoral campaigns, some proposals were made not in accordance with accounting law or the fundamental principles of the European civil law. The list of these proposals and the arguments against them are presented in Table No. 1.

Table 1

No.	Proposal content	Arguments against proposal
0	**1**	**2**
1	The prohibition to conclude loan contracts	It has a vague character and could lead to confusion and misinterpretation. It is not specified whether it's prohibited for a party to act as borrower or lender, neither if it about financial loan or commercial loan. The general prohibition of the loan according to the wording of the bill may require parties to pay on the spot any benefits, commercial credit also being banned, which would be absurd. Only the operation by which a party can grant a financial loan from income specific to political activity can be banned. Any other type of prohibition has implications in other chapters of the law regarding financing political parties making certain provisions inoperative[5].
2	Regulating political parties accounting by completing the legislation on financing political parties and electoral campaigns	In principle any accounting regulation should be included in the Accounting Law. In Romania as in other European countries there is a tradition of 100 years in compliance with the regulatory unit of accounting. Even during periods of authoritarian regime, the accounting regulation was achieved through a specific legislative act[6]. Proposed

[2] For example Virginia Greceanu Cocoş, *Comparative, commented, alignment, simplified and updated accounting for non-profit legal entities*,(Bucharest: ProUniversitaria Publishing House, 2008)

[3] Marie Goransson, Jean Faniel, *Le financement et la comptabilite des parties politiques francophones, on www.*

[4] The proposals of Institute of Charted Accountants of India, on the website www.zeenews.india.com

[5] Commercial loan is a part of commercial sales.

[6] Government Decision 1598/1948 and Government Decision 846/1950

No.	Proposal content	Arguments against proposal
0	1	2
		changes to political parties accounting, as rational or necessary as they would be, must be included in an initiative to amend the Accounting Law and not the legislation regarding parties financing. The regulation on the reconstruction of lost, stolen or destroyed documents should refer to common provisions in the field. An evasive wording specific to political parties is not justified if there is a common, well-defined framework with a relevant practice. Accounting standards have general rulls adecquate including for political parties: the discussion about objectives is really about which group′s returns management is trying to maximise.[7]
3	Obligation to communicate quarterly contributions revenue within 30 days	The obligation to communicate quarterly contributions revenue within 30 days has the character of an accounting report. Economic entities and all other types of entities have a longer deadlines for the first semester. Usually the deadline for reporting is around August 15. For annual reporting there are no deadlines with less than 60 days.[8] A 60 calendar days duration is recommended for every periodic reporting, including the one regarding contributions. The objective is to obtain accurate reporting, not sanctioning parties for late submission of the situation.
4	Obligation of collecting contributions and donations of more than 1,000 lei in bank accounts	Obligation of collecting contributions and donations of more than 1,000 lei through bank accounts should be eliminated for the following reasons: is inconsistent with the rules on the movement of money. Government Ordinance 15/1996 has a cap on cash operations only between legal entities[9]; cash operations of much greater value and operations of greater complexity are allowed, such as property sale or sale of agricultural products; there was not recorded any exaggerated volume of cash revenues in the nature of contributions or donations to disrupt the circulation of money as a whole; political parties in Romania face a chronic under-funding and the introduction of new restrictions increases the financing gap; the previous limit of privacy equivalent to 10 salaries (in terms of donations) is amended. There is no reason that the limit for privacy of contributions to be much smaller; the extent of the banking sector is not as high in Romania so that most people would have a personal account; such legislation limits the ability of citizens to participate in the

[7] ACCA Financial information for management, ACCA Official Publisher, London, 2001, pp.27
[8] Law 82/1991, point 36
[9] Government Ordinance 15/1996, updated, point 5

No.	Proposal content	Arguments against proposal
0	**1**	**2**
		financing of political parties.
5	Recording donations at market value	The liberties and benefits received for free by parties fall are registered as fair value, an accounting concept that includes the market value. Some favors or benefits do not have market value. The proposed regulation creates a blokage in recording favors or benefits received for free in accounting.
6	The introduction of a specific stipulation allowing all the contributions received during the campaign to be transferred to campaign financing if they are passed through specific campaign treasury accounts in compliance with accounting regulations	Contributions are legal and permanent sources of financing political parties. Individual amounts are small and can not generate frauds in the election campaign funding transparency. Accounting legislation requires the existence of supporting documentation for such transfers. In principle it is natural that the amounts remaining from the campaign to be transferred to the current activity. The transfer operation will be performed by the financial agent as part of its obligations and will be subject to review by the Permanent Electoral Authority to finance the campaign. A deadlock is avoided after which at a subsequent control there is another point of view than at the election campaign financing control.
7	Drafting a trial balance in 15 days after the completion of the election campaign.	The 15 days period to prepare the trial balance is unrealistic and in conflict with the provision of other legal rules: the invoice may be issued under the Tax Code within 15 days after the benefit[10]; therefore for the services rendered in the last days of the campaign there is no time for the movement of the invoice from supplier / provider to the beneficiary and for the centralization of data; Payments are due within 30 days from receiving the invoice; only after that date that they become outstanding[11]; In conclusion the trial balance drafted after 15 days of completion of the campaign has preliminary data that does not use the information system in any way.
8	Unspent money from the campaign of political parties are made revenues to the state budget.	Confiscation is a penalty and can only be based on a deviation from legal norms; savings during a campaign is an approach to efficiency that can not be punished by confiscation; savings during campaigns of independent candidates can be discussed in the spirit of the Constitution[12]; amounts unspent in the campaign of political parties must be transferred to the current activity; they can not be seized.
9	Political parties are required to submit all documents and information	Documents whose provision depends on third parties and which political parties have not included in the mandatory reports can not be requested.

[10] Tax Code, point 155,about invoice
[11] General rull including for public entities
[12] Romanian Constitution, point 44

No.	Proposal content	Arguments against proposal
0	1	2
	required to PEA within 15 days if those documents forms or had formed, according to accounting rules and rules regarding parties funding, the basis for preparation of legal accounting reports.	

Solutions to improve accounting of political parties in the knowledge society

In knowledge society there are special requirements to effectively achieve transparency in parties financing. Accounting plays an important role. The control system of the financial management method also acts besides accounting. To improve certain components of this flow I would suggest that solutions presented in Table 2 are taken into account. The arguments presented draw attention to their usefulness.

Table 2 - Solutions to improve accounting of political parties in the knowledge society

No.	Solution to improve accounting	Arguments and methods of achievement
0	1	2
1	Strict control on the actual political independence of people in the financial control bodies of the parties	High profile public friendship relations between employees of financial control bodies of political parties and members of governing bodies of the parties should be eliminated. In addition political rewards subsequent to membership term in control bodies must be monitored.
2	The special sanction of transitioning from one party to another of people who meet financial responsibilities and do not loyally fulfill their assumed duties.	Accounting of parties must be a true mirror of the management of funds. Infiltration from one party to another in order to create financial problems alters the true and fair view that accounting must provide.
3	Clarifications on the establishment of the limit of donations to political parties in the case of a individual's natural association with a company.	If the individual has donated an amount of a party's campaign, a commercial company should be able to donate. Functioning of any company is based on the principle of property separation between employers (shareholders, partners) and the company they have shares to[13]. For this reason the individual must always be treated as a separate legal entity than the one to which it has holdings. When the law sets limits on party and electoral campaigns financing then they are valid for every legal entity. Therefore the limit of donation should be treated as a sum of the individual limits and of each legal entity controled by it.

[13] Commercial Code and Civil Code from Romania

4	Completing the list of expenditure categories by introducing fundraising expenses	A political party that organizes fundraisers has a number of expenses. These are associated to the current activity. Their separate recording proves transparency in party financing.
5	The precise regulation of the campaign surplus.	Unspent or surplus income over the legally allowed maximum is to be carried to the current activity of the party or any other legal project, as decided by those entitled.
6	Any other sources obtained during the election campaign outside contributions can be used for campaign financing if they are declared at Permanent Electoral Authority	The introduction of a provision to allow any other sources obtained during the election campaign outside contributions can be used for campaign financing if they are declared at Permanent Electoral Authority similar to donations and legacies.

The correlation between the accounting of political parties and the accounting expertise in knowledge society

Accounting expertise is susceptible to interference with the accounting activity of political parties as well as in all types of organizations outside of some processes or in processes.

Besides some processes, accounting expertise can track the accuracy of financial statements of political parties especially when replacing the management, determining some accounting and financial vulnerabilities, how the legislation with application in accounting can be met in the case of political parties, transfering balances and accounting activity between current accounts and accounts of election campaigns, etc.. Current legislation has no clear provisions on how accounting expertise operates. In the case of political parties the fluctuation of management or execution personnel may be higher and less predictable. Legislation should specify the compliance obligation and the presence of persons who finish their mandate or withdraw from a party when conducting accounting expertise for the duration of the mandate. Changing policy options should not affect the management of funds that is basically a matter of public interest.

The accounting expertise in a process related accounting of parties on the one hand takes the general elements of such an accounting expertise but also has special features.

According to the rules of civil procedure, the parties in a process are obliged to give the expert any clarification about the subject in work. This is also required of people who represent the political party at the date of the process and those that represented it during litigation. In the absence of mandatory rules, because of the fluctuation specific to politics there is the risk that people who ordered certain actions or inactions can not be constrained in any way to express themselves on the facts of their mandate. If they do not participate in the expertise it will be very difficult for possible effects of the court sentence to be applied to them. Thus it creates an advantage for people of bad faith. At the same time the legal obligation to be summoned and welcomed to express their opinions of those who met thier mandate in the period subject to litigation also seems as their right. If they do not participate in the expertise, these individuals may be disadvantaged by the court's solutions. There is an unjustified disadvantage for people of good will who want to support the actions and inactions during their mandate.

Given the political fluctuation in the management of political parties it is natural that only supporting documents that have been taken in the financial statements and only final or intermediate reports approved by the party leadership can be invoked against them. Documents provided by people who are no longer part of the party structures can not be included in any expertise much less in a judicial one. The exception to this is the proof that the document has been validated at that date

and included in the financial statements. Another interpretation of the legal regime of supporting documents or intermediate reports of political parties would allow sanctions against smaller political parties in which supporters of large or ruling parties have infiltrated. In no case reports or documents may be accepted that were provided by people for which there is proof that the party imposed disciplinary sanctions, including exclusion.

If the objective of the expertise is related to a dispute between the party and a state authority with control attributions then the obligations of the parties on supporing the work of the expert are very important. The parties, both the control authority and the political party, will simultaneously provide documents supporting their opinion before the expert. Simultaneously, if needed, the person who served in the mandate during the term covered by the control will be called. If it results three distinct interests, all will present views and documents simultaneously, so that truth is not distorted by agreements between two parties. The expertise report will record whether in conclusions were used official documents of the party or and other categories of documents or reports. In justified cases such documents will be included, specifying the reason for their inclusion and the impact their lack would have on the conclusions. In any case, no documents will be received after the submission of the report unless it is proved that they occurred after its preparation. When submitting a document that was not part of the party's official list there will be allow time to identify the actual situation that has generated them. Documents that are not part of the official party list and obtained or made in violation of legal norms or by exceeding internal competencies will also not be used.

The existence of the preparation date, of the period covered and the business segment to which it refers are essential elements in establishing the relevance of each document considered in the expertise report. Separating the a party's current activity from the election campaign and of the main activities from the economic ones are important elements to be considered when taking over a document into the expertise report.

Each person fulfilling a mandate within the party is obliged to know the situation mainly based on the official summary documents or the internal reports they received. They can also be obtained under certain conditions from mail correspondence, specifying that it is not a supporting document unless under limited circumstances.

Any defect in a document made available to the expert, if taken into account in drafting the conclusions, it will have to be mentioned in the report.

Neither party should be allowed to avoid the legal role of the expert of finding out the truth by providing the document directly to the court.

Conclusions

Main solutions to improve accounting of political parties in the knowledge society in my opinion:

- Strict control on the actual political independence of people in the financial control bodies of the parties;
- The special sanction of transitioning from one party to another of people who meet financial responsibilities and do not loyally fulfill their assumed duties;
- The precise regulation of the campaign surplus;
- Any other sources obtained during the election campaign outside contributions can be used for campaign financing if they are declared at Permanent Electoral Authority;
- clear provisions on how accounting expertise operates in the case of political parties;
- only supporting documents that have been taken in the financial statements and only final or intermediate reports approved by the party leadership can be invoked against them;
- participate in the expertise people who represented the political party during litigation.

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- Government Decision 846/1950 from România
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- Law 334/2006 regarding financing political parties and electoral campaigns from Romania
- Romanian Constitution
- Tax Code from Romania

LIMITS AND VULNERABILITIES OF BANKING PROFITABILITY INDICATORS DURING THE FINANCIAL CRISIS

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Abstract
Bank performance measurement, as an expression of banks' ability to generate sustainable profits, is a topic of major interest, located in the core of all categories of participants involved in the banking business: banking supervisory authorities, rating agencies, shareholders, investors and analysts of banking activity.
Recent developments in bank profitability during the global financial crisis have highlighted a number of limitations of traditional banking performance measurement indicators, in respect of their capacity to provide relevant, credible and genuine information related to credit institutions' activity. In this article we intend to argue, by investigations at conceptual and quantitative level, the extent to which traditional indicators of bank profitability provide a comprehensive and real insight into the credit institutions' financial performance.
The empirical study applies the stress test methodology, through which is assessed the extent to which Romanian banking system's performance, represented by ROE, changes in the context of defining adverse, but plausible scenarios. Hence, it had been simulated ROE's degree of response for three types of scenarios. We have applied both univariate stress tests (sensitivity analysis) in order to isolate the potential impact of each risk factor on bank profitability, and multivariate stress tests, which allow the simultaneous application of multiple shocks on risk factors. The results show the most important risk factors that adversely affect banking system's profitability and the concrete value by which profitability is expected to decrease for each scenario analyzed.

Keywords*: profitability indicators, banking systems, financial instability, regulation, stress test scenario.*

Introduction

Financial markets' current concern is to strengthen financial activity's regulation, a special emphasis being placed on refining the capital adequacy requirements. Indirectly, on medium and long term, banking profitability acquires a key role in the capital formation, because maintaining it on an upward trend will enable banks to generate internal capital, thus reducing their dependence on foreign or interbank loans.

Profitability ratios are used to measure how well a business performs in terms of profit, by offering different scales for assessing an entity's ability to achieve positive financial results. The analysis of a bank's ability to be profitable has been the subject of numerous studies, which revealed the presence of correlation between bank performance and macroeconomic variables.

Bolt, de Haan, Hoeberichts van Oordt and Swank (2011) examined the relationship between banking profitability and business cycles, by developing a model which takes into account the history of bank loans, amortization and provisions. Their analysis focused on bank profit components: net interest income, other income, net provisions and other costs. The results confirmed the cyclicality of bank profits and their strong decline during crises. The authors found that for each percent of GDP contraction, during a severe recession, it is registered a decline of 0.24% of the level of profitability based on assets (ROA).

Another study (Apergis, 2009) also put in evidence the correlation between bank profitability and business cycles. The relationship is positive and robust in every phase of the economic cycle, but

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in the expansion phase the correlation is even more intense and is conclusive both in the case of the emerging and developed countries.

McKinsey global consulting company (Visalli, Roxburgh, Daruvala, Dietz, Lund, Marrs 2011) has analyzed banks' performance in 2010, compared with the average value recorded in the period before the financial crisis (2001-2007). This revealed that banks in emerging markets have managed to recover the performance and confidence indicators in the banking system faster than in developed countries (see the picture below).

Overview of banking "performance" and "confidence" indicators

2010

Better than 2001–07 avg.
Near 2001–07 avg.
Worse than 2001–07 avg.

		Developed markets	Emerging markets
Performance	1 Financial depth[1] (% GDP)	427	197
	2 Banking revenue pool growth after provisions (%)	23	21
	3 Net interest and fee margins (%)	2.7	5.9
	4 Annual provisions for loan losses (% revenues)	23	16
	5 Nonperforming loans (%)	4.0	3.8
	6 Cost-to-income ratio (%)	54.0	45.7
	7 Banking profit pool growth (%)	141	28
	8 Bank ROEs (%)	7.9	19.6
	9 Bank capital ratios (TCE/RWA[2], %)	10	14.1
	10 Loan-to-deposit ratio (%)	92.2	82.3
Confidence	11 Cross-border capital flows (% GDP)	9.2	5.6
	12 Short-term cross-border loans[3] (% foreign liab.)	12.3	11.9
	13 LIBOR-OIS spreads (bps)	21.6	-
	14 Bank CDS spreads (bps)	136	213.7
	15 Bank market caps (% total market cap.)	10.8	17.3
	16 Bank P/B multiples	1.0	1.9

NOTE: "Better/worse than 2001–07 average" indicates deviation >10%
1 Stock market capitalization, public debt securities, financial and nonfinancial corporate bonds, and securitized and nonsecuritized loans
2 Tangible common equity/risk-weighted assets
3 Stock of cross-border loans with a maturity of less than 1 year

SOURCE: McKinsey Global Banking Practice; McKinsey Global Institute

Also, the authors have made a forecast relative to the potential level of ROE in 2015. For U.S. banks, it is expected to vary between 6.2 and 8.3%, while for the European Union banks it will range between 7.4 and 8.6%, well below the levels recorded in the year prior to crisis (11.4% in the U.S. and 16.7 % in the EU in 2007).

Aebi, Sabato, Schmid (2011) examined the extent to which corporate governance, subordinated to risk management procedures, exerts any influence on bank performance during crises, especially in 2007-2008. The results indicate that banks are determined to maximize shareholder wealth before the crisis and to take on risks in order to generate significant revenue later. Banks that are well prepared to cope with financial crises present an important and significant improvement in the quality of risk management function, but, at the same time, a lower performance than previous periods. An important point is that related to the mix of factors that impact banks' performance during crises. The results show that liquidity and credit quality are the variables that contribute positively to banking performance recording.

Another study that answered the question why some banks perform during crises is Beltratti and Stulz (2009), which made a comparative study on the impact of governance and banking regulation. Using conventional indicators to express corporate governance, the authors show that

banks with a friendly relationship between its board and shareholders registered poor performance during crises; in turn, countries where regulations are strict in terms of capital and supervisory authority is independent, banks registered better performance.

According to Coffinet and Lin (2010), from the standpoint of supervisory authority, the identification of vulnerabilities that may have negative impact on bank profitability is subordinated to maintaining banking system's solvency.

Bank profitability sensitivity to adverse, but plausible changes in the macroeconomic, financial and bank-specific indicators is a concern that catches more and more shape, being subject to stress tests carried out under the aegis of central banks.

In this respect, Coffinet and Lin (2010) conducted a study on the French banking system, for the period 1993-2009, the empirical results indicating that although the profitability of individual credit institutions is largely influenced by GDP growth; interest rate spread; volatility of capital markets; the share of financial income, other than interest, in the total asset; banks' size and capital ratio, all the simulated shocks do not severely erode the profitability level.

Stress tests conducted at the Bank of Norway (Andersen, Berge 2008), based on a sample of five major credit institutions, have reported that under a scenario of severe housing prices decrease, rising interest rates and boost of banks' risk aversion, their profits will face a downward trend.

Rouabah (2006) performed univariate stress tests on banks profitability in Luxembourg, based on historical data series for the time interval 1994-2005. Results indicated that the monetary shocks have a marginal effect on the level of profitability, but the GDP and stock index Stoxx DJE variation have a high impact on the revenue of Luxembourg banks.

Stress exercises conducted by Lehmann and Manz (2006) for the Swiss banking system revealed significant influence of GDP growth rate and interest rates on bank profitability. The stress scenario that captures the simultaneous manifestation of the recession, lower stock prices and increasing interest rates has generated substantial loss of profitability for Swiss banks.

On the other hand, a strong point of view, supported by the European Central Bank (2010), is on the ROE indicator limits during the current period of financial instability. The ECB has made a number of critics on the ability of this indicator to provide relevant information about bank performance, after the onset of financial crisis. Thus, ROE as a measure of performance has some limitations, namely:

- *it is not risk-sensitive;*
- *it hasn't a long term predictive ability*. A number of banks that, during the financial crisis, recorded significant losses had, with 3-4 years before its onset a good level of ROE. Therefore, ROE is a short-term indicator and has many weaknesses in times of financial uncertainty;
- *provides contradictory information*: for example, while banks have had to restructure their capital by issuing new titles, this strategy for improving capital and income has generated a decline in ROE;
- ROE is the *best known indicator of bank performance*, being under the attention of all market investors. Targeting this performance indicator exposes the bank to a strategy based on short-term balance sheet management;
- *lack of transparency and inconsistency* of this indicator made it difficult and irrelevant to be used for comparisons across different banks. Non-recognition of losses and the use of different accounting standards show that this indicator cannot be used for comparative measurement of bank performance.

In the present study we aimed, in the first instance, to investigate to what extent the traditional indicators of bank profitability provide a comprehensive picture of the actual financial performance of banks. The second part of the study evaluates, by applying the stress test methodology, the way Romanian banking system's financial performance will change, as a result of simulating adverse, but plausible scenarios that may materialize in the loan portfolio or macroeconomic environment.

The stress test methodology and simulation results

In the following, we intend to evaluate the impact of macroeconomic and bank-specific risk factors on the traditional indicator ROE, which provides a quantitative measure of the global performance, recorded by all the business lines of a credit institution and synthesizes shareholders' investment profitability.

The empirical study involves two steps: a) defining and processing the set of explanatory variables, by applying stationarity tests, multicolliniarity tests, deseasonalisation and estimating the functional form of the equation; b) performing stress test analyses, through which it had been measured the degree in which Romanian banking system performance changed in the context of the definition of adverse, but plausible scenarios.

In essence, stress exercises are designed to identify potential sources of vulnerability (risk factors) for a financial institution and to simulate the impact of extreme events on its activity. These complete the risk management tools available to financial institutions and central banks.

A report published by the BIS (2005) made a synthesis of major financial institutions' stress test practices, revealing that 47.5% of them consist of sensitivity analyses, 30.43% are hypothetical scenarios and 22.01% are scenarios based on historical data analysis. Most stress exercises were designed to simulate changes in interest rates or credit.

In this study we have simulated the response of ROE indicator for three types of scenarios: one reflecting increases in idiosyncratic risk factors (bank-specific risks: credit risk, liquidity risk, interest rate risk), other that captures the impact of exogenous factors, having a macroeconomic nature (unemployment rate, inflation, average salary on economy, EUR/RON exchange rate) and a third one that combines idiosyncratic risk factors with macroeconomic ones.

It had been performed both univariate stress tests (sensitivity analysis) in order to isolate the potential impact of each risk factor on bank profitability, and multivariate tests, which allow the simultaneous application of multiple shocks on several risk factors.

The analysis was developed based on data aggregated for the entire Romanian banking system, available for the period January 2001 - October 2011, the time series considered having a monthly frequency. The methodology used is the classical linear regression model, the coefficient values being determined with OLS estimation method. In Table 1 we summarized the variables used.

Table 1. Description of variables

Dependent variable	Return on equity (ROE)
Explanatory variables	***Macroeconomic factors:*** - unemployment rate - inflation rate - net average salary on economy - EUR/RON exchange rate
	Bank-specific variables: credit growth loan loss provisions due and doubtful loans/total loans liquidity indicator lending/deposit interest rate ratio

Preliminary analysis of the statistical characteristics for the variables considered revealed the presence of a positive asymmetry (skewness) for *inflation rate, liquidity indicator, lending / deposit ratio, loan loss provisions, due and doubtful credits in total credit, average net salary* and *the*

unemployment rate, suggesting that, during the period considered, these variables have followed an upward trend, while *ROE*, *the* EUR/RON *exchange rate* and *the credit growth* showed a negative asymmetry. Also, we noticed a trend towards platikurtosis for *the exchange rate, liquidity indicator, the average net salary* and *ROE*, the remaining variables indicating a tendency for leptokurtosis, which means that the likelihood for an extreme event to occur is higher. It hasn't been detected the presence of multicollinearity between variables; the time series for unemployment rate, net average wage, loan loss provisions and credit growth rate were deseasonalized. Time series' unit root was tested using the Augmented Dickey-Fuller test. *Inflation rate* and *credit growth* were found to be stationary in level, *the average net wage* is stationary in the second difference while the other variables are stationary in first difference, the null hypothesis of having a unit root being rejected at a critical level of 5%. In addition, the variables were considered in their logarithm, to facilitate the interpretation of the estimated coefficients in the form of elasticities.

In the following, we have estimated the parameters of simple and multiple linear regression equations, which will constitute the basis for performing univariate and multivariate stress test exercises. In the case of simple linear regressions, the only variables that statistically prove to have explanatory power on the level of ROE are: *the liquidity indicator, loan loss provisions* and *due and doubtful loans in total loans*. The estimated equations are presented as follows:

$$\ln ROE = 0.6107 \times \ln \text{liquidity indicator}(-8) - 0.0265$$
$$\ln ROE = -1.3516 \times \ln \text{due and doubtful loans in total loans} - 0.01$$
$$\ln ROE = -0.1764 \times \ln \text{loan loss provisions}(-1) - 0.0254$$

Thus, a 1% increase in expenses with loan loss provisions will be followed one month late by a decrease of ROE with 0.1764%; a 1% increase of the liquidity indicator, with a lag of 8 months, will generate in the current period a reduction of 0.6107% in ROE level and the increase of the share of due and doubtful loans in total credit by 1% will be followed by a reduction of ROE of 1.3516%.

In the case of multivariate regressions, in order to facilitate the subsequent stress exercises, we tested three specifications:

a regression model that includes only bank-specific variables, reflecting banking activity idiosyncratic risk (credit risk, liquidity risk, interest rate risk). Regression's functional form is:

$$\ln ROE = 0.0489 \times \ln \text{credit growth}(-6) - 1.6943 \times \ln \text{due and doubtful loans in total loans}(-3) - 0.1829 \times \ln \text{loan loss provisions}(-1) + 0.6413 \times \ln \text{liquidity indicator}(-8) + 0.126418$$

a regression model composed only by macroeconomic variables (inflation rate, unemployment rate, exchange rate, net average salary on economy). The results revealed that ROE level can be explained only by the variation registered by unemployment rate and inflation rate.

$$\ln ROE = -2.0293 \ln \text{unemployment rate}(-3) + 23.7235 \ln \text{net average salary}(-3) + 0.018182$$

Thus, increasing the unemployment rate by 1% will take effect on the level of ROE with a delay of three months, leading to a reduction of 2.0293%. On the other hand, the increase of net average wage in the economy by 1% will be reflected in the growth with 23.7235% of the ROE level, with a lag of one quarter.

a regression model that gathers both bank-specific variables and macroeconomic ones. The estimated coefficients are:

$$\ln ROE = 0.4462 \times \ln \text{inflation rate}(-3) - 3.7807 \times \ln \text{exchange rate}(-16) - 3.0399 \times \ln \text{unemployment rate}(-3) + 29.2260 \times \ln \text{net average wage}(-3) + 0.0429 \times \ln \text{credit growth}(-6) - 1.1174 \times \ln \text{lending/deposit ratio}(-13) + 0.6379 \times \ln \text{liquidity indicator}(-8) - 0.1637 \times \ln \text{loan loss provisions}(-1) - 2.0286$$

It can be noted that, although the sign of estimated coefficients is in line with economic theory, for the inflation rate the coefficient is positive, meaning that an increase in the inflation rate

improves bank profitability. Coffinet and Lin (2010) reported that the effect induced by inflation on profitability is ambiguous, although most recent studies indicate a significant positive effect. The explanation lies in the ability of banks to accurately forecast the inflation rate and to adjust the interest rates charged on loans and deposits, so as that revenues grow faster than expenses.

The second stage of the analysis consisted in defining several adverse scenarios and simulating the ROE's response, as a reaction to the volatility recorded by explanatory variables. The severity of shocks applied to each risk factor has been calibrated based on the most significant changes in the historical series of observations. In other words, we have considered the first two most significant changes in the level of each explanatory variable, recorded during January 2001- October 2011.

Table 2. Sensitivity analysis

The scenario defined	*The change induced in the level of ROE*
Decrease of the liquidity indicator (8 months lag) with 14.5%	Decreases with 2.78%
Decrease of the liquidity indicator (8 months lag) with 30%	Decreases with 5.76%
Increase of the share of due and doubtful loans in total loan with 30%	Decreases with 38.43%
Increase of the share of due and doubtful loans in total loan with 54%	Decreases with 69.17%
Increase of loan loss provisions (one month lag) with 34%	Decreases with 61.82%
Increase of loan loss provisions (one month lag) with 27%	Decreases with 49.10%

As seen in the simulations presented in Table 2, the change of the liquidity ratio has a relatively low impact on profitability; in turn, the impairment of credit risk proxy variables (the share of overdue and doubtful loans to total loans, loan loss provisions expenses) significantly erodes banks' profitability. In Table 3 we summarized the combined influence of explanatory variables on ROE, assuming three stress scenarios.

Table 3. Multivariate stress tests

The scenario defined	*The change induced in the level of ROE*
Microeconomic scenarios	
Credit growth contraction (6 months lag) with 33.72% Increase of the share of due and doubtful loans in total loan (3 months lag) with 54% Increase of loan loss provisions (one month lag) with 34% Decrease of the liquidity indicator (8 months lag) with 30%	Decreases with 149.22%
Credit growth contraction (6 months lag) with 2.1% Increase of the share of due and doubtful loans in total loan (3 months lag) with 30%	Decreases with 101.02%

Increase of loan loss provisions (one month lag) with 27% Decrease of the liquidity indicator (8 months lag) with 14.5%	
Credit growth contraction (6 months lag) with 2.1% Increase of the share of due and doubtful loans in total loan (3 months lag) with 30% Increase of loan loss provisions (one month lag) with 27% Decrease of the liquidity indicator (8 months lag) with 10%	Decreases with 100.1%
Macroeconomic scenarios	
Increase of unemployment rate (3 months lag) with 44% Decrease of average wage (3 months lag) with 9%	Decreases with 15.5%
Increase of unemployment rate (3 months lag) with 11% Decrease of average wage (3 months lag) with 9%	Decreases with 14.89%
Increase of unemployment rate (3 months lag) with 11% Decrease of average wage (3 months lag) with 2%	Decreases with 2.78%
Mixed scenarios	
Increase of inflation rate (3 months lag) with 2% Exchange rate depreciation (16 months lag) with 6% Increase of unemployment rate (3 months lag) with 44% Decrease of average wage (3 months lag) with 9% Credit growth contraction (6 months lag) with 33.72% Increase of lending/deposit ratio (13 months lag) with 21% Decrease of the liquidity indicator (8 months lag) with 30% Increase of loan loss provisions (one month lag) with 34%	Decreases with 244.95%
Increase of inflation rate (3 months lag) with 2% Exchange rate depreciation (16 months lag) with 6% Increase of unemployment rate (3 months lag) with 11% Decrease of average wage (3 months lag) with	Decreases with 216.4%

9% Credit growth contraction (6 months lag) with 2.1% Increase of lending/deposit ratio (13 months lag) with 12% Decrease of the liquidity indicator (8 months lag) with 10% Increase of loan loss provisions (one month lag) with 34%	
Increase of inflation rate (3 months lag) with 2% Exchange rate depreciation (16 months lag) with 6% Increase of unemployment rate (3 months lag) with 11% Decrease of average wage (3 months lag) with 2% Credit growth contraction (6 months lag) with 2.1% Increase of lending/deposit ratio (13 months lag) with 9% Decrease of the liquidity indicator (8 months lag) with 10% Increase of loan loss provisions (one month lag) with 27%	Decreases with 65.81%

The combination of banking system's specific variables generates a significant loss of profitability in our simulation, of over 100%. Of these, the deterioration of loan portfolio quality, reflected by the increase of overdue and doubtful loans to total credit and the increase of provisioning costs have the greatest impact on the level of ROE.

In terms of the macroeconomic scenarios simulated, we noticed a more pronounced decrease in the level of ROE, mainly due to contraction of net average wage and, in a smaller proportion, to increases in unemployment rate. The explanation lies in the fact that not all borrowers can be affected by the entry in unemployment, but a generalized decrease in the level of wages in the economy will be passed on to each debtor.

The third scenario offers an overview of the evolution of profitability level, because it connects both the specific characteristics of banking activity and macroeconomic factors. Thus, developments on the labor market directly affect the profitability both directly, as increases of unemployment and / or decreases of disposable income are translated into the contraction of the demand for new credit, and indirectly by the fact that repayment difficulties faced by borrowers will damage the quality of loan portfolio, will increase the provisions costs, thus eroding the profitability of credit institutions. The results indicate that ROE is very sensitive to reductions of net average wage in the economy and increases in loan loss provisions expenses.

Conclusions

ROE is an indicator that characterizes the overall performance of the activity of credit institutions, without revealing how much of this performance is due to certain lines of business: retail, corporate, investment banking, private banking. In our opinion, it is necessary to design new profitability indicators that provide a more faithful picture to banks' sources of profit (non-bank customer lending operations, loans and placements with other financial institutions, securities

transactions, and asset management). The empirical results obtained indicate that the main macroeconomic indicators and the specific banking system ones don't explain, overwhelmingly, the changes recorded by ROE. Analysis must be completed with variables that reflect, with a greater degree of accuracy and detail, financial situation and vulnerabilities related to retail and corporate sector, and individual characteristics of banks: sources of revenue, operating expenses, the market share held (banks with a higher market share and diversified products can benefit from greater stability of revenues).

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EMERGING CAPITAL MARKETS: OPPORTUNITIES AND LIMITS

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Abstract

This theoretical study examines the concept of emerging capital markets in Europe from the border between certain opportunities and limits. The financial architecture of emerging capital markets has certain characteristics such as a high degree of instability and a sharp level of illiquidity which exposed the vulnerability of this particular type of market. Emerging capital market represents a main characteristic of developing countries and they are less efficient than the developed market given their deep functional, structural and institutional dysfunctions.

Keywords*: emerging capital markets, developed capital markets, dysfunctions, efficiency, investment, risk.*

Introduction

This article examines issues of current interest in the financial field, respectively the concept of emerging capital markets analyzed in relation to their opportunities and limits. It is well known that over the past two decades, capital markets in developing countries, known as emerging capital markets, have experienced a tremendous rise. Moreover, emerging capital markets represent a significant part of the financial markets area, extremely attractive and dynamic.

The importance of this study is to highlight certain aspects of great current interest, especially in context of the global financial crisis. Financial investors, both institutional ones, as well as individual ones, perceive emerging capital markets as a great chance to obtain significant benefits.

Metaphorically, this category of capital markets was perceived at one time as an unexploited financial oasis. Even in the context of the current financial crisis restrictive conditions, emerging capital markets remain attractive due to return opportunity and to the possibility of increase the portfolio return.

This article aims to emphasize the main features of emerging capital markets in Europe, being focused on their opportunities and limits. In recent past years, the economic literature has provided an extensive series of studies regarding emerging capital markets characteristics. In addition, this article tries to identify as well those characteristics which are seen only in times of financial crisis, but not noticed in terms of economic growth or stagnation.

Another important approach analyzed in this article is considering the concept of market efficiency in the context of emerging capital markets in Europe. It is considered in general that emerging capital markets are not efficient in semi-strong form or strong form. In the most optimistic case, empirical research studies have identified a weak form of efficiency. Emerging capital markets are less efficient than the developed capital markets given their functional, structural and institutional malfunctions and limitations.

Emerging capital markets opportunities - an exhaustive theoretical analysis

An emerging capital market is distinguished by certain key features such as : great return expectations, sharp volatility and various specific risks. In terms of investment opportunities that characterized emerging capital markets in Europe, statistical evidences emphasize significant performances on this particular type of capital market.

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Before trigger the analysis, it is necessary to be made several additions. Therefore, according to the Financial Times Stock Exchange (F.T.S.E) evaluation criteria there are four categories of classification of national capital markets: developed markets, advanced emerging markets, secondary emerging markets and frontier emerging markets.

Advanced emerging markets category are: Brazil, Mexico, Hungary, Poland, South Africa and Taiwan, while the secondary emerging markets include countries such as China, Russia, India, Egypt, Colombia, Czech Republic, Peru, Pakistan, Turkey, Indonesia and Thailand.

F.T.S.E places the Bucharest Stock Exchange in the last category of quality of the four, along with the capital markets of: Bulgaria, Serbia, Tunisia, Cyprus, Estonia, Macedonia, Malta (September 2010), Slovakia, Slovenia, Croatia, Bangladesh, Botswana, Kenya, Nigeria, Sri Lanka or Vietnam. Also, Standard & Poor's (S&P) and Morgan Stanley Capital International (M.S.C.) evaluation criteria placed the capital market of Romania in the category of frontier emerging markets.

The global financial crisis that was caused by U.S. subprime crisis affected all the capital markets in the world. The negative impact was reflected by: reduction of the value and volume of transactions, significant reduction in the level of investment, the share price decrease and the unprecedented reduction of the profit opportunities.

The major stock markets indices of developed countries registers significant declines since the beginning of the financial crisis in the second half of 2007, as well as the advance emerging capital markets indexes that have evolved in close contact with mature stock markets in the U.S., Europe and Asia. Some specialists consider that there may be only an emotional connection between a relatively small capital market, like certain emerging capital markets in Europe and one characterized by extremely high volumes, because of the fact that institutional investors are unable to validate a significant packet of shares because of low liquidity and insignificant holdings of value compared to the case of developed capital markets.

Nevertheless, there are a number of counterarguments in favor of investing on emerging capital markets. First of all, there are real opportunities for increasing the financial assets portofolio return. It is also one of the reasons why foreign investors are attracted to invest there. Also, relatively low experience and not very high level of training of local professional investors are other opportunities to exploit by foreign investors.

Emerging capital markets are defined as transitional, being noticed an increase in both foreign and local financial investment. Based on the idea that an emerging economy is characterized by low to middle per capita income, is obvious that a consistent investment can decisively influence the stock prices.

In another train of thoughts, one of the main opportunities of emerging capital markets, which is important for both individual and institutional investors, is that this particular type of capital market is less informational efficient comparing to developed capital markets.

According to Eugene Fama : ”an efficient market is defined as a market where there are large numbers of rational, profit-maximizers actively competing, with each trying to predict future market values of individual securities, and where important current information is almost freely available to all participants”.

Efficient Markets Hypothesis suggests that since everyone has access to the same information, it is impossible to regularly beat the market, because that stock prices are efficient, reflecting everything we know as investors. In other words, a market in which prices always “fully reflect” available information is called efficient.

Capital market efficiency involves three dimensions : allocational, operational and informational efficiency. However, it has been noted that capital markets with higher informational efficiency are more likely to retain higher operational and allocational efficiencies (Müslümov et al, 2004). A market is efficient with respect to a set of information if it is impossible to make economic profits by trading on the basis of this information set (Ross, 1987).

Malkiel suggested the following definition:

"A capital market is said to be efficient if it fully and correctly reflects all relevant information in determining security prices. Formally, the market is said to be efficient with respect to some information set…if security price would be unaffected by revealing that information to all participants. Moreover, efficiency with respect to an informational set …implies that it is impossible to make economic profits by trading on the basis of (that informational set)."

Accordingly, a market in which prices always "fully reflect" available information is called efficient. One of the main aspects of Efficient Markets Hypothesis is represented by the degrees of efficiency issue. Thus, on a capital market, the degree of informational efficiency involves the following categories :

a) weak form efficiency

b) semi-strong form efficiency

c) strong form efficiency

It would be an illusion to believe that an emerging capital market is efficient in semi-strong form or strong form. As it was already suggested in the introduction to this article, in the most optimistic case, empirical research studies have identified a weak form of efficiency. Emerging capital markets are less efficient than the developed capital markets given their functional, structural and institutional deficiencies.

What is the importance of these issues for investors? In the case of emerging capital market, the access to information is delayed, distorted, difficult, incomplete, influenced and expensive. Although at first glance seem to be disadvantages, features mentioned above are actually investment opportunities. An intelligent investment strategy can provide significant gains from these certain malfunctions. One of the most important issue regarding efficient market theory is that it is not possible to outperform the market over the long-term. As it was stated previously, there are great opportunities to do so in the context of emerging capital markets.

Emerging capital markets limits

An emerging capital market is characterized by deep functional, structural and institutional dysfunctions. In other words, we can identify certain particularities such as : high volatility, the existence of bubbles, panic, speculation, anomalies, high-risk investment opportunities, a low level of liquidity, reduced capitalization, strong correlation with developed capital markets, reduced number of transactions, insufficient development of financial instruments, exchange rate instability and many others also.

A very important issue with major consequences is the concept of "liquidity" and its implications in the context of emerging capital markets. Liquidity is a sine qua non condition for a capital market to be effective, in the sense that its capacity to ability to ability to manage financial flows is significantly higher during periods when the market is more liquid. Especially in the case of emerging capital market, maintaining an optimal level of liquidity is very important. In the literature, the concept of market efficiency is the cornerstone of modern finance and also represents a significant advance in the financial field. a liquid market allows that a large volume of transactions to be conducted with minimum effect on price. At some point, it is crystallizes a very interesting connection between the concepts of efficiency and liquidity. Thus, the capital market liquidity contributes significantly to improve market efficiency. A high level of liquidity contributes substantially to enhancing the available information that is reflected in market prices.

Metaphorically speaking, the reverse of the medal is very dramatic. Destabilisation implications of the emerging capital market generated by insufficient liquidity are extremely severe. It is extremely important to distinguish between liquidity and trading volume. There is a paradox in time of financial crisis, respectively a lower liquidity level corresponds to a high volume of transactions.

Efficient market hypothesis have not reached the issue of liquidity crisis, or even the concept of liquidity itself. It assumes that investors are rational and they aim to select certain efficient

financial assets to form an optimal portfolio as to achieve the highest possible returns over the long term, under the terms of a tolerable level of risk. However, in conditions of crisis, investors have a completely irrational behavior.

According to Peters : "If all information had the same impact on all investors, there would be no liquidity. When they received information, all investors would be executing the same trade, trying to get the same price."

It is significant to highlight the fact that investment decision is influenced in a large proportion by psychological and emotional factors. Human emotional complexity includes the following primary feelings: fear, panic, anxiety, envy, euphoria, greed, satisfaction, ambition or vanity. This cocktail of human emotions interferes in certain proportions in a financial investment decision making. Investors are people with many deviations from rational behavior, which often make illogical decisions. In the existing global financial perspective, the major influence of psychological factors in investment decision-making is undeniable.

Accordingly, chances that an investor to behave rationally in liquidity crisis conditions are extremely low. In such circumstances, obtaining a fair price is no longer a priority. Liquidity crises are a consequence of inadequate capital market functioning. In terms of emerging capital market it highlights the fact that they are characterized by severe institutional, structural and functional disequilibrium.

Conclusions

Emerging capital markets opportunities and limits complement each other to form a whole extremely attractive for investors.

In this article have been highlighted a number of issues of current importance such as the global financial crises. The vulnerability of emerging capital markets and its high degree of exposure to financial crises can be reduced by implementing some rigorous measures, such as : the adoption of relevant legislation, securities laws and regulations, the improvement of the trading infrastructure system, the establishment of appropriate supervisory structures, promoting transparency and fairness, discouraging short-term speculation in favor of long-term investments**.**

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THE FRACTAL MARKET HYPOTHESIS

FELICIA RAMONA BIRĂU*

Abstract
In this article, the concept of capital market is analysed using Fractal Market Hypothesis which is a modern, complex and unconventional alternative to classical finance methods. Fractal Market Hypothesis is in sharp opposition to Efficient Market Hypothesis and it explores the application of chaos theory and fractal geometry to finance. Fractal Market Hypothesis is based on certain assumption. Thus, it is emphasized that investors did not react immediately to the information they receive and of course, the manner in which they interpret that information may be different. Also, Fractal Market Hypothesis refers to the way that liquidity and investment horizons influence the behaviour of financial investors.

Keywords*: Fractal Market Hypothesis, chaos theory, fractals, capital market, Efficient Market Hypothesis.*

Introduction

Capital markets are extremely complex and unpredictable. Capital markets' chaotic behavior and non-liniarities, complication and uncertainty, unexpected booms and crashes are some of the most challenging current issues.

Fractal Market Hypothesis is an alternative to Efficient Market Hypothesis and it is based on chaos theory. The antagonism between the two theories is more than evident. Actually, Fractal Market Hypothesis is a new and different approach which was developed to provide an alternative solution to the difficulties faced by the traditional theory in explaining certain financial phenomena.

Fractal Market Hypothesis is an alternative to Efficient Market Hypothesis and it is based on chaos theory. The antagonism between the two theories is more than evident. Actually, Fractal Market Hypothesis is a new and different approach which was developed to provide an alternative solution to the difficulties faced by the traditional theory in explaining certain financial phenomena.

Chaos theory has established a new level of understanding regarding the concept of capital market. In general, capital market is one of the most fertile and accessible areas to apply chaos theory. Through its fundamental characteristics, a capital market is even more appropriate. A chaotic system, as it is a capital market presents certain characteristics such as: unpredictability, instability, disorder, noise and lack of control.

Chaos represents a state of complex, unpredictable, nonlinear dynamics. Moreover, a chaotic system appears to be random when in fact is an evolved form of order. In other words, a chaotic system is a unconventional collage consists of a deterministic and a random process.

Chaos theory provides an explanation for the fact that complex and unpredictable results can and will occur in systems that are sensitive to their initial conditions. In addition, chaos theory is perceived as a qualitative study of complex and unstable irregular behavior regarding deterministic nonlinear systems such as capital markets.

Fractal Market Hypothesis - the boundary between traditional and unconventional finance

The analysis of capital market based on chaos theory provides a completely different perspective compared to the concept of Efficient Market Hypothesis. Under the terms of a globalized world, traditional finance paradigm can no longer be considered a panacea.

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Eugene Fama suggested that : "The ideal is a market in which firms can make production-investment decisions and investors can choose among the securities that represent ownership of firms' activities under the assumption that security prices at any time "fully reflect" all available information. A market in which prices always "fully reflect" available information is called efficient".

The central idea of the efficient market theory is that any information is available to all investors or market participants, so capital prices always incorporate and reflect all relevant information. Due to this issue, the price of a capital should reflect the knowledge and expectations of all investors or market participants. Because of that, except for long-term investment trends, future capital prices are difficult, if not impossible, to predict. In other words, an investment strategy based on past capital prices cannot preview future prices, no matter how complex and deep would be.

Eugene Fama defined market efficiency in a very accessible manner: "In an efficient market, competition among the many intelligent participants leads to a situation where, at any point in time, actual prices of individual securities already reflect the effects of information based both on events that have already occurred and on events which, as of now, the market expects to take place in the future. In other words, in an efficient market at any point in time the actual price of a security will be a good estimate of its intrinsic value."

On the other hand, according to Mandelbrot, in finance, the concept of chaos is not a rootless abstraction but a theoretical reformulation of a down-to-earth bit of market folklore - namely, that movements of a capital or currency all look alike when a market chart is enlarged or reduced so that it fits the same time and price scale.

Consequently, it becomes impossible to identify price changes from one period to another, even if it's weeks, days or hours. This feature defines the charts as fractal curves and make available to users a wide range of mathematical and computer analysis methods.

According to Peters, through the Fractal Market Hypothesis, we can understand why self-similar statistical structures exist, as well as how risk is shared distributed among investors.

Fractal Market Hypothesis is based on certain assumption. Thus, is emphasized that investors did not react immediately to the information they receive and of course, the manner in which they interpret that information may be different.

A central concept in the framework of this theory is the capital market liquidity. The Efficient Market Hypothesis does not mention at all the concept of liquidity. This aspect is very important considering the fact that the most dramatic crashes were caused by the lack of liquidity. As a consequence, a lack of liquidity constrains investors to accept any price whether it is fair or not.

A liquid capital market is a stable market. However, a capital market is stable when it consists of a large number of investors which have different investment horizons. In contradiction with Efficient Market Hypothesis, the Fractal Market Hypothesis suggests that information is valued according to the investment horizon of the investor. Short-term price changes have a predisposition to be more volatile than long-term price trends.

The capital market is a complex and dynamic system with noisy, nonstationary and chaotic data series.[1] Some researchers are suggesting that such complexity is an intinsic characteristic of such system. The interesting thing about the chaotic dynamics of capital markets is its great ability to generate dramatic movements which appear to be random, with higher frequency than linear models. Obviously, this chaotic behavior of capital markets in general, but especially of capital markets is a non-linear deterministic process. The non-linear models are much more complex and can generate a much more varied types of behavior.

Capital market modeling is an area of interest to capital traders, quantitative finance specialists, investment professionals and applied researchers. One of the most controversial issue in

[1]Peters Edgar, "Fractal Market Analysis: Applying Chaos Theory to Investment and Economics", New York: John Wiley & Sons, 1994

the recent past is probably whether the capital market can be predict in a satisfactory manner or not. Howerer, there is always some risk to investment in the capital market due to its unpredictable movements. Thus, an appropriate prediction model for capital market forecasting would be highly valued and useful, being an issue of a major interest.[2]

Human understanding of capital market is limited, because our capability in analyzing all the date has not been complete and empirical economic methods have not been satisfactory. The obvios complexity of the capital markets has been investigated by various researchers and a large amount of research papers has been published in recent times. Resolving such complexity has been for many long years just an utopia.

Capital market is characterized by complex nonlinear dynamics which does not converge to a known purpose, a result that may be anticipated or influenced, or at least to a limit cycle. In this context, even the concept of financial investment rationality reaches a completely different meaning. Thus, limited rationality replaces rational expectations.

At a certain level, on the capital markets is distinguished exclusively the human dimension of the financial events and, of course, the causes that led to the triggering of these particular phenomenon. Fractal Market Hypothesis and implicitly Chaos theory are applied to explain different categories of discontinuities. In recent past, this unconventional theory was applied in the financial field for modeling discontinuities based on complex and quite sophisticated mathematical models.

Conclusions

Fractal Market Hypothesis is an alternative to classical finance. Metaphorically speaking, there are many scientific boundaries in terms of market efficiency.

Chaos theory represents a significant progress in understanding a dynamic, complex, unpredictable, nonlinear systems such as the capital market. Assuming that capital market is a chaotic system and not just purely random, chaos theory is in sharp contradiction with Efficient Market Hypothesis. A market in which prices always "fully reflect" available information is called efficient. The most important issue regarding efficient market theory is that it is not possible to outperform the market over the long-term. Chaos theory contradicts deeply and argued this conventional principle of traditional finance.

Capital markets behavior is extremely haotic and difficult to predict, so it is not an unusual or an impossible fact that seemingly minor events can cause major perturbations in the final outcome. In other words, very small and insignificant variations in initial conditions can generate extremely significant differences in the final event.

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THE CAPITAL MARKET IN THE CURRENT ECONOMIC CONTEXT

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Abstract
For nearly a century now, economists have studied the advantages and disadvantages of financial systems based on either banks or financial markets in their attempt to forward economic growth and a better capital resources allocation. Nevertheless, the effects of the financial crisis that began in 2007 over the capital market are not only numerous, but also affect financial institutions, the stock exchange volume and list, the behaviour of market investors and not least such generate the need for capital market regulations to be amended. Even so, due to measures that have been taken, in Romania the stock exchange works on profit, while the effects of the financial crisis over such still fail to occur.

Keywords*: capital market investments, institutional investors, financial crisis, financial instruments, regulations.*

Introduction

For many years, economists from all over the world are examining the advantages and disadvantages of financial systems which are based either on the preponderance of the money market (namely the banking system) or on the financial markets, in their attempts to forward economic stability and a better capital funds allocation within the current economic and financial crisis. We are trying to demonstrate below which structure of the financial system better promotes inward investments. Also tests are made on whether the structure of the financial system has independent influence on inward investments by controlling the level of financial development. Economic studies have concluded that the level of financial development, namely the economic development, is the one that influences the investment decisions and not the structure of the financial system. So, in this case what could be the investors' option in conditions of economic crisis?

Two questions emerge regarding the impact of financial mediation on the real economy. The first question is whether the development of the financial sector affects the economic activity. The second question is whether the structure of the financial system weighs in obtaining some results in the economic sector. Many studies embrace the idea that the development of the financial system has a positive effect on the real economy, including investments, employment, productivity and sustainable economic growth.

Until recently, economists[1] have stopped on the role of financial system structure on economic activity based on some case studies regarding the advantages and disadvantages of either bank-based financial systems (Germany and Japan) or the capital market (U.S. and Great Britain). Studies in Germany and Japan have examined the banks playing a leading role in corporate management and the role of banks-firms relations in granting credits, allocating capital efficiency, productivity, namely on the whole economy. The economic research in U.S. and Great Britain have emphasized the role of the financial markets in providing information on corporate activity, mergers and acquisitions and their impact on economic efficiency. It is difficult to assert that a structure of the

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[1] Asli Demirguc-Kunt and Ross Levine - Bank-based and market-based financial systems: cross-country comparisons, Development Research Group, The World Bank, and Finance Department, University of Minnesota, 2000

financial system is better than the other, especially since these studies have been made on some countries (Great Britain, Germany, Japan and the U.S.) that have similar performances on long-term economic growth.

New studies[2] have concluded that both banks and financial markets play an important role in supporting economic growth and that they are complementary. There were two new approaches in economic literature: (1) the role of financial services and (2) the role of law and finance.

The first approach emphasizes the role of the financial system in reducing market imperfections and providing key services to the private sector, thus increasing economic performance. Financial systems improve economic performance through a better assessment of investment opportunities, by exerting corporate control, minimizing the risk management, as well as capital allocation costs. As the financial system develops, it becomes more efficient in providing financial services, with direct implications on the economic growth. According to this approach, it is irrelevant to the economic activity whether the economy of a country is based on the financial system or the capital market.

The second approach which is based on the role of law and finance emphasizes the role of the creditor and investor rights for the development of financial intermediation. In countries where the legal system enforces these rights effectively, the financial system also becomes more efficient in providing services to the private sector. The quality of the legal system is one of the most important predictor of financial development. These studies wish to emphasize the role of the legal environment that will facilitate the development of the banking system and capital markets, which in turn will support economic growth.

Paper content

The banking system can influence investments in several ways[3].

The banking system can influence investments in several ways.

First, banks help to increase the funds available for investments by attracting deposits. Financial intermediaries are thus saving by reducing costs to attract savings and to collect and process information on debtors. Thus, for a given level of income per capita and for a potential saving rate, the current level of savings and investment should be higher in countries with a more developed banking system.

Second, banks facilitate investments by reducing liquidity risk. Generally, investments imply the mobilization of large amounts on a long-term. Private investors are reluctant to long-term fund immobilization, because they have a higher preference for liquidity. Banks can achieve the liquidity-profit balance by attracting the population's savings, making short-term loans and granting long-term loans. In a country that does not have a developed banking system, the profitable but more risky investment projects will not be carried out successfully due to lack of available capital. The development of the banking system should lead to a better allocation of capital and to an equilibrated balance between the short and long term private sector investments.

Third, financial intermediaries play an important role in reducing the cost of collecting and processing information on future investment projects, as well as on exerting control over firms. Many firms manage to obtain the necessary amount for financing their activity from a large mass of foreign investors who, individually, cannot monitor the use of funds by firm managers. On behalf of individual investors banks play the role of "delegated monitoring activity" and firm management

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[2] Milan Kuber, Management consulting, ANCOR Publishing House, Bucharest 1992 and many other American authors Hans F. Olsen, Daniel Kessler, Kenneth Kuttner, Andrew Lo, Robert Merton, Vance Roley or David Laibson and Romanian authors: Valerica Olteanu, Beatrice Vlad (The behaviour of financial products consumers, online marketing magazine, volume 1 no. 4), Camelia Burja, T. Hada, M. Stoian, I. Stanciu, N.C. Ene, V. Valcu and others

[3] Demirgüç-Kunt, Asli and Maksimovic, Vojislav. "Law, Finance, and Firm Growth", Journal of Finance, December 1998, 53(6), pp.2107-2137.

behaviour monitor. The banks' ability to carry out this function stimulates foreign investors to invest, which improves the allocation of funds for investment projects. A developed banking system will lead to increased investment and a better allocation of capital.

Banking innovations provided the possibility to offer customized financial products that address specific needs of each firm. These represent the investors' main source of external financing who have limited access to financial markets, such as small or newly constituted firms. According to economist Robert C. Merton,[4] "financial markets tend to be efficient institutional alternatives to intermediaries when the financial products are standardized, being able serve a large number of investors, and they are facilitating the contracting parties in order to be comfortable in assessing their prices." Studies have shown that, in industrialized countries, small firms depend more on bank financing than large firms. Moreover, the reduction of the volume of loans granted by banks (due to the new monetary policy) has a large impact on the investments of the firms that are dependent on the banking financing.

Banks are important for the discovery of new financial products due to the customized packages offered to customers. Some of these new products are transferred on the capital markets; banks and financial markets are complementary institutions. Therefore, banks play an important role in the process of financial innovation for both the real economy – by financing innovative investment projects - and for the financial sector - by creating new financial instruments.

Those who criticize the bank-based financial systems describe a number of disadvantages and weak points of such a system in terms of growth in investment and economic performance. First, banks are interested in active participation in innovative investment projects from which they can earn a lot reducing the effort of firms to carry out innovative activities. Second, banks may be inclined towards greater caution. Indeed, evidence shows that in Japan firms closely connected to a bank are using fewer technological innovations and have lower profit rates than the others, fact which suggests that banks profit from their relationship with the client-firms. Third, critics of the bank-based economies state that the existence of some close relations between firms and banks prevent the competition on the credit market and reduce banks' ability to boost corporate governance. Some studies show that banks tend to support firms that face problems, but where they and / or other banks from the system have shares, while their relations with the other firms promotes the interests of creditors. If a close connection between firms and banks can facilitate access to capital, this does not necessarily reduce the cost of capital, nor increase the volume of investments for the firms where they hold shares.

The implications of the financial sector on enterprises

Several recent studies have shown that industrial sectors, namely those firms that depend heavily on external financing, grow faster in countries with developed financial sectors. Therefore it is natural to expect for industrial specialization and trade to be influenced by the financial sector. Indeed, a well-developed financial intermediation sector and some developed financial markets have a positive impact on the external trade financing.

Financial systems endowed with strong, well-structured and regulated institutions will specialize in production of goods that use intensively the services provided by these institutions. Economists believe that the financial markets and intermediaries are all factors that influence the production of goods and services. In order to support comparisons between countries, the condition imposed to a production factor is to be movable in international trade. Although it is not obvious that this condition is met, it is considered that between the development of the domestic financial sector and the internationalization of production factors is a negative relationship. Recent studies have shown that financial services are immovable geographically speaking, even in the USA.

[4] Robert Merton, Nobel Prize laureate in economics in 1997 (together with Myron S. Scholes)

The financial sector

The financial sector is seen as a production factor. A country endowed with strong financial institutions will specialize in sectors that widely use services provided by these institutions. On the other hand, countries with developed financial markets are external financing exporters.

Why the financial sector is seen as an immovable production factor building in terms of international trade? Currently the answer to this question is given by the fact that the inclusion of international production factors can lead to incorrect results. If capital markets are integrated, the level of domestic financial development would not be important for local investment opportunities. Financial services are not movable in terms of trading, even within a country.

The information asymmetry on the financial markets and the conflict of interests between creditors and debtors have led to intermediaries specialised in evaluating and monitoring investment projects, information dissemination, which reduces the negative effects of market imperfections. If we were to compare two countries with relatively equal interest rates, of which one has a more developed financial sector, the difference would occur in terms of allocation of financial capital. The level of uncertainty of investment projects and the share of investments in intangible assets are just two of the factors that make financial intermediation even more important. Financial intermediaries have other roles as well besides collecting money to finance investments in physical capital.

Many economists consider the financial sector as a type of human or organizational capital, specialised in overcoming market imperfections related to the financing of the economic growth. The level of financial development represents a determinant factor of the level of development of firms, industry and overall economy. In this type of study a causality problem emerges: a developed financial sector may be the result of high demand for financial services, suggesting a causal reversed relationship, meaning that the industry structure affects the demand for financial services and, therefore, the financial development as well.

Current debates determined by the economic crisis are focusing on bank-based financial systems versus capital market-based financial systems.

An economy based on the banking system may be superior to one based on the financial market due to long-term relationships established between banks and firms, which may increase the investors' incentives to acquire information about the firm and exercise corporate control. Capital markets aggregate information about firms, as well as internal market and they make these data publicly available, an action which a bank cannot do. Moreover, corporate control may be facilitated by stock markets through compensation schemes that are linked to stock market performance. Banks invest less in risky projects, being biased against risk; which can be explained by observations made upon economies based on financial markets where riskier industries attract more external funding. Another explanation might be capital markets expand the possibilities for risk diversification, thereby making high-risk projects more attractive for the individual investor.

The efficiency of financial markets has been brought into theoretical debates starting with 1970, Eugene Fama's studies, which have been followed by a synthesis in 1991, and Jensen's in 1978, Grossman's and Stiglitz's studies in 1980, etc., thus being formulated the hypothesis on whether financial markets have their own "intelligence". In this regard, three major trends can be identified among those trying to analyze the behaviour of financial markets: a) random walk theory according to which all the fluctuation of financial markets is random, b) "fundamentalist" school theory according to which any fluctuation is the result of an intelligible whole, within which assessments can be made c) technical and cartographic analysis which we can call diagnosis and whose supporters take an intermediate position and, rejecting the examination of the explanatory factors of the assessment of financial assets' course, believe that any asset has no other possible value than the price set by the market.

Capital market

Most studies highlight a positive correlation between the activity of capital markets and investment market. In which way do the capital markets effectively affect investments?

Capital market provides information about the expected profitability of investments. As a result, a functioning capital market may increase the volume of investments because it identifies the most profitable projects (with an estimated probability of achieving them and a higher risk) which otherwise would have been considered too risky. Capital market also affects the quality of investments, as well as capital allocation because it identifies the most profitable economic activities.

On the other hand, capital market affects investment decisions by its effects on cost of capital. Along with the development of capital market and as it becomes more liquid, the investment risks decrease which leads a reduction of financing costs. This statement is supported also by studies on the liberalization of capital markets, which is followed by an increase in market capitalization, a reduction in capital cost and an increase in volume of investments.

Third, capital market influences positively investments by exerting pressure on corporate managers, threatened by hostile takeovers and mergers. Capital market affects corporate governance because it allows the connection between firm performance and managers' compensation.

Critics of financial markets-based financial systems support a number of factors that limit their ability to increase the volume and quality of investments. Investment decisions are based on the fact that the market estimation on firm's profitability is a better indicator than that calculated by the firm's managers. This difference emerges due to asymmetric information or speculative operations. Which of the following predictions is better: the prediction made by the market or the one made by the firm's management? Opinions vary in this case. On one hand, some economists suggest that investment decisions should be based primarily on market evaluation. The reason is the fact that foreign investors are willing to accept lower rates of return, while managers try to equalize the rate of return with the marginal product of capital. Although mergers and acquisitions occur on the capital market, critics show that this does not necessarily mean a higher efficiency. Financial markets do not eliminate the information asymmetry and those inside the firms have more information than the outsiders. From the U.S. experience results the fact that large firms do survive not due to increasing profitability, but due to the fact that that the size of the firm increases even more through mergers and acquisitions. Moreover, takeovers do not necessarily lead to a quantitative increase in investment; there is only a transfer of "property" from old owners to new owners. Massive takeovers that took place in the 80s on the U.S. capital market did not resulted in increased net investments or market efficiency, but, in turn, they damaged the corporate sector to a great extent.

Also based on the observations made on the U.S. capital market, it was demonstrated that hostile takeovers create value only for the new owners, by redistributing the property to the disadvantage of staff and suppliers. Experts point out that hostile takeovers determine a preference of managers to make investments with short-term results at the expense of long-term investments, with negative consequences for the economic performance.

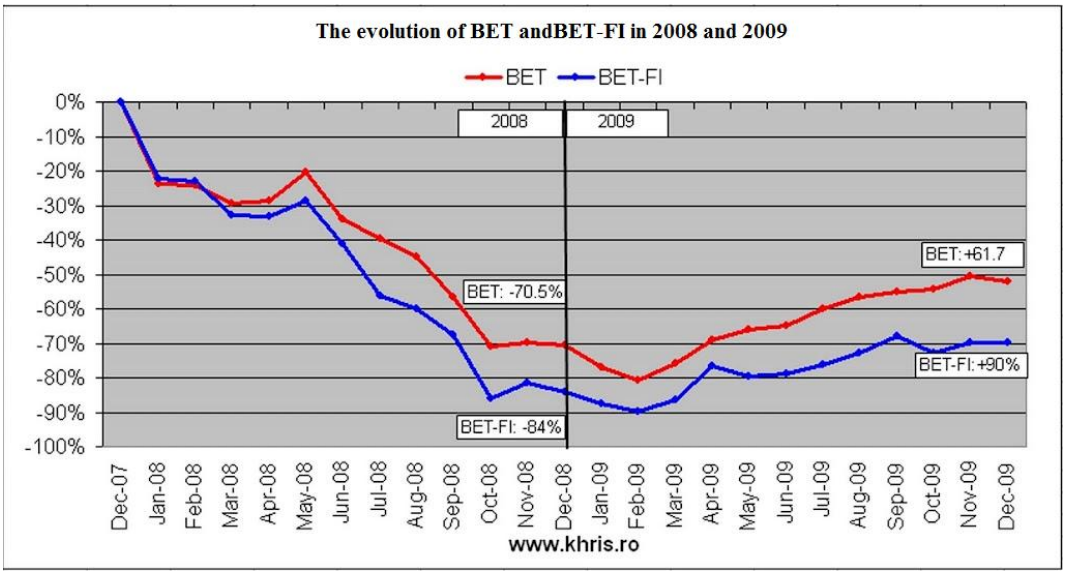
The underlying cause of the financial crisis was the abundant liquidity created by the world's main central banks (FED - U.S. Central Bank, BOJ - Central Bank of Japan) and by the desire of the countries that export oil and gas to limit the currency appreciation. Also, there was a over saturation with savings generated by the increasing integration into the global economy of some countries (China, Southeast Asia in general), with high rates of accumulation, but also by the global redistribution of wealth and income towards the supply exporters (oil, gas, etc.). The abundant liquidity and the over saturation with savings created available resources for investments, including sophisticated financial instruments, more difficult to understand for some investors. The consequences of the abundant liquidity were the very low interest rates and their low volatility. Together, these consequences have led to the increased appetite for assets with large gains. In addition, the low market volatility has created the tendency to underestimate the risk and a real lack

of vigilance from the investors. The risk margins have also been very low and non-discriminatory. Together, the low interest rates, the appetite for high income assets, the low vigilance to risk and the low margins hampered the warnings of prices on the financial markets and led to an incomplete understanding of the involved risks. Under these circumstances a series of microeconomic reasons has also functioned as aggravating: excessive securitization, cracks in the business model of the rating agencies, privately rational outsourcing but socially ineffective and, finally, an increased international competition for deregulations. The consequence of the excessive securitization was that once the crisis was triggered by the emergence of failure to pay rates on loans for houses, the financial market became non-transparent. Establishment of investors' lack of confidence has placed rapidly the bonds issued by the special purpose vehicles (SPV) in the risky category (quality of assets financed was not clear any longer) and refinances became impossible. Due to discrepancy between maturities on assets and liabilities, these SPV have started relying on financing from sponsoring banks. In the end, the liquidity demand combined with the loss of confidence in banks, resulted in the rush after cash and the effective interest rate started to increase.

In the USA and some states in Europe, governments and central banks responded by improving liquidity; granting governmental warranties for loans; recapitalization of financial institutions; warranty of the newest issuance by insured banks; prevention of erratic collapse of major interconnected enterprises; purchase of stocks in banks; coordinated reductions of interest rates. Although such type of measures have been implemented, after 17 months from starting the turbulences, the market remained non-transparent, and hence the financial crisis increased and facilitated its entry in the real sector of economy, first in the USA, then in other developed countries. What are the main challenges from now on? How to invest effectively in conditions of recession?

The evolution of stock market

After the poor results in 2008, not too many analysts hoped that in 2009 we'd witness a comeback of the decreasing quotations trend on the BSE, trend started in mid 2007 and continued until early 2009, at which the BET index was 82% lower than the maximum, and BET-FI fell by 92% - in other words, who invested 100 lei in the SIFs in July 2007, in February 2009 had only 8 lei. Moreover, the capitalization of stock markets worldwide decreased from $ 63,000 billion in October 2007 to $ 28.7,000 in February 2009, which means a decrease of 54.4%. Thus, the DJIA value was 53% lower than the peak in October 2007, London's index FTSE 100 had fallen by 47%, while the German DAX by 55%. If we think that in order to compensate for a decrease of 84%, an increase of over 500% is needed, meaning 6 times. However, who bought in early 2009 won in 10 months the equivalent bank interest for at least 5-6 years. The evolution of BSE for BET and BET-FI indices, from 2008 - 2009 had the following configuration:

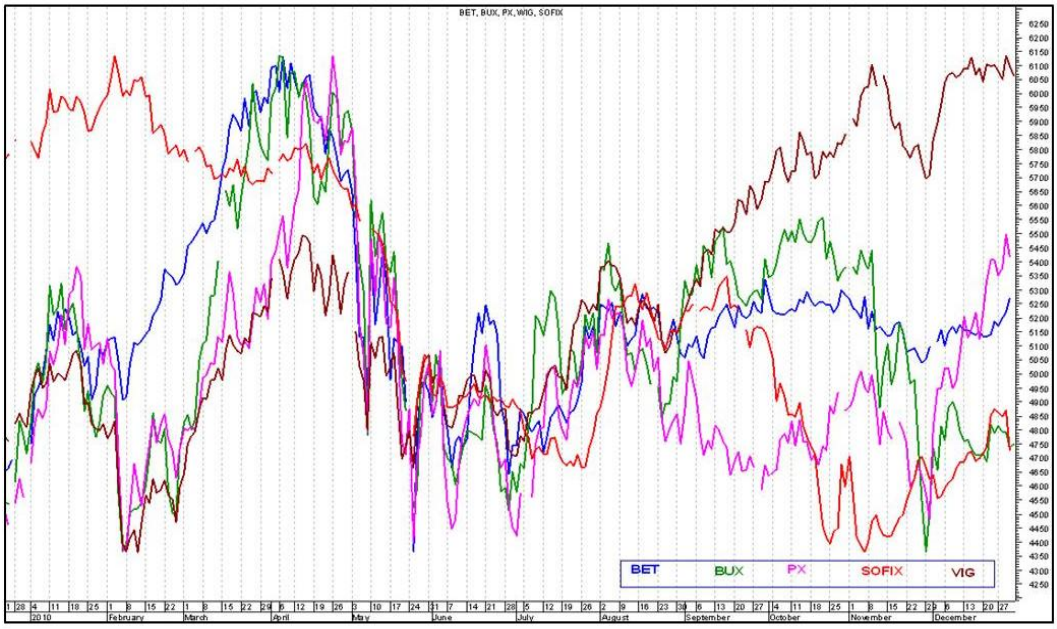


Unfortunately, the evolution of Bucharest Stock Exchange is largely dependent on the development of the other markets, especially the U.S., and the evolution of the developed economies during crisis can also shake the Bucharest Stock Exchange, regardless the evolution of the Romanian economy.

2010 was a weaker year for the stock quote although most indices ended the year with positive values. For share indices, 2010 recorded more modest values than the previous year. The performance of stock indices on BSE, as well as international stock market indices was affected by the fact that some European Union countries have faced and are still facing the sovereign debt crisis, while developed economies have continued to increase after the financial crisis. The contradictory performances recorded on the stock markets of the emerging countries are remarkable: poorer performances on some stock markets in emerging countries (Brazil, China), but an increase on Russian stock market. But some stock markets in Central and Eastern Europe (Czech Republic, Austria, Poland and Romania) had better performance, except the Sofia Stock Exchange which registered a downward trend.

Comparing the evolution of the stock indices in Central and Eastern Europe in 2010, one can see that the Polish WIG index increased by 18.8%, in Austria the ATX index was 16.4%, then the BET index was 12.3%, the Czech index PX was 9.6% and Hungary's BUX index which increased by only 0.5%. SOFIX index in Bulgaria decreased by -15.2% was the discordant note.

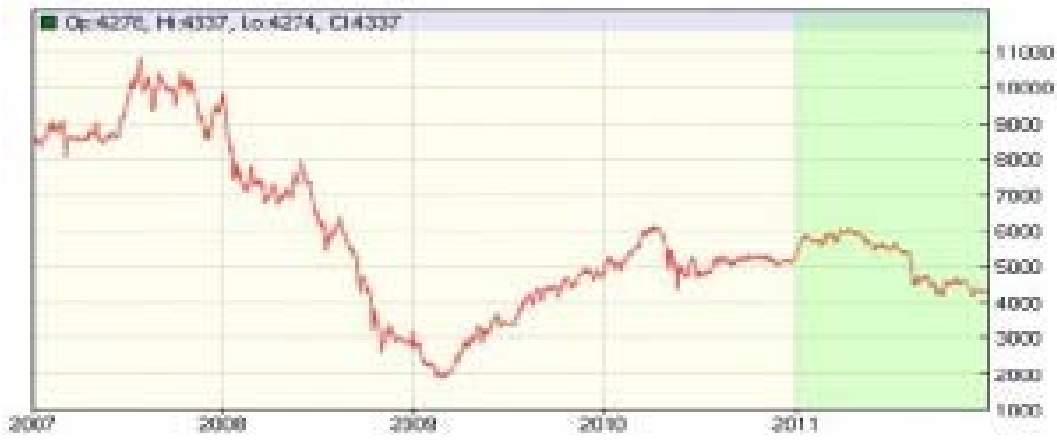
The evolution of the main stock indices in Central and Eastern Europe in 2010



Source: Puls Capital

The evolution of the stock indices experienced distinct periods in 2010. The first part of 2010, precisely the first 3 months, led to further increases recorded since March 2009. But sovereign debt crisis in Europe and panic felt on large international financial markets have shaken the stock market in Bucharest which was already small, with no large companies listed. Thus the situation has changed radically in the second quarter of 2010, when stock indices showed significant corrective movements according to stock market indices of developed markets. In the third quarter, stock indices began to resume their increases, while the fourth quarter brought new withdrawals and reluctant developments of these indices.

Romanian capital market recorded a dropping year in 2011. The evolution of the main index of Bucharest Stock Exchange (BET) from 2007 to 2011 is presented below:



Source: Puls Capital

Contrary to pessimistic analysis carried out by Razvan Pasol, president of Intercapital Invest brokerage company, Romania, the Bucharest Stock Exchange (BSE), ranked 59 in the world in 2011 in the world's major stock markets based on the variation of the main indices.

Due to the global economic crisis only 12 markets ended with positive results in 2011, while the other 77 markets brought negative results to investors. Venezuela Stock Exchange ranked first with a benefit of 78% on the main index. Caracas market is strongly influenced by the decisions of the political regime in this country and the nationalization of several major companies, as well as the shutting down of more than 40 brokerage firms represent the most recent measures that have negatively influenced trading on this market. Stock exchange from Mongolia, Panama and Jamaica are ranked next, each with double-digit returns for their main indices. The New York Stock Exchange makes the USA the only developed market in the world to finish the year with increased results.

Increasing the threshold for holding SIFs and subsequent recovery helped Romanian index BET-FI to get on the first part of the ranking. But taking into account the evolution of BET, the main index of the Bucharest Stock Exchange, Romania descends into the lower half of the above mentioned ranking.

The penultimate place is occupied by Greece, the most affected country by the sovereign debt crisis in 2011. In 2011 Athens Stock Exchange fell by nearly 61%. Only Cyprus Stock Exchange recorded values lower than Greece, with an average loss of 72%.

Conclusions

Before the current crisis, some insights about the aggregate efficiency of the financial system and legal environment have widened the debates on the merits of various structures of the financial system. Some economists argued that financial markets and banking system are complementary rather than substitutes and that the efficiency of the financial sector as a whole, is more important. They believed that the legal system represents the key for the financial system to function (especially, protection of creditors and minority shareholders against expropriation by majority shareholders and management team). Currently Romania is facing one of the highest rates of expansion of money supply in the world, which could predict a large increase in the Bucharest Stock Exchange. In this regard, a recent study made by the analysts of the Austrian financial group Erste Group and released on December 21, 2011[5] shows that in periods marked by intense financial and economic turmoil as the one that we are currently going through – and which will probably continue, if not get worse, and in 2012 – the analysis of the underlying factors is no longer able to offer the players on the stock exchange the right signals needed to accurately explain the market developments and to make correct investment decisions. According to analysis conducted by the Austrian financial group, it is believed that accelerating the growth rhythm of the money supply and credit lead to the appreciation of stock quotes listed, while the opposite phenomenon puts negative pressure on stock prices. Accelerating the growth rhythm of the money supply[6] and the volume of credit in economy is likely to signal investors that a boom period on the stock market is about to happen. Monetary indicators that are most useful to observe in order to anticipate the trends of the capital markets are money supply in a narrow sense (M1), which comprises currency in circulation and current deposits in banks, intermediate money (M2), composed of narrow money M1 plus deposits with agreed maturity up to two years. Along with monetary aggregates, the evolution of credit both the nongovernmental, corporate and public, as well as the government credit may be taken into account. Thus, "investors must rely on the appreciation of stock quotes and to overexpose themselves on cyclical sectors and

[5] The study includes the U.S.A., the Euro area, Japan, the four BRIC countries, 6 countries in Central and Eastern Europe and Turkey

[6] Gerald Walek, Henning Esskucken and Stephan Lingnau. - Austrian vision, Bursa newspaper January 9, 2012

financial companies shares as long as the credit is easily accessible and rapidly growing. As soon as lending conditions tighten and growth rate of loans decreases, investors should sell these shares gradually and to focus on more defensive sectors," says the Erste Group study. In conclusion the two markets overlap in a unique way so that none of them can develop without the contribution of the other. Only if the stock could exploit the advantage provided by the listing of the Fondul Proprietatea which is currently exploited too little, although there is great interest from investors.

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STRUCTURAL AND COHESION FUNDS VERSUS THE IMF LOANS: IMPLICATIONS AND CHALLENGES FOR THE ROMANIAN FINANCIAL SYSTEM

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Abstract
The Structural and Cohesion Funds as well as the loans obtained by our country from the IMF have significant implications upon the Romanian financial system. This article is a comparative approach structured on five parts as it follows: the second part is a review of the specific literature regarding the theme of our work, the third part is an analysis of the absorption stage of the Structural Funds and the evolution of the stand by agreements between Romania and IMF, the fourth part is a SWOT analysis of the Structural Funds versus the IMF loans and the last section is dedicated to the econometric quantification of the efficiency of the two financing opportunities. The IMF loans ensure the coordinates of the financial stability but the structural funds represent the link between stability and the development that Romania needs. We consider and claim that Romania needs European funds. We do not ask to give up entirely to the IMF loans but we plead for having an equilibrium which could support the economical development.

Key Words: *Structural and Cohesion Funds, IMF facilities, economic growth, financial stability, Romania.*

Introduction

Our paper covers a complex financial matter, related to the opportunity of attracting European funds versus the implications of the loans obtained by our country from the International Monetary Fund (IMF) upon the Romanian financial system. The purpose of this article is a comparative approach of the two funding sources mentioned above and it structured on five parts as it follows: the second part is a review of the specific literature regarding the theme of our work, the third part is an analysis of the absorption stage of the Structural Funds and the evolution of the stand by agreements between Romania and IMF, the fourth part is a SWOT analysis of the Structural Funds versus the IMF loans and the last section is dedicated to the econometric quantification of the efficiency of the two financing opportunities.

Using a simple linear regression model we analyse the efficiency of the Structural and Cohesion Funds versus the IMF loans using Romania's example for the period 01.2007- 08.2011, based on data with monthly frequency.

In academic literature, we find a lot of studies which analyze the implication of IMF facilities upon financial systems and economic growth (Hutchison, 2004; Atoyan and Conway, 2005; Nsouli et al., 2005; Barro and Lee, 2005; Steinward and Stone, 2009). Instead, we can not say the same thing about the Structural and Cohesion Funds, which are a relatively new topic for the economic theory and practice, and studies on the example of the Romanian economy are few.

The critiques consider that the Romanian government has preferred the IMF because the money from the European funds "cannot be embezzled" and has chosen to get the Romanian people into debt. This affirmation is sustained by the austerity conditions imposed by the IMF. In the context of the financial assistance offered by the IMF, which determinates a drastic reorientation of the fiscal

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– budgetary policy, we suggest the raise of the absorption rate of the Structural and Cohesion Funds as possible solution.

We propose a comparative approach of Structural and Cohesion Funds in relation with IMF loans in order to outline a complete background of their challenges upon Romanian financial system.

Previous empirical research

The European Union aims at reducing the economic and social gaps among the EU countries using the Structural Instruments. The European Fund for Regional Development and the Social European Fund constitute the Structural Funds and these last ones along with the Cohesion Fund form the Structural Instruments.

It is very important to emphasize the impact of these European funds upon the economical growth. The image of irredeemable financing creates a perpetual satisfaction feeling and an enrichment desire. John Bradley and Gerhard Untiedt have identified in their work *Do economic models tell us anything useful about Cohesion Policy impacts? A comparison of HERMIN, QUEST and ECOMOD*, 4 main stages in analysing the impact of the cohesion policy:

Stage 1: The cohesion policy – a challenge

Stage 2: The creation of the interventions inside the cohesion policy

Stage 3: The methodology for evaluating the impact of the cohesion policy

Stage 4: The presentation and analysis of the results

It is not easy to measure the impact but we can use a series of measures for creating an overview (Report from Commission, 2010):

- The regional statistics measure in terms of GNP, labour market, unemployment, but they do not show the impact of the policy in terms of changes;
- Monitoring the programmes emphasizes the result of the policy: how many kilometres have been built? How many persons have been trained?
- The analysis cost-benefit ex-post can estimate the contribution of the infrastructure to the economical growth;
- Macroeconomic models: The General Direction of the Regional Policy uses two macro-models: HERMIN and QUEST and also a model regarding the transportation investments TRANSTOOLS;
- Models with impact upon the labour market, the companies and the farms: model that has been recently applied in 6 member states: Denmark, Germany, Italy, Austria, Poland and United Kingdom with different socio-economical features but representative for the other EU states;
- Interviews, case studies can be used for quantifying the contribution of the Structural Instruments.

It is obvious that the European Commission cannot bring proofs for justifying the performance of the Structural Instruments. Thus, EU asks the state members to make their own evaluations. And when dealing with several evaluations it is possible to draw an image of the performance and of the improvement of the Structural Instruments.

An example is the ex-post evaluation of the period 2000-2006. For the FEDR evaluation 2000-2006, 105 detailed case studies have been generated, 29.500 monitoring indicators have been analysed from 382 programmes. In the context of the ex-post evaluation for FES 49 case studies have been made and 2000 measures from 238 programmes have been analysed (Report from Commission, 2010).

For quantifying the impact of the Structural and Cohesion Funds, many authors use the mathematic – econometric model type HERMIN, model focused upon the main features of the marginal economies of EU (Bradley and Untiedt, 2007).

Using such a model for the Romanian economy implies the analysis of the four very important blocks that constitute the model based on the studies elaborated so far (Ibraim, 2010).

For catching as precise as possible the influence of the structural instruments upon the regional development from Romania and considering the Herom model, the Romanian version of the Hermin model, which has been used during the autumn of 2008 by the experts of the National Commission of Economical Prognosis for a quantitative estimation of the macroeconomic impact of the Community Support Framework for the period 2007 – 2020 (Marchis, 2008).

The HEROM model considers two basic scripts imagining an economical growth in Romania, „with structural funds" and „without structural funds". The „without structural funds" version does not consider the EU structural funds planned for Romania during 2007 - 2013, being limited only to the pre-adhesion funds. The second script „with structural funds" is based on the supposition that the structural funds planned in the National Development Plan 2007-2013, will be absorbed at a rate of 100%. The HEROM model starts also from the premises that after 2013 the structural funds will be reduced to zero, fact that will cause a „shock" for the Romanian economy, with negative effects for several years (Gherghinescu and Băndoi, 2009).

The literature offers multiple possibilities for analysing the impact of the structural instruments in accomplishing the economical convergence. Thus, some specialists recommend macroeconomic simulation models (Bradley et all., 2006), this version being accepted by the European Commission while others choose regression econometric models oriented towards specific dimension, coordinates, influence factors (Boldrin and Canova, 2001; Ederveen et all., 2002; Fuente, 2003).

Ibraim Kagitc, in his PhD thesis, *Improving the attraction and use of structural and cohesion funds of the European Union in financing the Romanian projects*, has calculated the impact of the Structural Funds upon the modification of the main variables (GNP and the gross capital formation), econometrically by estimating two regressions which follow the way in which the variation of the funds generate the variation of the two variables indicated above (Ibraim, 2010). The conclusion of the analysis has shown that the impact of these financial instruments upon the GNP and upon the gross capital formation has not been a considerable one, although we have to mention that Romania needs reliable and realistic projects for attracting European funds.

Gabriela Marchis, in her PhD thesis, *The Impact of the European Union Extension upon the Regional Strategies and Policies. The Role of the Structural Funds*, has chosen a multiple linear regression model for testing the existence of the relationship between the GNP of each county and the volume of the investments, the working population, the number of projects and the absolute absorption of the Phare funds during the programming period 2000 – 2006 (Marchis, 2008). The F test of global signification has shown that the regression is adequate for the purpose of predicting the GNP of the county and the observed data have allowed the identification of a linear valid model especially between the volume of investments and the county's GNP.

In the modern literature we identify many studies which investigate the way in which the IMF programmes and their implementation affect the equilibrium of the payment balance, the inflation and the economical growth (Bird, 2007; Steinward and Stone, 2009). The impact of the IMF programmes upon the economical development is analysed by many authors whose conclusions are different without reaching unanimous consensus. The empirical contradictory results appear from the differences regarding the sample of analysed countries, the test period and the methodology used.

Dreher (2006) using panel data for over 98 countries during the 1970-2000, analyses the way in which the IMF implication influences the economical growth and the empiric results show that the impact of the conditionality upon the development is quantitatively low. Steinwand and Stone (2009) claim that very few aspects are certainly known about the effects of the IMF credits but that a lot had been learned about the mechanics of the IMF programmes which will be considered for obtaining objective estimations of these effects .

The impact of the IMF programmes upon the countries facing the crisis seems a certitude. Kutan et all (2011) analyses the impact of the assistance offered by IMF upon the countries that experiment periods of financial crisis, such as Indonesia during the Asian crisis. The results indicate

the fact that the IMF actions during that crisis had a significant impact upon the profitableness of different sectors. Also, the results of the empirical tests done by Dreher and Walter (2010) show that the involvement of IMF reduces the probability of currency crisis. Hândoreanu (2010) analyses the impact of the agreement between Romania and the International Monetary Fund upon the exchange rate EUR/RON. The conclusion of the study is that the agreement with the International Monetary Fund has reduced the pressure regarding the depreciation of the national currency and, in conditions of *caeteris paribus*, has lead to a reduction of the inflationist pressures which are sent by the currency exchange channel.

Stenward and Stone (2009) suggest four main directions for improving the IMF programmes: refining the existing selection models, shaping the heterogeneity of the debtors, shaping the variations in conditionality; shaping the variations in practice .

The justification of the opportunity of the IMF loans for the economy of our country rise different opinions. The reason for which the central bank has made appeal to such loans is justified by the necessity of avoiding a financial crisis caused by the lack of currency provisions (Creţan and Lacrois, 2010). The IMF intervention has generated the reduction of the public expenses along with the increasing of the taxes with serious implications reflected at the level of the main macroeconomic indicators. The effects of the economical redressing measures will be experiences in time.

The stage of the absorption vs the stand by agreements of romania with imf

The Structural Instruments are specially designed for contributing to reducing the gaps in seven domains very important for our country. Thus, seven Operational Programmes (OP) have been elaborated in the context of the "Convergence" objective (meant to accelerate the economical development for the regions left behind, by investments in human capital and in the basic infrastructures).

Table 2 shows the stage of the Structural and Cohesion Funds absorption identified in the column for internal payments towards beneficiaries and intermediary payments from the CE. The Ministry of European Affairs (MAEur) makes a few clarifications regarding the definition of the absorption rate (Press release, 2011, http://www.dae.gov.ro):

Absorption in national plan (14,72%) – quantified by the real payments towards the beneficiaries accounts (pre-financings and reimbursements from community funds and from the state budget).

External or effective absorption (3,72%) – transfer of the advance from the European Commission at programme level and transfer of the intermediary payments (reimbursements).

Table 1. The stage of absorption of the Structural and Cohesion Funds for each Operational Programme the 30th of November 2011

Programme	Allocation EU 2007-2013 mil. RON	Projects submitted		Projects approved		Contracts Signed		Domestic payments to beneficiaries		Interim payments from the EC	
		No.	Total value (mil.RON)	No.	EU Value (mil.RON	No.	EU Value (mil.RON)	mil. RON	%	mil. EUR	%
Transport	19 686	115	37 880	62	7 857	53	6 857	609	3,09	113,69	2,49
Environment	19 455	457	34 642	288	16 134	233	16 005	2 380	11,50	85,36	1,89
Regional	16 065	7 924	53 145	2 773	13 543	2 340	12 098	4 278	24,49	274,56	7,37
Human Resource Developmente	14 987	10 187	43 031	2 990	15 118	2 139	12 093	3 742	23,61	102,92	2,96
Competitiveness	11 013	11 051	67 897	3 288	7 465	2 094	4 656	1 878	15,39	117,49	4,60
Administrative Capacity	897	1 346	3 480	344	540	323	444	102	10,67	9,84	4,73
Technical Assistance	734	92	414	78	266	73	251	87	11,70	11,65	6,85
TOTAL	82 837	31 172	240 489	9 823	60 923	7 255	52 404	13 076	14,72	715,51	3,72

Source: site of The Ministry of European Affairs (MAEur)

The results of the absorption are not at all encouraging and the disappointment is even stronger when we observe that by POS Transport only 3,09% have been attracted from the 2007 – 2013 allocation for the modernization and the development of the national transportation networks, for promoting the railroad, naval and intermodal transportation. We wonder if we don't really need intervention in these chapters and if we afford to miss such an opportunity. Most people blame the imposed bureaucracy, the difficulties in obtaining the notifications etc. We prefer to develop human resources, fact proved by the percentage of 23,61%.

The implementation of programmes and of new support services for developing the enterprise culture, the development and promotion of modern management abilities are very important indeed. In the beginning it was understandable that many people needed training courses, teaching, support but we can benefit from the new abilities for accessing more funds for the environment, for transportation, for developing the administrative capacity.

On the other hand, the financial assistance given by IMF to Romania has been materialized in loan Stand by agreements, loan programmes and, starting 1972, our country has used the IMF resources on twelve occasions as financial support for the government economical projects. The 31st of December 2010, the total amount drawn by Romania from the IMF agreement was of 9,8 billion DST (approximately 11,9 billion Euro) from which 7,85 billion DST by BNR and the difference – in an unusual way – by MFP for financing the budget deficit.

The total of the irredeemable credits by the end of February 2011 was of 10569 million DST, respectively 1025.52% from the quota. The Romanian authorities have closed in March 2011 a new financial agreement with EU, IMF and MB for 5,4 billion Euro, the support offered by IMF being of 3,5 billion Euro.

Swot analysis of the structural and cohesion funds vs IMF loans

By this article we try to answer to the question: *Why we take loans from IMF and we don't attract Structural Funds?*

Romania has received in May 2009 a financial support of 20 billion Euro, from which 12,95 billion Euro (17,1 billion USD) from the IMF. Many critiques claim that we have chosen the wrong way because we won't have enough funds to return this amount. Some say that the Romanian government has preferred the IMF because the European funds "cannot be embezzled" and has chosen to burry the Romanian people in debt. This affirmation is sustained by the austerity conditions suggested by IMF and the obligations imposed.

In order to see which of these financing possibilities could contribute more to the economical growth of Romania we will try to emphasize some features which define these international funds:

Strong aspects

Structural and cohesion funds

reducing the economical and social gaps among the EU members by the Structural Instruments;

irredeemable financing – solution against the negative effects of the financial crisis;

making the EU members responsible by the decentralized (national) management of the funds;

creating a close collaboration between the European, national and regional authorities in writing, evaluating and implementing projects (partnership principle);

lower costs of accessing projects by the Structural Funds compared to other financing modalities (reference to the beneficiary and to the Romanian Government).

International monetary fund

- IMF offers financial assistance to the states who have difficulties in the payment balance, giving them the possibility to rebuilt the international provisions stock, to stabilize the currency rate, to continue the payments of the imports and to reinstall the economical growth conditions;
- the IMF implication reduces the probability of currency crisis;
- the IMF programmes re-establish the investors' trust and reduce the contagion from other markets, having in the end a positive effect upon the financial stability;
- the partnership with IMF is a supplementary anchor for the reforms that Romania needs;
- introducing at the level of the bank sector the International Standards of Financial Reports (ISFR) starting the 1st of January 2012.

Weak points

Structural and cohesion funds

- lack of commitment and financial instruments which should allow the co-financing sustainment;
- reimbursement principle – means that the projects beneficiaries should make some expenses from their own funds and recovering the amounts after the audit and the validation of those expenses;
- weak institutional capacity for controlling the way to spend the funds and to prevent fraud.

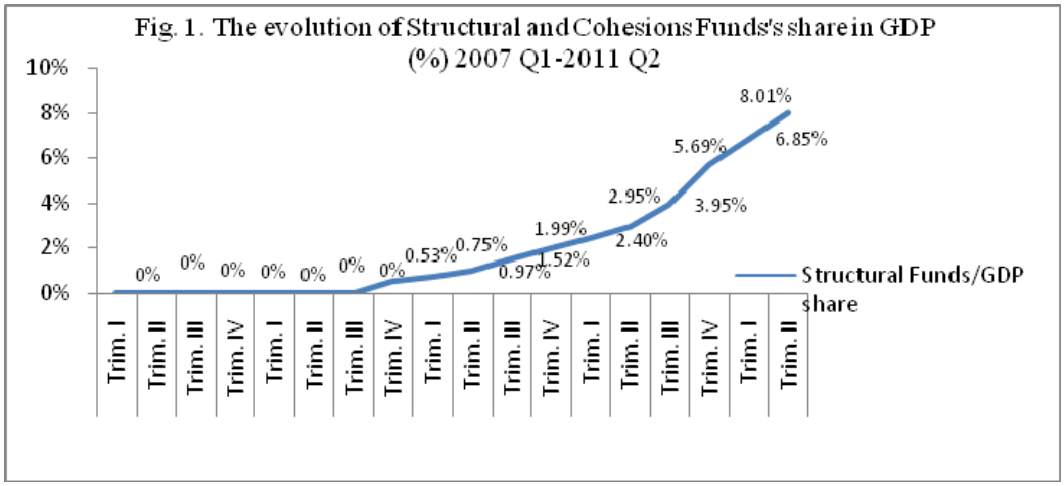
International monetary fund

- as a consequence of the conditionality of the agreements closed with IMF and EU of consolidating the public finances sustainability at medium term, the adverse effects have generated extended inflation and economical contraction;
- increasing external debt at medium and long term. The medium and long term external debt has been of 75 292 million Euro the 30th of September 2011 (76,9% from the entire external debt) bigger with 3,3% compared to 31st of December 2010.
- the rise of the standard VAT quote with 5 percentage points (to the level of 24%), starting the 1st of July 2010 has generated problems in configuring and implementing the monetary policy;
- Romanian authorities do not estimate the future quantum of the annual budget based on the specific criteria, waiting first of all the prediction made by IMF.

Opportunities

Structural and cohesion funds

- reducing the economical, social and financial gaps among the EU countries;
- offering reliable financing at reduced costs;
- environment protection, human resources development, professional reconversion, administrative capacity development, economical competitiveness for the IMM, regional development, modern territorial infrastructure, transnational good practice exchange;
- reaching performance indicators important for the economical growth: rise of the occupation rate, of the GNP:



Source: own calculations based on Ministry of European Affairs database

In the above graphic we can observe the ascendant trend of the absorption rate at national level of the Structural and Cohesion Funds upon the General National Product. The year 2007 has been considered to be dedicated for establishing the technical aspects, for elaborating and approving all the specific documents for these European funds. In 2008 the first project requests have been launched and only the IV-th trimester brought the effective payment for the beneficiaries. Unfortunately this small launching has been stopped by the international crisis and, as a consequence, the absorption rate was still at a reduced level. Starting 2009 and until now we can observe "flourishing" results but it is still not enough considering the fact that we occupy the last place in the member states top. The impact of these funds upon the GNP is not a significant one but it has an ascending trend and we hope that we will reach the planned indicator – a GNP per citizen of 41% from the EU average until 2015 (The National Development Plan 2007-2013, 2005).

International monetary fund

- the financial discipline imposed by IMF represents a guarantee of the foreign investments with beneficial effects for the Romanian economy;
- the possibility of covering the financing risks which could appear when materializing an antagonistic script on external plan having as consequence the reduction of capital entrance or exports;
- the state companies will benefit of private management.

Threats

Structural and cohesion funds

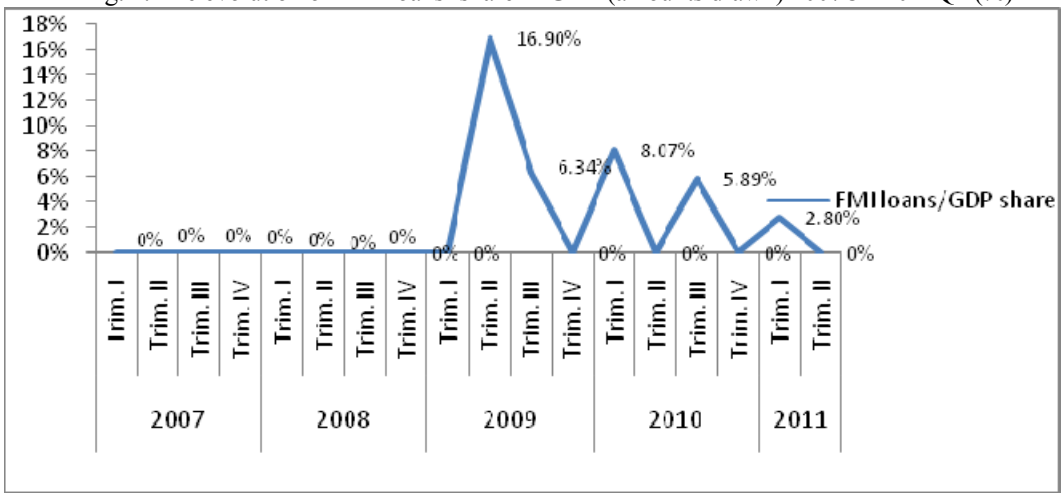
- financial contribution of the applicant;
- carelessness and indifference from the beneficiary;
- inefficient communication with the institutions which offer consultancy;
- time gap between the moment of applying the financing request and the selection result;
- lack of a strategic plans at the institutional level which supervises and implements the European funds.

International monetary fund

- protests of the syndicates unhappy about the economical policy of the governments;

• consequence of the painful reforms (for instance, budgetary, salary, fiscal, pension system and medical insurance revisions) which affect directly the life standard of the population's majority and the activity of the business environment, the agreements closed with IMF do not benefit from the public support.

Fig. 2. The evolution of IMF loans' share in GDP (amounts drawn) 2007Q1-2011Q2 (%)



Source: own calculations based on NBR database

The quarterly analysis of the loans rate obtained (sums drown) by our county from IMF inside GNP during the period Q1 2007-Q2 2011, shows the fact that their value is decreasing. The highest value, 16.90%, has been registered in the II-nd trimester 2009 fact sustained by closing the stand by agreement in April with a value of 11 443 billion DST, the value of the sums drown effectively being of 10 569 billion DST. The rate of these loans in GNP has diminished, the agreement closed in March 2011, with a value of 3090 million DST being of preventive type.

Econometric quantification analysing the efficiency of the structural funds versus the imf loans

Data and methodology

The purpose of this section is to analyse the efficiency of the Structural and Cohesion Funds versus the IMF loans using Romania's example for the period 01.2007- 08.2011, based on data with monthly frequency.

For fulfilling the purpose we have used a simple linear regression model: **$Y=\alpha+\beta*X$,** where Y= dependent variable, X= independent variable, and α and β the parameters of the regression equation. We plan to quantify econometrically:

the relation between the employees number (the working population – thousands of people) – labelled as "efectivul_sal" and the value of the payment towards the beneficiaries (lei) "plăți_benef";

the relation between the number of employees (the working population – thousands of people) and the value of the sums drawn by the stand by agreements (thousand of lei) labelled as "imprumuturi_fmi".

The dependent variable (Y) is the number of employees and the value of the payments towards the beneficiaries and respectively the value of the sums drawn by the stand by agreements are independent variables (X). We choose as proxy variable for economic growth the number of employees (working population) due to the lack of data with monthly frequency available for other

macroeconomic variables. The choice of a variable with quarterly frequency (as GNP) would have put at doubt the results of the empirical testing because of the reduced number of observations. The source of the data is represented by the data bases of the Romanian National Bank and of the Ministry for European Affairs.

Empirical results

The Unit Root test shows that the variable "efectivul_sal" is stationary in the first difference at the level of 10%, the other two variables being stationary at any level, still from the first difference.

The econometric results of the first testing show that there is a reverse link between the values of the payment toward the beneficiaries in the context of the Operational Programmes and the number of employees inside the Romanian economy. The estimated equation is:

efectivul _sal= -7, 899207-0.041940 * plati_benef.

The determination report R^2 =0.116343 shows that only 11,63% from the variation of the employees number can be explained by the variation of the independent variable – payments toward beneficiaries, so there are other variables which influence the evolution of the dependent variable in question.

Table 2 The estimation on regression model

Dependent Variable: D(EFECTIVUL_SAL)
Method: Least Squares
Date: 12/07/11 Time: 17:47
Sample (adjusted): 2007M02 2011M08
Included observations: 55 after adjustments

Variable	Coefficient	Std. Error	t-Statistic	Prob.
C	-7.899207	3.431821	-2.301754	0.0253
D(PLATI_BENEF)	-0.041940	0.015877	-2.641596	0.0108

R-squared	0.116343	Mean dependent var	-8.163636
Adjusted R-squared	0.099670	S.D. dependent var	26.81146
S.E. of regression	25.44024	Akaike info criterion	9.346227
Sum squared resid	34301.91	Schwarz criterion	9.419221
Log likelihood	-255.0213	F-statistic	6.978030
Durbin-Watson stat	0.904468	Prob(F-statistic)	0.010821

Source: own simulation, significant at 5%

The results obtained, using this model, contradict the unanimous opinion of the specialists according to which the Structural and Cohesion Funds contribute to the economical growth. The possible explanations could be:

- the time gap in which the beneficial effects of these irredeemable funds are felt in economy, the transmission mechanism being made more difficult by the negative implications of the economical and financial crisis;
- many of these projects are still in progress;
- the analysed period is too short for emphasizing a convincing result (financial allocation being for the period 2007-2013).

The econometric results of the second empirical test show that there is no significant relationship between the value of the sums drawn from the stand by agreements with IMF and the number of employees from the Romanian economy.

Table 3 The estimation on regression model

Dependent Variable: D(EFECTIVUL_SAL)
Method: Least Squares
Date: 12/07/11 Time: 17:46
Sample (adjusted): 2007M02 2011M08
Included observations: 55 after adjustments

Variable	Coefficient	Std. Error	t-Statistic	Prob.
C	-8.284046	3.668171	-2.258359	0.0281
D(IMPRUMUTURI_FMI)	0.007725	0.025768	0.299772	0.7655
R-squared	0.001693	Mean dependent var		-8.163636
Adjusted R-squared	-0.017143	S.D. dependent var		26.81146
S.E. of regression	27.04030	Akaike info criterion		9.468220
Sum squared resid	38752.42	Schwarz criterion		9.541214
Log likelihood	-258.3760	F-statistic		0.089863
Durbin-Watson stat	1.066625	Prob(F-statistic)		0.765524

Source: own simulation, significant at 5%

Although the results are statistically significant, we can identify some limits of the proposed model:

- the short period of time which have been taken into consideration for our analysis;
- due to the lack of data with higher frequency available for other macroeconomic variables, we consider the "number of employees" as proxy for economic growth.

Conclusions

The main contribution of our study is the fact that we propose a comparative approach of Structural and Cohesion Funds in relation with IMF loans in order to outline a complete background of their challenges upon Romanian financial system.

The Structural Instruments are specially designed for contributing to reducing the gaps in seven domains very important for our country. However, the results of the absorption are not at all encouraging and the disappointment is even stronger when we observe that by POS Transport only 3,09% have been attracted from the 2007 – 2013 allocation for the modernization and the development of the national transportation networks, for promoting the railroad, naval and intermodal transportation. We wonder if we don't really need intervention in these chapters and if we afford to miss such an opportunity. Most people blame the imposed bureaucracy, the difficulties in obtaining the notifications etc. We prefer to develop human resources, fact proved by the percentage of 23,61%.

The IMF loans ensure the coordinates of the financial stability but the structural funds represent the link between stability and the development that Romania needs. By the absorption of the European funds, focused on our country's priority, the economical growth will have an ascendant trend. And, the bigger the economical development, the smaller will be the burden of the external debt.

Using a simple linear regression model we analyse the efficiency of the Structural and Cohesion Funds versus the IMF loans for the period 01.2007- 08.2011. Firstly, we quantify econometrically the relation between the employees number (the working population – thousands of

people) and the value of the payment towards the beneficiaries (lei) and, secondly, the relation between the number of employees (the working population – thousands of people) and the value of the sums drawn by the stand by agreements (thousand of lei).

The empirical results of the first regression model shows that only 11,63% from the variation of the employees number can be explained by the variation of the independent variable – payments toward beneficiaries, so there are other variables which influence the evolution of the dependent variable in question. Our results contradict the unanimous opinion according to which the Structural and Cohesion Funds contribute to the economical growth. The possible explanations could be:

the time gap in which the beneficial effects of these irredeemable funds are felt in economy, the transmission mechanism being made more difficult by the negative implications of the economical and financial crisis;

many of these projects are still in progress;

the analysed period is too short for emphasizing a convincing result (financial allocation being for the period 2007-2013).

The econometric results of the second empirical model show that there is no significant linkage between the value of the sums drawn from the stand by agreements with IMF and the number of employees from the Romanian economy.

Therefore, our country cannot count on loans from IMF for raising the number of employees, the role of the stand by agreements being to ensure the coordinates of the financial stability in the eventuality of shocks manifesting in the international financial markets.

We consider and claim that Romania needs European funds. We do not ask to give up entirely to the IMF loans but we plead for having an equilibrium which could support the economical development.

As implication of such outcomes, we expect to increase the interest and the concerns of policymakers in managing better the European funds.

For further research, we suggest to test other macroeconomic variables in order to validate the econometric model. We consider that GDP would be a better choice.

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AN EMPIRICAL INVESTIGATION OF FACTORS AFFECTING CREDIT MARKET

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CIPRIAN-ANTONIADE ALEXANDRU[**]

Abstract
We investigate through an econometric approach the credit market and the factors that interact with it. The current research is beyond the minor aspects of the behavior and determinants of credit market in Romania and our concerns go to macroeconomic factors, consumption, investments and capital market. Results demonstrate a relationship between complex factors such as monetary policy and the credit market.

Keywords: *credit market, monetary policy, macroeconomic factors, non-governmental credit.*

Introduction

The credit market appeared and developed in Romania after 1989. The appearance and the boost of the private sector of the national economy, as well as the increase in household incomes have determined a serious demand for financing, which was mainly satisfied by the financial-banking sector through non-governmental credit. Although initially limited, its development became significant after 2000, when the economic growth[1], combined with the favorable perspective of accession to the European Union, as well as the constant improvement of the internal macroeconomic environment as a result of a well-planned mix of economic policies represented factors which led to an unprecedented growth in non-governmental credit.

This article focuses on the credit market in Romania, in particular during the period 2000-2010. Econometric methods are used to highlight the evolution of this market in the general macroeconomic context as precisely as possible. The main innovation is represented by the estimation and validation of a disequilibrium model for the Romanian credit market for the first time.

The article has the following structure: in the first part this market is described briefly. The main characteristics of the evolution of the credit market are presented, with special focus on its development after 2000, unanimously considered to be the year when the stable and sustainable growth of the national economy began. The second part is an overview of the theoretical framework of the disequilibrium models and of the significant results from the specialty literature related to evaluating/ controlling the credit markets from various countries that apply this set of models. The third part focuses on the evaluation/ control of the credit market by using a disequilibrium model adapted to macroeconomic developments in Romania. The last part of the article includes comments on the estimated model, as well as the conclusions of this analysis.

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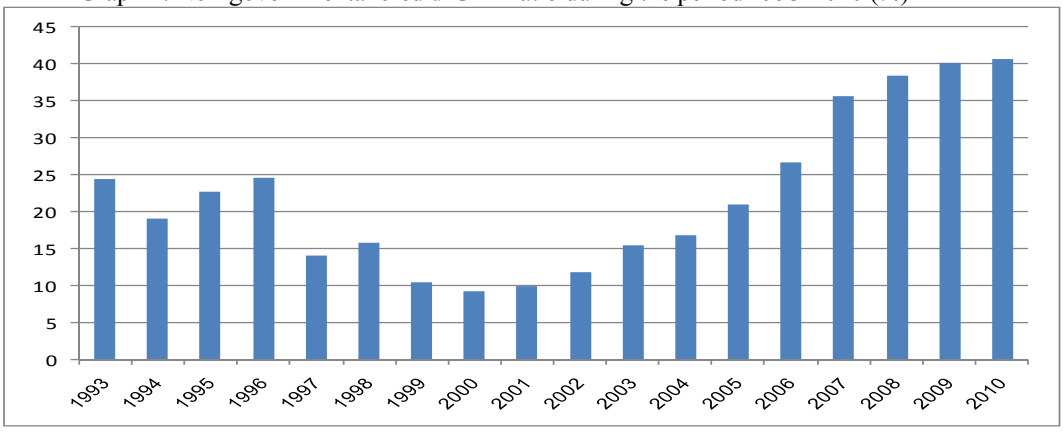
[1] During the period preceding the economic crisis – 2002-2008, the gross national product increased at an average annual rate of 6% (real values).

1. The crediting activity in Romania: main characteristics

In the first decade after 1989, the level of credits was initially very low, which is common to all emerging national economies in Eastern Europe. Starting from 1998, in a relatively short period, several banks went bankrupt and others were privatized, thus facilitating the appearance of foreign capital, which had a positive impact on the development of the credit market. Annex 1 presents a chronological overview of the restructuring of the banking sector, structured according to the information provided in the paper [Isărescu, 2009].

It is well known that bank privatizations improve performance and encourage competition [Clarke, Cull, Shirley, 2005]. As a result of the repositioning of the financial-banking sector, bank credit developed quickly, and its relevant indicators gradually reached the same levels as those in developed countries. The graph below illustrates the evolution in our country of non-governmental credit/ GDP, the most used index according to the specialty literature.

Graph 1. Non-governmental credit/ GDP ratio during the period 1993-2010 (%)



Source: *National Bank of Romania*

In the first stage, 1993-2000, the analyzed indicator had a fluctuating evolution. Thus, after having reached the value of 25% in 1996, it decreased to 14% in 1997 and 9.3% in 2000, as a consequence of the bankruptcies mentioned previously and of the rise in interest rates. During 2001-2010, the non-governmental/GDP ratio increased steadily as a result of the rapid growth in GDP (which led, among others, to increased revenues of the economic operators) and of the decrease of active interest rates. It is important to mention that, apart from these two factors, other causes contributing to this ascending trend were:

- the improvement of prudential bank supervision by the central bank by introducing the uniform banking rating system – CAAMPL – in 1999;
- the use of a new method for calculating the specific provisions for credit risk[2] starting from 2003.

The indicator registered the highest growth in 2007, when its value was 11 percentage points higher than in the previous year, reaching the level of 35.6%. This spectacular evolution occurred as a consequence of the significant appreciation of the national currency exchange rate, which led to massive capital infusions, a phenomenon that started in the first months of 2006. In its turn, this appreciation was significantly encouraged by external factors:

- the improvement of the investors' perception of the national economy, in a political context;

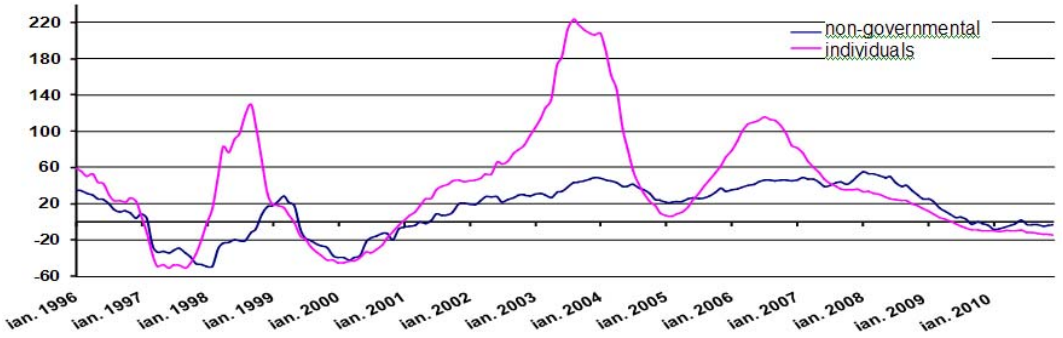
[2] NRB Regulation 5/ 2002concerning the classification of credits and investments, as well as the formation, regulation and use of specific credit risk provisions, published in the Official Journal of Romania n. 626/ 2002

- the lei-foreign currencies differential;
- the increased degree of financial integration[3].

Due to the economic crisis that has affected our country since the last three months of 2008, the indicator remained stable in 2009 and 2010. We must mention that despite this generally ascending evolution, the final value of the indicator in December 2010 (40.7%) was lower compared to its similar values in developed countries.

The non-governmental credit growth rates also registered high values, which is also true in the case of real increases in consumer credit. One of the causes of this boost is the fact that the initial values were very low. Thus, total non-governmental credit represented the equivalent of only 3.1 billion euro in December 2000, while in December 2010 its value reached 48.8 billion euro, which is a growth of over 1500%. In its turn, consumption credit in the national currency evolved significantly in the same period, from the equivalent of 141.2 million euro to 8.4 billion euro, which represents a growth of over 5900%[4].

Graph 2. Credit dynamics during the period 1996-2010
(in real terms, the corresponding month in the previous year = 100)



Source: *National Bank of Romania, own calculation*

After having a fluctuating evolution, sometimes reaching negative values in the period 1996-2000, the real growth of consumer credits in lei registered positive values after January 2001, reaching the highest value in the second half of 2003. The dynamics of the indicator had impressive monthly values of up to 223%, a figure that was recorded in August 2003. After a drop in the growth rate at the end of 2004, a new peak was reached in May-September 2006, with values between 110-120%. The phenomenon of credit growth can be to a great extent associated with the significant increase in revenues. This led to a higher demand for goods, especially durable, non-food goods, which finally determined the increase in household credits, both in terms of absolute and relative values.

Generally speaking, non-governmental credit had a similar evolution, with positive values after July 2001 and the maximum value reached in the second half of the analyzed period, in January 2008 (55.5%). Both indicators started to decrease in September 2009. A notable exception was registered in June 2010, when non-governmental credit grew by a marginal value of 1.97%. After this period the real crediting dynamics had only negative values, and the improvement of crediting has not yet been confirmed. There are several factors that have influenced both the supply of credits offered by banks:

[3] Isărescu, 2009, p. 250-251
[4] References were made based on the exchange rates at the end of the respective months

- the increase of the share of state securities portfolio (the appearance of the crowding-out phenomenon);
- the perception of the amplification of risk credit;
- the refusal to loosen credit standards,

and the demand for credits:

- the increasingly difficult financial situation of firms and individual consumers (due to government measures for reducing the budget deficit[5]),

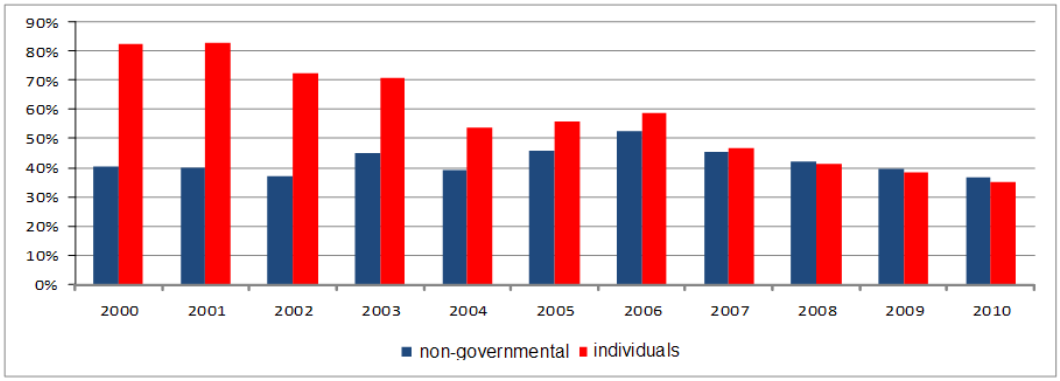
and that have contributed directly to these negative trends.

Compared to the rhythms of 2007-2008, when the average annual rates had an approximate value of 45%, in 2009 non-governmental credit had an average growth of only 7.5%. Actually, 2009 was the last year when growth was registered, as in 2010 non-governmental credit started to decrease by approximately 3.8%.

As a partial conclusion, we could say that the expansion of the non-governmental credit practically reflected a process of catching-up in the field of financial intermediation, a process which was influenced in a negative way by the difficulties that the Romanian banking system had to face during the period 1998-2002, as well as by the economic crisis that started in the second half of 2009.

Regarding the structure of non-governmental credit in terms of currency denomination, illustrated in Graph 3, the national currency had a higher share in household credit in 2004, when 70-80% of household credits were provided in lei.

Graph 3. The share of credits in lei in non-governmental and consumer credit



Source: *National Bank of Romania, own calculation*

The factors that caused this situation were the central bank's policy of controlled floating of the exchange rate in order to minimize currency risk and the fact that bank resources were mainly denominated in lei during this period (2000-2004).

On the other hand, the share of loans in lei from the total value of non-governmental credit was much lower in the first years of this period, due to the fact that firms generally preferred credits in foreign currencies to finance their import activities and to reduce currency risk, in the context of a relatively high volatility of the exchange rate.

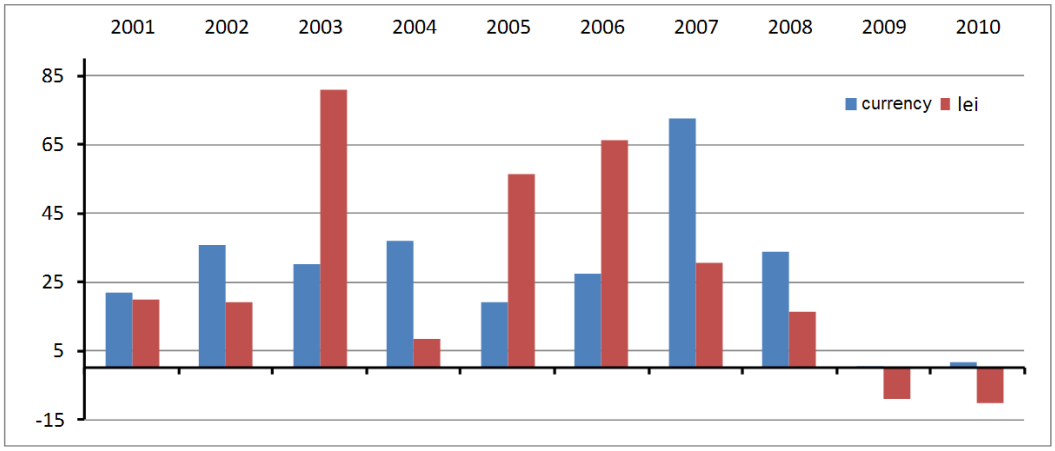
After the liberalization of the capital account, which started in 2004 (one of the conditions for accession in the European Union), individual consumers started to show increasing preference for credits in foreign currencies, the share of loans in lei decreasing below 35% at the end of 2010.

[5] The increase in the VAT rate from 19% to 24%, through the Emergency Government Ordinance 58/ 2010 (Official Journal of Romania n. 431/ 2010), as well as the decrease in salaries in the state sector by 25%, through Law 118/ 2010 on necessary measures for ensuring a balanced budget (Official Journal of Romania n. 441/ 2010)

During the period 2006-2010, loans in foreign currencies constantly consolidated their share both in non-governmental and in consumer credit, reaching values of 63%, respectively 65%. It is important to notice that 2006, when the share of credits in lei in the non-governmental credit went beyond the psychological threshold of 50%, was also the year when the lowest rate of inflation for the entire period was registered (4.87% December 2006/ December 2005). This year was also the only one when the central bank reached its inflation target (4% ±1pp).

The following graph indicates the evolution of non-governmental credit according to the currency denomination of the loans.

Graph 4. Annual credit growth, according to the currency
(values deflated with the consumption price index, year 2000= 100)



Source: *National Bank of Romania, own calculation*

Before 2004, the constant economic growth, as well as the obvious perspectives of accession to the European Union, which were the result of the beginning and finalization of negotiations for accession[6] in a relatively short period, led to accelerated rates of credit growth. The real growth rates of credits, both in lei and in foreign currencies, were also influenced by the regulations and the monetary policy of the central bank. After the central bank stopped applying its policy for maintaining a low volatility of the exchange rate, the risk related to credits in lei increased and the debtors started to prefer loans in foreign currencies.

In September 2005, the central bank introduced several regulations in order to set limits to credits denominated in foreign currencies[7], which had a positive influence on the evolution of credits in lei, which registered high growth rates in real terms: 56.5 % in 2005, respectively 66.1 % in 2006. Nevertheless, credit in foreign currencies increased significantly in 2007 by 72.6% due to the inflow of foreign currencies during that year. At the same time, the growth rate of credits in lei dropped to only 30.6% in the same year. Finally, in 2009 and 2010 there was a dramatic slowing down in the growth rates, and in the case of credits in lei there was even a drop in real terms: -9%, respectively -10.1%. This phenomenon can be attributed to the economic crisis, which led to the decrease of GDP after many years of sustained economic growth. The demand for credits decreased drastically as a direct consequence of the significant decrease of the gross domestic product, and credits in lei

[6] In December 2004 Romania closed the negotiations for all the 31 chapters of the Community acquis, which had started in the spring of 2000

[7] The NBR Regulation 11/ 2005 on restricting the exposure of credits in foreign currencies, published in the Official Journal of Romania n. 840/ 2005

declined as a result of the decrease in available revenues (denominated to a large extent in lei) of the companies and the individual consumers.

In conclusion, we could say that, on the whole, one of the sources of credit growth was the external financing obtained by commercial banks. The interest rate differential between lei and foreign currencies, as well as the real appreciation of the national currency determined the banks to expand their portfolio of credits in lei. Regarding the credit in foreign currencies, its ascending trend occurred due to the banks' ability to increase their resources through the mechanism of external financing, as well as to the increasingly fierce competition in the banking sector, the credit in foreign currencies being perceived as an alternative to loans in lei.

2. Theoretical framework of the model

A disequilibrium model involves the estimation of two functions, one related to the demand for credits, the other to credit supply. The two sets of independent invariables have to be distinct and to include variables that determine supply and demand from an economic perspective. It is considered that the minimal of the two values represents the level of credit equilibrium on the market. The theoretical framework of this group of models was presented for the first time in the article of Maddala and Forrest [6]. In order to formalize the described method, the following linear regression equations are given:

$$D_t = X_{1t}^{'}\beta_1 + u_{1t}$$

$$S_t = X_{2t}^{'}\beta_2 + u_{2t}$$

where D_t, S_t represent the demand, respectively the supply in period t, the vectors X_1, X_2 represent the exogenous variables that influence the demand, respectively the supply of credits, and u_1, u_2 represent the residuals. Then, the level of equilibrium of the market at a given t moment is established by:

$$Q_t = \min(D_t, S_t)$$

This assumption is reasonable, as if demand is higher than the supply, then the excess demand remains unsatisfied, and in the opposing situation when supply is higher than the demand, the excess supply remains uncovered. It is necessary to determine the degree of probability π_t to establish whether each observation belongs to the equation of the demand or to the one of the supply; the method of maximum likelihood estimation is used.

3. Previous results

The method described above has been used relatively recently by various authors for analyzing certain national markets: Ghosh and Ghosh[4] for Korea, Indonesia and Thailand, Barajas and Steiner[2] for Columbia, Peru and Mexico, Nenovsky, Peev and Yalamov[7] for Bulgaria, Baek[1] for Korea, Vodova[8] for the Czech Republic. We will present briefly the results of these studies.

Ghosh and Ghosh[4] use a disequilibrium model to investigate a potential credit crisis in three Asian countries: Indonesia, Korea and Thailand during the period 1997-1998. Credit crisis is a situation when interest rates do not lead to a balance between the demand and the supply of credits, and the aggregate volume of credits is restricted by the demand, meaning there is a rationalization of quantity.

The analysis starts from the premise that a decrease of credit in real terms is consistent with the decrease of the supply or of the demand for credits, or even with declines in both. The key identification issue consists in associating the noticed changes in the actual credit values to the subjacent evolutions of the functions of supply and demand. This issue is solved in an alternative regression framework by setting exclusion restrictions *a priori* (for instance, the restriction that only

the supply of credits, not the demand, is influenced by the banks' ability to provide loans). Thus, the authors assume that the real supply of credits depends on the following variables: i) the real interest rate compared to the cost of resources (the latter is estimated according to the rates for deposits); ii) the current output as a measure of the companies' reimbursing capacity; iii) the commercial banks' real capacity to grant loans. In its turn, the real demand for credits is determined by the following variables: i) the real interest rate; ii) the current output, in order to evaluate both the demand for working capital and as an indicator of future output (calculated as an average in the periods t-2, t-1 and t in order to reduce endogeneity-related issues); iii) the production gap, measured as a deviation of the current industrial production from its long-term trend; iv) stock market prices (as a proxy for expected output); v) inflation, as a general indicator of the macroeconomic environment.

Barajas and Steiner [2] examine the slowing down of bank credits to the non-governmental sector in eight countries in Latin America. By using an econometric approach based on a disequilibrium model, they focus on investigating the possible causes of the decline in three countries: Columbia, Mexico and Peru. Although both the factors that influence the supply and those that influence the demand play a key role, their relative significance varies from one country to another. The econometric analysis uses data at a macroeconomic level to establish if credit contraction situations actually represent a credit crisis. This is defined as a situation in which, for a given level of deposits, banks refuse to increase the interest rate for their loans up to a level where the market becomes saturated.

The functions of aggregate supply and demand for credits in the three countries – Columbia, Mexico, Peru – are estimated. For identifying a model it is necessary to exclude one or several variables included in one function from the other. For this purpose, the authors use the key-variable "capacity to grant loans", defined as the availability of funds necessary for granting credits. The second challenge involves the identification of variables which provide a reflection of the **macroeconomic context and the business environment**, which the demand for credits should be connected to in a positive way, and the supply should "respond" to the extent to which this affects the level of credit risk. The following variables are included: i) the industrial production; ii) the gross domestic product; iii) the GDP gap – only for Columbia – calculated as a monthly linear interpolation of a three-month gap; iv) the expected inflation rate – the arithmetic average of inflation on a three-month period, expressed in annual terms, focusing on the current month; v) the stock market index. In addition to elements presented in previous studies, two **specific variables** are included for the supply function: the percentage of non-performing loans from the total volume of credits, as well as the percentage of specific credit risk provisions from the total volume of non-performing loans. The dependent variable is the natural logarithm of real credits to the private sector.

The econometric estimates for Columbia, Mexico and Peru lead to the following conclusions:

- macroeconomic conditions influence the demand and sometimes the credit supply;
- the capacity to grant loans plays a key-role in determining the credit supply;
- certain alternative interest rates have a significant impact on the demand for credits.

The study of Nenovsky et. al[7] can be placed in the category of those that use a disequilibrium model, making use of a variety of factors to explain credit supply, respectively credit demand. The authors extend this perspective, whose main limitation consists in the use of traditional "mechanical" factors in establishing supply and demand (the capacity to grant loans, interest rates, income). They consider that this type of approach cannot express the entire range of relations between banks and companies, especially in the context of an economy in transition, which is characterized by significant institutional changes. The argument at the basis of the authors' approach is the following one: credit supply and demand concentrates in themselves to a great extent the entire "range" of relations between companies and banks; in their turn, these relations are a reflection of the economic environment and context. The influencing factors can be grouped in the following categories: i) traditional factors (the size of the companies, the profit, bank resources), which also

include internal regulations, as well as the structure of the banks and the companies; ii) the legal and institutional framework, mainly the restrictions resulting from the implementation of the monetary council regime; iii) corruption, influence exercised by the state; iv) property structure, control over the companies and the banks. Data regarding companies was gathered from a data base which includes 118 large companies listed on the stock market in Bulgaria, and the covered period is between 1998 and 2001. Data about banks was obtained mainly through a questionnaire that all the 35 commercial banks in America completed, and other necessary information was gathered from the banks' balance sheets and profit and loss accounts.

Baek's study[1] uses a disequilibrium model to identify credit crisis in Korea, defined as a situation when credit supply in real terms decreases and there is an excess demand for real credit on the market. The study makes use of monthly data collected in the period 1992-2005.

The author uses the following vectors of independent variables for the Korean credit market:

- for the supply: loans granted in the previous period, the interest differential between the interest rate for credits and the coupons of corporate bonds, bank deposits from the previous period, compulsory reserve rate and the industrial production index;
- for the demand: the value of credits in the previous period, the interest differential between the interest rate for credits and the performance of certificates of deposit and the industrial production index.

Four credit crises are identified (the decline of real credit supply and excess demand for real credit for at least two months). Two of them occurred before the financial crisis, and the most recent one started in December 2004 and lasted 4 months. In the author's opinion, the main causes of these crises are related to the companies' credit risk, the lack of trust persisting on the market and/ or the decrease in the volume of bank deposits. The most effective policy would be to eliminate distrust and to diminish the companies' credit risk rather than to stimulate the expansion of crediting provided by commercial banks. The elimination of factors that determine the decrease of bank deposits would also offer significant support in this direction.

Vodova's article[8] focuses on the credit market in the Czech Republic and uses a disequilibrium model to estimate the volume of loans granted. Thus, the regressive factors used for credit demand are: i) the interest rate; ii) the gross domestic product, with a lag of 3 three-month periods; and iii) the inflation rate, measured by using the consumption price index. For credit supply two independent variables are used: i) the banks' capacity to grant loans, defined as the total liabilities from which minimal reserves, necessary liquidity, cash in the cashier's desks and owners' equity are eliminated; and ii) the gross domestic product, as a measure of the debtors' ability to pay their debts.

The available data cover three-month periods between 1994 and 2006. All the estimated coefficients are statistically significant at the threshold of 5%, and their values are in accordance with the macroeconomic context. The following is worth noticing: positive signs would be expected for both determinants in the equation of credit supply. However, in reality the GDP coefficient has a negative sign, which illustrates the existence of an inverse relation between this parameter and the credit supply. According to the author, this can be explained by referring to the banks' potential anti-cyclic behavior: if they expect a decline in the economic growth in the future, they can reduce their current credit supply. Next, the forecast data is compared to the real one and periods of excess demand – the first and last third in the period (1994-1998, 2002-2006), respectively excess supply (1999-2002), are identified.

The study synthesizes in a table the determinants of both credit demand and supply used in other analyses. The author makes two observations:

a) some determinants are common, which means that they can be used to control both "sides" of the credit market;

b) the list for credit supply is much longer; as a consequence it is more difficult to control supply than demand. This means that, from the practical perspective of implementing the mix of economic policies, it is easier to influence demand.

4. The empirical disequilibrium model for the credit market in Romania

In the sequel, we shortly describe the variables included within the empirical model, together with their motivation for such a choice. The estimation results are also presented, and some comments on their relevance from an economic viewpoint are made. Finally, we drawn some practical considerations on the credit market evolution and we indicate some future research directions related to the empirical disequilibrium model.

4.1 Description of the model

In order to estimate and subsequently validate the disequilibrium model in Romania's case, first we have to establish the regressors' vectors. The regressors must be macroeconomic indicators that could influence either credit demand or credit supply.

To this end, for credit demand we take into consideration the following vector:

$$\mathbf{X_1 = (IPI, INFL, RDCR)}$$

where:

- IPI is the manufacturing output index, as a *proxy* for the general economic activity;
- INFL is the inflation rate, measured by consumer price index. This is a truthful indicator of the „quality" of ecoomic environment;
- RDCR is the real lending rate, as a price of the credits granted by banks;

In demand's case, the manufacturing out index will be lagged, and the lag's value will be chosen to offer the best statistical parameters. Economically speaking, a certain lag means that a better creditworthiness, resulted from getting revenues in a past period, allows getting credits in present period. Estimation of the demand's regression should deliver negative coefficients both for lending rate and for inflation rate. The motivation lies in the fact that a worsening of the economic environment (perceived through an inflation rise) as well as an increase in the cost of loans (measured through interest rate) should eventually result in a plummeting demand. The IPI's estimated coefficient should be positive, and this is explained by the fact that growing industrial production increases the creditworthiness of firms and individuals, consequently stimulating the borrowers' demand for new loans.

The regressors' vector for credit demand is as follows:

$$\mathbf{X_2 = (IPI, CAIM)}$$

where:

- IPI - is the manufacturing output index, seean as a measure of borrowers's capacity to repay their debts;
- CAIM – is the real lending capacity of banks, in million lei. The time series was computed as follows: total bank total liabilities (both in lei and foreign currency) minus capital minus cash in vault. Required reserves were calculated by applying the National Bank of Romania rates to the lei and foreign currency liabilities.

Estimating supply regression should lead to a positive coefficient for manufacturing output, due to the fact that its increase determines an improvement of the borrowers capacity to reimburse their debts, especially for companies. In this way, banks are tempted to increase credit supply toward the potential borrowers. In addition, the estimated lending capacity coefficient should be positive and less than 1, since, by definition, it measures banks „power" of granting loans.

The dependent variable is the real non-government credit, CNG, expressed in million lei.

We mention that, since the initial time series are non-stationary, we used the first level series in our model. For D(CNG) series the augmented Dickey–Fuller tests rejects the null hypothesis

of a unit root at significance level of 5%. The completed results of these tests are presented in annex 2.

In order to capture the influence of the economic crisis as an exogen influence factor on the credit market we introduced a *dummy* variable for both regressions, having value 1 for 2009m1-2010m12 interval and 0 otherwise. The rationale behind this as follows: the first quarter of 2009 marked the beginning of the economic crisis from a macroeconomic standpoint, the gross domestic product registering a fall of 6.1% in annual terms.

The nominal values of the lending rates, lending capacity and non-government credit were deflated by the cumulated consumer price index, starting from 31 December 1999.

The time series have a monthly frequency and covers January 2000-December 2010 period (132 observations). The data is obtained from National Bank of Romania website, except for manufacturing production index, which is obtained from Unite Nations Economic Commission for Europe. This index represents the monthly level of manufacturing output, with 2005 as base year, and is de-seasonalised.

The majority of the studies in this research area used the gross domestic product as is research area used the gross domestic product as a *proxy* for the general level of economic activity. Nevertheless we chose manufacturing production index based on the following reasons:

- monthly frequency of the data, which is available for all the other time series, except for GDP;
- in the analysed period, on average, loans to companies account for 70% of the overall non-government credit. This is a strong argument in favour of our choice, since the manufacturing output could heavily influence both credit demand and credit supply.

4.2 Estimations' findings

In order to estimate regression equations we used the software package *Eviews 5.0*. After trying to estimate different variants, we chose *lag* 4 for the manufacturing output index, as regressor in demand's equation, since it delivers the best statistical results.

Estimation's results are presented in the following table. Full data are presented in annex 2.

Table 1. Estimation's results

Demand regression (n = 128, k = 4)[8]		**Supply regression** (n = 131, k = 3)	
IPI(-4)	21.38 (p=0.005)	IPI	30.72 (p=0.00)
INFL	-18.25 (p=0.013)	D(CAIM)	0.29 (p=0.00)
RDCR	-33.70 (p=0.079)	*dummy*	-933.37 (p=0.00)
Dummy	-1097.47 (p=0.000)	Constant	-2959.46 (p=0.00)
Constant	-1157.58 (p=0.233)		

Source: *own calculation*

The constant is statistically insignificant in demand's equation, while of all the other coefficients are statistically significant, and the coefficient's signs confirm the expectations.

We observe that for demand's equation both inflation and lending rate negatively affects the demand; the lending rate has a much more influence than inflation, its coefficient is almost twice the inflation's coefficient. We infer that financing costs are greatly taken into account in the process of making borrowing decision by the economic operators, while the general economic climate, represented by inflation rate is considered to a lesser extent. Also the credit demand is positively influenced by manufacturing output index, with lag 4.

[8] *Sample size and number of regressors, respectively*

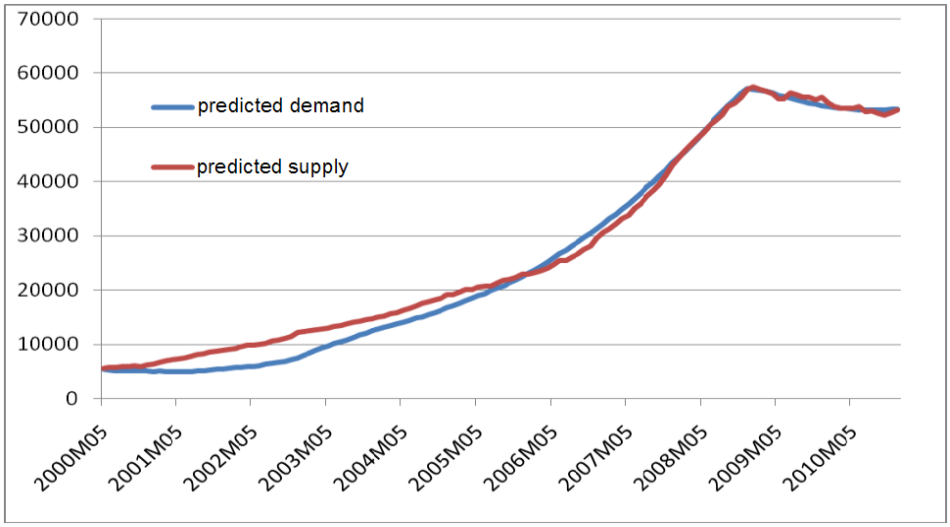
Estimation of the supply regression confirms the heavy influence of the industrial production on the credit supply, at a ratio of 1:30.7.The coefficient of D(CAIM) variable is less than 1 and thus confirms the assumption of using the lending capacity as a barometer for credit supply .

The negative values of the *dummy* variable represent the negative impact of the economic crisis on the credit market. The lesser value of the dummy's coefficient in demand's case shows the greater crisis impact on demand as compared to the supply.

Re-estimating our model by using quarterly data[9] for the same study period (44 observations) leads to similar results. The complete results are shown in annex 3. A remarkable difference from monthly data is a better explanatory power of the model, the R-squared coefficients being 0.63 and 0.67 respectively. This fact stems from the following argument: a reduced sample rate has the advantage of a better measuring of the exogenous variables on the credit market. It is worth mentioning that, in demand's equation we chose a lag 1 (*id est* three months) in order to get the desired similarity with precedent estimations, where the lag is 4 months.

Having in mind that our estimation delivers the fitted values in **first difference** of the non-government credit, we computed dynamically the theoretical values of the credit demand and supply. We used the initial (observed) values from April 2000 for demand, and from January 2000 for supply as starting points. In general, in the disequilibrium models framework, the actual values of the supply and demand cannot be observed; therefore this „reconstruction" indicates the (theoretical) periods of excess demand or excess supply. The following graph represents the two series.

Graph 5. Excess demand and excess supply, according to the predicted values of D(CNG)



Source: *own calculation*

After a short period of equilibrium, ended in December 2000, the model predicts the excess supply appeared, starting from January 2001. The „cleaning" of the banking system from the „bad" banks, a process that ended in the first years of the 2000-2010 lead to an excess supply, which persisted until the first half of 2005. Afterwards, the trend reversed, and the excess demand appeared and lasted until the beginning of 2008.

[9] *Quarterly values calculated as average of the monthly data in the current quarter*

This could be interpreted either by a reduction of bank supply, or by the emergence of a greater demand, generated by the accession to the European Union and the perspectives of a sustainable growth, which had to be financed. First possible explanation cannot be corroborated, since in this sub-period (July 2005-January 2008) the actual lending capacity increased with a percent of 130%. Moreover, the excess demand was generated by an acute need for new loans, additionally sustained by a sensible reduction of lending rate, from 19.5% in July 2005 to 13.1% in January 2008.

The end of 2008, which marked the beginning of economic recession, coincided with a decreasing trend of both credit market components. In the last two years of the studied period, the excess supply prevailed until August 2010. The last five months of this year registered a resurrection of the credit demand, one possible explanation could be the governmental austerity measures implemented in July 2010. Excess demand appeared on a plummeting credit market, while the firms' and individuals' revenues largely decreased, leading to an emerging need for bank loans as substitute for the previous inherent cuts of profits and salaries.

4.3 Further research area related to the model

This paper's model uses lending capacity as a variable that discriminates between demand and supply, and it is calculated as described in paragraph 4.1. If we take into account the large number of possible factors that may affect credit supply, mentioned by Vodova [7], a future research area is the testing and validation and calibration of disequilibrium models that include those factors, and/or credit supply. Another argument in favour of inclusion of other exogenous variables in the model is the relatively low explanatory power, the R-squared coefficients being in both cases lesser than 0.5.

Additionally, the present study may be improved by estimating coefficients through maximum likelihood method, as presented in Maddala and Nelson [5]. Due to the complexity and the necessity to validate such computations, this research is reserved for a future work.

Conclusions

This paper investigates the Romanian credit market that appeared in the process of transition to the market economy, which include a healthy banking system. First part of our paper is purely descriptive and deals with the synthetically indicators regarding the credit market, closely related to macroeconomic climate.

The second and third parts shortly present the theoretical model, as well as some findings in the economic literature that use of such an approach. The variables used in these studies are reviewed, and the overall conclusions are highlighted.

The last part is dedicated fully to the proposed disequilibrium in Romania's case. The time series, as well as the rationale behind their choice are thoroughly treated, our model being an empirical one. The estimations results on one hand confirm this choice, and on the other hand reveal, by means of the econometric approach, the ongoing processes of the credit market. Re-estimating the model using quarterly data leads to a better explanatory power.

Finally, some possible future research areas related to the improvement of the analysed disequilibrium model are suggested.

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Annex 1

Banking restructuring in Romania, 1998 - 2002
(worked out from [Isărescu, 2009], pp. 286-290)

No.	Bank name	Type of restructuring	Year
1.	Banca Agricolă S.A.	privatization	1999-2001
2.	Banca Albina S.A.	insolvency	1999
3.	Bankcoop S.A.	insolvency	2000
4.	Bancorex S.A.	acquisition by Banca Comercială Română	1999
5.	Credit Bank S.A.	insolvency	2000
6.	Dacia Felix S.A.	cesionarea creanțelor	2001
7.	Banca Română de Scont S.A.	Insolvency	2002
8.	Banca Turco-Română S.A.	Insolvency	2000-2002
9.	Banca Internațională a Religiilor S.A.	Insolvency	2000-2002
10.	Banca Columna S.A.	Insolvency	2003
11.	Casa de Economii şi Consemnațiuni S.A. (CEC Bank din anul 2008)	transformed from savings bank for natural persons to a retail bank	2002
12.	Banca de Export-Import a României S.A.	Transformed from a commercial to state agent for sustaining foreign trade	2000
13.	Banca Română pentru Dezvoltare S.A.	privatization	1999
14.	Bancpost S.A.	privatization	1999-2002

Nota: In 1998 the new laws on banking industry have been adopted as follows: Law no.58/2001-banking law, Law no. 101/1998 on NBR statute, Law no. 83/1998 on insolvency procedure of banks

Annex 2

Estimation Command:
==========
LS D(CNG) IPI(-4) INFL RDCR DUMMY C

Estimation Equation:
==========
D(CNG) = C(1)*IPI(-4) + C(2)*INFL + C(3)*RDCR + C(4)*DUMMY + C(5)

Substituted Coefficients:
==========
D(CNG) = 21.38464513*IPI(-4) - 18.25516384*INFL - 33.70302231*RDCR - 1097.472639*DUMMY - 1157.580223

Dependent Variable: D(CNG)
Method: Least Squares
Sample (adjusted): 2000M05 2010M12
Included observations: 128 after adjustments

Variable	Coefficient	Std. Error	t-Statistic	Prob.
IPI(-4)	21.38465	7.621782	2.805728	0.0058
INFL	-18.25516	5.533280	-3.299158	0.0013
RDCR	-33.70302	19.04711	-1.769456	0.0793
DUMMY	-1097.473	147.0262	-7.464471	0.0000
C	-1157.580	966.1487	-1.198139	0.2332

R-squared	0.393782	Mean dependent var	371.2944
Adjusted R-squared	0.374068	S.D. dependent var	707.6417
S.E. of regression	559.8570	Akaike info criterion	15.53152
Sum squared resid	38553104	Schwarz criterion	15.64293
Log likelihood	-989.0172	F-statistic	19.97433
Durbin-Watson stat	2.114830	Prob(F-statistic)	0.000000

Estimation Equation:
==========
D(CNG) = C(1)*IPI + C(2)*D(CAIM) + C(3)*DUMMY + C(4)

Substituted Coefficients:
==========
D(CNG) = 30.72715534*IPI + 0.2927893851*D(CAIM) - 933.373874*DUMMY - 2959.46128

Dependent Variable: D(CNG)
Method: Least Squares
Sample (adjusted): 2000M02 2010M12
Included observations: 131 after adjustments

Variable	Coefficient	Std. Error	t-Statistic	Prob.
IPI	30.72716	5.098769	6.026387	0.0000
D(CAIM)	0.292789	0.044170	6.628736	0.0000
DUMMY	-933.3739	129.3340	-7.216774	0.0000
C	-2959.461	543.2673	-5.447523	0.0000

R-squared	0.538118	Mean dependent var	362.3004
Adjusted R-squared	0.527207	S.D. dependent var	701.9793
S.E. of regression	482.6804	Akaike info criterion	15.22665
Sum squared resid	29588510	Schwarz criterion	15.31444
Log likelihood	-993.3453	F-statistic	49.32064
Durbin-Watson stat	1.912062	Prob(F-statistic)	0.000000

Null Hypothesis: CNG has a unit root
Exogenous: Constant
Lag Length: 3 (Automatic based on SIC, MAXLAG=12)

		t-Statistic	Prob.*
Augmented Dickey-Fuller test statistic		-0.389748	0.9064
Test critical values:	1% level	-3.482035	
	5% level	-2.884109	
	10% level	-2.578884	

*MacKinnon (1996) one-sided p-values.

Null Hypothesis: D(CNG) has a unit root
Exogenous: Constant
Lag Length: 2 (Automatic based on SIC, MAXLAG=12)

		t-Statistic	Prob.*
Augmented Dickey-Fuller test statistic		-3.277540	0.0180
Test critical values:	1% level	-3.482035	
	5% level	-2.884109	

	10% level	-2.578884

*MacKinnon (1996) one-sided p-values.

Null Hypothesis: CAIM has a unit root
Exogenous: Constant
Lag Length: 0 (Automatic based on SIC, MAXLAG=12)

		t-Statistic	Prob.*
Augmented Dickey-Fuller test statistic		1.201154	0.9981
Test critical values:	1% level	-3.480818	
	5% level	-2.883579	
	10% level	-2.578601	

*MacKinnon (1996) one-sided p-values.

Null Hypothesis: D(CAIM) has a unit root
Exogenous: Constant
Lag Length: 0 (Automatic based on SIC, MAXLAG=12)

		t-Statistic	Prob.*
Augmented Dickey-Fuller test statistic		-10.39558	0.0000
Test critical values:	1% level	-3.481217	
	5% level	-2.883753	
	10% level	-2.578694	

*MacKinnon (1996) one-sided p-values.

Annex 3

Dependent Variable: D(CNG)
Method: Least Squares
Date: 02/09/12 Time: 22:30
Sample (adjusted): 2000Q2 2010Q4
Included observations: 43 after adjustments

Variable	Coefficient	Std. Error	t-Statistic	Prob.
IPI(-1)	57.77171	26.05692	2.217135	0.0327
INFL	-54.26446	18.05335	-3.005784	0.0047
RDCR	-121.4190	67.64951	-1.794825	0.0806
DUMMY	-3203.095	483.0399	-6.631119	0.0000
C	-2607.625	3354.161	-0.777430	0.4417

R-squared	0.634801	Mean dependent var	1103.063
Adjusted R-squared	0.596360	S.D. dependent var	1674.433
S.E. of regression	1063.813	Akaike info criterion	16.88605
Sum squared resid	43004490	Schwarz criterion	17.09084
Log likelihood	-358.0501	F-statistic	16.51325
Durbin-Watson stat	2.368312	Prob(F-statistic)	0.000000

Dependent Variable: D(CNG)
Method: Least Squares
Sample (adjusted): 2000Q2 2010Q4
Included observations: 43 after adjustments

Variable	Coefficient	Std. Error	t-Statistic	Prob.
DUMMY	-2991.448	485.8263	-6.157444	0.0000
D(CAIM)	0.266659	0.103653	2.572629	0.0140
IPI	100.5384	20.15229	4.988929	0.0000
C	-9720.257	2109.659	-4.607501	0.0000

R-squared	0.674130	Mean dependent var	1103.063
Adjusted R-squared	0.649063	S.D. dependent var	1674.433
S.E. of regression	991.9324	Akaike info criterion	16.72560
Sum squared resid	38373265	Schwarz criterion	16.88943
Log likelihood	-355.6003	F-statistic	26.89325
Durbin-Watson stat	1.933698	Prob(F-statistic)	0.000000

EU COMPARISON OF VAT

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Abstract
VAT is one of the newest tools of the global economy and is widely adopted in most of the countries. For EU Member States is required not only the existence of VAT, but also that its main characteristics to be uniformly implemented. This should facilitate intra-Community transactions, but in practice does not as there are many local variations which can lead to costly errors and penalties.
The objective of this paper is to collate data about the main characteristics of VAT in EU Member States and to highlight the key differences between them.
This survey shows that there continue to be opportunities and risks for businesses trading cross border, as a result of differences in application of Community legislation on VAT. This led to the necessity of VAT reform. On this basis, the Commission adopted on the end of the last year a Communication on the future of VAT. This sets out the fundamental characteristics that must underlie the new VAT regime, and priority actions needed to create a simpler, more efficient and more robust VAT system in the EU.

Keywords: *VAT standard rate, VAT registration threshold, distance selling, VAT recovery, principle of destination.*

Introduction

Fiscal policies represent an important lever for the support of a sustainable economic growth and for public finances consolidation. It is important that the European fiscal system becomes effective, efficient and correct, especially regarding the VAT European system given the fact that at present, the VAT constitutes one of the main sources of revenues for the Member States budgets.

One of the conditions to accede to the EU is that the main characteristics and rules regarding VAT be uniformly implemented. The objective of this request is to simplify the taxation of intra-community transactions, but in practice this thing is not possible because of different local VAT regulations and foreign languages assessing the compliance of some operations. In the first part of the work, we shall emphasize these differences which are especially related to the level of VAT rates, thresholds of VAT and foreign companies VAT recovery.

In the second part of the work, we shall analyze the recent initiatives of European Commission regarding the creation of a more efficient, stronger and simpler VAT system. This system should reduce the operational costs for companies and administrative charges of authorities, fighting at the same time against fraud which represents a considerable burden for public finances and for consumers.

1. Comparison of VAT in Member States of European Union

The main normative act of VAT is Council Directive 2006/112/EC on the common system of value added tax, which is a recast of the Sixth VAT Directive of 1977. This normative act pursues to establish a general frame as VAT systems of Member States be compatible. The Directive establishes

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mandatory rules for all states, but some aspects are left in care of Member States which can have thus a certain degree of decision.

For example, the mandatory rules deal with the definition of taxable operations, taxable persons, VAT rules in case of intra-Community aquisition and supply, VAT tax base etc. Uniformity of VAT tax base is necessary taking into account the obligation of EU Member States to contribute to the Union budget with a part of collected VAT, a contribution which is calculated by application of a percentage rate upon the tax base.

One of the most significant differences between the VAT systems of Member States refers to VAT rates. Besides the standard VAT rate, another three rates are applied: reduced rate, over-reduced rate and parking rate. *Table no. 1* presents the four VAT rates applied in EU Member States at 1st of January 2012.

Table no. 1. VAT rates in EU Member States (%)

	Standard rate	**Reduce rate**	**Super reduce rate**	**Parking rate**
Belgium	21,0	6/12	-	12
Bulgaria	20,0	9	-	-
Czech Republic	20,0	14	-	-
Denmark	25,0	-	-	-
Germany	19,0	7	-	-
Estonia	20,0	9	-	-
Ireland	23,0	13,5	4,8	13,5
Greece	23,0	6,5/13	-	-
Spain	18,0	8	4	-
France	19,6	7	2,1	-
Italy	20,0	10	4	-
Cyprus	15,0	5/8	-	-
Latvia	22,0	12	-	-
Lithuania	21,0	5/9	-	-
Luxembourg	15,0	6/12	3	12
Hungary	27,0	5/18	-	-
Malta	18,0	5/7	-	-
Netherlands	19,0	6	-	-
Austria	20,0	10	-	12
Poland	23,0	5/8	-	-
Portugal	23,0	6/13	-	13
Romania	24,0	5/9	-	-
Slovenia	20,0	8,5	-	-
Slovakia	20,0	10	-	-

Finland	23,0	9/13	-	-
Sweden	25,0	6/12	-	-
United Kingdom	20,0	5	-	-

Source:

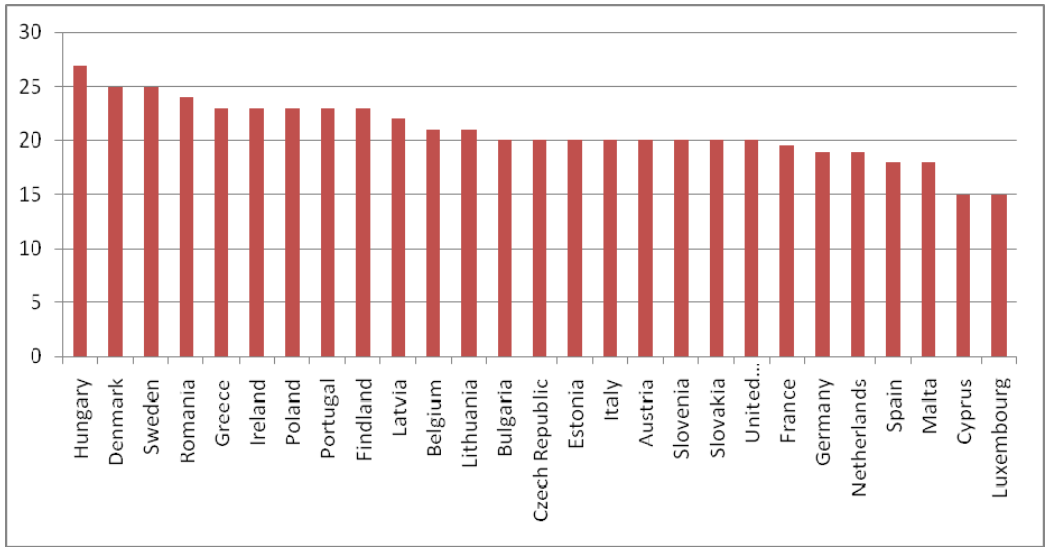
http://ec.europa.eu/taxation_customs/resources/documents/taxation/gen_info/economic_analysis/tax_structures/2011/report_2011_en.pdf

http://www.vatsystems.eu/index.php/news/show_prev_news/12/2011

The minimum standard rate in EU is established to 15%, each Member state having the liberty to establish the rate considered appropriate for its budgetary necessities. This minimum rate helps to avoid substantial variations in Member States' VAT rates which could lead to distortions of competition between high and low rate countries and put the smooth functioning of Single Market at risk.

Hungary practise the biggest standard rate of TVA from EU: 27%. The rate of 25%, the second as size in EU, is applied in Denmark and Sweden. Romania was till the 1st of July 2010 in the group of middle states with a rate of 19%, but now it occupies third place in the classification of EU Member States with a rate of 24%. The most relaxed taxation regarding VAT is found in Cyprus and Luxembourg, countries which practise the minimum rate of 15% (graph no. 1).

Graph no. 1. VAT standard rates in the Member States



According to the data from table no. 2, between 2000 and 1st of January 2012, the VAT standard rate remained unchanged in 8 Member States (Belgium, Bulgaria, Denmark, France, Italy, Luxembourg, Austria and Sweden), rose in 17 Member States and diminished only in Slovakia (from 23,0% in 2000 to 19,0% in 2012) and Czech Republic (from 22,0% to 20,0%). The highest rises were registered in Greece (from 18,0% to 23,0%) and Cyprus (from 10,0% to 15,0%).

Table no. 2. Evolution of the standard rate of VAT (%)

	2000	**2001**	**2002**	**2003**	**2004**	**2005**	**2006**	**2007**	**2008**	**2009**	**2010**	**2011**	**2012**
EU-27 average	**19,2**	**19,3**	**19,5**	**19,5**	**19,4**	**19,6**	**19,4**	**19,5**	**19,4**	**19,8**	**20,4**	**20,7**	**20,9**
Belgium	21,0	21,0	21,0	21,0	21,0	21,0	21,0	21,0	21,0	21,0	21,0	21,0	21,0
Bulgaria	20,0	20,0	20,0	20,0	20,0	20,0	20,0	20,0	20,0	20,0	20,0	20,0	20,0
Czech Republic	22,0	22,0	22,0	22,0	19,0	19,0	19,0	19,0	19,0	19,0	20,0	20,0	20,0
Denmark	25,0	25,0	25,0	25,0	25,0	25,0	25,0	25,0	25,0	25,0	25,0	25,0	25,0
Germany	16,0	16,0	16,0	16,0	16,0	16,0	16,0	19,0	19,0	19,0	19,0	19,0	19,0
Estonia	18,0	18,0	18,0	18,0	18,0	18,0	18,0	18,0	18,0	20,0	20,0	20,0	20,0
Ireland	21,0	20,0	21,0	21,0	21,0	21,0	21,0	21,0	21,0	21,5	21,0	21,0	23,0
Greece	18,0	21,0	21,0	21,0	21,0	19,0	19,0	19,0	19,0	19,0	23,0	23,0	23,0
Spain	16,0	16,0	16,0	16,0	16,0	16,0	16,0	16,0	16,0	16,0	18,0	18,0	18,0
France	19,6	19,6	19,6	19,6	19,6	19,6	19,6	19,6	19,6	19,6	19,6	19,6	19,6
Italy	20,0	20,0	20,0	20,0	20,0	20,0	20,0	20,0	20,0	20,0	20,0	20,0	20,0
Cyprus	10,0	10,0	13,0	15,0	15,0	15,0	15,0	15,0	15,0	15,0	15,0	15,0	15,0
Latvia	18,0	18,0	18,0	18,0	18,0	18,0	18,0	18,0	18,0	21,0	21,0	22,0	22,0
Lithuania	18,0	18,0	18,0	18,0	18,0	18,0	18,0	18,0	18,0	19,0	21,0	21,0	21,0
Luxembourg	15,0	15,0	15,0	15,0	15,0	15,0	15,0	15,0	15,0	15,0	15,0	15,0	15,0
Hungary	25,0	25,0	25,0	25,0	25,0	25,0	20,0	20,0	20,0	25,0	25,0	25,0	27,0
Malta	15,0	15,0	15,0	15,0	18,0	18,0	18,0	18,0	18,0	18,0	18,0	18,0	18,0
Netherlands	17,5	19,0	19,0	19,0	19,0	19,0	19,0	19,0	19,0	19,0	19,0	19,0	19,0
Austria	20,0	20,0	20,0	20,0	20,0	20,0	20,0	20,0	20,0	20,0	20,0	20,0	20,0
Poland	22,0	22,0	22,0	22,0	22,0	22,0	22,0	22,0	22,0	22,0	22,0	23,0	23,0
Portugal	17,0	17,0	19,0	19,0	19,0	21,0	21,0	21,0	20,0	20,0	21,0	23,0	23,0
Romania	19,0	19,0	19,0	19,0	19,0	19,0	19,0	19,0	19,0	19,0	24,0	24,0	24,0
Slovenia	19,0	19,0	20,0	20,0	20,0	20,0	20,0	20,0	20,0	20,0	20,0	20,0	20,0
Slovakia	23,0	23,0	23,0	20,0	19,0	19,0	19,0	19,0	19,0	19,0	19,0	20,0	20,0
Finland	22,0	22,0	22,0	22,0	22,0	22,0	22,0	22,0	22,0	22,0	23,0	23,0	23,0
Sweden	25,0	25,0	25,0	25,0	25,0	25,0	25,0	25,0	25,0	25,0	25,0	25,0	25,0
United Kingdom	17,5	17,5	17,5	17,5	17,5	17,5	17,5	17,5	17,5	15,0	17,5	20,0	20,0

Source:

http://ec.europa.eu/taxation_customs/resources/documents/taxation/gen_info/economic_analysis/tax_structures/2011/report_2011_en.pdf

http://www.vatsystems.eu/index.php/news/show_prev_news/12/2011

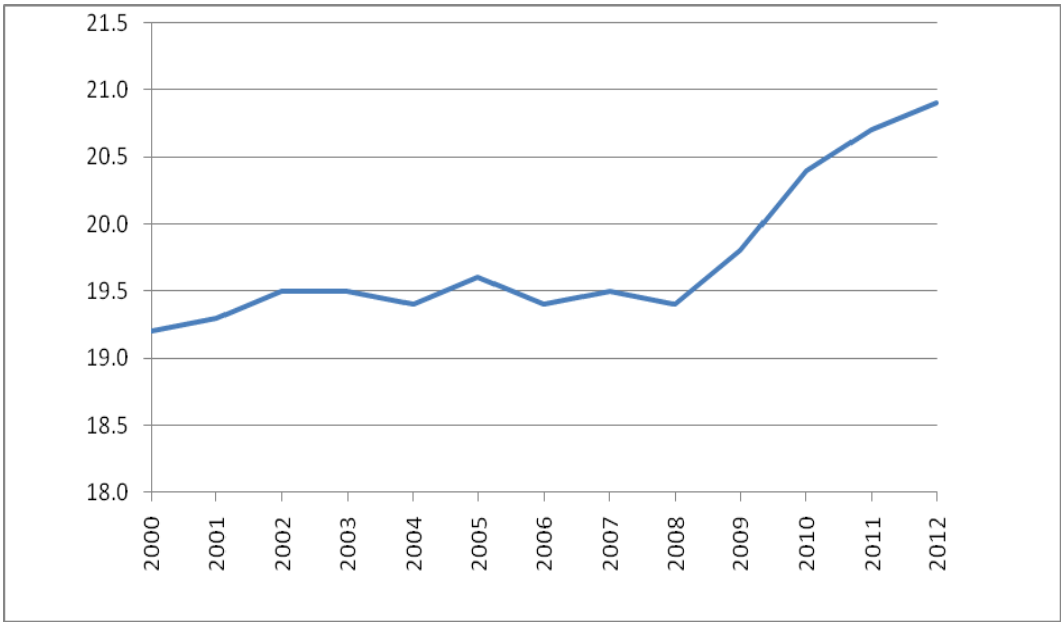
Under the pressure of the financial crisis, more European countries resorted last years to the enhancement of standard rate.

In 2010 Greece increased the VAT rate with four percentages, but in two stages. The first increase was from 19% to 21% and the second till 23%. In exchange, Spain increased the VAT rate only with two percentages from 16% to 18%. Also, Finland increased in 2010 the VAT rate but only with one percentage from 22% to 23%. Also, the VAT rate increases with one percentage in Portugal from 20% to 21% in 2010 while in 2011 it increases till 23%. In 2011, increases of VAT rate of one percentage have taken place in Latvia, Poland and Slovakia. On the 1st of January 2011, Great Britain increased the VAT rate from 17,5 % to 20%.

The only country which increased the VAT rate with 5 percentages like Romania is Hungary. The Hungarian government increased in 2009 the VAT rate from 20% to 25%. From the 1st of January 2012, two countries increased the VAT rate with 2 percentages: Ireland from 21% to 23% and Hungary from 25% to 27%.

According to the data from table no. 2, in EU-27 the VAT standard average rate rose from 19,8% in 2009 to 20,2% in 2010, 20,7% in 2011 and 20,9% in 2012. As compared to 2000, in 2012 the rise of VAT average rate was of 1,7% (Graph no. 2).

Graph no. 2. Evolution of the standard rate of VAT (EU-27 average)



Member States have the option of applying one or two reduced rates to a restricted list of goods and services. The reduced rate cannot be less than 5% and the list of eligible goods and services must be strictly interpreted. As we can see in table no. 1, the differences between Member States are substantial: 12 states have one reduced rate, 14 states have two reduced rates and Denmark is the single state which doesn't have reduced rate. The minimum reduced rate of 5%, value imposed by European Directives, is found in Cyprus, Latvia, Hungary, Malta, Poland, Romania and Great Britain. The highest values of reduced rate are found in Hungary (18%), Czech Republic (14%), Ireland (13.5%), Greece, Portugal and Finland (13%).

Not only the value of reduced rates differs from one state to another, but also the categories of goods and services for which these rates are applied. There are 21 of such categories among which

we enumerate: foodstuffs, medicines, medical equipment for the disabled, books on all physical means of support, newspapers, periodicals, passenger transport, admission to shows, theatres, museums, etc.

The variety of reduced VAT rates brings a new level of complexity to intra-community transactions, leading to additional compliance costs. In spite of all this, for those who seek more advantageous situations, these differences can be used as opportunities worthy to be taken into consideration when they chose the country where they are going to open their business.

Over-reduced rates (lower than 5%) are applied only in five states: Spain (4%), France (2.1%), Ireland (4,8%), Italy (4%) and Luxemburg (3%), for goods and services as: food products, pharmaceuticals, books, newspapers, periodicals, television license fees, supply of new buildings, medical equipment for disabled persons etc.

A characteristic met among EU states is represented by the parking rate, which is a special VAT rate applied in five Member States (12% in Belgium, Austria, Luxemburg; 13% in Portugal; respectively 13,5% in Ireland) for certain goods as: certain energy products, certain wines, washing and cleaning products, printed advertising matter, tourism publications etc.

According to the table no. 3, European legislation provides three thresholds of TVA: for small enterprises (column A), for intra-Community acquisition accomplished by taxable persons not entitled to deduct input tax and by non-taxable legal person (column B) and for distance selling (column C).

Table no. 3. VAT Thresholds (September 2011)

Country	**A. Exemption for small enterprises (annual turnover)**		**B. Threshold for non-taxable intra-Community acquisition (annual value of intra-Community acquisitions)**		**C. Threshold for application of the special scheme for distance selling (annual value of distance selling)**	
	National currency	**Euro equiva-lent**	**National currency**	**Euro equiva-lent**	**National currency**	**Euro equiva-lent**
Belgium	5.580 euro	-	11.200 euro		35.000 euro	
Bulgaria	50.000 BGN	25.565	20.000 BGN	10.226	70.000 BGN	35.791
Czech Republic	1.000.000 CZK	40.851	326.000 CZK	13.318	1.140.000 CZK	46.570
Denmark	50.000 DKK	6.707	280.000 DKK	6.500	280.000 DKK	37.557
Germany	17.500 euro	-	12.500 euro	-	100.000 euro	-
Estonia	15.978 euro	-	10.226 euro	-	35.151 euro	-
Ireland	75.000 euro or 37.500 euro	-	41.000 euro	-	35.000 euro	-
Greece	10.000 euro or 5.000 euro	-	10.000 euro	-	35.000 euro	-
Spain	None	None	10.000 euro	-	35.000 euro	-
France	81.500 euro or 32.600 euro	-	10.000 euro	-	100.000 euro	-
Italy	30.000 euro	-	10.000 euro	-	100.000 euro	-
Cyprus	15.600 euro	-	10.251 euro	-	35.000 euro	-

Latvia	35.000 LVL	49659	7.000 LVL	9.932	24.000 LVL	34.052
Lithuania	100.000 LTL	28.962	35.000 LTL	10.137	125.000 LTL	36.203
Luxembourg	10.000 euro	-	10.000 euro		100.000	
Hungary	5.000.000 HUF	18.328	2.500.000 HUF	9.164	8.800.000 HUF	32.257
Malta	35.000 euro or 24.000 euro or 14.000 euro	-	10.000 euro	-	35.000 euro	-
Netherlands	None	None	10.000 euro	-	100.000 euro	-
Austria	30.000		11.000 euro	-	35.000 euro	
Poland	150.000 PLN	37.774	50.000 PLN	12.592	160.000 PLN	40.293
Portugal	10.000 euro or 12.500 euro	-	10.000 euro		35.000 euro	
Romania	119.000 RON	28.249	34.000 RON	8.071	118.000 RON	28.012
Slovenia	25.000 euro	-	10.000 euro	-	35.000 euro	-
Slovakia	49.790 euro	-	13.941,45 euro	-	35.000 euro	-
Finland	8.500 euro	-	10.000 euro	-	35.000 euro	-
Sweden	None	-	90.000 SEK	10.190	320.000 SEK	36.232
United Kingdom	70.000 GBP	81.843	70.000 GBP	81.843	70.000 GBP	81.843

Source:

http://ec.europa.eu/taxation_customs/resources/documents/taxation/vat/traders/vat_community/vat_in_ec_annexi.pdf

Small enterprises, meaning entrepreneurs whose turnover (plus the value-added tax on it) has not exceeded the legal threshold in the preceding calendar year and is not expected to exceed this threshold in the current year, do not need to pay value-added tax. According to the data from *table no. 3*, column A, this threshold varies between 5.580 euro (Belgium) and 81.843 euro (United Kingdom). There are only three Member States not applying the special exemption for small enterprises: Spain, Netherlands and Sweden.

For simplification reasons, goods acquired by taxable persons not entitled to deduct input tax and by non-taxable legal person are not subjected to VAT if annual acquisitions are below an annual turnover threshold set by their Member State, though it is still possible to opt for taxation.[1] This threshold varies between 8.071 euro, in Romania, and 81.843 euro, in United Kingdom (table no. 3, column B).

Regarding distance sale, differences appear although theoretically it should be used either the minimum threshold of 35.000 euro or the maximum one of 100.000 euro. In spite of all this, as we can notice in *table no. 3,* column C, this request wasn't applied and implemented uniformly in those 27 states.

The great variations regarding these three thresholds of TVA can represent a real trap for many entrepreneurs who wish to develop their businesses in different Member States.

Even for companies which know their responsibilities regarding VAT registration and payment, the differences regarding the reporting periods specific to each country, as well as those

[1] M. Z. Grigore, M. Gurău, *Fiscalitate. Noţiuni teoretice şi lucrări aplicative*, Cartea Studenţească Publishing House, Bucharest, 2009

regarding the order of declarations which must be submitted every month, quarter or year, create great problems (*table no. 4)*.

Table no. 4. Fiscal period of VAT

Country	Fiscal period	Annual VAT declaration deadline
Belgium	Monthly / Quarterly	Not Applicable
Bulgaria	Monthly	Not Applicable
Czech Republic	Monthly / Quarterly	Not Applicable
Denmark	Monthly / Quarterly / Biannually	Not Applicable
Germany	Monthly / Quarterly	May
Estonia	Monthly	Not Applicable
Ireland	Biannually / Annually	Not Applicable
Greece	Monthly / Quarterly	10 May
Spain	Monthly / Quarterly	January
France	Monthly / Quarterly	Not Applicable
Italy	Monthly / Quarterly	Not Applicable
Cyprus	Quarterly	Not Applicable
Latvia	Monthly / Quarterly / Biannually	1 May
Lithuania	Monthly / Quarterly / Biannually	Not Applicable
Luxembourg	Monthly / Quarterly / Annually	May
Hungary	Monthly Quarterly Annually	Not Applicable
Malta	Quarterly	March
Netherlands	Monthly / Quarterly / Annually	March
Austria	Monthly / Quarterly	April
Poland	Monthly / Quarterly	Not Applicable
Portugal	Monthly / Quarterly	15th July
Romania	Monthly / Quarterly / Biannually / Annually	Not Applicable
Slovenia	Monthly / Quarterly	Not Applicable
Slovakia	Monthly / Quarterly	N/A
Finland	Monthly	Not Applicable
Sweden	Monthly / Quarterly / Annually	Not Applicable
United Kingdom	Monthly / Quarterly / Annually	Not Applicable

Source: http://www.agn-europe.org/htm/firm/news/ttf/2011/2011_vat_web.pdf

The fiscal period varies depending mostly on the overall turnover of the previous year, but also depending on VAT payment of precedent or current fiscal year (Hungary and Netherland), or depending on type of taxable person. Only 9 of the 27 EU Member States are required to submit an annual statement of VAT.

Since 1st January 2010, the procedure for reimbursement of VAT incurred by EU taxable persons in Member States where they are not established has been replaced by a new fully electronic procedure, thereby ensuring a quicker refund to claimants. The previous paper-based procedure was slow, cumbersome and costly. The new procedure better facilitates taxable persons and improves the functioning of the internal market. A new feature is that taxable persons will be paid interest if Member States are late making refunds.

The data from *table no. 5* suggest that the new procedure determined the improvement of VAT recovery time as a result of the fact that many Member States joined the statutory term of 4 months.

Table no. 5. Foreign Company VAT Recovery

%	Claim time limit?	Representative required?	Approximate recovery time (months)	Surrender of original invoices required	Proof of payment needed	Certificate of registration required
Belgium	30 June	yes	6	yes	no	yes (original)
Bulgaria	30 September	no	4	no	no	yes (original)
Czech Republic	30 September	no	6	yes	no	yes (original)
Denmark	30 September	no	3	yes	no	yes (original)
Germany	30 June	no	6	yes	no	yes (original)
Estonia	30 September	no	4	yes	no	no
Ireland	30 June	no	0	yes	yes	yes (original)
Greece	30 June	no	6	yes	yes	yes (original)
Spain	30 September	yes	6	yes	no	yes (original)
France	30 June	no	3	yes	yes	yes (original)
Italy	30 June	no	6	yes	no	yes (original)
Cyprus	30 September	no	4	yes	no	yes (original)
Latvia	9 months	no	4	yes	yes	yes (original)
Lithuania	30 June	no	4	yes	yes	yes (original)
Luxembourg	30 June	no	6	yes	no	yes (original)
Hungary	30 September	no	4	yes	yes	yes (original)
Malta	9 months	no	4	yes	yes	yes (original)
Netherlands	30 June	no	6	yes	no	yes (original)
Austria	30 June	no	6	yes	no	yes (original)
Poland	30 September	no	6	yes	no	yes (original)
Portugal	30 September	yes	0	yes	no	yes (original)
Romania	30 September	no	6	yes	yes	yes (copy)
Slovenia	30 September	no	4	yes	no	yes (original)
Slovakia	9 months	no	6	yes	no	yes (original)

Finland	30 June	no	3	yes	no	yes (original)
Sweden	30 June	no	3	yes	no	yes (original)
United Kingdom	9 months	no	4	no	no	no

Source: http://www.agn-europe.org/htm/firm/news/ttf/2011/2011_vat_web.pdf

2. Directions for VAT system improvement from EU

On 1st December 2010, the European Commission adopted a Green Paper on "The future of VAT – Towards a simpler, more robust and efficient VAT system"[2]. The purpose of the Green Paper was to generate a comprehensive debate with all interested stakeholders (businesses, academics, citizens, tax authorities) regarding the assessment of actual VAT system and possible modalities to enhance its coherence with the single market and its capacity to mobilize revenues, reducing at the same time the VAT compliance cost.

The Green Paper deals especially with the way of approach of cross-border transactions as well as other essential aspects related to VAT neutrality, the necessary degree of harmonization on the single market and decrease of bureaucracy.

One of the VAT essential aspects is the **principle of neutrality**. As VAT is a final consumption tax, companies shouldn't bear the VAT payment burden. As a result, Member States should ensure, in principle, the taxation of all commercial transactions and similar goods and services should be treated similarly.

Regarding intra-community transactions, the actual VAT system diverged from the initial commitment of Member States to apply the principle of origin, for lack of political support between Member States regarding cooperation in view of application of this principle.

A VAT system based upon the **principle of destination**, not only in case of goods but also in case of services seems to be a pragmatic and feasible solution.

According to the Communication released by European Commission as a result of the public debate of the Green Book,[3] the result of the proposed reform should be a VAT system with three attributes.

First, VAT must be made more workable for businesses. It should exist one single set of clear and simple rules regarding VAT (an EU VAT Code), which to be applied in case of a taxable person who develops its activity in many EU states; such a person should deal with tax authorities from one Member state. Among the measures envisaged for a more business-friendly VAT are expanding the one-stop-shop approach for cross border transactions, standardizing VAT declarations and providing clear and easy access to the details of all national VAT regimes through a central web-portal.

Second, VAT must be made more neutral and efficient in supporting Member States' fiscal consolidation efforts and sustainable economic growth. Broadening tax bases and limiting the use of reduced rates will generate new revenue or will allow the standard rate reduction without decreasing the revenue. The Communication sets out the principles that should guide the review of exemptions and reduced rates. Neutrality imposes equal rules regarding the right of deduction and very limited restrictions regarding the practising of this right.

Third, the huge revenue losses that occur today due to uncollected VAT and fraud need to be stopped. It is estimated that around 12% of the total VAT which should be collected, is not. Modern methods of VAT collection and monitorization should maximize the revenue practically collected

[2]http://ec.europa.eu/taxation_customs/resources/documents/common/consultations/tax/future_vat/com(2010)695_en.pdf

[3]http://ec.europa.eu/taxation_customs/resources/documents/taxation/vat/key_documents/communications/com_2011_851_en.pdf

and limit or even eliminate fraud. Besides the facilitation of legislation observance by companies, local tax authorities should concentrate upon risky behaviours, aim to combat frauds and finally to act collectively as European authority. An intensified, automatic and fast information exchange between national tax administrations will be vital in achieving this goal.

Conclusions

Value added tax constitutes an important source of revenue for national budgets of Member States. Consumption taxes are considered to be a more stable revenue source, and more growth-friendly, than certain other taxes such as profits and income. Therefore many Member States have recently increased their VAT rates as part of their consolidation efforts.

The VAT legislation is regulated at the community level, but the necessary time to observe the tax liabilities comprised in the VAT legislation varies depending on different administrative used practices. For example, the observance of tax liabilities regarding VAT needs 222 hours in Finland and 288 in Bulgaria.[4]

With different local VAT regulations and foreign languages assessing the compliance of some operations, preparing and submitting VAT declarations can be complicated and time consuming for companies involved in European cross-border operations.

Business environment needs clear norms as regards VAT which grow the juridical degree of security and the probability that these norms be interpreted uniformly in Member States. Actual Council directives comprise inaccurate dispositions which increase the possibility of interpretation while the complex VAT system thus created prevents the cross-border activities and generates useless administrative charges.

The objective of Commission initiative, under the form of the Green Book, is to create a „simpler, stronger and more efficient" VAT system which is more transparent and focused on a close collaboration and exchange of best practices between Member States with the observance of subsidiarity principle.

A simpler, more harmonised VAT system, more adapted to modern business models and new technologies, would create a better environment for business and a more attractive market for investment.

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[4] http://www.pwc.com/gx/en/paying-taxes/pdf/paying-taxes-2011.pdf

COMPARATIVE STUDY ON ACCOUNTING AND FISCAL AMORTIZATION

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Abstract
Placed in the international trend, Romanian accounting had experienced various changes, especially as regards of progress on disconnection between accounting and fiscality. In the present, fiscal rules should not have any role in accounting decisions, because accounting rules are applied to produce accounting information that is useful in making decisions and to provide a "true and fair view" upon financial reality of the entity. However, the barrier in the habit of accounting to thinking for fiscal point of view all economic transactions remains insurmountable, yet.
Starting from this perspective on disconnection between accounting and fiscality would mean that amortization recorded in the accounting, as a result of management policy, to be different from fiscality amortization, to calculate income tax.
Although formally accepted, disconnect between accounting and fiscality continues to meet many difficulties. In this sense, it is usual in practice to use the same method of amortization for accounting purposes and for fiscal purposes to prevent complications of double track amortization and prevent wandering in the rules in this field. Accounting rule is deliberately eluded in favor of the fiscal rules.
This is the reason we proposed to make in this paper a comparative study between norms and rules on accounting and fiscal amortization, paper in which we intend to show the benefits of applying accounting and fiscal rules separately.

Keywords*: true and fair view, fiscal amortization, linear amortization, disconnect between accounting and fiscality.*

Introduction

In the engaged (integrated) relationship between accounting and fiscality is integrated recognition, measurement, amortisation, all these being subordinated to profit tax. In regard to the acceptance by fiscality of accounting rules and treatment in regarding items listed, occur three types of situations:

- fiscality accept tacit the accounting treatment;
- fiscality accept explicit the accounting treatment;
- fiscality defines its own behavior and its own treatment.

Situations in which fiscality defines its own behavior and its own treatment refer to taxation of profit, but also to those elements that converge to the taxation of profits.

One of the problems that develop asymmetries between accounting and fiscality, amortization, as a resource to rebuild equity, urges businesses to reflections in order to choose the best methods in accordance with the economic context in which they operate, but also with the strategy of the entity.

State aims to reduce amortization costs for the income taxes to be as high. On short term higher fiscal incomes collected, in the long term this fact determines disequilibrium at the microeconomic level, which subsequently has macroeconomic effects. In terms of inflation it must not have tax interest; duration of use should be adjusted to finance fixed capital.

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Symmetries and asymmetries on accounting and fiscality amortization

Amortization in accounting understanding

Assets that are subject to amortization are tangible and intangible assets. In the amortization study are important to define some elements in terms of European and international accounting rules. In this regard:

amortization is the allocation of the depreciable amount of an fixed asset over the estimated life. Collection of the year amortization is deducted directly or indirectly from the result of that financial year;

useful life is the period in which the entity expects to use a depreciable asset or the number of production units expected to be produced by functioning of the respective asset;

appreciation of useful life of amortizable assets or a group of similar assets is generally based on physical depreciation estimated moral wear and legal or other limits imposed on asset. Durations useful life should be reviewed periodically, default rates of depreciation must be updated to the current and future periods.

The depreciable amount of an asset subject to amortization is its historical cost or other value which replaced the historical cost from the financial statements, less estimated residual value; If it is considered a significant residual value, it is estimated at the time of recognition or on any further review. National accounting rules do not recognize the residual value of an amortizable asset.

Amounts related to amortization of assets shall be allocated on each financial year during the use of asset, as different methods. Whatever is the amortization method chosen, it must be used with consistency in the spirit of the principle of consistent methods, without being conditioned by the level of the company profitability, by the tax considerations or changing the economic strategy.

There must never lose sight of the fact that a change of accounting method have the effect of distortion of the image reflected by the financial statements and that the information offered by them may not be comparable from one year to another. Amortization method may be modified only when it is determined by an error in the estimation of consumption of the benefits for that fixed assets, and this must be mentioned in the notes to financial statements, together with the reason that led to changing the method of amortization.

Fiscal amortization

In the acceptation of the Fiscal Code, the concept of asset is used to define any property, which is held for use in the production or supply of goods or services, to be leased to third parties or for administrative purposes, if it has a normal duration more than one year and a value greater than the limit established by Government decision.

We can define amortization, in fiscal terms, as a recovery by deductions of acquisition, production, construction assembly or improvement assets costs from the result.

Fixed assets are differentiated in amortizable fixed assets and unamortized fixed assets. Fiscality defines amortizable fixed assets as any tangible assets that satisfying the following conditions:

is owned and used in the production, supply of goods or services to be leased to third parties or for administrative purposes;

has a tax value higher than the limit established by Government decision, the entry in the assets of the taxpayer;

has a normal duration of use more than one year.

In the Tax Code sense are considered amortizable fixed assets too:
a) investments to fixed assets subject to leases, lease, location management or other similar;

b) fixed assets partially put into operation, for which no registration forms as tangible were prepared. They are included in those groups in witch it will be recorded, with the value resulting from the sum of actual expenses occasioned for their implementation;

c) investments for uncovering in order to exploit the useful minerals, as well as openness and readiness work to underground and surface extraction;

d) investments to existing fixed assets, as further expenditures made to improve the initial technical parameters and leading to future economic benefits, by increasing the asset value;

e) investments from own resources, embodied in new goods, on the nature of public domain and in the development and modernization of public owned property;

f) fittings of land.

For tangible assets that are used in lots, sets or forming only one wing, lot or set, to determine amortization should consider the value of entire body lot or set. For parts in the structure of a tangible asset, of which normal period of use differs from the normal use of the asset result, the amortization shall be determined for each component.

From the perspective of accounting rules, from the tangible assets, only land are not amortized. In fiscal terms, in addition there are also other fixed assets which are not amortized as follows: land, including woodland, paintings and works of art, lakes , marshes and ponds which are not the result of an investment, public goods financed from the budget, any asset that does not lose their value over time due to use, according to the rules, own rest houses, housing protocol, vessels, aircraft, vessels cruising, other than those used for his income realization.

The evaluation base of accounting and tax amortization

From an accounting perspective, the amortizable value of an asset is historical cost or other value which replaced the historical cost, respectively the input value of the tangible assets. Therefore, the assessment base of amortization is represented by:

- *acquisition cost* for bought goods;
- *production cost* for goods produced in the entity;
- *contribution value* determined by an expert assessor for property obtained as a contribution to capital;
- *market value* or fair value for assets received free of charge or plus to the inventory found;
- in amortizable value are included the costs after putting into service of an asset when they improve operational status of the asset in comparation with the initially estimated performance of that asset ;
- amortizable value may be decreased if the utility of an asset or group of assets is permanently altered as a result of moral damage or wear;
- revalued value, in case of application for revaluation treatment.

From a fiscal perspective, the evaluation base for amortization consists of costs for acquisition, production, construction, assembly, installation or improvement of depreciable assets that are recovered in terms of tax by deducting amortization.

Fiscality uses as a evaluation basis, *fiscal value* represented by:

- acquisition cost,
- production cost,
- market value of assets gained free of charge or provided as contribution, the entry in the property taxpayer

Fiscal value includes accounting revaluations.

Accounting and fiscal policies for amortization

Amortization along with recognition and evaluation of amortizable assets is, in our opinion, the most bidder section on accounting methods and alternative treatments that give the possibility of accounting options, more or less correct, to serve the interest of the economic entity.

In this regard, we take into account:

- **useful life / normal operating period**;

- **amortization methods** ;

- the borrowing costs directly attributable to the acquisition, construction or production of a qualifying asset production, which may be included in the cost of that asset.

Useful life

From an **accounting** perspective, amortization period for an amortizable asset is called useful life or economic period. Amortization period should correspond with the useful life, which have be determined by reference to the future economic benefits expected to be obtained by use of amortizable assets.

In setting amortization of tangible assets are considered duration of economic use and conditions of use.

Most often choose amortization period is a matter of optimization ranging from accounting and fiscal interest, amortization enrolling between components of self-financing capacity of the entity.

Just as often there is no agreement between accounting and fiscal interest, the same happens when choosing the amortization period. Accounting may choose a different amortization period than fiscality does, at least in theory, although in practice not much happens.

More specifically, economic duration, and the normal amortization duration of fixed assets are estimated, not measured, depending on experience offered by the practice for amortizable asset categories. On the other hand, this period may be different from the physical life of assets.

Factors that determine the establishment of normal duration of use are:

- physical wear, which sets a limit for the duration of service;
- moral wear due to new technology which shortens the life of the asset before the exhaustion of physical life, and
- inadequacy of assets in relation to changes in the profile and increasing the capacity of the entity.

With regard to the freedom that accounting rules allow for setting service life, it is important to note that, if fully amortizated tangible can be more used, to reevaluation a new value is established and a new period of economic use, for the period estimated to still use.

Amortization period initially set may change if there is a significant change in the terms of use, the aging of a tangible or in other exceptional cases. This should be chosen independent of the fiscal arrangements in the field.

The normal operating period

In terms of taxation, the amortization period is called the normal operating period. Establish normal operating duration imposed an authorized control to temper the businesses policy to establish small duration of use, and amortization too.

In this sense, the amortization duration is fiscal period which may differ from the accounting and are governed by Decision no. 2139/2004 for approving the Catalogue for classification and normal operating duration of fixed assets.

This catalog includes the classification of fixed assets used in the economy and their normal operating period, corresponding to amortization times, in years, for the system of linear amortization.

The normal operating period is the period of use in which recovering by amortization, from fiscal point of view, the fiscal value of the assets. The catalog specifies that normal operation period is lower than the physical life of respectively asset and for each fixed asset are presented a system in years of beach between a minimum and maximum, with a choice of choose normal operation period between these limits.

We can say therefore that there is some flexibility in determining the normal operating period.

The normal operation period of the asset, determined as the range of years from the catalog, remain unchanged until full recovery of its input value or removed from function.

An overview of symmetry and asymmetry between accounting and fiscality regarding amortization, starting from the known fact that fiscality divides tangible assets in amortizable and unamortizable tangible assets, is shown in the table below:

Accounting amortization of fixed assets	**Fiscal amortization of fixed assets**
Tangible assets are assets that: - Are held by an entity for use in the production of goods or services to be leased to third parties or used for administrative purposes and - Are used for a period longer than one year.	Depreciable fixed assets are represented by any tangible which meets the following conditions: - Are owned and used in the production, supply of goods or services to be leased to third parties or for administrative purposes; - Have a fiscal value higher than the limit established by Government decision; - Have a duration of use more than one year.
	By exception, if an item of tangible asset has a fiscal value less than the limit established by Government decision, the taxpayer may choose to deduct costs or to recover these costs by amortization deductions.
The assessment base is: - acquisition cost for bought goods; - production cost for goods produced in the entity; - contribution value determined by an expert assessor for property obtained as a contribution to capital; - market value or fair value for assets received free of charge or plus to the inventory found;	The assessment base is *fiscal value* represented by: - acquisition cost, - production cost, - market value of assets gained free of charge or provided as contribution, the entry in the property taxpayer Fiscal value includes accounting revaluations.
The assessment base can change with: - including in amortization of value of the costs after putting into service of an asset when they improve operational status of the asset in comparation with the initially estimated performance of that asset ; - amortizable value may be decreased if the utility of an asset or group of assets is permanently altered as a result of moral damage or wear; - revalued value, in case of application for revaluation treatment.	The assessment base can change with: - the later costs will be included in asset cost, if this leading to higher economic benefits - Replacing the initial fiscal value with revalued value, only if it is not lower than the entry value.
Useful life is determined by economic life.	The normal operating period – from Catalog
Useful life can change: After revaluation; May be reviewed	The normal operating period can not be reviewed (change).
Not amortized: land	Not amortized: - Land, including forests; - Paintings and works of art; - Goodwill; - Lakes, ponds and lakes that are not the result of an investment;

	- Public goods financed from the budget; - Any asset that does not lose value over time due to use, according to the rules; - Own holiday homes, housing protocol, vessels, aircraft, cruise ships, other than those used for his income.
It amortized and: - investments for arrangement of lakes, ponds, land and other similar works.	It amortized and: Land arrangements, linear over a period of 10 years
It amortized: - Investments to tangible assets leased, on the lease duration. On expiry of the contract value of the made investment and the corresponding amortization gives to the property's owner	It amortized: - Costs of investments to fixed assets leased, rented or leased by the management who made the investment, during the contract or during normal use, as appropriate.
Amortization method: - The linear method; - Degressive method; - Accelerated method; - Method per unit of product.	Amortization method: - In case of construction applies linear amortization method; - In case of technological equipment, machinery, tools and plants, as well as computers and peripherals thereof, may opt for linear amortization method, degressive or accelerated; - In case of any depreciable asset, can opt for linear or degressive amortization method. - Per unit of product for exploitation of mineral substances useful; - Vehicles can be amortized and depending on the number of kilometers or number of operating hours provided in the manuals
It is necessary to use the same method of amortization for all assets of the same nature and having identical terms of use	It is necessary to use the same method of amortization for all assets of the same nature and having identical terms of use
It is also amortized - Development costs are amortized over the contract period or duration of use - Costs of setting up are amortized over a maximum period of five years, if the entity choose not to recognise them in period's costs. - Goodwill is amortized, usually within a period not exceeding five years. - Patents, licenses, trademarks, rights and other similar assets are amortized over their expected use by the entity holding them.	It is also amortized using linear method during the contract period or useful life of: - Costs related to the acquisition of patents, copyrights, licenses, trade marks or factory - Other intangible assets recognized for accounting purposes, - Development costs which are recognized like intangible assets from accounting point of view linear, over a period of three years - Cost of acquisition or production software. Degressive or accelerated amortization method. - For invention patents
	Not amortized: - Costs of setting; - Goodwill,

As can be seen from the table, between accounting and fiscal treatment there are asymmetries at all levels: elements that are subject to amortization, amortization methods, the possibility of revision, revaluation. Perhaps for this reason, the accounting rules and fiscal rules come to meet the need of specialists with very clear specifications about amortization.

In the case of amortization there are the most differences between accounting and fiscal rules. Accountants must understand that this should not affect the true and fair view of the entity showed through financial statements. Knowing the symmetries and asymmetries of amortization, we can calculate and record amortization in accounting according to accounting rules, and in terms of taxation (in the register of fiscality) depending on fiscality rules. Also, the Income Tax Declaration (101) we have to declare separately accounting and fiscal amortization. Note that if is chosen to apply the fiscal rules for accounting too, is compulsory to complete the information about accounting and fiscal amortization in the Income Tax Declaration 101.

Conclusions

Financial statements should provide a true and fair view of the entity. We believe this is a great ideal in the context of the market is too complex to be captured by any accounting system, and the establishment (by choice) to amortization methods involve a high degree of subjectivity, the classification of this process into an accounting set of rules can be dangerous, or even impossible.

We consider that it is necessary awareness of the inherent accounting's limits by its nature and by the complexity of economic reality for which reflection aims to realize. In our opinion, economic entities have no reason to not apply accounting rules for financial statements and fiscal rules, other than accounting, in order to determine the taxable profit in the direction of amortization. Maybe just one of convenience, because the use of different methods for the two areas involves double work: accounting by accounting documents and fiscal evidence, into the Fiscal Register for amortization.

In conclusion, we can say that the national accounting regulations contain explicit provisions relating to amortizable assets mostly converging with IFRS and offer the possibility of detaching of the fiscality, perhaps in the greatest extent by comparison with other cases of this kind.

We hope that shown comparative analysis of accounting and fiscal amortization to be useful for accounting specialists in selecting of accounting policies on amortization.

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SKEWNESS IN STOCK RETURNS: EVIDENCE FROM THE BUCHAREST STOCK EXCHANGE DURING 2000 – 2011

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Abstract
Our paper investigates the symmetry in stock returns of the 30 most liquid companies traded on Bucharest Stock Exchange during 2000 – 2011 and also the most representative 5 market indices. Our daily data shows that skewness estimates are slightly negative for most indices and individual stocks, but only a few present values significantly different from the characteristics of a normal distribution. We compare our results with skewness estimates for 21 major and emerging stock market indices around the world and find that such results are similar to other low capitalization and trading volume markets. For all the Romanian and international assets studied, the Studentized-Range (St-R) and Jarque-Bera (J-B) tests reject the hypothesis of normal distribution of daily returns.

Keywords: *Skewness, stock returns, asymmetric returns, frontier and emerging markets.*
JEL Classification: G01, G12, G14, G15

Introduction

This paper is dedicated to the study of the normality of distributions and especially the symmetry (or asymmetry) of the financial assets returns. Our focus is on the Romanian capital market and especially on the indices and individual stocks traded on the Bucharest Stock Exchange but for comparison reasons we also include in our analysis a good number of international developed and emerging stock market indices.

Maximization of utility is the principle behind investment choice. The conventionalmean-variance equilibrium method (a two-parametermodel) requires either that return distributions are normal (Gaussian) or quadraticutility functions. Although over time esearchers have proposed different statistical distributionsfor pricing financial assets, the pertinence of symmetry analysisexceeds the pure determination of the statistical distributions.

The well known Capital Asset Pricing Model(CAPM) assumes that investors are only interested about the mean andvariance of returns, and thus implying that upside and downside risks are viewedwith equal dislike.

Some other authors have found that CAPM-based valuationmeasures are not so appropriate when market timing strategies and their subsequentnon-normal returns are taken into account. Also, investors typically take into consideration the difference between upside and downside risk. As a result, the basic hypothesis of the CAPM are disputed, and its emblematic risk measure beta is equally doubted.

There are models that allow for some asymmetry of the returns (two or three-parametermodels) and require logarithmic or cubic utility functions.Alternatively, some financial models were created to allow skewness to affect the requiredreturn of financial assets. Kraus and Litzenberger (1976),(1983) constructed a three-moment capital asset pricing model that includesthe effect of skewness on valuation.

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If we take into consideration arguments that higher moments of returndistributions are not negligible, at least not in major international financialmarkets like USA, UK and Japan, it is not reasonable to assume thatinvestors will ignore them.

Consequently, the objective of ourinvestigation is to extend the previous work and to find whether such results are true for the Romanian capital market. In order to achive this, we will compute skewness according to its most widely used defition and will employ statistical tests for the significance of mean, skewness and for the normaly of the distributions of the sample daily log-returns.

A number of authors have proposed analysing portfolioson the basis of the first three moments of return distributions, rather thanthe traditional two moments (mean and variance introduced by Markowitz in 1952). The positive sign of the third derivative ofthe utility function ((Arrow, 1964), (Pratt, 1964)) gives tells us that investors' risk aversion decreases as wealth increasesand, therefore, has cubic utility functions.

Arrow (1971) suggests that the most desirable properties for an investor'sutility function are (a) positive marginal utility for wealth, (b) decreasingmarginal utility for wealth and (c) decreasing absolute risk aversion.The first two conditions are consistent with mean-variance preference.Arditti(1967) has argued that condition (c) implies preference for positive skewness.

Important work about the type of empirical returns wasperformed byFama and Roll (1968) and Fama (1971). Also, a theoretical refference on thirdmoments was developed by Jean (1971), by addressing the question of skewnesspreference in a portfolio context.

Recently, Kearney and Lynch (2007) used daily returns on 6 international stock market indices from 1978 to 2002 in order to search for skewness in the tails, in different intervals and in the entire distribution and found very limited evidence of statistically significant skewness.

Tudor (2008) explored the power of the skewness coefficient in explaining stock returns on the Romanian equity market employing weekly observations for 31 common stocks traded on Bucharest Stock Exchange during 2000-2006 and found positive results.

Lucey et all (2006) showed that the incorporation of skewness as an objective in portfolio selection causes the optimal portfolio to change significantly from one formed only under conditions of meanvarianceanalysis.

Peiro (1999) addressed the symmetry of daily returns in eight international stockmarkets and three spot exchange rates. He showed that for his data the tests of symmetry with the sample skewnessseem of little value, due to the non-normality of the returns, butunder alternative nonnormaldistributions, the symmetry of the returns cannot be rejected for most markets.

Again Peiro (2001) examined the symmetry of twenty-four individual stock returns at different frequencies: daily, weekly and monthly. He found that while some asymmetries are observed indaily returns, they disappear almost completely at lower frequencies.

Machado-Santos and Fernandes (2005) used binomial and distribution free tests and found significant evidence of negative skewness in the Portuguese market during 1997-2002 period.

Brunner et all (2009) experimentally tested skewness preferences at the individual level. And found that the skewness of a distribution has a significant impact on the investment decisions.

Data and methodology

In our study we used daily prices from 21 international indices, 5 indices of the Bucharest Stock Exchange and 30 individual stocks traded on the Bucharest Stock Exchange. For the international indices the source of data was Yahoo Finance (www.finance.yahoo.com), while the date for the Romanian stocks and indices were obtained directly from the Bucharest Stock Exchange, courtesy of the Data Dissemination Department.

Our objective was to investigate the symmetry of the distribution of the daily returns during 2000 – 2011. However, a few of the indices and individual stocks used in our study were traded for only a part of this period, or data was unavailable for the first part of the period that we investigated.

These exceptions are mentioned in the Table 1 presented below. We consider that this compromise is not significant and didn't influence our conclusions.

Table 1: The financial time series used

Series symbol	Description	Period of daily observations
_AEX	Amsterdam Stock Exchange Index (Netherlands)	2000 - 2011
_ATX	Wien Stock Exchange Index (Austria)	2000 - 2011
_BET	Bucharest Stock Exchange BET Index	2000 - 2011
_BET_C	Bucharest Stock Exchange BET-C Index	2000 - 2011
_BET_FI	Bucharest Stock Exchange BET-FI Index	2001 - 2011
_BET_XT	Bucharest Stock Exchange BET-XT Index	Jun 2008 - 2011
_BFX	Euronext BEL-20 index (Belgium)	2005 - 2011
_BSESN	BSE SENSEX Index (India)	2000 - 2011
_BVSP	IBOVESPA Index (Brasil)	2000 - 2011
_FCHI	CAC 40 Index (France)	2000 - 2011
_FTSE	FTSE 100 Index (UK)	2000 - 2011
_GDAXI	DAX 30 Index (Germany)	2000 - 2011
_GSPC	SP500 Index (USA)	2000 - 2011
_HSI	Hang Seng Index (Hong Kong)	2000 - 2011
_JKSE	Jakarta Composite Index (Indonesia)	2000 - 2011
_KLSE	FTSE Bursa Malaysia (Malaysia)	2000 - 2011
_KS11	KOSPI Composite Index (South Korea)	2000 - 2011
_MERV	MERVAL Buenos Aires (Argentina)	2000 - 2011
_N225	NIKKEI 225 (Japan)	2000 - 2011
_NZ50	NZX 50 Index (New Zeeland)	May 2004 - 2011
_OMXSPI	OMXS All Share Index (Sweden)	2000 - 2011
_OSEAX	Oslo Exchange All Share Index (Norway)	2001 - 2011
_ROTX	Bucharest Stock Exchange ROTX Index	Oct 2008 - 2011
_SSEC	Shanghai Composite Index (China)	2000 - 2011
_SSMI	SMI Index (Switzerland)	2000 - 2011
_TWII	TSEC Index (Taiwan)	2000 - 2011
ALT	Altur Slatina SA	2004 - 2011
ALU	Alumil RomIndustry SA	2007 - 2011
AMO	Amonil Slobozia SA	2000 - 2011
ATB	Antibiotice Iasi SA	2000 - 2011
AZO	Azomures Tg-Mures SA	2000 - 2011

BCC	Banca Comerciala Carpatica SA	2004 - 2011
BIO	Biofarm SA	2000 - 2011
BRD	BRD - GSG	2001 - 2011
BRK	SSIF Broker Cluj SA	2004 - 2011
CMP	Compa Sibiu SA	2000 - 2011
COMI	Condmag SA	2000 - 2011
DAFR	Dafora SA	2000 - 2011
IMP	Impact SA	2000 - 2011
ELMA	Electromagnetica SA	2000 - 2011
OLT	Oltchim Rm-Valcea SA	2000 - 2011
PTR	Rompetrol Well Services SA	2000 - 2011
RRC	Rompetrol Rafinare Constanta SA	2004 - 2011
SCD	Sicomed SA	2000 - 2011
SIF1	SIF1 Banat-Crisana SA	2000 - 2011
SIF2	SIF2 Moldova SA	2000 - 2011
SIF3	SIF3 Transilvania SA	2000 - 2011
SIF4	SIF4 Muntenia SA	2000 - 2011
SIF5	SIF5 Oltenia SA	2000 - 2011
SNO	Santierul Naval Orsova SA	2000 - 2011
TBM	Turbomecanica SA	2000 - 2011
TEL	Transelectrica SA	2006 - 2011
TGN	Transgaz SA	2008 - 2011
VNC	Vrancart SA	2004 - 2011
TLV	Banca Transilvania SA	2000 - 2011
SNP	OMV - Petrom SA	2001 - 2011

Regarding the returns estimation, as Strong (1992, p.353) pointed out "there are both theoretical and empirical reasons for preferring logarithmic returns. Theoretically, logarithmic returns are analytically more tractable when linking together sub-period returns to form returns over long intervals. Empirically, logarithmic returns are more likely to be normally distributed and so conform to the assumptions of the standard statistical techniques." Precisely for this reason we decided to use logarithmic returns in our study since our objective is to test of whether the returns of the Romanian stock and indices during 2000 – 2011 were normally distributed or, instead, showed signs of asymmetry (skewness). The computation formula of the daily returns is as follows:

$$R_{i,t} = Ln\left(\frac{P_{i,t}}{P_{i,t-1}}\right)$$

where $R_{i,t}$ is the return of asset *i* in period *t*; $P_{i,t}$ is the price of asset *i* in period *t* and $P_{i,t-1}$ is the price of asset *i* in period *t-1*. According to this methodology of computing the returns, the prices of

the assets must be adjusted for corporate events such as dividends, splits, consolidations and share capital increases (mainly in case of individual stocks because indices are already adjusted).

As a result of this initial data gathering we obtained 56 time series of log-returns, each with approx. 3000 daily observations.

Concerning the estimation of skewness, according to most authors a time series of financial asset returns is symmetric around it's mean (noted here with μ) if:

$$\forall k, f(\mu + k) = f(\mu - k)$$

where f is the density function of the returns. If this property is valid then the mean of the returns series coincides with its median.

The skewness of a data population is defined as the third central moment. To be more precise, skewness is computed as the average cubic deviation of the individual observations from the sample mean, divided by the standard deviation raised to the third power. As a consequence of these considerations, we have calculated the sample skewness as follows:

$$\hat{S} = \frac{\frac{1}{N}\sum_{t=1}^{N}(R_t - \bar{R})}{\hat{\sigma}^3}$$

where $\hat{S}$ is the sample skewness; N is the total number of individual observations within the sample, R_t is the return of period t, $\bar{R}$ is the sample arithmetic mean and $\hat{\sigma}$ is an estimator for the standard deviation that is based on the biased estimator for variance ($\hat{\sigma} = \sigma\sqrt{(N-1)/N}$), where the standard deviation is given by:

$$\sigma = \sqrt{\frac{\sum_{t=1}^{N}(R_t - \bar{R})^2}{N-1}}$$

The skewness of a symmetric distribution, such as the normal distribution, is zero. Positive skewness means that thedistribution has a long right tail and negative skewness implies that the distributionhas a long left tail.

According to Peiro (1999), under normality hypothesis, the asymptotic distribution of $\hat{S}$ is given by $\hat{S} \to N(0, \frac{6}{T})$.

Results and interpretations

The first thing that we observe analyzing the data is that for 45 out of 56 of assets investigated we cannot reject the null hypothesis of zero mean of the sample daily returns over the 2000-2011 period. Still, it is very interesting that from the 5 Romanian indices investigated, three present mean sample returns that are significantly positive (at the 5% level). Also, 2 out of the 30 individual Romanian stocks studied present significant negative daily mean returns and 4 out of 30 present significant positive daily returns. From 21 the international indices studied for the period 2000-2011 only 2 present significant positive daily returns, while for all the other 19 indices we were not able to reject the hypothesis of zero mean returns.

More important for our study, from all the 56 assets investigated, during the period 2000-2011 only 11 presented skewness values that appear far from zero (the value of the standardized normal

distribution). All these 11 assets are Romanian assets: one index (ROTX) and 10 individual stocks. None of the 21 international indices appear to present significant skewness although most values are slightly negative.

As shown below in Table 2, both tests of the normality of the distribution of sample returns during 2000-2011 that we have conducted (the Studentized-Range test and the Jarque-Bera test) indicate that none of the 56 assets studied present a normal (Gaussian) distribution. In such a context, where the sample returns don't seem to conform to a normal distribution, a more complex analysis is needed in order to verify whether there is asymmetry in the data.

Table 2: Return statistics

Series	N	Mean (in %)	t-stat	Std. Dev. (in %)	Skewness	Sk S.E.	St-R	Jarque-Bera
_AEX	2989	-0.0092%	-0.7246	0.0069	0.0245	0.0448	12.30	3802.74
_ATX	2892	0.0089%	0.7122	0.0067	-0.2902	0.0455	14.44	6601.98
_BET	2898	0.0360%	2.4616	0.0079	-0.5053	0.0455	13.06	6110.21
_BET_C	2891	0.0256%	1.8644	0.0074	-0.5350	0.0456	20.40	24260.21
_BET_FI	2684	0.0501%	2.2116	0.0117	-0.1251	0.0473	11.07	2977.05
_BET_XT	855	-0.0257%	-0.6991	0.0107	-0.5089	0.0838	9.58	857.99
_BFX	1552	-0.0098%	-0.6048	0.0064	0.1600	0.0622	12.92	3456.70
_BSESN	2891	0.0164%	1.1878	0.0074	-0.1155	0.0456	16.26	4315.93
_BVSP	2891	0.0213%	1.3544	0.0085	-0.0643	0.0456	13.24	1522.98
_FCHI	2988	-0.0066%	-0.5255	0.0069	0.1190	0.0448	12.66	2490.25
_FTSE	2963	-0.0019%	-0.1790	0.0057	-0.0806	0.0450	14.09	3848.92
_GDAXI	2983	-0.0009%	-0.0703	0.0071	0.1243	0.0448	11.03	1766.27
_GSPC	3019	-0.0022%	-0.2044	0.0060	-0.1525	0.0446	14.73	6242.37
_HSI	2915	0.0016%	0.1162	0.0072	0.0110	0.0454	16.27	6286.14
_JKSE	2828	0.0240%	1.9207	0.0066	-0.6811	0.0461	12.14	4277.19
_KLSE	2874	0.0086%	0.8998	0.0051	-0.2201	0.0457	33.03	869185.20
_KS11	2868	0.0091%	0.6299	0.0078	-0.4093	0.0457	13.23	2055.04
_MERV	2880	0.0182%	1.0348	0.0094	-0.1602	0.0456	13.37	2682.09
_N225	2847	-0.0116%	-0.8870	0.0070	-0.3707	0.0459	15.77	5200.25
_NZ50	1863	0.0042%	0.5384	0.0033	-0.3789	0.0568	14.00	1983.22
_OMXSPI	2733	0.0002%	0.0123	0.0065	0.0684	0.0469	10.70	1331.09
_OSEAX	2661	0.0141%	1.0654	0.0068	-0.5903	0.0475	12.02	3430.63
_ROTX	789	-0.0093%	-0.2526	0.0103	-1.1287	0.0872	12.68	3087.56
_SSEC	2958	0.0067%	0.5190	0.0071	-0.0933	0.0450	11.49	2488.70
_SSMI	2961	-0.0013%	-0.1243	0.0056	0.0911	0.0450	14.76	4119.56
_TWII	2867	-0.0026%	-0.1999	0.0069	-0.2359	0.0457	10.42	714.01
ALT	1503	-0.0619%	-1.3276	0.0181	0.1104	0.0632	11.27	797.87
ALU	1094	-0.0733%	-1.5720	0.0154	-0.5380	0.0741	8.37	875.59

ATB	2795	0.0196%	0.7499	0.0138	-0.3673	0.0463	9.92	6411.76
AMO	2594	-0.0159%	-0.4027	0.0201	0.1103	0.0481	6.53	763.88
AZO	2748	0.0481%	1.4460	0.0174	-1.3681	0.0467	25.04	131989.50
BCC	1758	-0.0515%	-1.8918	0.0114	-0.3367	0.0584	11.50	4912.83
BIO	2363	0.0084%	0.1009	0.0406	0.2151	0.0504	45.76	8278150.00
BRD	2533	0.0209%	0.6903	0.0152	6.3559	0.0487	42.04	7089361.00
BRK	1591	-0.0906%	-1.9790	0.0183	-2.1014	0.0614	15.50	33666.87
CMP	2730	0.0272%	0.8999	0.0158	-0.4526	0.0469	14.22	6607.11
COMI	1248	0.1208%	0.7553	0.0565	0.0381	0.0693	18.81	46759.67
DAFR	1780	0.0255%	0.1466	0.0734	0.4441	0.0581	32.43	1905812.00
ELMA	2296	0.0167%	0.3408	0.0235	-6.5459	0.0511	25.30	1340663.00
IMP	2554	-0.0470%	-1.2981	0.0183	-2.4815	0.0485	18.33	94268.74
OLT	2658	0.0492%	1.2440	0.0204	1.3308	0.0475	18.45	48503.15
PTR	2492	0.0168%	0.2578	0.0325	-30.3469	0.0491	44.16	171000000.00
RRC	1773	0.0066%	0.1945	0.0142	0.4581	0.0582	9.91	1265.69
SCD	2780	0.0288%	1.1098	0.0137	-8.0406	0.0465	32.88	6646394.00
SIF1	2848	0.0516%	2.0217	0.0136	-0.2789	0.0459	9.64	2873.11
SIF3	2836	0.0439%	1.6136	0.0145	-3.2254	0.0460	24.88	546528.10
SIF2	2849	0.0564%	2.1254	0.0142	-0.2634	0.0459	9.26	2639.46
SIF4	2832	0.0351%	1.4139	0.0132	-0.2075	0.0460	9.94	2965.16
SIF5	2836	0.0503%	1.9384	0.0138	-0.1601	0.0460	9.50	2547.85
SNO	1976	0.0384%	0.9071	0.0188	0.0594	0.0551	6.98	543.21
SNP	2374	0.0239%	0.9764	0.0119	-0.2607	0.0503	11.01	3512.21
TBM	2461	-0.0030%	-0.0959	0.0155	-0.0934	0.0494	8.46	3096.99
TEL	1270	-0.0132%	-0.4068	0.0116	0.0440	0.0687	11.00	1302.75
TGN	956	-0.0084%	-0.2436	0.0106	-0.2264	0.0792	12.15	3620.56
TLV	2718	-0.0159%	-0.5301	0.0156	-9.1025	0.0470	27.78	3489067.00
VNC	1473	-0.0159%	-0.4251	0.0144	0.0599	0.0638	9.07	875.80

Conclusions

This study was dedicated to the issue of symmetry in financial assets returns on the Romanian capital market during the period 2000-2011.

In early financial studies, many authors and traditional methodologies used only the first two moments of the distributions (mean and variance) for pricing of the financial assets, assuming implicitly the normality of those distributions. Latter,a vast literature appeared suggesting that the inclusion of skewness and kurtosis in such valuation methods is useful since the third and fourth moments of the distribution are not negligible and therefore they are not ignored by investors and speculators.

We used daily data from Bucharest Stock Exchange for the mentioned period to prove that the distributions of the log-returns are not normally distributed although for most of the series we could not reject the null hypothesis of zero mean. This result is consistent with what we find for 21

international indices (both from developed and emerging markets) during the same period and confirm the recent studies of other authors for other markets, periods and asset groups.

Calculating the skewness of the distributions of the daily log-normal returns we found very few evidence of significant asymmetry, with only 10 individual Romanian stocks and 1 Romanian index presenting clearly negative skewness out of the 56 total assets studied. None of the 21 international indices presented clear evidence of skewness significantly different from zero. Still, we think that further analysis is required to clarify the issue of asymmetry because according to literature, the rejection of normality does not necessary imply the rejection of symmetry (Machado-Santosand FERNANDES, 2005). In this context a binomial distribution test and a distribution-free test such as Kruskal-Wallis test could be more suited.

Also, it would be interesting, as a piece of further research, to extend this study of skewness to a low frequency sample data such as the weekly and monthly returns for the same period.

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CONSIDERATIONS CONCERNING ACCOUNTING INFORMATION AND ACCOUNTING DECISIONS AND THEIR IMPLICATIONS IN BUSINESS MANAGEMENT

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Abstract
The accountants need to make choices to recognize, evaluate and classify business transactions for assuring true and fair value of information. In this paper, we try to classify these choises so that called accounting decisions. Also we try to view them in an informational perspective knowing the importance that accounting information has in the process of making business decisions.

Keywords*: accounting decisions, accounting information, business management.*

Introduction

Many professional writers that define accounting as technology science argue that accounting information, they predominantly due to the specific number, is placed within the perimeter of objectivity and accuracy.

It is known that accounting information as a starting point are two different sources and uneven in terms of quality.

Thus, the following transactions carried out from various markets are seen in the emergence during the financial year. They are largely the result of estimates and reflect the accounting policies of the enterprise management.

Even when there are seemingly strict rules, professional accountant can do to make ordering choises to describe the facts, of a margin of fredoom that lead to a subjective interpretation of them.

Economic decision-maker needs information coming from the external environment and internal environment of the enterprise.

Accounting information is essential in making economic decisions by management factors.

Accounting performs a data processing transactions and economic events held in the firm providing financial information (if the form of a monetary valued information), non financial (if expressed quantitatively) and/or accounting (if it has undergone a process of specific data processing accounting).

In their concern to provide a true and fair view in order to help decision makers, professional accountants reasoning applies (according to International Accounting Standards/Financial Reporting), taking decisions on the use of another treatment or to make a good information.

In this context, in this paper, we will try to outline a possible answer to these questions:

1. ***Use accounting information in accounting decisons?***
2. ***Accounting decision is an economic decision?***
3. ***Accounting decision is an operating decision, an investment decision, or a financing decision?***

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Importance of professional reasoning – a skill summum

In their concern to provide a true and fair view in order to help decision

makers, professional accountants reasoning applies (according to International Accounting Standards/Financial Reporting), taking decisions on the use of another treatment or to make a good information.

Accounting is not an exact science for obtaining relevant information requires making judgments for each case - shows a business associate of the French audit firm.

Financial Accounting provides financial information to external users. Is and why it is called so. It should be noted however, that it applied accounting treatment of the data represented by economic events in order to provide financial information.

Economic decisions concerning the optimal functioning of the company so long term and short term.

Financial decisions relate to financial instruments are financial risks for the enterprise or speculative purposes. They occur under the conditions of capital markets where the price negotiated equity investors offered securities of companies that listed on the stock market.

The major role of management accounting is to produce information that allows modeling of the relationship between resources deployed and consumed and results in return; in an optical forecast, management accounting help decision makers, and a retrospective measure optical performance[1].

Managerial accounting provides accounting decision-maker in the spotlight. He must deal with planning and budgeting, performance evaluation and cost control so that the overall objectives of the company can be reached.

Lack of standardization in the field of management accounting provides accounting in abiguous situations where you must prove velleities the decider. Furthermore, by applying the International Accounting Standards, accountants must use professional reasoning in finding problems, evaluation and classification.

In accordance with International Accounting Standards, in case there is no relevant accounting standard, enterprise management develop accounting policies in accordance with *"General preparation and presentation of financial statements"* and ensure that "financial statements provide information showing true results and financial position of the company, reflecting the economic reality of events and transactions, not just their legal form, are unbiased and prudent and has all significant material[2].

If in special circumstances, compliance with accounting standards do not meet the requirement to present a true, enterprises management will deviate from these requirements as necessary to present a true. In this case, the company must submit in the notes, the provisions from which deviations were made, the nature of misconduct, considered improper accounting treatment, the treatment adopted, and the financial impact of these deviations.

The main areas in which management accounting estimates and judgments are important is: tangible and intangible assets, financial investments, provisions for assets, long-term contracts, determining provisions and contingent liabilities, segment reporting.

Accounting decisions and their adoption results in business management

Accounting management of the enterprise lies in its administration regulatory compliance with accounting data so that decisions and actions of the company to respect the fundamental objective of the true and fair value.

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[1] Bouquin H. – *Comptabilité de gestion,* translation and introductory study – professor N.Tabară, Publishing TipoMoldova, Iaşi, 2004, pp.65

[2] Bogdan V. – *Harmonisation of international accounting,* Economic Publishing House, Bucharest, 2004, pp.404

The objective of financial statements is to provide information about financial position, performance and changes in financial positionm performance and changes in financial position of the enterprise, which are useful to a broad scope of users in making economic decisions[3].

Often the leaders pursuing the objectives of enterprise management, the accounting will be tempted to make a subjective choice[4]:

1. The reduction result: by extracting depreciation and provisions for risks and charges; by extracting overheads; the undervaluation of stocks;

2. The increase in earnings: by estimating from a lack of provisions for impairment; by generating a profit from a financial leasing operations; the abandoument of claims within a group; by estimate asset value as a result of mergers between companies; incorporating the financial costs of the acquisition cost of an asset or a stock; the failure to update a term debt and interest without generating.

So far we have tried to emphasize that the accounting work is not limited to the registration of a company acts in the economic and technical knowledge does not require registration in accounts skills decider they do not make books in a management team member. Robert Kaplan says the team that creates value for an organization is one in which accountants are involved and that they should participate in formulating and implementing strategies in an organization.

Identify activities that are decisions to be made carefully, because not every activity performed by an accountant involves a decision.

These decisions consist of choosing from a set of possible alternatives.

Research in the field of accounting decisions are not many studies on the role although there are numerous accounting and information provided by it in decision making.

In the field of management research organization well known are those relating to economic decision.

In the field of accounting decisions proves significant with reconsidering the accounting officer responsabilities and powers in the chief financial officer. This was not an accident but was caused by the adoptation of Romanian companies in the management structures of capitalist organization. This feature of the proffesional accountant and business leaders namely dress specific to certain types of managerial responsabilities.

Chief financial officer is responsible for managing the organization, compliance directives dealing with senior management control and effective management of organizational resources.

Management is planning, organization, coordination and control. Being chief is in our opinion, not only to drive and we belive that in the financial accounting function to perform all the attributes of enterprise management. Thus we speak of enterprise accounting management. Presence of several options in a country's accounting referential that fact and the presence of several reference in the accounting system of a country or difficulties resulting from international comparisons, diversity in accounting policies and estimation techniques can create a state of anarchy with serious consequences for decision making.

When asked if there is only one true account?

The answer is definitely negative although that can be answered, however, each accounting provides economic and social life protagonist in truth it needs[5].

Economic event analysis reveals practical problems of quantification enterprise: problem finding, problem assessment and classification problem.

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[3] IASB – Framework, paragraph 12

[4] Popescu A.F. – *Methods and techniques of reconciling the differences between accounting and taxation in the application of International Accounting Standards,* Congress of the accounting profession in Romania – "*Harmonisation or convergence in the International Accounting Standards",* Bucharest, 2006

[5] Pop A. – *Romanian financial accounting harmonised with EU Accounting Directives and International Accounting Standards,* Publisher Intelcredo, Deva, 2002, pp.15

These three issues are now based on almost any major decisions in the field of financial accounting and application of accounting policies.

Thus, these decisions can be listed asset management activity represented by assets, stocks and cash: choosing a method of depreciation of property, choosing a method of evaluation of goodwill, inventory selection system, the choice of assessment methods outflows of stocks, assessing claims based on certain valuation bases, the problem in assessing the fair value of assets, the revaluation for assets using historical cost to register.

Decisions in business debt management: debt evaluation according to certain bases of assessment, classification and distinction in debt, contingent liabilities or provisions as appropriate, the classification of leasing operations, classification of financial instruments that assess their accounting and financial assets or liabilities, credit risk problem in assessing the fair value of financial instruments, hedge accounting issues related to credit risk arising from the use of derivatives, tax management.

Decisions in business enterprise capital management sizing issue and redemption premiums, subsidies for investment management, classification of financial instruments in debt and equity elements.

Table 1

Accounting decisions and their adoption results in business management

Scope	Name	Detail	Result
Financial Accounting	Observation Evaluation Classification	Decisions related to professional reasoning in making management accounting firm heritage	Presentation of financial information used by these external users in financing and investment decisions.
Management Accounting	Make or buy Capital expenditure policy and management Award costs of products and services	Decisions related to performance management (balanced scorecard, dash boards) and monitoring budgets to achieve the planned levels	Disclosure by the management company for planning, control and decision making (especially those operating work-related).

Internal Management

Reveal internal management issues: performance evaluation, planning and budgeting (track to achieve planned levels by budgeting), cost allocation methods used for products and services, forecasts, assess each area of responsibility within a company, determining the causes of deviations and taking the necessary measures, budgeting capital expenditures, such decisions to produce or buy, decisions on special orders, capital expenditure policy and management, maintain control over production costs (continuous comparison of costs with revenues expected proceeds from the sale of products), inventory control structure, (there are enough goods products, raw materials and products in progress to meet future demand), critical point analysis.

Decisions management accounting for assets, liabilities and equity are taken by the chief financial officer with other accountants in the financial accounting department, on the basis of financial accounting information, economic environment, the existing norms and standards in the field and analysis based on information held, provide appropriate solutions.

Note that all these decisions are not subject to approval by the general manager, they have adopted or approved by the chief financial and information resulting from the adoption of such

decisions in the company's information flow is materialized in the accounting system output and active input, debt or equity.

Supporting documents for the information represented by these accounting decisions are economic manager decisions.

For internal management, decisions are taken by the chief financial support of management accountants performers, based on information relating to costs or activities provides cost management solutions, performance evaluation and for budgeting and planning.

Conclusions

The first question asked in this approach is:

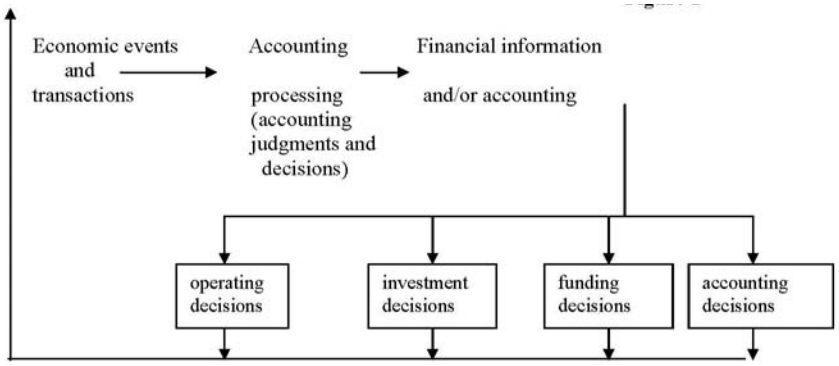
1. Use accounting information in accounting decisions?

Accounting decisons makes a primary data processing system provided by transactions and economic events.

Our opinion is that the accounting information used in decisions related to management accounting (decisions make or buy) sizing budgets, performance evaluation of managers).

In the following figure we present the link between accounting information and accounting decisions.

Figure 1



A second question that arises is:

2. Accounting decision is an economic decision?

Accounting decison is an economic decision to the extent that it takes place in a company and is related to its economic life. But accounting decisions related to management activities specifically, accounting is known as a science of business maangement.

Going concern is an accounting principle and a goal for management.

The third question that arises is:

3. Accounting decision is an operating decision, an investment decision, or a financing decision?

Cycles of economic activity of the company are divided into: investment cycles, cycles of operation and funding cycles.

In their accounting decisions are provide information relevant internal and external users.

In conclusions, the decision is specific accounting of all business cycles of the enterprise.

What does this mean for users of financial accounting information ?

Users of financial accounting information is ussually in a paperless environment, a system needs to offer the conditions for satisfying its decision. In fact, based on information and knowledge

are making a decision. Translated in accounting, decision making based on accounting information and knowledge are carrying.

Current systems for automatic data processing transactions are focused on transactions (namely the supporting document).

It is enough for an accountant to get that operate with a supporting document in the accounting and recording solution is offered by computer application.

In this context, it is proven that an accountant apply knowledge, reasoning and even make decisions in accounting problems, we belive that under International Financial Reporting Standards implementation, IT applications should include more opportunities for analyzing information to help makers.

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FISCAL POLICY AND ECONOMIC DEVELOPMENT IN THE CURRENT FINANCIAL CRISIS

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Abstract
Fiscal policies in the current era are the sovereign right of states to collect and administer taxes on national territory. In this respect, the European Union, which is an association of independent states, did not created an European tax - although many politicians proposing it - and within the Union is found important differences between the tax systems of member states.
Due to historical and national different traditions, the EU member states have heterogeneous tax systems and revenue sharing systems because of different conceptions of public policies relative to the role of state in social and economic respective community's life.
The financing of public spending is usually considered the main function of taxation. In the original tradition following Locke[1], property protection is the main functions of the state. As a result, the tax must correspond to the services rendered, that is to say, to pay the State for the protection of the rights it provides. Here we are at the origin of the doctrine of the benefit that there should be equivalence between the utility derived by the citizens of public services they consume and the "price" they pay tax.

Keywords*: direct and indirect tax, fiscal revenues, public expenditures, redistribution, incentives, macroeconomic development.*

Introduction

With the development of state functions, justified by the need to counterpart market failures or to ensure the harmonious development of industrial capitalism, government spending increased, particularly spending on infrastructure and education, and demanding an extension of the role of the tax.

Redistribution aims to redress inequalities in income and wealth distribution. It may take a monetary or non-monetary form. Traditionally, there are two dimensions of redistribution. Horizontal redistribution operates transfers that are not motivated by the income hierarchy. It is therefore either transactions between households in the same stratum of income or operations based on criteria other than income. Social protection responds mostly to this type of problem because it aims to make transfers of resources for the benefit of people at social risk: sickness, maternity, family, etc.

The vertical redistribution takes into account the income hierarchy and seeks to reduce inequalities. In this context, the objective of fiscal redistribution is the narrowing of the income spectrum and its preferred instrument is the progressive income tax. It is said that a tax is progressive when the average tax rate is growing faster than income, which means that the elasticity of the tax yield is greater than 1. It follows that escalation can be understood as a positive deviation from a levy proportional to income. In fact, escalation can be analyzed as the structure of a sample, that is to say the distribution of a monetary unit as tax among taxpayers classified according to their position in the income range, while redistributive effects measure the magnitude of changes introduced by the levy in the income distribution. Given a primary distribution of income, the magnitude of these

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[1] John Locke (1632-1704) a British philosopher.

distributional effects depends on both the degree of progressively and average tax rate, that is to say, the bulk of revenue actually collected. In other words, the variation of inequality resulting from a sample can be expressed as the product of its progressiveness by the average tax rate.

Fiscal policy as the main component of macroeconomic policies to stimulate development

The problem of economic policy coordination occurs at two levels: national budgetary policies among themselves and that of their interaction with monetary policy.

In the first case, the need for coordination is a function of the magnitude and meaning of externalities they generate on the partners. Fiscal policy, since it involves a significant investment, can have two effects on the activity. It exerts a positive externality in the sense that it increases the demand partners, but also a negative externality by higher interest rates of the entire economic area concerned. If the benefits outweigh, the non-coordination of fiscal policies will lead to overly restrictive policies. If the negative effects take over, fiscal policies are too expansionary; since national governments underestimate the actual cost to the Union conducted a fiscal stimulus at national level.

As for monetary policy, the policy mix in Europe is possible only when policies are coordinated between Central Bank and European Commission or European Parliament. Then it is to have equal means and an even consistency in objectives between monetary and fiscal policies. But the monetary policy of the Union is not managed according to the particular situation of a state, but depending on the situation of all states. It would therefore be natural to develop a degree of European federalism for fiscal policy in addition to the current centralized policy monetary.

In the European context, it seems - at first glance - that functions to stabilize the economy should be met by the European Union than by its Member States. As for the prerogatives of government, they remain in the distribution of goods and services where consumption is located. In this regard, the provision of public goods corresponds to the respective preference given in terms of cost of facilities, ability to pay and demands for public goods. To do this, this activity should not be centralized at the European level, except for public goods whose provision would be relevant at the federal level.

Moreover, in the economic literature, it seems to be equivalence between politic and institutional federalism and the coordination of economic policies.

The coordination of economic policies can open a very wide range of possibilities, from the simplest coordination where states are happy to inform each other of their national policies to centralize the most important. The main quality of this coordination should be the speed of adaptation and its freedom of action. This coordination also needs to have a relative independence vis-à-vis the electoral and administrative machinery that characterize inter-governments. This is extremely important since it is relevant to the implementation of the policy of the European Union, it is equally important for the design of its financial resources.

Economic and financial crisis, together with fiscal policies adopted by governments had a major impact on tax revenues. It should be noted that even using the same methods of data recording, the major's legislative changes and economic situation had a major impact on tax revenues.

Governments have limited leeway to conduct their fiscal policy. Various constraints such as economic, cultural or institutional can indeed intervene, reducing the ability of fiscal policy to achieve its objectives, or limiting its scope. The tax can also cause unwanted effects, which in turn affect the economic mechanisms.

To control the macroeconomic balance, to ensure the growth and to move towards full employment, there are usually centered on policies to support the application for or recovery of the economy, policies favoring the offer, those more restrictive, favorable for savings and / or seeking to improve business competitiveness.

According to Keynesian analysis, the positive impact of the fiscal policy on economic growth and employment is the result of the multiplier. However, for Keynesians, an increase in public spending is not equivalent to a reduction in revenue. Indeed, the budget expenditure multiplier is greater than the tax multiplier due to slower reaction times of individual incomes and therefore consumption, changes in taxation.

For their part, offer's economists does not believe in the effectiveness of the multiplier and criticize what they call "damage of Keynesianism", in particular the misallocation of productive capacity in the economy that would be generated distortions caused by the tax and public spending. That is why they argue that lower taxes are the instrument of public spending cuts which would result in a revival of investment and activity to eventually fill the deficits.

It must also take into account the counter-cyclical effect of most public activities, including taxation. These activities have certain inertia about the economy and act as automatic stabilizers. In particular, the tax burden and particularly the tax on personal income increases during booms and fall during recessions. The variations are even more important that the samples exhibit a progressive profile. In this regard, Robert Solow[2] argues that tax policies addressing escalation charges call into question the ability of budgets to mitigate the impact of spontaneous economic shocks.

The tax burden characterized indeed by their dual nature, legal and economic. This power is expressed in the tax law that revolves around a set of rules, whose combination determines the extent of contributions and tax policy changes in order to give concrete form to the options which it precedes. From an economic perspective, tax exempt purchasing power to private so that it alters the income distribution, influences the overall activity and affects behavior. It follows that if the tax part of the state functions, it does not fit directly to the type of Musgrave.

As regards fiscal policy, it should be considered the potentially disruptive effects of mobility of factors of production - material resources, skilled labor and capital - in the Union, so that national economic policies in an attempt to gain unilateral advantages by applying a low taxation does not lead to reallocation of business, that could strongly negatively affect other Member States.

At the same time, States supporting the application of a lower tax burden and restriction, at least for certain taxes, tax harmonization, motivate their choices by the need to stimulate the national economy and monitoring of public debt, which has become lately a major problem for all countries, whether developed or developing. This imperative is even more pronounced in the EU Member States, as these economies are economies with a high degree of openness, exhibited competitive pressure and the Union as a whole, must develop and implement effective fiscal policy, being able to challenges posed by sovereign debt crisis in several Member States.

Taxation is the heart of relationship between citizens and the state. Therefore, not only government experts and academics, but also ordinary citizens addressed their questions on the taxation of their country and the European Union, European community we belong to and how the member states are compared with each other.

In this respect, the Stability and Growth Pact[3] provides a fiscal strategy at Community level to reconcile the two trends, following the meeting the need for balanced development of the Union and

[2] Robert Solow (2002) "Can we use fiscal policy? Is it desirable?" Revue de l'OFCE, No. 83, pp. 7-24.

[3] Stability and Growth Pact (SGP) is a regulatory framework for the coordination of national fiscal policies in economic and monetary union, which includes a preventive component and an arm.

The preventive

Under the provisions of the preventive arm, Member States must submit annually stability programs (convergence) to show how they intend to perform or ensure stable medium-term fiscal positions, taking into account the impact it will have imminent population aging on the budget . These programs are evaluated by the Commission and Council issues an opinion on each of them. Preventive component includes two policy instruments that can be used to avoid deficits "excessive".

protect the interests of Member States in terms of growth potential in the very competitive Community environment.

The consequences of opening the economy[4] to the economic system, mainly commercial on the tax-budget system are numerous, with both direct but especially indirectly impact. In all Member States of the European Union, the openness of the economy - measured as a share of the total volume of foreign trade volume of trade - is high, as the first pillar of the European constitution was even free movement of goods.

According to Ramsey's[5] theory, that levies taxes to be effective - that is, to achieve its goal with acceptable expense - tax bases should be as stable and large amounts, so collected revenues to be less sensitive to tax rate changes. In fact, the American Arthur Laffer showed that a steady rise in marginal tax rate leads, over a certain limit, to a decrease in tax revenues.

Between taxation principles it is found that of equity, which makes the tax system to be optimal when applied to all taxpayers and the marginal rates of taxation are regressive, allowing positive marginal utility of labor factor. Also, it appears that the entity is paying tax effective support and tax pressing exercises, mainly on the less elastic foundations.

Openness of the economy reveals a major difference in tax bases according to their degree of mobility, because of a number of factors that are potentially incompatible. Thus, the mobility factor increases with the openness of the economy, and when they tend to migrate - such as the labor in an economy with low performance, adversely affecting remuneration - tax levies volume decreases, with negative implications for both public sector financial balance - reordering deficit and also increased borrowing - and the private sector, which will be supported to a lesser extent by active economic policy, namely through public spending the internal's economic redistribution.

In the same vein, it should be noted that the most mobile elements: employees with the highest degree of professional qualification, the most modern businesses and high processing capacity, etc., contribute the most, due to their higher pay.

Of equal importance in building an efficient tax system is the share of social contributions of enterprises, because they affect the cost of labor factor with direct influence on management decisions on the duality of labor / capital productivity, thus affecting the inclination of technical and technological modernization.

Economic and financial crisis currently facing the vast majority of EU states to reveal all aspects on which public policies have to lean very closely, referring mainly to the competitiveness

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Based on a proposal from the Commission, the Council may initiate an early warning procedure to prevent an excessive deficit. Through early warning system, the Commission may recommend a Member State to respect the Stability and Growth Pact obligations.

Corrective component

Preventive arm of the Pact governing the excessive deficit procedure (EDP). This is triggered when the deficit exceeds the 3% of GDP in the Treaty. If it concludes that the deficit is excessive for the purposes of the Treaty, the Council shall issue recommendations to the Member States concerned to correct the excessive deficit and set a deadline for it. Failure initiation recommendations leads to the following stages of the procedure, including the possibility of sanctioning euro area Member States.

Long-term sustainability of public finances

Since the aging European population as people live longer and have fewer children, EU Member States face the challenge of ensuring long term sustainability of public finances, given the impact this phenomenon will have on the budget. To meet this challenge and given the strong focus on long-term viability Pact revised version in 2005, are designed joint long-term budget forecasts in the EU and assess and monitor the situation of individual Member States. Complete analysis can be found in the report on viability. Long-term sustainability of public finances is taken into account when assessing stability and convergence programs.

(Source: http://ec.europa.eu/economy_finance/sgp/index_ro.htm)

[4] The concept of an open economy designate the intensity of trade in goods and services of a state with a foreign State.

[5] Frank Ramsey, British mathematician, theorist of the determinism and hazard in a system.

and alleviate imbalances between states, without losing to the Union's position in the global economy.

Thus, the recession has had a clear impact on revenue already in 2008, not only for income taxes (usually very sensitive to growth), but also consumption taxes, which are usually expected to be somewhat more resistant to a downturn, in particular consumption tax revenue, fell more than the volume of consumption itself. However, in 2008, the effect of the crisis was felt strongly on the expenditure side than on the revenue side, probably because of the adoption of spending programs in order to prevent the impact of the crisis. In all main tax measures, both tax increases and tax cuts were introduced in the last two years, often in the same country and sometimes even within the same tax. This is because in the early stages of the crisis, almost all governments have placed greater emphasis on supporting economic activity, but in a later stage of strengthening. Another explanation is that governments often use the reforms as an opportunity to make some needed "maintenance" of the tax system, the introduction of tax incentives at the same time as new features are introduced. Changes in statutory tax rate, as a tax measure, given their high visibility and the fact that they affect a greater number of taxpayers, would normally have a stronger impact on agents' expectations, but usually costs more (in budgetary terms, if the rate reduction, and politically, if growth rate) measures aimed at the tax base, such as the introduction of exemptions.

Given the wide diversity of characteristics tax levy in each country, comparing them is difficult to be taken, and the total compulsory levies collected by the tax authorities, even expressed in the same currency per capita, taking into account purchasing power, have very different values.

To overcome these shortcomings and to make comparative analysis of the states tax being pressed, the used statistical information[6] reveal an indicator known as the tax burden rate or level of taxation, which is defined as the ratio of receipts to mandatory sampling data reported in Gross Domestic Product (GDP), considered the most synthetic macroeconomic indicator.

$$Tax\ burdon\ rate = \frac{Tax\ revenues}{GDP}$$

This indicator is relatively simple and easy to determine, based on information provided by national tax statistics and, therefore, is considered the most common synthetic indicator between macroeconomic indicators on tax and social levies. Accordingly, tax levy rate allows comparative analysis of fiscal policies implemented in different countries of the world, but details of the tax burden analysis must take into account not only tax plus compulsory social contributions, but also the volume of public expenditure dedicated funding social services, which are consistent for each individual state, social policies involved in a greater or lesser extent, public authorities in the community.

Evolution and significance of the tax burden rate is dependent on several factors:

- The level and size variations of GDP. Being located in the denominator of the above function, it is noted that, with the assumption about a constant volume of tax revenues at a constant, any decrease in GDP is reflected in an increase in tax burden, and vice versa, any GDP growth determines a decrease in that pressure. In reality, changes in economic performance are combined with public finances and underground economy size, which is quite difficulty sized, and which, however, influence in many ways the GDP, should be considered when fiscal policy is developed and / or start a significant reform in this area.

- The role of public sector - size and involvement in community life - influence of a decisive manner the tax levy. But there are significant nuances from one country to another, mainly because

[6] Information sources are diverse, but the most used are those provided by economic institutions and / or financial international vocation: OECD, IMF and World Bank, Eurostat, European Central Bank and others, plus information provided by governments national tax. (Sources: Agnes Benassy-Quere, Martine Carré-Tallon, Matthieu Crozet - A competitive tax system in a competitive world, Report for the Council Levies Obligatory CEPII, October 2009)

the public social institutions role: insurance and assistance in several areas such as health, old age pensions, education for all ages, disadvantaged persons protection, etc. join organizations within public / private partnership or even those services are assumed by the private sector, as determined by the national legal framework that stimulate this involvement;

- The degree of intervention of public central authorities, which is another indicator, measured by the rate of tax levies namely the so-called degree of tax net, which takes into account the primary budget deficit[7]. Thus, if, in successive fiscal years, the state register important budget deficits and, to cover its, have recourse to new loans, tax burden rate, calculated according to the formula above, is less than the share of spending in GDP, because expenditures include the cost of debt (interest and fees). In fact and vice versa is true: if a state was indebted in previous years tax levy rate may be greater share of public expenditure so that it would be possible to cover financial debt.

- Ways of intervention of central public authorities. The State has various means of intervention in the economy, which affects, according to their use, the rate of tax burden. Thus, if a State considers certain socio-economic circumstances, can act providing various types of subsidies, can reform the tax system to achieve objectives similar to those that can be achieved through public spending, etc. If we exclude the possibility of resorting to deficit increase, providing new subsidies to the businesses produce, inevitably, increase the tax burden to finance these subsidies. On the contrary, if the equivalent benefits are allocated through measures on taxes, the tax burden rate will be reduced accordingly;

- Redistributive effect. In calculating the rate of tax burden are taken into account only gross levies, which are redistributed to taxpayers aside amounts through various programs and social protection. In this respect it should be emphasized that in determining the rate of tax burden does not take account of public funds to finance public goods and services provided by the state and established by mandatory contributions. Exclusion counterpart does difficult, if even not conclusive, the comparison of tax systems of states, because sampling required is a direct cost figures, while the expenditures cost advantages, particularly those with social value may be quite vague. Redistributive impact can be significant, especially in countries where public sector is important and whether the central government implements active policies of redistribution;

- Distribution of tax burden and tax structure used. Rate tax burden does not consider the weight of various types of taxes and, at the same time, the typology of individuals and / or legal entity to legal regulations of a fiscal nature. In this way, can not be determined by analyzing this ratio, fiscal pressure on individuals or corporations, but the indicator can be used with good results to analyze the impact of fiscal policy on public finances national concerned.

Despite its widespread use, the concept of tax and therefore the fiscal burden suffer from several shortcomings that affect its use. While the tax burden analysis, considered as the sum of taxes can detect a higher tax rate for a given country, the indicator does not provide relevant information on social services made by public authorities, which have to be closely correlated with the amount of contributions social. However, the tax rate is a useful indicator for international comparisons and analysis of fiscal developments, coupled with public spending.

Evolution of the share of different taxes in the democratic states that have implemented tax systems adapted to the activity-based competition is different from country to country, but it can distinguish common trends that occurred in most of them, considering a period of time relative prolonged.

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7 Primary budget deficit is calculated by subtracting from gross deficit (budgetary revenues - budgetary expenses) payment of amounts of public borrowing costs in fiscal year at the national level.

$$\text{Primary budget deficit} = \text{Fiscal deficit} - \text{Public debt cost}$$

Primary deficit is a sign for net borrowing requirement, i.e. the amount to be obtained from outside sources to cover the total budget expenditures, from it been extract the cost of previous loans.

Evolution of fiscal taxes in OECD countries

	1965	*1975*	*1985*	*1995*	*2000*	*2008*
Total	*100*	*100*	*100*	*100*	*100*	*100*
Personal income tax	26	30	30	27	25	25
Corporate tax	9	8	8	8	10	10
Social security contributions, of which:	18	22	22	25	24	25
- The employee *part*	*(6)*	*(7)*	*(7)*	*(9)*	*(9)*	*(9)*
- - The employer *part*	*(10)*	*(14)*	*(13)*	*(14)*	*(14)*	*(14)*
Taxes on property	8	6	5	6	6	5
General tax on consumption	12	13	16	19	19	20
Specific taxes on consumption	24	18	16	13	12	10
Other taxes and taxes	2	2	2	3	3	3

Sources : OECD Fiscal Statistics 2010

It is observed relatively high share of social security contributions, given that most democratic countries have adopted and implemented policies to protect the population, particularly the vulnerable one, because low income or due to aging, health, the adverse economic circumstances that involves an increase in unemployment, etc.

Also, a generalized tendency in all OECD member states is to increase general consumption tax, represented in most of them by the value added tax, which was adopted as neutral tax on the consumption of goods and services throughout the entire European Union and the other countries outside the Union.

In the EU there is a wide variety of tax systems, with reference both to the tax base and tax rates and administration procedures, particularly after the accession of ten and then two new states in 2004 and 2007. Also, compared with the major developed countries in the world, the European Union presents a higher tax generated and the need to finance public expenditure system covering a wide range of public services.

In the EU, tax levies evolution marks specific fluctuations, especially if we consider heterogeneous composition in terms of macroeconomic development, of the Member States in the last decade, when the Union was enlarged by the accession of another 12 new states.

Government revenues evolution in European Union
- % in GDP -

No.	Types of revenues	Year			
		2000	2008	2009	2010
1=2+6+7+8 +9	Total revenues, of which:	45.4	44.6	44.0	44.0
2=3+4+5	Fiscal taxes, of which:	27.3	26.6	25.5	25.6
3	- indirect taxes	13.4	13.1	12.9	13.2
4	- direct taxes	13.7	13.1	12.3	12.2
5	- per capita taxes	0.2	0.4	0.3	0.2
6	Social contributions	13.9	13.6	14.1	13.9
7	Other current revenues	1.8	1.9	1.9	1.8
8	Capital revenues	0.2	0.2	0.1	0.2

Sources: "eurostat. Statistical books. Government finance statistics. Summery tables – 1/2011. data 1996-2010. 2011 edition.

As a general trend, it is observed the decrease of the tax burden exercised by all taxes and fees (25.6% in 2010 compared with 27.3% ten years ago, in 2000, as a percentage of GDP), the causes can be grouped into two broad categories:

- EU enlargement, the new Member States applying in the most part, a lower tax burden, since the policy of stimulating economic development is the Keynesian type;

- After 2008, the first year that it is felt strongly the financial crisis and subsequent economic crisis, all European countries have tried to implement fiscal policy instruments and / or budget to maintain macroeconomic balance and avoid skidding sovereign debt.

The distinction between receipts from direct and indirect taxes is empirical, but for a depth analysis of taxation and, especially, to implement a policy to achieve the main objective of stimulating economic stabilization, this distinction is essential, because the way that taxes affect the taxpayer concerned, first and second, but perhaps even more important, the entire economic and social life varies according to their typology.

Direct tax burden for individuals consists of income taxes (wages, property rights, rights of use of property disposal, income from self-employment and income from independent activities, income from capital, etc.) and circulation of wealth or property, which is, the rule in most states, imposed by local authorities. These tax obligations that are entirely without direct counterpart, compulsory social security contributions are added to individual task in general when it performs dependent work.

Direct business taxation consists of taxes placed on the benefits they obtained during the fiscal year, as well as obligations of the employer's social contributions costs for staff, plus taxes on heritage buildings, land, vehicles, etc., that is, as with individuals, local taxes.

The tax burden both on individuals and legal entities is much higher than that of indirect taxes as their bearer is the final consumer.

The overall progressivity determination of tax systems is difficult and imprecise. In most states applying progressive taxation, i.e. increasing taxes as the tax base increases, it is specific for personal income tax, unlike all other taxes or fees that apply proportional tax - which means single percentage calculated for the tax base - or specific tax, i.e. sampling is a fixed amount per unit of physical measures.

Undoubtedly, personal income tax makes the tax customization. Through fiscal measures which take into account family situation and applying a progressive tax scale, progressive tax burden can be adapted according to economic and social situation of the taxpayer. Most developed countries, where the middle class population, which has medium to high income, has the largest share in total population, was traditionally applied, progressive personal income tax, including as a measure of respect equity and social solidarity.

In recent times, however, tax reforms implemented in developed countries, especially after the '80s, when public intervention had to nuance and to adapt to new challenges of globalization and the rapid expansion of information society, the general trend was reduction in personal income tax share of total public revenues and increased indirect taxation, especially as the current period is characterized as increased consumer society, even though currently mitigated the effect of financial crisis.

Income taxation of individual's revenues from any sources presents a relative diversity in the European Union but Member States can be grouped into two categories that have similar characteristics:

- Member States with a higher development level, applying a direct tax on personal income in progressive installments proportionate share, with a high marginal quota, so that people with higher incomes to contribute more to the financing of public services through budgetary allocations. I.e. there are in this situation, the European Union: Germany, Austria, Belgium, Denmark, Spain,

Finland, France, Luxembourg, Netherlands, Portugal, United Kingdom, Sweden, etc. Some of these states exempt an annual amount, above which sits a tax on income and other income differential rates of pay than that: dividends, interest and income immigrant entrepreneurs or rich persons who are subject to lower tax pressure – as in Belgium, Netherlands and others;

- Member States that have recently integrated in the European Union and implements structural reforms in many sectors, trying to induce and stimulate sustainable economic growth. They shall apply to mail tax systems axis, emphasizing indirect taxation to collect most of the public revenues, which, although it is inevitable, even if they have the highest revenue neutral to individuals and businesses. Most Member States in this second category imposes a personal income flat, relatively lowered, trying to stimulate savings and thus increase capital available for investment financing. Examples: Lithuania, Romania, Slovakia, Czech Republic etc.).

Taxation of benefits / corporate income also shows a great variety in European Union Member States, both in terms of tax rates and the methodology for determining the tax base are correlated with economic policy conducted by national public authorities in the field of real economy. It could be notice in this respect several features that distinguish each member:

- Countries where the rate of profitability of domestic firms is large, practice a higher tax on profits, but also more exemptions / deductions to stimulate activities considered of national interest. For example, in Belgium, the standard rate is 33.99% with application of special deductions for interest earned by companies and scientific research exemptions of benefits affected. At the same time, Belgium practice a decreased quota at 24.98% on profits applied to the benefits achieved by SMEs to support their financial solvency.

Spain used an advantageous tax regime applies to companies for research and development, extension work, training, SMEs. Luxembourg, a tiny state, but very attractive for equity investments, exempts from tax all financial companies. Some Member States use differentiated rates - tax sliced-depending on the business benefits gained from the current activity: France (331 / 3% and 15%), Hungary (19% and 10%), Ireland (12.5, 10% up to 25%), Netherlands (29% to 34%), United Kingdom (19% to 32.7%);

- New Member States shall, in general, tax rates proportionately lower profit, but such an approach is found in countries with very high level of development, such as, for example, Switzerland.

Indirect taxation must respect freedom of movement of labor, location and movement of services, capital movements, as in equal situations, tax discrimination are prohibited through the effect of the provisions of the European Community Treaty. In the European Union, taxation falls within the provisions of the EU Treaty, which prohibits any discrimination on the domestic market, limiting tax incentives to the export and also obliging Member States to eliminate double taxation within the European Community international bilateral tax conventions.

At the same time, the tax system of each Member State has to respect freedom of movement of persons, mainly those who exercise a profession, the organizational entities that provide services and movement of capital, so that similar situations, tax discrimination are prohibited.

Tax harmonization within the European Union does not mean putting value added tax similar in all Member States, but only on the construction regulations trim identical VAT rates applied may vary as follows:

- The standard rate from 15% minimum and 25% maximum. Currently, VAT rates used in Europe have increased: from 15% in Cyprus and Luxembourg, 25% in Denmark and Sweden, the European Union and Switzerland from 8% to 25% in Norway, outside the European stars Europe;

- reduced tax rates, two or even three, applied to products and / or services that public authorities consider important to the life and / or the country's economic development. Examples of reduced rates are multiple: three reduced rates used in Luxembourg - the country with the highest average level of income / capita; in Denmark, which does not use any reduced rate and standard rate, mentioned above, the maximum of 25 %, although it should be noted that the Danish living standards

are among the largest in Europe and even in the world. On the other hand, in countries where the income / capita is above the EU27 average, even more than the EU15 average, applied to food and general products of interest - for example children's clothing - much reduced rate, which makes the weighted average tax rate of VAT to be much lower than in poorer countries. Examples are numerous: Great Britain, which apply a zero rate for food products and many other products and services, Germany 7% on food; France 5.5% for food, etc.

Conclusions

European fiscal strategy[8] has become a necessity in the current situation, marked by financial and economic crisis, but to develop and implement such a strategy is necessary to overcome, through the adhesion of the majority of Member States' populations, a large number of obstacles refers to compulsory levies that produce adverse behavior, the budget deficits that still remain and a number of other situations, different and difficult to monitor and handle. In general, the above issues adversely affect the growth potential of the European Union, considered in its whole, which requires measures to be applied to most mobile economic factors, namely the production, capital and labor the best qualified.

The eexperience about harmonization of consumption taxes, namely the indirect tax: value added tax and excise duties, and implementing the common commercial policy, which eliminated the clearance of goods crossing the national borders of Member States, leads to the thought of achieving a Community tax bases covering primarily to a tax professional, taking into account the free movement of persons, which is perceived as the main pillar of the European Union. The main feature of a common European tax system aims to combine a wider tax base and lower rates. Fiscal and budgetary convergence between Member States involves the need to reduce public debt, while reducing budget deficits, which can not be achieved without a monitor, even a reduction in general government spending. Without, however, affect national policy autonomy to influence productivity regions. In addition, the proposed strategy should influence national decision to choose a social system or another, but at the same time, consider European competitiveness across the EU. In this respect, it should be noted that the Stability and Growth Pact, which was based on a number of options at national level related to their autonomy, proved ineffective. The danger of bankruptcy that faced with several European countries in 2010 and 2011 threatens even the existence and the functioning of the euro zone. To support the Union, was created European Financial Stability Fund, which has been allocated significant sums to support financial integration and monetary union.

Fiscal incentives to manipulate the behavior of economic agents play an increasingly important role in tax policy. The fiscal intervention is performed, so massive, very long time, but it was mostly an economic and social vocation. In recent years the tax incentives are increasingly used to discourage harmful activities and promote activities socially valued positively.

The mechanism by which conduct fiscal incentives can be described starting from the impact of a levy on any market. The presence of a tax in any transaction causes a disjunction between the price paid by the buyer and the price collected by the seller. This difference between the taxes and / or all payroll taxes and the tax price, collected by the government and social, is called "tax wedge". According to economists the welfare cost of taxation is higher than that single puncture of monetary value, because by changing the system of relative prices, the tax also alters economic behavior. If we distinguish the effect of income resulting directly from the levy on resources officers the substitution effect that comes from the new arbitration or reallocations that occur after the change of the signal transmitted by prices, the excess tax burden is the latter substitution effect. That's why one of the conditions for an efficient tax system is that it minimizes the excess tax burden.

There are several reasons that can not reach this ideal situation for tax efficiency. Fiscal instruments required may not be available. Above all, the markets themselves can not be effective.

[8] http://www.europa.eu/European fiscal strategy 2011 qe-198-en.pdf

This of course raises the problem of imperfect competition but also that of the presence of externalities. There is externality when the action of an economic agent is positively or negatively on the value of at least one other agent, without this interaction goes through the price mechanism.

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THE IMPACT OF MANAGEMENT CONTROL ON THE HUMAN FACTOR AND CONSEQUENTLY ON ENTERPRISE PERFORMANCE

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Abstract
The current economic environment where enterprises run their activities is characterized by diversified, competitional supply, superior to the demand; a supply that is heterogenous, unstable both quantitatively and qualitatively; comprising numerous technical as well as technological mutations. Under these circumstances, enterprise managers must ensure the achievement of objectives and performance. In order to accomplish these, human, financial, material resources are to be used.
The limits imposed by the usage of financial and material resources can be compensated for by means of the creativity and innovation pertaining to employees, therefore, the success of an enterprise becomes closely related to the capitalization of staff intelligence and skills, while the human resource becomes important for the management control by means of which an enterprise makes sure that its activities run according to plan and that objectives are met.
The paper presents the impact of management control on the human factor and further to the enterprise performance, strategies of employee motivation, aspects regarding the use of plans as objectives, as well as aspects concerning the use of control techniques regarding the assessment of results.

Keywords*: performance, management control, control techniques, strategies of employee motivating.*

Introduction

The main objective of an enterprise is performance, creating added value, i.e. a positive value obtained from the running of activities after the remuneration of all participant factors, including the enterprise capitals.

'Performance […] can have at least three meanings or connotations: success, the result of an action or the action itself […]. Performance shows capacity for progress, due to constant efforts. The term performance is the bearer of an ideology of progress, effort, of always striving for the better.' (A. Bourguignon, 1997)

For an enterprise to be performant, it needs to set up and have the capacity to reach strategic objectives by means of efficient usage of all current means, or, to put it differently, to be simultaneously efficient and efficacious.

Reaching strategic objectives can be achieved by doing certain activities by the enterprise employees under the managers' guidance. 'The process meant to motivate and incite the people in charge into doing activities conducive to the reaching of organization objectives' is management control. (R.N. Anthony, 1965)

The creation of affluence involves the consumption of material, financial, human and informational resources. Human resources are the ones making the difference between enterprises having similar financial and material resources because of the employees' educational and professional qualifications, skills, abilities and knowledge that can be turned into value, thus influencing the enterprise profitability in the long run.

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Transforming employee knowledge into value also depends on the managers' capacity to influence their subordinates' work and guide them into reaching the objectives.

Contemporary Japanese management considers that the success of an enterprise is closely related to putting to good use of the intelligence of every employee.

In order for the enterprise of the future to continue its activity and be performant it will have to focus, among other things, on the degree of employee satisfaction so as for the latter to enjoy work and be committed to it.

'The enterprise's human elements are the ones able to learn, change, innovate and create if they are rightly motivated, being the ones that ensure the company survival in the long term'. (N. Bontis et al.,1999)

The right motivation, the use of the intellectual capacities of the personnel with a view to reach the objectives will ensure both the survival of the enterprise as well as the creation of value. Pursuing the reaching of objectives and the setting of employee motivation strategies can be achieved by means of management control.

This study objectives are to present the role of management control in the creation of value, the results' assessment, personnel motivation strategies and the indicators proposed to be used as performance evaluation instruments.

1. Management control and its role in creating value

Managers of any enterprise consider three parameters when running the business: objectives, means and results.

Objectives must correspond to the the aims pursued by the enterprise in the long run. Means are represented by the resources used in the running of objective-reaching activities, and the results represents the consequences of the actions undertaken in order to reach the ojectives.

There is an interdependence relation between objectives, means and the results obtained by enterprise. Objectives are set in accordance to the means available to the enterprise as well as to the expected results, means will be allotted depending on the objectives settled and the results pursued, while the actual results will be the consequence of using the means efficiently and efficaciously. At the same time, the results obtained will be compared to the initially settled objectives in order to find out the deviations or the degree of achievement of the latter.

"The process by which people in charge make sure that the necessary resources are obtained and used with full efficiency and effectiveness in order to reach the objectives set by the enterprise"[1] is management control. Therefore, the role of management control is to ensure the correlation of the objectives to the resources; to set up a system of indicators that would allow the decision-makers to monitor the evolution of the enterprise; to adjust the behaviour of the factors with a view to reach the objectives.

"Management control helps the managers to guide the actors into getting organized for performance." (C. Alazard, S. Sépari, 2001). Consequently, management control urges the people in charge to act as the enterprise needs, to use the means available in order to reach the objectives settled, to assess the results of the activities undertaken and compare them to the ones initially settled, and if the former are not up to the expectations, to take corrective steps so as the global activity may ensure the creation of value.

Management control does not have the role to sanction, but to recommend, suggest, notify. Thus, the control system will be regarded as an assistant to the managers and not as a supervisor.

The purpose of management control is the provision of information useful to the managers' decisions. The information will be synthesized and presented by control panel boards, scorecard balances, various reports, depending on the informational needs of the management of the enterprise and it has to meet the following characteristics: to offer a representation as faithful as possible to the

[1] **Dictionnaire fiduciare, organisation et gestion**, La villeguerin Editions, Paris, 1991, p.9

reality; to be provided in due time; to indicate all the elements that would allow the decision-making process; to be adapted to the issue under investigation; to be accessible**.**

Management control by means of its instruments mentioned above (control panel, scorecard balance, reports, etc.) informs the management with respect to the way in which the resources are used and the objectives are reached, thus contributing to the decision-making with the view to create value. It is equally a system of regulating the behaviours of the enterprise employees and guiding them towards performance.

2. Control techniques and results evaluation

Results evaluation involves the comparison of the objectives settled to the actual achievements and if applicable, the finding of deviations. It can be achieved by using the budget control and the control panel.

"Budget control represents one of the management control techniques that allows, by starting with a decentralization of responsibilities, the existance of a control in the framework of a budgetary exercise (generally one year), of the whole system of enterprise activities, translated into monetary units. It consists of a permanent comparison of results and objectives, in order to:

Look for the differences'causes;

inform the various hierarchical levels;

take the necessary corrective steps or exploit the favorable differences;

appreciate the activity of the budgetary managers." (C. Alazard, S. Sépari, 2001).

Monitoring the activity of the enterprise and comparing its results to the objectives in the framework of the budget control implies the existence of budgets.

The budget, as a provisioning document, is elaborated over the period of one year and it settles the allotment of resources to each department, sector, centre of activity in the enterprise. It equally influences the ones using it by means of the responsibilities of each one.

The budget does not have a standard form, it can feature various forms and contents according to the informational needs of the persons using it and the professional judgement of the specialists that draw it up. However, the information supplied needs to be presented in a logical order, neither too numerous since it might affect the meaning and exactness of the data, nor too scarce because it might lead to the incurring of expenses too low or too high due to the user's lack of perception of the limits presented in the document.

By means of budgets, the management control seeks to obtain data with the purpose to know, plan and understand the important events that have an impact on the enterprise. At the same time, the indicators calculated and presented in the budgets help to assess the efficiency of the activity run by the budgetary centre, as well as its performance, allowing the evaluation of the results of the managers'actions and, at the same time, of the behavioral influence of the management control over the actors.

The evaluation of the results of the activity of an enterprise can be done by means of the control panel – an instrument measuring the performance and whose construction starts from „ the mission, vision and the key factors of success". (M. J. Epstein and J. Manzoni, 1997; L. Vilain, 2003).

The control panel gathers and presents a system of indicators linked by the important decisions and objectives of the enterprise and, at the same time, it makes comparisons between targets and achievements, highlighting the differences. „Highlighting deviations for the significant indicators and their analysis allows the identification of sideslips, errors and it represents a prior condition for the correction of the enterprise trajectory and of the modification of the enterprise projects". (N. Albu, 2005)

The indicators presented in the control panel allow the people in charge to know the evolution stage of the activity centre they run, future trends and therefore to take decisions regarding the corrective steps with a view to reach the settled objectives.

The results obtained by various centres of activity are actually the results of the activity of the employees, and the level of the indicators calculated and presented in budgets or control panels represent the degree of their performance. Consequently, budgetary control techniques are useful, among other things, for the employee evaluation which needs to be correct, fair, and made with the purpose to motivate, to stimulate them towards reaching the strategic objectives.

3. Employee motivation

Performance is built by permanently monitoring the activity, comparing the objectives and setting up the corrective measures. This action involves, among other things, the analysis and guidance needed for the human behavior to reach the expected results.

Management control participates to the process of analyzing human behavior by providing information regarding its results by means of the indicators calculated and presented in various instruments (control panel, budgets, reports, etc.). At the same time, management control participates to the process of guiding the employees' behavior by motivation.

A motivated employee is an employee who will contribute to the creation of value, to the enterprise's increase in performance. Thus, an enterprise that wishes to be perfomant must be interested in the employee degree of satisfaction.

Under the current economic context, namely the economic crisis, not only will material incentives not be offered on a continued basis, but they will fail to motivate employees in the long run. A big remuneration does not necessarily make an employee enjoy doing their activity and contribute to it by working more and better for the increase in performance of the enterprise, but it is the work environment, the relations with the superiors or peers that will achieve this.

Motivating every individual to reach the set objectives represents the managers'or the activity centres'duty, sometimes as a consequence of the notifications issued by the management control after signaling deviations.

Stimulating employees by management control could be achieved by means of:

evalutions and fair incentives, not necessarily monetary;

organizing management control in a flexible way that would allow decentralization, a certain degree of autonomy and initiative on the part of the managers in setting up the objectives assumed by the centre they run;

dialogue, permanent communication between the management and the operational personnel regarding the achievements and the objectives to reach.

Involving the employees in setting the objectives makes them more responsible and motivated to reach them.

At the same time, the perspective of long-term career development, the promotion of values can represent methods of stimulating the increase of employee performance and, consequently the enterprise performance.

Management control is a system of subsequent decisions that need to focus on the active participation of employees with a view to setting up the objectives, by motivating employees and thus leading to the manifestation of an invisible control model.

4. Indicators regarding human resources to be pursued in the performance measuring instruments

The development of human resources by lifelong learning, the involvement in the setting of objectives, the making of decisions regarding the corrective measures to be taken when non-favorable deviations from objectives' achievements are recorded, generates value for the enterprise. This value involves the definition of a set of indicators to be pursued in the framework of performance measuring instruments (C. N. Albu, 2008) as it follows:

indicators targeting productivity:

value added as percentage from the remuneration cost – offers a more faithful representation of the productivity of each employee;

the level of implicit knowledge per employee – knowledge inside an enterprise appears and develops as a result of social interactions that transform individual knowledge into collective or implicit knowledge, and the latter are the ones on which the organization can build competitional advantages. The indicator measures the degree in which the enterprise manages to incorporate knowledge;

the relative increase of individual knowledge compared to the formation costs – it represents a degree of the enterprise concern for the preservation of a certain level of knowledge;

indicators targeting processes:

degree of communicating the strategic information;

life-long learning – the employee participation to life-long programs reflect the degree of commitment for increasing or at least maintaining the level of their professional knowledge;

indicators targeting employees:

the degree of employee preservation – a high level of the indicator reflects a good working environment that will contribute to the employee motivation and the increase of performance;

the employee satisfaction – considers the acknowledgement obtained by the employees for the work done, the acccess to the necessary information necessary for work, the employee involvement in the decision-making process;

the degree of current employees preservation - this indicator can be used together with the degree of employee preservation in order to find out the extent to which their loss would have a negative effect on the enterprise's capacity to raise the value of its implicit knowledge;

indicators targeting the financial aspects:

the value of the employee knowledge;

knowledge per employee – offers information both on the employee perception on the knowledge formation and development process, as well as on the quality of human resources management;

employee knowledge as percentage of the total number of assets – offers information regarding the importance held by human resources in the whole system of the enterprise resources.

The above mentioned indicators can be used both for establishing the value of the employee knowledge for the enterprise, and the degree of satisfaction and involvement in obtaining performance.

Conclusions

In the current economic context where a wide ranging supply exceeds the demand and consumers are losing purchasing power, it can be said that it is not the enterprises that select their customers, but the latter choose the former.

It is customers that choose to buy the goods and services that cater to their needs and that offer the best quality-price balance.

Customers' income represents the revenue source for the enterprises as well. Therefore, in order to survive and create value it is essential to keep the current customers and attract new ones, and consequently enterprises will set up certain objectives which they are going to try to reach under efficient circumstances.

Reaching the objectives involves the use of the means available to an enterprise at a certain time. The most important resource used in the running of its activity by an enterprise is made up of the human resources and, more acurately, their knowledge, educational and/or professional qualifications. The more an employee is motivated the more they contribute to the increase of the organization performance. Consequently, enterprises must monitor the deviations of the achievements from the initially established targets and motivate the employee with a view to reach

the strategic objectives. Deviations' monitorization is made by management control techniques like budgetary control, but also by means of the control panel which equally allow the managers of activity centres to know their level of evolution and implement corrective measures, if unfavorable deviations are ascertained.

To conclude with, management control has a significant role for the motivation of the employees of an enterprise with a view to reach the strategic objectives and create value. Management control should feature certain indicators in its performance-measuring instruments that would show the degree of employee satisfaction as well as the impact of the latter's knowledge over the enterprise performance.

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AUGUSTINIAN MODEL IN THE BYZANTINE POLITICAL THINKING. CASE STUDY: THE ELEMENTS OF POLITICAL AUGUSTINISM IN THE CURRENT ROMANIAN MENTALITY

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ABSTRACT
The byzantine society, de jure and de facto heir of the Greco-Roman world, has it's own philosophy, it's own structure model and policy thinking. Without doubt, for the New Rome this model is that sprang from the Christian teachings, and as a philosophy it harmoniously blends the legacy of the Roman world with Blessed Augustine's thinking about man and city which itself is a symbiosis between the acquired pagan knowledge and Christian experience of the latter. The Byzantine fortress (The Empire-n.n.) will use religion as the main instrument for political and social consolidation. Religion (Christianity – n.n.) is, for the Byzantine monarchy , the path to divinity, immortality... The Byzantine Christianity is not just a "phrase invented by them" as in the words of Eminescu, but a complex mechanism which represents the totality of good concepts about the world and about life of the constantinopolitan city.In preparing this study we started from the model offered by St. Augustine, "De Civitate Dei", a model which compares the two types of cities - people's city, with all its flaws, and the City of God, personified by the Church to which the Christian Roman Empire provides the Regnum. Our study tries to reflect how the model of the two cities becomes a political ideology of the Byzantine Empire and, arch over time, how it is manifested in the public and political mind of the Romanian society. This research tries to increase the understanding of the mental archetypes amongst those who are active participants in public life in Romania. However, we want our message to be disseminated in a wider public and to provide the possibility of assimilation, as much as it can, of the participatory political culture. Thus, the study becomes an attempt of reporting the Byzantine society, respectively the current Romanian society, to the model of the three types of political culture offered by Almond and Verba - participatory, parochial and dependent.

Keywords: *political thought, political culture, Augustin, Byzantine Empire, Romanian mind*

INTRODUCTION

This study emerges from "Augustinian paradigm in the byzantine thinking and the political culture", one of the authors' dissertation work. The novelty is reflected in reporting to the mental and historical evolution of the Romanian people, especially in the current times, of the researched aspects in the mentioned work.

The study analyses the implementation of the Augustinian theory in the byzantine public philosophy and, arch over time, has does not have an influence on the balcanic mentality in general and Romanian mentality in particularly. In the same time, the study tries to follow and identify the ways the Augustinian teachings, especially the ones in "De Civitate Dei", influenced the religious, political and day-to-day life of the whole Medium Eve, especially the relations between the Church and the State in the Occident and in the Byzantine Empire[1], and the way it manifests in Romanian

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[1] Ibidem, 4.

present, how and how much it kept its Augustinian paradigm in the XX – XXI centuries, and what are the distortion elements of Happy Augustine's message.

The research models used in this study are: *descriptive*, wich deals with the fundamental aspects of Augustinian philosophy, and *comparative*, with which we tried to apply Agustin's model to the praxis of political philosophy or the Dark Ages and also in the contemporary world. We umnst note from the beginning that our research theme relates to the broader area of political utopias.

Specialized historiography includes many titles among which we selected the ones we consider to be the most important: *De Civitate Dei*[2]*, A History of Byzantium*[3]*, Civic culture: Political attitudes and democracy in five nations*[4]*, Identity in rift: postwar Romanian mentalities*[5]*, A burning culture: about Schism, Ludic and Balkans*[6]*, History of Byzantine philosophy*[7]*, The philosophy of St. Augustine*[8] *or the Christian paradigm of freedom between ontic and meonic*[9].

1. Augustinian paradigm

Nothing is lost, but everything is transformed, is inherited, continues ... History of the Byzantine Empire has a special place in medieval history, a special case from several points of view: it is a bridge between ancient Rome, whose heir and religious reformer line is, and the Ottoman Empire, which continues the Byzantium in a politic perspective. If the historians agreed that the Constantinopolitan era ended in the middle of the fifteenth century, when the Rome of Orient was conquered by the *osmanlâi (romanian term. otoman)* (May 29, 1453), the birth of the Christian Empire still leaves room for controversy.

Although the chronological limits and continuity of history do not currently play an important role, there are epochs in which, after achieving a certain degree of civilization, past accumulations produce a visible transformation that gives a new turn in the whole world[10]. According to specialists, a such *culminating* period took place in the history of the Roman Empire in the early decades of the fourth Christian century during the reign of Constantine the Great (306-337 AD), about which JB Burry said it represented "a new era, in a more profound sense than the reign of Augustus, the founder of the empire"[11].

Certainly, Burry refers to what, by edict of 313, Constantine the Great granted the Christian religion to become lawful. Tradition says that the son of Helen and Constantius Chlorus would become favorable to Christianity due to events during the struggle for succession against Maxentius in 312, when "his victory would have been announced by the Christian symbol of chrismei, represented by the first two Greek letters of the name of Christ"[12]; but the conversion was to come much later, on his deathbed, but even then it was not out of pure conviction.

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[2] Augustin, *De Civitate Dei* (Editura Ştiinţifică, Bucureşti, 2002).

[3] Stelian Brezeanu, *A History of Byzantium* (Editura Meronia, Bucureşti, 2005).

[4] Gabriel A. Almond, Sidney Verba, *Civic culture: Political attitudes and democracy in five nations*, (Editura Du Style, Bucureşti, 1996).

[5] Sorin Alexandrescu, *Identitate în ruptură: mentalităţi româneşti postbelice* (Editura Univers, Bucureşti, 2000).

[6] Aurelia Satcău, *O cultură în flăcări: despre Schismă, Ludic şi Balcani*, vol. 1 (Carpathia Press, Bucureşti, 2006).

[7] Nikolaos Matsoukas, *Istoria filosofiei bizantin* (Editura Bizantină, Bucureşti, ISBN 973 – 9492 – 49 – 5).

[8] Anton I. Adămuţ, *Filosofia Sfântului Augustin* (Editura Polirom, Iaşi, 2001).

[9] Adriana Claudia Cîteia, *Paradigma creştină a libertăţii între ontic şi meonic* (Editura Cetatea de Scaun, Târgovişte, 2007).

[10] J.B. Burry, *History of the Later Roman Empire from the Death of Theodosius I to the Death of Justinian (Istoria Imperiului Roman târziu: de la moartea lui Teodosie I până la moartea lui Iustinian I)*, Volumul I, Publisher: Dover, New York, 1958, p.1, apud http://www.questia.com, consulted on the 27th of May 2011, 21: 45.

[11] *Ibidem.*

[12] Jean Carpentier şi François Lebrun (coord.), *Istoria Europei* (Editura Humanitas, Bucureşti, 2006), 85.

Whatever the nature of his conversion (belief or political pragmatism!), Constantine the Great will protect the followers of Jesus Christ, Christianity being gradually transformed into a Christian "history, ecclesiastical, based on public obligations"[13]. It made the transition from Roman to Byzantine Christianity[14]. In fact, Christianity was the locomotive that pulled the train called the Roman Empire to a new world, even if not all wagons have reached the finish line. The transfer was made from the disordered and pagan Rome to the New Rome located in the old capital of Byzantium, who now wears Christian clothes. By its monotheist nature , Christianity has provided the unity of the empire for more than a millennium .

Byzantine society, de jure and de facto heir of the Greco-Roman world, has its own philosophy, its own pattern of structure and of political thinking. Undoubtedly, for *the New Rome*, the model is emerged from the Christian teachings and, as a philosophy, it harmoniously blends in the heritage of the Roman world with Blessed Augustine's thinking about man and city, which itself is the symbiosis of the *pagan knowledge* and the *Christian experience* acquired by the latter.

The Byzantine citadel (Imperial-o.n.) will use religion as its main instrument of political and social consolidation. Religion (Christianity - o.n.) is the Byzantine monarch's gateway to divinity, immortality... Byzantine Christianity is not just a "phrase invented by them" as Eminescu said, but a complex mechanism, which represents the synthesis of the totality of good concepts about the world and life of the Constantinoplitan city

Some considerations on the notion of political culture

The term of political culture is, like many other concepts and terms, one very new, being first used by the german illuminist Johann Gottfried Herder, in late eighteenth century[15] (the century of lights - o.n.), although the term, in the sense of **political thought**, is extremely old. Raisa Radu believes that political culture related items are included in the *Veterotestamentar writings*[16], stating that "The Bible contains oracles, paraenesis and anathemas of the prophets in wich they refer to different qualities and inclinations of the Amalekites, Philistines, Assyrians and Babylonians"[17].

The evolution of human society, from the pre-state organization to the political organisation, is pointed, in this type of writings, by the listing and analyzing the rights of the political leaders - kings, military commanders, archons, nobles - on subordinates. Greco-Roman Antiquity writings are eloquent in this respect. "Histories" of Herodotus contain particulars of different ways to understand politics and how to relate to it. By idealizing the democratic model of state management, Herodotus claims that "the Athenians showed initiative and zeal when these qualities served as a benefit of all"[18].

Interesting is, for the demonstration on how the Antiquity relates to the concept of political thinking (culture), the work of Origen, "De principiis" which examines the Bible as a body of laws that orchestrates Christianity in the philosophical sense. [19] Origen believes that three ways of the Old and the New Testament exist - historical, mystical and moral - which he calls "*the body of the text* (the message to the simple people), *the soul of the text* (the moral significance) and *spirit of the text* (which allows initiation of the supreme truth)"[20].

Byzantine political philosophy is an intermediate phase between classical philosophy and modern political thinking. Therefore the bases were placed in *the golden age* of Hellas of Socrates,

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[13] Adriana Claudia Cîteia, *Paradigma creştină a libertăţii între ontic şi meonic* (Editura Cetatea de Scaun, Târgovişte, 2007), 27.

[14] *Ibidem.*

[15] Raisa Radu, *Cultură politică* (Editura Tempus, Bucureşti, 1994), 10.

[16] **VETEROTESTAMENTAR** adj. wich belongs to the Old Testament (ex. Veterotestamentar prophets). (lat. *vetero* „to make it old") - cf. http://dictionare.edu.ro/, consulted on the 27th of May 2011, 22:15.

[17] Raisa Radu, *op. cit.,* 10.

[18] *Ibidem,* 12.

[19] Anton I. Adămuţ, *Filosofia Sfântului Augustin* (Editura Polirom, Iaşi, 2001), 37.

[20] *Ibidem.*

"who dropped down philosophy from heaven and brought it within the walls of the cities, introducing it in households, and he was the one who forced it to inquire the lifes and customs of the people and the good and bad things[21]. "Consequently, the subject of political philosophy is the City and the Man, in this case the relations between the soul (man) and place (city).

1.1.1. The beginnings of political thinking in Europe

The notion of *political culture* in ancient Greece can not be separated by what *city* means. The people's lives, the way of thinking and political steering, the good (in the sense of good and right - nm) are synonymous with the very existence of the city, which accompanied the whole history of Hellas.

Plato and Aristotle, considered to be the founder of philosophy in the service of the polis[22], are the most important thinkers of the Greek area. "Republic" of Plato, considered a "rigid work"[23] gives us an ideal city, which implies ideal citizens. "Politics" of Aristotle is an exposure of personal experiences, presented in a realistic way. Plato is an idealist, an incurable dreamer, while Aristotle is "a cold logician, whose fantasy is not allowed to take any step without being controlled by reason opposed with reality"[24]. Regarding the administration of the city, Plato argues that a good leader needs good education, the knowledge of the *Goodnes*, and to acquire *Wisdom* ... The prerequisite for acquiring it is free time, "which means the one who have to work for a living can not acquire the wisdom, but only those who have independent livelihood"[25].

As mentioned, Aristotle's political philosophy identifies its fundamental axis in historical reality. Aristotle is not an adept of equality, but believes that "a governing is good if it pursues the good of the whole community"[26], identifying three good regimes (monarchy, aristocracy and *politea* - the constitutional government) and three harmful forms of government (democracy, oligarchy and tyranny)[27]. The purpose of political philosophy is to create the best political system, but this goal is virtually impossible as long as people-citizens will be anchored in existing policy, however identifying an ideal leader, Hippodamos, about which we find that he was the first political philosopher, a brilliant city planner and a proponent for the order, giving attention to the way he dressed and enjoying to have as much knowledge about the universe. Hippodamos proposes a city that revolves around the number 3: 10,000 citizens divided into three groups, a territory divided into three sections, three types of laws and three reasons that lead to initiation of trials to the Court of Justice.[28]

For the Antiquity, the city is the only place where one can live, there is nothing else beyond, beyond are barbarians, eternal enemies, Tartary ... The first to sees otherwise this issue of foreigners is Cicero, who, in the first century BC, stated that <<the whole foundation of human community>> is threatened when an unfavorable treatment is applied to foreigners compared with that applied to Roman citizens "[29]. The thesis (the argument) of Cicero is a form of political culture, in the sense of reporting the speaker to the state policy and to the general mentality of the Roman Republic.

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[21] Leo Strauss, *Cetatea şi omul*/ trad: Radu Pavel Gheo (Editura Polirom, Iaşi, 2000), 21.

[22] Vasile Muscă, *Aristotel sau filosofia în slujba polis-ului*, în Vasile Muscă şi Alexander Baumgarten, *Filosofia politică a lui Aristotel* (Editura Polirom, Iaşi, 2002), 73 – 93.

[23] *Ibidem*, 76.

[24] *Ibidem.*

[25] Bertrand Russell, *Istoria filozofiei occidentale*, volumul I (Editura Humanitas, Bucureşti, 2005), 124.

[26] *Ibidem*, 208.

[27] *Ibidem*, 209.

[28] Leo Strauss, *op. cit*, 26- 27.

[29] Robert D. Kaplan, *Politici de război: de ce necesită conducerea politică un etos păgân* (Editura Polirom, Iaşi, 2002), 42.

Almond's and Verba's[30] accepted meaning to the concept of political culture is a particularised distribution "of patterns in the orientations to political objectives, as it is done between members of the nation" or community. Divided into three main categories (**participative, parish and dependent**), political culture may or may not be "in harmony with the structures of the political system."[31] If we would try to identify the type of political culture of Athens, we would be turning to a participatory culture. The participation of all citizens in the debates in Agora was not only a right but a duty, decisions being taken following discussions that took place three times a week. Valuable information in this respect we have from Thucydides, who, in the "Peloponnesian War" refers to a speech of Pericles on the benefits of democracy.[32]

Unlike Aristotle and Plato, who seek the ideal city or try to identify the best form of political organization, Thucydides puts us in the everyday reality of the city, irrespective of how severe or abject reality is. By "Peloponnesian War", Thucydides brings a new image of the ancient city, whatever it is: Athens, Melos or Sparta. Carefully analyzing the historian's work, we can distinguish the three types of political culture theorised by Almond and Verba. Thus, when the city is not under threat of war or unwanted constraints (lack of democracy - a.n.), we can talk about a political culture of obedience to divine will, people leaning towards the past, towards the traditional values, praising moderation and submission.[33]

Rome's expansion will bring "a political organization, a lifestyle, a culture (including political - a.n.) - based mainly on Greek elements - which are strong unifying factors"[34]. If the type of political culture, in which we consider that Athens is, consists mainly of a predominantly participatory political culture, imperial Rome has a dependent one, in the sense that the emergence of the empire and the relocation of Roman institutions' operating mechanisms have contributed to "a gradual decline of the role of the people's assemblies"[35] and to an increase of the imperial powers. Thus, the emperor was Imperator (commander of the army and the possessor of the judiciary and the legislative), pontifex maximus (high priest) and protector of the people (Pater Patriae), which gave him various gifts: the establishing of the imperial cult by Augustus will result not only in the replacement of the dictum VOX POPULI, VOX DEI (voice of the people is the voice of God) but rather the weakening of the institutions of republican Rome. The fundamental principle of political culture of imperial Rome was the phrase "bread and circus" within the meaning of food and show. The emperor increased his powers in the detriment of the people, which he turned into a mere tool, in a mass for maneuvres.

Therefore, the emergence of the Christian community in Judea Province and the rapid expansion of faith in the resurrection of Jesus Christ in the entire imperial space have confused both the Roman administration and the simple citizen who could not conceive to have a life led by the modesty imposed by the Gospel and by the preachings of the apostles; this triggered the violent reaction against Christians in the first three centuries of our era. In terms of thinking, Plotinus (204-270 AD) is considered to be the last of the great philosophers of antiquity, "as it helped to shape medieval Christianity and Christian theology."[36] With Plotinus start the rumours about salvation by philosophy, by reference to the mystic of One, who can not think and can not create the perfect way, everything in the world appearing through illumination, through emanation, like the relationship

[30] Gabriel A. Almond şi Sidney Verba, *Cultură civică: atitudini politice şi democraţie în cinci naţiuni* (Editura Du Style, Bucureşti, 1996)
[31] *Ibidem*, 50.
[32] Raisa Radu, *op. cit*., 12.
[33] Leo Strauss, *op. cit.,* 249.
[34] Jean Carpentier şi François Lebrun (coord.), *op. cit*., 70.
[35] *Ibidem.*
[36] Bertrand Russell, *op. cit*., 305.

between fire and heat. [37] In Russell's view, Plotinus is, in cultural terms, the end of a world - the Greek one - and the beginning of another - the Christian world.

"For the ancient world, tired becouse of the centuries of disappointment, worn out by despair, his doctrine could have been acceptable, but it couldn't have been stimulating. For the barbaric world, where reckless energy needed not to be stimulated but contained and regulated, what was able to penetrate out of his teaching was good, because the real evil was not apathy, but brutality.[38] "Therefore, Plotinus's philosophical inheritance, which entered the Christian theological concept, will also enter the way of functioning of the *New Rome*'s institutions, and hence it irradiated the whole life inside and outside the empire.

1.2. Byzantine political culture

We can not talk about the development of the Byzantine Empire without observation on the transformations that took place throughout the european space, in the human mentality and in the functioning of the institutions in the transition period from Antiquity to the Middle Ages. The political culture of the following one, *de jure* and *de facto*, of ancient Rome is in line with the coordinates imposed by Christianity, not just a religion or a philosophical current but fundamental axis of the Medieval world.

We must admit that the Medieval European world and, especially, its civilization is founded on principles emerged from the teachings of the Gospel, in other words, on Christianity. Unique, by reference to Jesus Christ, and yet different, with a flourishing world of cathedrals and universities in the West, and conserving both the Greek and Orthodox traditions, Eastern Europe remains original in many respects, being, as related to the religious phenomenon, the only continent entirely christianised.[39] Christianity has influenced life in all of Europe, be it religious life, whether we refer to the functioning of institutions. Clothed "with a broad white mantle of churches"[40], Europe will see a development which, without any real break, leads from the ancient city to the medieval one, from the Greco-Roman pantheon to the Christian era.[41]

As Jacques Le Goff says, the medieval man, whether king or subject, the patriarch, pope or Christian, citizen or peasant, merchant or intellectual, is Christian by excellence, rarely happening for an individual not to be animated by the teachings of dogma, whether Orthodox or Catholic. If, however, existed, this human should have been excluded from the medieval world picture, as was one who didn't know God, or, worse, did not recognize God[42]. "The fool says in his heart <<God does not exist!>>" [43] is the foundation of Augustinian and post-Augustinian poorly-understood paradigms of a theology which, in the name of Jesus Christ, has killed. From this verse in Psalms rise all the prelates of the Dark Ages, in their convenience and greed. The people of the Middle Ages are people without universe, without opening ... People are limited, depending on the category, they belong to the field, the village or, in the happy case of monarchs and high prelates, to the Eurasian space.

The introduction of Christianity, first as a lawful religion (313), and then as the imperial religion, while prohibiting pagan cults, was a turning point in European history. The great migrations also contributed to this mutation, which was the cause of the division of the *colossus with clay feet* in

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[37] Anton I. Adămuț, *op. cit*., 37.

[38] Betrand Russell*, op.cit.*, 316.

[39] Jean Carpentier şi François Lebrun (coord.), *op. cit*., 141.

[40] René Rémond, *Religie şi societate în Europa: secularizarea în secolele al XIX- lea şi XX (1780 – 2000)* (Editura Polirom, Iaşi, 2003), 27.

[41] Jean Carpentier şi François Lebrun (coord.), *op. cit*., 88.

[42] Jacques Le Goff (coord.), *Omul medieval*/ trad: Ingrid Ilinca şi Dragoş Cojocaru (Editura Polirom, Iaşi, 1999), 8.

[43] Psalmi 14, 1, apud Jacques Le Goff, *op. cit*, 8.

the Western Roman Empire and Eastern Roman Empire (395 AD) and the disappearance of the first, in 476, with Odoacer's[44] deposit of Romulus Augustus.

In this context of socio-political and cultural-religious mutations, the European civilization transfer takes place to a more complex form of organization, which can be understood by "the opposition of an Oriental Europe, where Roman structures maintained and developed in the Byzantine Empire, and Western Europe, whose development depends on the distribution of power between barbarian kingdoms and contacts between the two forms of culture, Roman and German"[45].

On this bidimensional mold (the fight between good and evil, the confrontation between the Byzantine civilization and the existing danger beyond the Danube limes, but also the fight from within Christianity, between different schools of thought) will be and will persist what today we call the Byzantine Empire. The *reduced* Roman Empire, who focused it's whole political and administrative power in Constantinople, lasted a thousand years, and for a long time was the most powerful state in Europe, even if surrounded by enemies and grinded by internal strifes for life and death.[46]

Throughout the world's Medieval thinking about man, we dyscover the paradigm of the two cities not only regarding to the outside world, Babylon and Jerusalem being perfectly integrated in the universe represented by the human individual. Thus, the same being is inhabited by two entities: one virtuous and another sinful. The first is created in the image and likeness of God, the other one being no more than the heir of the original sin of Adam and Eve, being punished with death penalty. So, what Gnostics identified with spirit and matter, Christians related to the two cities: one, full of virtue, "condemned" to eternal life, and one that is doomed to the burning wich transcends time. And in terms of human's image, we have to deal a bivalent aspect: between centuries IV - XII the prevailing image is one of a man both weak and vicious, knelt before God to ask forgiveness, while the image of creative-creation, able to continue the work of Trinity in the city's terrestrial space and to save, imposes since the twelfth century.[47]

Augustine referred to Rome when speaking of Babylon as a prototype of the human city and to the Church when talking about Jerusalem. Official theology, both Eastern and Western, considered the two cities as the same individual, in the nature of the sin, the flesh, and in the nature of the virtuous, the spirit.

Byzantine history, recorded in documents, will encounter distinct stages of its evolution, from the expansion period to decline, and from there to the empire that gave apparent signs of recovery, but a pseudo-recovery, which is rather the chance of history.

The end of Greek-speaking Roman Empire is admirably captured in the work of Palamas - "Death of Byzantium": "... The turks are coming, the turks are here, we are surrounded by Karaman, the destroyer of the world, the one that wastes peoples, Asia's ruler. And *acriţii* are the histrion's mockery. Silvered lances are rusty, gold saddled battle horses are red becouse of lice ... and Nichifors alone, and the rulers and the impetuous Tzimisces and Bulgarohton centaurs aren't only smoke anymore, cloud and ashes, the great Dighenis Acritas was sipped by Caron, in the depths and darkness, the heart of Hellenism died"[48].

Byzantinism survived after the fall of Constantinople and other imperial centers, basic elements of law, culture, theology and political ideology, consolidated in more than a millennium, will radiate throughout the space Orthodox in Russia, Armenia and Georgia to northern Africa and Serbia. A special case is that of the Romanian Principalities, where continuity of Byzantine forms

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[44] **Odoacru** – German leader (b. ca 430 - 493 m.), an officer in the Roman imperial guard of 472 , commander of the barbarian militia formed by heruli, scirians, rugians and turcilingi, position of the leading events of 476 – cf. ****Enciclopedie de istorie universală*** (Editura All Educational, Bucureşti, 2003), 959.

[45] Jean Carpentier şi François Lebrun (coord.), *op. cit.*, 89.

[46] J.B. Burry, *op. cit*., 3, apud http://www.questia.com, consulted on the 31th of May 2011, 12:45.

[47] Jacques Le Goff, *op. cit*., 9.

[48] *Apud* Eugen Barbu, *Săptămâna nebunilor* (Editura 100 + 1 Gramar, Bucureşti, 1996), 5.

experienced particular issues because of the Greek aristocracy exile which began in the XIV century and continued in the centuries XVI and XVII. Whether we refer to Greek language, as the language of school and office during the phanariot reigns, to taking over Byzantine legislation, political ideology and mentality, which is preserved until today, "it is outlined a laborious adaptation of the law to the socio-economic needs and political changing of the Romanian society." [49] It is significant in this regard that romanian rulers claimed to be considered legitimate heirs of the Byzantine emperors.

1.2.1. Christianity - a fundamental element of Byzantine political thought and culture

Life, during the Byzantine Empire, including citizens reporting to the political act, is indestructible related to the Christian religion. Christianity was the entire Byzantine political ideology, founded by Eusebius of Caesareea. According to this imperial theological doctrine, the result of "a long political and philosophical developments of concepts of East and Roman world"[50], "the Empire is the emanation of divinity itself and has a providential mission on Earth, which is to subject all the people of the universe and to impose faith in Christ. [51] "Therefore, the entire nation will be subject to the ruler of the empire, which, according to the same theory, is the chosen (anointed) of God. King is God on earth, and everything is connected to it is sacred, "the Finance Minister will become, as soon as the king's wealth is identified with the wealth of the empire, <<committee of sacred spending>>, head of the imperial wardrobe, <<committee of sacred clothes>> etc ".[52]

Since the second half of the fifth century, in the same time with the power of the emperor, the political power of the Church increases; in 457, we assist the king's coronation ceremony by the patriarch, an "act that gave authority to the election of political bodies and translated into practice the idea that imperial power is of divine origin." [53] Church became thus, the soul of the empire, which ensured the geographical area for preaching the Word of God.

Starting from Almond and Verba's division of political culture, we can easily identify the membership of the Byzantine political culture to the type of depent culture; the Byzantine state is extremely well organized, the old Roman magistracies are replaced by a bureaucratic apparatus, composed of officials appointed and carefully supervised by a despotic imperial authority. Here we can fit the links between the emperor and Byzantine different population groups. As Stelian Brezeanu said, "public relations between the old Roman prince and the magistrates who surrounded him gives way for links in course of <<privatization>> between the despot (*Dominus*) and officials, officials wich were turned into his trusted people (*comites*) and, finally, the Roman citizen, a member of a free comunity, is replaced by the Byzantine subject (*doula*)"[54].

In fact, with the establishment of Christianity as the only religion of the Roman Empire, philosophy, political thought, morality and law were unified into a single body... The Church became the Empire, a dual unit of the 2 cities, "of which pnly one will reign forever with God, and the other will be in eternal torment with Satan"[55] in the sense that the Church's role will be the Christians' mobil to eternal life, to the *City of God*, as it is defined by St. Augustine. The city Augustine of Hippo speaks about is different from the city of people in wich the "principles and those who subjugate nations are dominated by passion to dominate." [56] However, the existence of the **binomial empire - church** must be understood in letter and spirit of the Christed dictum "Give therefore to

[49] Stelian Brezeanu, *op.cit.,* 329.
[50] Stelian Brezeanu, *op. cit*., 17.
[51] *Ibidem.*
[52] Paul Lemerle, *Istoria Bizanţului*/ trad: Nicolae Şerban-Tanaşoca (Editura Teora, Bucureşti, 1998), 33.
[53] Stelian Brezeanu, *op. cit*., 18.
[54] *Ibidem*.
[55] Bertrand Russell, *op. cit*., 376.
[56] Augustin, *De civitate Dei*, XIV, 28.

Caesar what is Caesar's and to God what is God's."[57] Administration and Byzantine church hierarchy used freely both biblical precepts and ideas arising from Augustinian thought, which they turned into augustinism. Byzantine subjects had no other choice than to comply with the will of his master, no other freedom than Christianity, acording to which they could reject the political city's strenght, "by choosing the desert cities."[58]

The status of official church led to a profound change in the functioning of the empire, whether we talk about politic life or the everyday life. Greco-Roman Pantheon was often used as an instrument of policy, but its value was rather symbolic. This (the use of pagan religion as an instrument of imperial policy - a.n.) did not involve any theory about the universe, no dogma that could share people's thinking and generate disputes, but rather was consistent with most pre-Christian religions and beliefs. Christianity destroys, simultaneously with the destruction of a world of fornication and abundance, the belief in a pantheon of gods with human weaknesses of the city. Once adopted as the state religion, Christianity turns, slowly but surely, in a political, imperial dogma, which had to define and consolidate itself. In this manner the christologic fights in the first centuries must be seen, and so has to be analyzed the second stage, one of the battles between iconoclasts and iconoduls. Church, now in power, denied the other cults' right to manifest, forgetting the moments when it asked freedom for itself.

A great problem of both the Christianity and the empire was, without doubt, that of christologic fighting. In the context of an immense religious freedom and intense theological activity, the Church was faced with developing a strong controversy between various schools of thought within it.

In the fourth century, a new heresy grows - **Arianism** - due to Arius, a servant of the altar in Alexandria. It emitted the idea that the three persons of the Trinity would not be equal, as Son, unlike the father, is a creation, a creature of cells without the body and timeless. Arius denied the consubstantiality of Jesus Christ and thus, indirectly, the divinity of the Son. Is excommunicated by Athanasius, Bishop of Alexandria, which led to the division of the whole Christian Orient. The situation determined Constantine to intervene for the first time in disputes about dogma, to ensure internal peace of the empire. Consequently, he summons the First Ecumenical Council of Nicaea in 325. On this occasion a number of fundamental elements of Christian dogma are established (consubstantiality of Christ, Sunday, etc.), Nicaea having a particular importance, politically, because, "for the first time, the imperial power intervenes in a dogmatic matter"[59] placing the "foundation of the future establishment of relations between temporal and spiritual."[60]

Another heresy was the **Nestorian heresy**, from the name of Nestorius, patriarch of Constantinpolului, that human nature of Christ outweighs the divine nature as the Son is nothing else but a man who became God. This doctrine was sentenced in 428 by Celestine, Bishop of Rome and Cyril of Alexandria ordered Nestorius to accept the orthodox teaching, threatening him with the deposition as Bishop.[61] To avoid a worsening of the situation, Theodosius II convokes the Council of Ephesus, in 431,, the Third Ecumenical Council. Following this, Nestorius is removed as a Bishop and Cyril was in management of the whole Christian Orient.

Two rationalist doctrines of Arius and Nestorius are opposed to **Monophysitism**, which emphasizes the divine nature of Christ, leaving human nature in the background . Monophysitism is condemned at the fourth Ecumenical Council (Sinod), in Calkedon, 451.[62]

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[57] *** *Noul Testament*, Matei 22, 21 (vezi şi Luca 20, 25).
[58] Adriana Claudia Cîteia, *op. cit.,* 7.
[59] Paul Lemerle, *op. cit*., 23.
[60] *Ibidem*, 25.
[61] *Ibidem*, 47.
[62] Maria Georgescu, *op.cit.*, 81.

Byzantine philosophy is based, in the opinion of Nikolaos Matsoukas, on three factors, three basic archetypes: **Gnosticism**, **Judaism** and **Hellenism**.[63]

Gnosticism, the syncretistic thinking of the pre-Christian era, is influenced by Christianity, but without losing the fundamentals. Gnostic philosophy is distinguished by two large categories::

dualism[64];

gnosis (knowledge) of universal and unitary reality, as a necessary and saviour movement.

Gnostic dualism aims the combining spiritual and material elements, stating that "the matter is the reality of lower and perishable (corruptible), while the spirit, or the intelligible element, is the high and incorruptible world"[65].

Judaism also influenced Christian-Byzantine philosophy. The triadic monotheism of the Old Testament (religious foundation of the chosen people), Judaism is the base of Christian theology but, with the loss of *Triadic God Himself* (by not recognizing the divine nature of Jesus Christ - a.n.), it becomes the main source of heresies, and Jews become apostates. In the conception of many historians of dogmas and theologians of the Bible, Christianity relies radically on Judaism, while for historians and theologians of the Church Christianity is a superior form of Judaism.

Hellenism is considered to be a different cultural matrix of Christianity, especially in terms of hierarchy.

Despite the fighting and the opposing elements of Gnosticism, Hellenism and Judaism are found in Christian theology, being assimilated by Christianity and integrated to his own interest.

A special place in the recivilizing of the Roman world it is the *dogma*. The concept of dogma asserts its supremacy in the Middle Ages, during the time when people "used to say that, if Lot challenged by the shine of the feasting, Job by patience, Abraham by faith, and Simeon by hope, after that, Solomon was challenged by the teaching (dogma)."[66]

As stated, the doctrine will play the primary role in the Middle Ages, even if the obstacles in understanding the different meanings of the word persists today.

The greek meaning of the word, derived from the verb *doxein* ("to think", "to imagine", "to have this or that opinion") wich designates doctrines (principles) of different schools of thinking, recieves new meanings after the appearance of Christianity. In the first centuries after Christ's resurrection miracle, "dogma was the expression of what Christians accepted to confess"[67], the expresion of reality within the Church, not just a simple statement.

There are several types of interpretation of the dogma. Ferenc Eduard proposes the analyzing of the dogma in a triple perspective:

Interpretation as a *verbum rememorativum* - an evocative interpretation of the facts of God;

Interpretation of the *verbum demonstrativum*, in the sense that biblical precepts are an illustration of the divine will;

Interpretation of the *verbum prognosticum* - prophetic value of the Christian dogma.

The reign of Constantine the Great represented a very beneficial time for Christians and Christianity, which, though it was equal in terms of legality with other religions, it earned an ascendant against paganism, being placed, in the late fourth century AD, to final defeat of the latter.

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[63] Nikolaos Matsoukas, *Istoria filosofiei bizantine*/ trad: Constantin Coman şi Nicolae Deciu (Editura Bizantină, Bucureşti, ISBN 973 – 9492 – 49 – 5), 49 – 76.

[64] **DUALISM** – The use of two heterogeneous irreductible Principles (sometimes conflicting, sometimes complementary) to analyze the knowledge (epistemological dualism) or to explain the reality of the whole or general aspects of it (metaphysical dualism). Examples are the existence and epistemological dualism mind or subject and object, metaphysical dualism are examples of good and evil, God and world, body and spirit. Dualism opposes monism and pluralism.– cf. ****Enciclopedia Universală Britanică*, Volumul 5: *Dante – Evans* (Editura Litera, Bucureşti, 2010), 190.

[65] Nikolaos Matsoukas, *op. cit*., 51.

[66] Anton I. Adămuţ, *op. cit.*, 7.

[67] *Ibidem.*

After a brief period in wich the successor of Constantine, Julian the Apostate, gives an edict to reopen temples and offerings to pagan deities are allowed and Christians are removed from key positions in administration and education, Christianity regains force to the final blow on paganism, all culminating in the Edict of Thessalonica, in 380, that the only official religion is Christianity, and the edict of 392, which bans pagan sacrifices and ceremonies, including the entering into temples.[68]

1.3. The Augustinian model in Byzantine political thought

Around the year 400, Augustine was already talking about the city of the wicked and the saints, mixed by bodies, but separated by will. In "The Republic", Cicero says that Rome is a way for iustitia, a quality wigh is not enough to Augustine of Hippo, who claims that lost iustitia wil to lead the transformation of empires in *latrocinia magna* (large robberies).[69]

Full pages of City of God leave the bad impression that Augustine hated the Roman Empire and its political institutions, considering them as power-hungry organizations, created by the the ones with influence with the purpose of controling by their own will.[70] The foundation of the city of God is Christ, and the fundamental principle is love; the domain is this world the world beyond in terms of their spiritual connections; its law is divine will and its purpose is the victory over the terestrial city.[71]

On the other hand there is the human city. It is organized on the principle of abundance, comfort, power, lechery and domination - perishable values, limited in time and space; the terestrial city has, therefore, as a basis the devil, as purpose the intention to destroy the divine order, as finality the eternal punishment, and the principles are selfishness and contempt of God.[72] Augustine claims victory of the divine city against the human city, assuming that the Church has seen many empires disappearing, while no empire ever didn't see the Church disappearance. Thanks to Augustine, the public good, proclaimed by the Roman mentality, was transferred to the doctrine of universal salvation, the reference system moving from the human city to the City of God.[73]

This paradigm is the basis of the political philosophy of the Middle Ages, called the **political augustinism** - a hybrid of Christianity and pagan traditions. Political Augustinismul can be summarized in three different objects[74]:

The principle of a supernatural society different than the state, but comparable to it;

The practical consequences deduced by Augustine from the first principle, under the impact of Rome;

The practical consequences deduced by other Christian thinkers.

Written between 412 and 427, *De Civitate Dei* was meant as a response to the pagans, who saw in the adopting of christianity the giving up of the pagan pantheon, because of the disaster of Rome, namely the eternal City predation by Goths[75]. For Augustine, pagan worshipers' justification was meaningless; he exemplifies the fact that many of those who blamed Christianity were found, during the attack on Rome in 410, in churches "which the Goths respected, because they were Christians"[76], and as a counter-example are the events during the conquest of Troy, when the temple of Juno was not saved from disaster, concluding that "the Romans never spared the temples in the

[68] Anton I. Adămuț, *op. cit*., 42.
[69] *Ibidem*, 173.
[70] Henry Chadwich, *Augustin* (Editura Humanitas, Bucureşti, 2006), 135.
[71] Anton I. Adămuț, *op. cit*., 174.
[72] Henry Chadwich, *op. cit*, 137.
[73] Adriana Claudia Cîteia, *Instituţii eclesiastice pe litoralul vest-pontic, în lumina izvoarelor arheologice, literare şi epigrafice în secolele IV – VII* (Editura Muntenia, Constanța, 2006), 209.
[74] Anton I. Adămuț, *op. cit*., 174.
[75] Betrand Russell, *op. cit.,* 371.
[76] *Ibidem.*

cities they conquered; in this, predation of Rome was milder than most of the past devastations and the slowdown was a result of Christianity"[77].

Roman Empire was, in the Augustinian view, always a sinner, always devoid of virtue and that is why it will be destroyed by God, as its leaders, not wanting to know the true God, "they claimed to be wise and went crazy "(...)" and worshiped and served the creature rather than the Creator, who is blessed forever."[78] Unlike the Roman emperors who worshiped pagan gods, kings of the Christians are virtuous, because their virtue is eternal joy, and the city will endure as long as these leaders will be virtuous, giving the example of the Jewish kingdom, which "lasted as long as Jews have joined the religious truth."[79] St. Augustine believes that both Constantine and Theodosius I have been fortunate and full of virtue.

In this key must be seen throughout the life of the Church in the Middle Ages. The Church is therefore land area of the City of God, and the Byzantine Empire will be, in the conception of augustinian epigones, the geographic Church. It is found the theoretical justification of Church policy, particularly in Western Europe. The *sine qua non* condition of the membership of the empire/state of the eternal space of City of God is to obey the Church, a requirement fullfilled only in the East, where the king will control the Church, being obeyed to the Patriarch only in matters of christian piety.[80] This is especially true during the periods of intensified political crisis; the king, who was the absolute master of the visible world (inhabited), became deeply religious at this stage of political instability.

Augustinian thinking is confined to the idea that the church is the highest representative of the *supreme republic*, "embedded in a political organization (the state), called *Regnum*"[81]. According to this view, the Church is superior to the state; it has an indirect power over the empire, while the empire (the state) has a direct power over ecclesiastical institutions, in the virtue of the right of the ruler of basileia to be a bishop for matters outside of the Church.

In the Byzantine political thought, in wich the cultural layers of the Greco-Roman and Christian were perfectly combined, the emperor is of divine essence, by assuming the entire earthly power, which he holds from God, also assuming the spiritual power held by the Church. If the Pope is the successor of St. Peter, the Byzantine emperor is the deputy of the high priest in Heaven, and the Patriarch is the heir of Jesus Christ. The Relationship between the king and the patriarch should be ideal, as is defined in Epanagoge, the harmony between the throne and the is keept with some concessions. Constantine the Great identified Christianity as the best tool to achieve absolute power, by the principle of "One God, one authority, one law";[82] The Church comes into the proposed game by consolidating its power by blessing the emperor, "a bishop of the outside" and "a protector of the Church," as Olivier Clément says.

While St. Augustine sees the Byzantine empire as an anti-model of the of the *City of God*, yet the enounced principles resist in the Byzantine political thought, as his work includes few original ideas, as it is "of Hebrew origin and entered into Christianity by Apocalypse"[83], while the doctrine of predestination and election belongs to St. Paul, and the distinction between the two types of history (sacred and profane) may be sought in the writings of the Old Testament. Augustine's merit is the

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[77] *Ibidem*, 371- 372.

[78] Rom. 1., 21 – 25, apud Aurelius Augustinus, *De Civitate Dei /Despre Cetatea lui Dumnezeu (413 – 427)*, în *De la Cetatea lui Dumnezeu la Edictul de la Nantes (izvoare de istorie medievală, secolele V – XVI),* editori: Alexandru-Florin Platon şi Laurenţiu Rădvan (Editura Polirom, Iaşi, 2005), 176.

[79] Bertrand Russell, *op. cit*., 373.

[80] *Ibidem,* 378.

[81] Adriana Claudia Cîteia, *op. cit*., 210.

[82] Jean-Claude Eslin, *Dumnezeu şi Puterea: teologie şi politică în Occident*/ trad: Tatiana Petrache şi Irina Floare (Editura Anastasia, Bucureşti, 2001), 99.

[83] Betrand Russell, *op. cit*., 378.

unifying and the putting in line with the evolution of his own time. Therefore, the Augustinian paradigm[84] can be considered the starting point for both the Catholic West and the Orthodox East.

In the political thought of the East European medieval, the founding of Constantinople on the old foundation of Byzantium is the divine sign of the beginning of the Christian empire. The fall of Western Roman Empire in 476, will strengthen the power of Constantinople, Eastern Roman Empire remaining "the bastion of Christianity and the refuge of the Greco-Roman culture."[85]

The entire existence of the Byzantine Empire will be restrained to the dispute between two principles: "a realistic and Oriental one, who wants at all costs to maintain the Roman territory remained in the empire, and its evolution, within its borders, of the Byzantine population and the other, idealistic and Western, that aspires to recapture the West from the barbarians and the return of the brothers within the great Roman nation."[86]

The two fundamental principles of Byzantine ideology are the *order* (taxis) and *economia* (oikonomia), both referring to the goals of the empire and those of the Church. Another principle concept of the Byzantine theocratic doctrine is that there is no truly independent state, for the authority of both the land and divine is unique, which means that there can be only one empire: "of the Orthodox romans"[87].

Economia - wise wisdom - is the quality of the king to find and apply the best possible rule, theory which we find today in the Orthodox religion mentality states in the phrase "the lesser evil".

Taxis is an expression of the class that dominates relations between people, nature and society, the term being confused, in Byzantine thought, with that of hierarchy. Byzantine fortress, in terms of organization, is the fair view of the city of God. Heavenly hierarchy pyramid has God on top, while the king is on the highest step of the Byzantine hierarchy, which makes explicable the names of Cosmocrator (master of the world) and Cronocrator (master of the time), attributed to the Emperor by the Byzantine ideology.[88] By decoding the symbolism of the Byzantine institutional language, we find that the relation between the order (taxis) and economie (oikonomia), which replaces the old meaning of the term Sophia (wisdom), represents the foundation of the thinking of Pseudo Dionysius the Areopagite, and also the foundation of the whole theocratic imperial thinking. According to it, the emperor is lord of the entire area, while the patriarch is the one who gives legitimacy to imperial power.[89]

The fundamental principles of the Byzantine political thought are linked to the relationship between church and state. The state, represented by the king, and the Church, represented by patriarch, were the basic pillars of the existence of *New Rome*. In the opinion of Ahreweiller H., the relationship between church and state, between the temporal and spiritual authority, have profoundly influenced "political guidance of the ideology of each age and conditioned the behavior of Byzantine people"[90]. This was prophesied by Augustine, who, while seeing a counter-example of the Divine City, "accepts the cooperation between the two powers for the good of humanity"[91].

In the Byzantine *Regnum*, collaboration between Church and State was compulsory, virtue that the king was subordinated, even if only out of Christian piety, to the patriarch, wich was subordinated by the king, as an inhabitant of the city, otherwise, both would be crashed. This situation was summarized by king John Tzimisces, when he said: "I am aware of two powers on earth and in this life, priesthood and empire; the Creator gave the care of souls to the first, and to the

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[84] **Paradigmă** – example, model, teaching, , cf. http://dexonline.ro, consulted on the 5th of June 2011, 22: 33.

[85] Hélène Ahrweiller, *Ideologia politică a Imperiului Bizantin*/ trad: Cristina Jinga (Editura Corint, Bucureşti, 2002), 15.

[86] *Ibidem*, 16.

[87] Alain Ducellier, *Bizantinii: istorie şi cultură*/ trad: Simona Nicolae (Editura Teora, Bucureşti, 1997), 100.

[88] Hélène Ahrweiller, *op. cit*., 129.

[89] Adriana Claudia Cîteia, *op. cit*., 270 – 271.

[90] Hélène Ahrweiller, *op. cit*., 121.

[91] Adriana Claudia Cîteia, *op. cit*., 212.

second gave the authority over the bodies, if these two parts do not suffer any curtailment, then good reigns in the world."[92]

This happy relationship between the state and the Church will exist since the early begining of Byzantium, being noticed, also in terms of imperial law, starting with the fourth century AD. In the time of Theodosius I, 150 decisions are issued in defense of orthodoxy, as shown in the Book XVI of the Theodosian code, compiled between 429 and 439.[93]

But in the virtue of the augustinian challenges, the Church and the emperor have identified the Hebrews as the new inhabitants of the terestrial city, becouse they knew God, "they didn't glorify Him, neither were thankful, but became addicted to false thinking and their foolish heart was darkened."[94] This is the sense of the antisemitic politics of the Byzantine emperors. In 408, the Jews were denied the right to judge Christians, because in 431 to be called "*supernae maiestati et legibus Romanis inimici*, denying them the access to civil positions"[95].

As in other cases, the king has involved, as bishop from outside, in the application of a judicial system in the State-Church relations, including public law, starting with the fifth century, elements of the sacred law.[96]

1.3.1. Byzantine imperial institutions and their reporting to the Augustinian model

For the Byzantine Empire, legislation and hierarchical organization of the state and the church played a key role. King, Court and Senate were the main institutions in the Byzantine Empire, in a centralized political system.

The Emperor. The concept on the imperial position is that the top hierarchy of the system is the basilea[97], the absolute master of oikonomia as it was considered the "deputy of God" and "friend of Christ".[98] Due to these qualities, the Byzantine emperor leads the empire by virtue of divine emanations, being, apart from political leader of the state, confessor of the Orthodox faith, its defender and an "equal of the apostles"[99], which gave him the right to control what happend inside, but especially outside the Church. After the victory against the Persians, Heraclius takes the title of "a basileu who has faith in Christ", which will become the exclusive privilege of the true sovereign of New Rome. Thus, Roman philosophy was integrated into Christian ideology, resulting in a new imperial doctrine, maintained by successors like Constantine II.[100]

According to Nicholas the Mystic, the emperor of Constantinople "is above all terrestrial powers and the only power established on earth by the master of heaven"[101], while others are "younger brothers" (Carol the Great), "Beloved sons" (Bulgarian tsar) or simple subject - *douloi* (venetian dog and armenian rulers). This type of christian oikonomia hierarchy is called the *doctrine of the family of kings*, as we find out in *De ceremoniis aulae byzantinae* (On the Byzantine court ceremonies), written by Emperor Constantine VII the Porphyrogenet in the middle of the tenth

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[92] Apud Hélène Ahrweiller, *op. cit*., 123.

[93] Henri-Irenee Marrou, *Sfântul Augustin şi sfârşitul culturii antice*/ trad: Drăgan Stoianovici şi Lucia Wald (Editura Humanitas, Bucureşti, 1997), 117.

[94] Apud Aurelius Augustinus, *op. cit.*, în *De la Cetatea lui Dumnezeu la Edictul de la Nantes (izvoare de istorie medievală, secolele V – XVI),* editors: Alexandru-Florin Platon şi Laurenţiu Rădvan (Editura Polirom, Iaşi, 2005), 176.

[95] Adriana Claudia Cîteia, *op. cit*., 234.

[96] *Ibidem.*

[97] **BASILEU** (here, with the sense of emperor) - in Antic Greece, the name of the king; in Athens it was the title of the second archin wich had religious functions. It was atributed to the kings of Persia and to absolute suverans of helenistic kingdoms, being, in the constantinopoletan age, the title awarded to the byzantine emperors – cf. *********Enciclopedie de istorie universală*, 294.

[98] *Ibidem*, 315.

[99] *Ibidem*, 423.

[100] Emanoil Băbuş, *op. cit*., 85, apud. http://www.crestinortodox.ro/, consulted on the 8th of June 2011, 17:45.

[101] Stelian Brezeanu, *op. cit*., 135.

century. According to this book, the basileia was elected by the people and confirmed by the Senate, the role of people gradually decreasing in the favour of the army and, from the eleventh century, in the favour of the private guards of the powerful (dynatai). Leo III Isaurian, initiator of the inconoclasm, proclaims himself as "basileu and priest", an expression of *cezaropapism*[102]. With the ocasion of legitimacy of Constantine VII is born a new institution of dynastic principle: porphyrogennetos (the birth in the purple room). Constantine believes that porphyrogennetos is "God's anointed" when he tells his son: "God himself has chosen you and appointed you from your mother's womb to give you your royalty for excellence."[103] While affirming the right of the born in purple is a very old idea, it returns with greater force during isaurian times. This legitimacy provided by virtue of being born in the purple extends to the two daughters of Constantine VIII, Zoe and Theodora, considered to be "our mothers". They give legitimacy to the spouses and to the adopted successors. Byzantine empire does not give up the foundations of its ideology. Related to the statute of the emperor, Patriarch Anthony IV responds in 1395, to Basil I, Grate Duke of Moscow, as follows: "The Holy Emperor... can not be assimilated to an archon or a local sovereign, because since the beginning emperors considered and strengthened faith in the world, gave power to the divine and sacred canons.

He is anointed with holy chrism, consecrated for the Roman emperor, of all Christians, and his name is commemorated in all places by the patriarchs, metropolitans and bishops, wherever people are called Christians, which is no privilege for any other prince or local sovereign"[104]. In this context, it is seen that the great Comnena of Trebizond, while abandoning the traditional name of their ancestors, they do not give away the imperial name, which they adapt to reality, the imperial title is "basileu of the East and the region beyond the sea".

Central administration. The more we move away from the time of Augustine, we see that giving up the old stratification of Roman administration (magister officiorum, magistri militum and officiales), a new hierarchy appearing, headed by the king. Under Heraclius, a new stage of state organization starts, where the military and civilian power are united in the *themes (a military unit, an administrative circumscription where a military unit was established – after the VII century)*. The first themes appeared in Asia Minor (Anatolikon, Armeniakon, Karabisiani, Opsikion), while in Europe the Helladic and the Thrace themes were founded.

Starting the ninth century, the bureaucratic and centralized character of Byzantine administration increased , everything being in relation with the palace. There is a list of honorary positions (axia) and the official (offikia) that numbered 18 spots, the first three being the dignity of Caesar, nobilissimos and curopalates, to wich only the imperial family had acces. Ninth century and the next century brings a rapid increase in importance of the *parakoimomenos* function, the sleeping of king's guard, wich becomes the confidant and the most important minister of the byzantine state. Locally, the number of the themes varies between 7 and 40.

In XI-XII centuries, the Senate, army and people are left behind, while kings increase their power by enriching the positions, although they were empty of content. Thus, the head of the hierarchy is occupied by the sebastocrator and inflation of functions would be evidenced by the appearance of the same functions with several steps *(sebastos, protosebastos; nobilissimos, protonobilissimus)*[105].

The Army. Again with Heraclius, the military is experiencing a deep reform, reflected by replacing old mercenary troops with rural militias formed by stratiotes. The army was driven, since

[102] CEZAROPAPISM – a system of report between the state and the Church, in wich the public authority has powers that traditionally are reserved to the Church, with the purpose of unifying the temporal power with the spiritual one.. – cf. ****Enciclopedie de istorie universală*, 423.

[103] Stelian Brezeanu, *op. cit*., 155.

[104] *Ibidem*, 250 – 251.

[105] *Ibidem,* 135 – 136.

the seventh century, by a general wich was appointed *the great domestic* in the latter part of history of the Byzantine Empire. Marina was led at first by military officers. Leo III Isaurian divided the imperial navy fleet, one led by the Ploimon the drongar, based in Constantinople, and one fleet of three maritime theme (Kibyraiton, Hellas and Samos).

The elements of political augustinism in the current romanian mentality

Paraphrasing Professor Daniel Barbu, we can ask how much and how tributary we are to the Byzantine mentality, what percentage of quantity and quality of the Augustinian theory resides in the current public mental, especially in the approach of and reporting to the types of political culture.[106]

Throughout its history, the Romanian people, the beneficiary of Daco-Thracian cultural elements, Greco-Roman and Christian, to which were added Slavo-Byzantine and Turan mental archetypes, was considered a keeper of tradition. This becomes a ritual role, refering to "the illustrious ancestors, the ancient habits. And these originary myths regenerates the social body, << confirms >> faith, dreamt or proved, in the existence of common roots and a shared destiny. Thus, it comes from << the double body >> and the divine origins of the kingship, (sic) or even the speeches on the sovereignty of theorists of the revolts"[107].

Based on the above, we find that, often in modern and post-modern history of Romania, the appeal to the ancestors is obvious, ritualic and timeless. The evolution of the trial and Antonescu's tragic end may have similarities with King Decebal's destiny, just as the whole life of a despotic ruler of Romania, Nicolae Ceausescu, is related to national heroes, whose heir and collector of positive energy was presented in the templates of the communist propaganda machine, but not in the collective mentality, people running a saw on him through jokes and expressions in the last years of his personal regime.

As the king was God's *deputy* on earth in Byzantine political ideology, in the same manner the romanian rulers were anointed of God, modern Romanian Constitution keeping the phrase "by the grace of God and national willingness, ruler of Romanians"[108].

In *De Civitate Dei*, Augustine transforms the Greek myth of *the eternal enemy* into the prototype of the *human city*. The sinful man, the roman citizen, doomed to perdition along with the empire he built, is opposed to the christian citizen, wich, if he wil be virtous, he will become a citizen of the *divine republic*. This fight between good and evil is maintained during the entire existence of the Christian Church, and the world as a whole.

For Ion Antonescu, the eternal enemy, which is neither lucky nor virtuous, will be represented by the Gypsies and Communists, deporting the first in Transnistria and imprisoning the others. Romania entered the Second World War on 22 June 1941. This was not only an act of fair reunification of the country, but also an evidence that the head of the Romanian state identified the USSR as an "Enemy of the East and North"[109], asking them to release the Romanian soldiers in occupied territories from under the "red yoke of Bolshevism"[110].

For the communist regime, the enemy is reversed and acquires new meanings. He becomes *the class enemy*. Capitalism, American imperialism, the decadent society are prototypes that can destroy the new *divine republic*, in fact a fearsome opponent of the city of God without God (own

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[106] Daniel Barbu, *Republica absentă: politică şi societate în România post-comunistă* (Editura Nemira, Bucureşti, 2004), 9.

[107] Pascal Lardellier, *Teoria legăturii ritualice: antropologie şi comunicare*/ trad: Valentina Pricopie (Editura Tritonic, Bucureşti, 2003), 107-108.

[108] *********Constituţia din 1866*, *apud* http://www.rogoveanu.ro/constitutia/const1866.htm, consulted on the 10th of January 2012, 13:04.

[109] *********Ordinul de zi către armată din 22 iunie 1941*, Monitorul Oficial nr. 145/ 22 iunie 1941, *apud* http://istoriiregasite.wordpress.com/2011/10/30/ordinul-de-zi-catre-armata-din-22-iunie-1941/, consulted on the 10th of January 2012, 13: 43.

[110] *Ibidem.*

construction - a.n.). In one of his speeches in 1971, Nicolae Ceausescu warned the danger of capitalist products, be it material production or of the intellectual:

"It became a habit not too good, comrades, to look only to what is done elsewhere, to call for any import. This shows that there are some - let's say - kowtow to what is foreign and especially to what is produced in the West. It is the time ... to put our own strenghts in the foreground... and only then to resort to imports. Books are printed in tens of thousands of copies that advocate bourgeois lifestyle, while good Romanian books can not be printed due to lack of paper."[111] Along with annoying the enemy, the class struggle is getting more acute: the new man is idealizes - the bulldozer-woman, heroine mother, the miner, the cooperative peasant etc., while the intellectual is a negative symbol. The image of the enemy of the working class is well summarized by Nikita Khrushchev, for wich "historians are dangerous people. They are able to disturb everything. They must be advised."[112] Therefore, the truth of the augustinian philosophy is overthrown, a new truth being born, a new religion, a new universe. We are witnessing the failure of the twentieth century millennial movements (Romanian fascism and communism), emerged as a requirement of the collective mind to see - in this world and as soon as possible - the city projected by Augustine of Hippo

During the dictatorial regimes, the degree of subordination of church to state increases, although Augustine wanted a Church superior to the human Empire. Collaboration with the communist regime of the Romanian Orthodox Church has resulted in a pact "whereby, in exchange for supporting the communist regime, R.O.C. would have received in exchange the right to freely exercise their cult."[113] So, R.O.C. adopted a double standard to survive, are rare moments in which clergy expressed opposition to the communist state. Nicolae George and Adrian Enache Petcu identify the Security's White Book, Volume II, a single document that recorded such an attitude.[114]

In addition, the paradigm of the two Augustinian cities exists both in the relationship between state institutions with opponents of the communist regime and in the Church of Christ. The Orthodox Church sees in the Catholic Church the representative of the *sinful city*, the vice versa being also true.

Transformations taking place during the twentieth century do not change the mentality of the citizen. We are witnessing a Byzantine *doula*'s transhipment, limited in time, space and fact, to a human model slightly polished, but still expecting God's mercy, or state aid or illumination from Pater Patriae. The dependency of Byzantine subjects was related to the plot of land they worked on, the church and the lord. The dependency of the modern subject is anchored in a world without future, in the sense that now he lives in the past, the need to be assisted, guided and led is marking his existence.The creational universe of subjects in the last century was focused around some small activities and the type of political culture was mainly a dependent one. Moments when the collective mentality atitutudine suffers some changes, caused by psychic over-saturation of individuals are rare (see Uprising of 1907 and the Revolution of December 1989) and short term, being enough for the satisfaction of the basic needs of the community.

Regime change in 1989 did not produce structural changes in the Romanian mentality, the single perceptible change being the actors: the West, former enemy became a friend, while the Cold War ally becomes an adverse stance. Romania's democratic path is marked by *semi-brakings* and *semi-membership*, based on terms set by Raymond Aron.[115] This translates into how the Romanian

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[111] Nicolae Ceauşescu, *non vidi*, *apud* Katherine Verdery, *Compromis şi rezistenţ: cultura română sub Ceauşescu*/ trad: Mona Antohi and Sorin Antohi (Editura Humanitas, Bucureşti, 1994), 384.

[112] Nikita Hruşciov, *non vidi*, *apud ibidem*, 19.

[113] George Enache, Adrian Nicolae Petcu, *Biserica Ortodoxă Română şi Securitatea. Note de lectură*, 11, *apud* http://www.comunism.ro/images/enachesipetcu.pdf, consulted on the 10th of January 2012, 15:25.

[114] *Ibidem.*

[115] Raymond Aron, *Marxisme imaginare: de la o sfântă familie la alta*/ trad: Adina Cobuz (Editura Polirom, Iaşi, 2002), 15.

society, freed from a totalitarian regime, sticks to the psycho-social ills, the recent past, as well as the original sin. Here we can fit the forms of manifestation of the Phanariot model, of Byzantine-Ottoman essence, with balkanic features (see trading perversion, culture, in the sense of the country's transformation into a huge bazaar - Ed), although in terms of leadership, we are witnessing a speech catalyst for Western values.

Amid the moral decay of the Romanian society, Augustinian paradigm becomes an instrument in the hands of the politician. The citizen of City of God vanishes from the public discourse, which is now focused only on signaling the residents of the non-virtuous city, enemies being identified according to the interests of the moment (fatty budgetary, pensioner asshole, school that produces stupid, 40% of medical diagnoses are wrong, moguls, etc.)[116]. But we also identify speeches in which the two cities appear, reminding the public positions and attitudes of Corneliu Vadim Tudor, Gigi Becali or Dan Diaconescu.

Romanian Orthodox Church continues to be one of the main institutions to influence the colective mentality, wich can be used as an instrument of control in the interests of politicians. It appears that political discourse moves in the Church, the country's leaders at all levels trying to seize the moral ascendancy of the clergy on the population, mostly Orthodox.

It is not wrong to consider that the model of the two cities of the bishop of Hippo is always present. Thus, "the recent history remained to decide the vast, immeasurable division of east / west, which was committed and remained to perpetuate the fundamental form of mental structures, those responsible, in turn, for the distance between <<civilization>> and <<barbarism>>"[117].

Conclusion

The entire existence of the Byzantine Empire, from Constantine the Great to the fall of Constantinople in 1453, is marked by Christianity, such socio-political and cultural development of the whole medieval Europe. Christianity meant not only a religious doctrine embraced by most people, as he was in the hope of a better future (albeit a future that transcends the space time, geographical and physical existence!) springs to go on, regardless of existing challenges, but the imperial official doctrine, which united the entire existing philosophical codex...

Christian philosophy summed up in its benefit of the Church and the emperor, all the pre-Christian ideas and all philosophical and political doctrines. The Byzantine political culture is one in which the subject (doulos) is entirely dependent on the senior, the master; the emperor is anointed by God and therefore has the right to life and death of the vassal. In the Byzantine culture, there is no such thing as the power of the people as it is in Pericle'S Athens, but the will of the emperor, which is common with that of God.

The reminiscences of political augustinism meet today in the romanian public mind, and the collective consciousness still keeps alive the experiences of the model of the two cities, wich is poorly understood, a common thing for the totalitarian regimes that marked the twentieth century.

Our research focused on three main directions: Augustinian paradigm presentation and classification in the category of political utopias, the analysis of how the model of the two cities was taken and used in the self-interest of the emperor, transformed by the Byzantine ideology into God's deputy on earth, and identification of the elements of political augustinism in current Romanian mental, developed in the case study presented.

The subject of attention in this paper can be a starting base for those involved in studying the phenomenon of political culture of Byzantine and post-Byzantine. Also, this study provides the uninitiated a brief information on fundamental values that were the basis for the creation and development of the Romanian political thinking.

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[116] Elements of the speech of the president of Romania, Traian Băsescu.
[117] Aurelia Satcău, *op. cit*., 41.

We believe that through this study, for the first time we brought to the attention of those interested how the Augustinian model penetrated and influenced public thinking in the Middle Ages and modern times (be it dictatorial phases or stages of post-dictatorial - Ed) and also the classification of the byzantine and post-byzantine political culture in three types of political culture proposed by Almond and Verba.

We propose as future research directions the following:

Realization of a complex work (historical-sociological- and mental-psychological), in which to consider the weight of different types of political culture defined by Almond and Verba in Romanian mental structure;

Differences in approach / reporting / the Byzantine typology of Balkan peoples and populations;

Development of Augustinian concepts in the era of globalization.

To Christianity have been reported over the centuries not only different Christian denominations, but also other monotheistic religions which see their positions threatened, and totalitarian political ideologies (Nazism and Communism - sublime. Added), but which, while denying Christian truth, used the symbols of this religion.

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POLITOARCHEA

ANTON PARLAGI[1]

Abstract
According to the political phenomenology of law normative systems have multiple poles. From a politonomic point of view it is important for the number of communities which are poles of power to directly determine the forms and content of central power. In a one-pole system politocracy establishes, imposes and controls normative institutions for all communities (regional, local groups etc.); the advantage of this system is that it can settle disputes among those communities which pursue their activity autonomously as local power centres; the disadvantage of the system is that it limits normative autonomy of communities and it reduces their social power. As to the bipolar systems, in which there are two centres of normative power, each centre attempts to regulate the other one; the advantage of this system consists in the fact that each centre creates more and more efficient regulatory systems; the disadvantage is represented by the fact that a permanent confrontation between two forces uses up time, material and human resources. In tri-pole systems, each power system attempts to co-exist with at least one of the other two power poles or, anyway, it attempts not to conflict with the other two at the same time; the advantage consists in the fact that the normative system is the result of a legally institutionalized "compromise" between different principles and community values. Multi-pole systems have a set of rules of which the most important is the rule of not destroying the system the community belongs to.

Keywords: *politoarchea, normative policentrism, territorial policentrism, power distribution, institutional policentrism.*

Introduction

The concept of *politoarchea* is used to define the phenomenon of power distribution by which (self) regulation is ensured so that each community acts autonomously; this leads to normative polycentrism and the polarity of the legislative system.

Politoarchea defines the phenomenon of (self) regulation power distribution thanks to which each community can be normatively autonomous and determine the multiple poles of the legislative system. Political phenomenology of law reveals the fact that normative systems have multiple poles. From a politonomic point of view it is important to notice that the number of communities which are centres of normative power directly determines the form and content of central power.

According to ideonomy, *politoarchea* is a system of norms and fundamental principles by means of which each community elaborates its own ideology as to the way in which its organization and functioning should be regulated. According to socionomy, *politoarchea* illustrates the multiplication and diversification of normative institutions for every community. From a politonomic point of view, normative, legal and non-legal autonomy is accomplished thanks to the right and capacity of any community to govern itself. As far as terminology is concerned, we have used the concept of community - within the field of phenomenology of law - for defining a group (structure) which has a particular profile thanks to its normative institutions.

Political phenomenology of law illustrates the fact that the decline of legal centralism appeared as a consequence of administrative decentralization, which led to the multiplication of the legislative power centres.

Politoarchea illustrates state evolution towards the efficient organization and functioning of local and regional powers in conformity with the principle of subsidiarity according to which public

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responsibility must lie with the authorities that are close to citizens in accordance with their social tasks, the general interest and economic progress. *Politoarchea* defines a normative system which regulates social processes at different legislative levels in order to achieve public interest objectives; in Austria a formal system was set up for implementing public policies by administration structures; in Sweden the budgetary planning process is correlated to administrative structures objectives; in Germany the result-oriented management system is supported at land level; in Switzerland performance standards are established for public authorities.

(a) Normative policentrism

In monopolar systems politocracy sets up, imposes and controls legal institutions in all communities; the advantage of this system is that it can settle disputes incurred beween communities which are local centres of power; the disadvantage of the system is that it limits normative autonomy of communities and that it reduces social power. In bipolar systems, there are two centres of power and each of them tries to normatively subordinate the other one; the advantage of this systems is that each centre of power creates more and more efficient regulation systems in order to impose itself; the disadvantage is represented by the fact that a permanent conflict incurred between two forces uses up time, resources and effort. In tripolar systems each power centre tries to coexist with at leat one of the three poles or, anyway, it attempts to avoid conflict with the other two power centres at the same time; the advantage is represented by the fact that the normative systems are the result of a legally institutionalized compromise between different principles and values shared by the community. Multipolar systems have a set of rules, among which the most important one is represented by the interdiction to destroy the legal system thanks to which that community exists. From an ideonomical point of view, *politoarchea* is a system of principles according to which each social structure can develop its own ideology regarding the regulation of its organization and funtioning. According to socionomy, *politoarchea* represents the multiplication and diversification of normative institutions within any community. Politonomically, normative autonomy (legal or non-legal) is manifested as the right and capacity of any community to govern itself. As far as terminology is concerned, we have preferred to use the concept of community because we intend to bring into evidence the fact that a group (social structure) is defined by its normative institutions, too. *Politoarchea* may be better illustrated by using the concept of community, firstly because it illustrates a certain mentality as to (self)normativity, and secondly because it expresses solidarity as (self) regulation and thirdly because it describes (self) govenment forms more precisely. Normally, a community is self regulated by its institutions (religious, cultural, spiritual etc.) which, as normative systems, are different from legal institutions. The first conclusion we can draw is that normative plurality is based upon the community norms and principles (not upon territoriality); as the phenomenology of law illustrates some communities are normatively structured according to the same professional, ethnic or sexual relations although they are dispersed from a territorial point of view and, thus, cannot be regulated only according to territorial criteria.

If we deal with normative plurality from the perspective of each community's regulations, we have to take into consideration the other side of the coin, too, i.e. the capacity of norms to modify a community's preferences. In other words, the normative force derives both from each communitys's force to elaborate its own norms and from its capacity to apply them in conformity (or not in conformity) with a centralized legal system. If all communities adhered to the principles of justice (seen as social justice), the centralized legal regulation of social relations would no longer be necessary. From a socionomic point of view, one can easily notice that the system of norms elaborated in the interest of a community does not identify with the normative centralized system which is meant to satisfy "national interest". The main problem regarding regulation autonomy focuses on the contradiction between the institution of normative "centralization" and "decentralization". If we consider that any centralized political system is socionomically dominating

and politonomically opressive, then we can conclude that the system is obliged to ideonomically justify these prerogatives. Political phenomenology of law illustrates the fact that the state uses the legal system in order to oblige communities to observe certain norms such as the norms regarding individual rights and liberties; moreover, the legal system guarantees the fact that no community ever breaks the universal principles of law, among which one has to mention the defence of individual rights. On the other hand, normative centralism would limit the tendency of communities to become tyrannical and to restrain individual rights and liberties. One should mention here "lenient communitarism" according to which state confinement policy should be replaced with policies that encourage community norms which can ensure the emergence of plural normativity. To solve this socionomic dichotomy governmental policies include, among others, institutions and resources by which certain social groups can be reintegrated in a centralized normative system. Phenomenologically, normative multipolarity appears as a multiplication of regulatory institutions (systems) which, paradoxically, regulate the same types of social relations differently, depending on the type of each local community. It is useful to refer to the programme of gentrification **(**Engl. *gentry* = person with a high statute), characterized by: the *recolonization* of old city centres with residents who have a high social statute; *rehabilitation* of the built areas and the introduction of new local services; *bringing* persons who have the same culture, customs, language or traditions in spaces which are especially designed for this purpose; economically *reordering* property values. Ideonomically, another form of pluralism may be illustrated by the multiplication of virtual communities which, even if they exclude direct (*face to face)* relations, they are "real" communities as regards their capacity to form, regulate and support a certain community type. Such virtual communities do not rely only on technical computer-based communication means (CMC), but also on a set of common norms and values which set forth specific behaviour norms. Thus, *Facebook* does not only facilitate communication between individuals, but also coordinates social and political movements; at least in the sphere of ideonomy the set of norms used and officially accepted does not agree with the problem of dispersing "ideal" power centres within a society. We consider that the spread of Internet isolates the individual from the community since more and more often and more and more deeply people get lost in cyberspace or better said become alienated. Lastly, a conflict arisen between virtual *(online)* community and the real (*offline*) community brings about the question of politically recognizing the rights of each community. Thus, we can use as a work hypothesis the fact that an ideonomic community can ensure socionomic *politoarchea* thanks to the fact that conceptual identity determines individuals to conform to a regulation system.

Phenomenology of law deals with normative plurality which it regards as an effect of each group's (community's) manifesting its own will, thus, trying to regulate its own (adequate) system of norms, principles and institutions. Ideonomically, self-regulation requires being aware of the existing normative, legal or non-legal norms, principles and values, which are valid for the entire community. Normativism without subjectivism (understood as an inherent will of any person) would be impossible; let us remember Abraham Lincoln's statement according to which no man is sufficiently good to govern another man, without the latter's consent. Although the fact of being aware of a norm is not a coercitive (phyisically speaking) process, as Dennis Wrong points out, awareness generates a certain tension; according to Freud, the fear to lose someone becomes a threat, so it is coercitive. Ideonomically speaking, being aware of one's obligations is essential for a decentralized normative theory; each attempt to break a norm generates a risk. The problem of legal deconcentration has been ideonomically dealt with *avant la lettre* by Max Weber who considered that - for the members of the legal profession - norms have value only if they reflect the idea of justice; this approach is different from the sociologists' perspective, according to which norms have social value only if they can be used. Ideonomically, the existence of a decentralized normative system relies on the idea that individuals can become aware of their obligations and thus the observance of norms is simpler and quicker for them in comparison with the situation in which norms would be imposed on them from the outside. According to Kohlberg's theory, there are three levels which mark the evolution of any

person's moral judgement; on the first level, the "pre-conventional" one, individuals observe laws for fear of a penalty or because they have a certain interest to do so; on the second level, the "conventional" level, individuals observe the law because they understand that moral principles represent a necessity; on the third level, the level of "abstractization", individuals observe legal norms, contractual obligations and justice considering that they are rational forms of existential regulation. Normative polarity is socionomically revealed by the distribution of the regulation capacity among more social power centres; however, ideonomically the situations is different for it is the individual's consciousness that adopts, rejects or is neutral to the social norm. A. Lipietz adopts the same perspective. He states that progress by itself must not be obtained by any means unless it ensures the progress of the individual and collective options; from this point of view, he suggests a form of solidarity which can be accomplished by granting subsidies to "self-organized" or social utility actitivities. Thus, ideonomically, normative pluralism requires the existence of institutions that allow regulation centres and autonomous institutions to interfere; this is particularly important for it ensures solidarity and community development. If we agree with the premise that any comunity has its normative system and that this system constitutes the "law" of the community, we can draw the conclusion that *politoarchea* illustrates the lawfulness of law's self-regulation. Ideonomically, *politoarchea* is the cognitive dimension of a community and it represents its vision regarding the system of norms which ensures its existence; in this context, community norms are landmarks for the evolution of the legal system, for the modification, regrouping or the replacement of certain law principles. From a socionomic perspective, the dimension and importance of individual, group or collective interests imposes a *path dependence* upon the values and principles of the legal system. According to *politoarchea*, a system of norms, once settled, distributes normative power among different regulation centres according to community norms, values or principles, which are more or less socialized.

The dissemination of the regulation power among communities illustrates the fact that normative policentrism is indisolubilely linked to trans-community relations. Starting with the Middle Ages corporatism has proved to be a phenomenon which distributes socio-economic power among corporations and crafts organizations that were meant to regulate and control industrial and commercial activities and which, besides the clergy and the noblemen, formed the third socially important category in the state. The corporatist phenomenon is much older; thus, we can mention Titus Livius who used the phrase *corpus civitatis* to designate the community and Sallustius who used the phrase *corpus fabrorum* to designate the iron smiths craftmanship. According to the phenomenology of law, corporative normativity is important for us from two points of view: from a sociocratic perspective, since it reveals that these two non-state organizations have the authority to impose generally-compulsory norms for all its members and from a politocratic perspective, since these corporations function as normative institutions which represent an interface between the state and its citizens. Although the industrial revolution surpassed this form of social organization, the idea of corporatism was embraced by E. Durkheim in sociology and it was depicted as a useful institution for the moral training of the population, for the regulation of social discipline and for reducing *anomia* that modern society is suffering of. From a socionomic perspective, E. Durkheim understood that the state cannot surmont *anomia,* first of all because it does not establish a direct link with citizens and secondly because it has a neutral position as far as the civil society is concerned. Corporatist ideology was subsequently embraced by political interwar fascist institutions, which had an ethnically strong connotation. Franco's plan to build a corporatist Spanish society was the most sustainable and probably the most authentic plan, though in Italy under Mussolini there existed a series of corporatist institutions. In Spain and Italy, national assemblies and state councils were organized in a similar way with corporations and less as constituencies or in accordance with the changeable electoral system. According to the fascist ideonomy, corporatist ideonomy was good for it avoided class disputes during democratic elections. *Politoarchea* affects relations between politocracy and the civil society since normative decisions are the result of conflicts between the

interests, strategies and ideologies specific for different social organizations. Politocracy may impede access of other social structures to the decision-making process for saving its values and interests and this might lead to a normative blockage or to a legislative lack of decision. In this context, some European states accept the neocorporatist process of law-making according to which normative decision is the product of an institutinoalized dialogue between politocracy and the sectorial sociocracy. In this context we mention European integration as a phenomenon which implies decentralization and economic liberalization processes and which offered sociocracy ideonomic arguments for contesting the supremacy of the state in the law-making process. According to the political phenomenology of law, *politoarchea* determines the clash between the law-making political system and decentralized law-making systems; the unification, coordination and integration of normative systems do not depend upon the state but upon non-governmental decentralized networks. "State-sectorial corporatism", normative pluricentrism tend to be replaced with negotiated normative centralism, which is more efficient because it allows the creation and implementation of public policies that are accepted both by the state and the local or sectorial communities. Normative pluralism functions thanks to neo-corporative institutions which currently indicate that politocracy is more and more inclined to closely cooperate with sociocracy (corporations, trade unions, employers associations, etc.) in the legislative domain with a view to more efficiently accomplish its functions of coordination and political control over society. Policentrism ensures a form of state organization in which there is a limited number of power centres which are ranked and differentiated per technical, scientific, economic etc. sectors of activity. What is important from a politonomic perspective is the fact that these corporations are regulated by the state and the legal statute they acquire ensures their reprezentation monopol in the sector in which they are active; on the other hand, these corporations are subject to the control of the state, as well as to the legal forms of access to political leadership. From a politonomical point of view, neo-corporatism proposes that public power distribution, as a multiparty governing system, should be accomplished by state representatives and social partners, as well: trade unions, employers associations, professional associations, farmers. Neo-corporatism is an institutionalized political compromise accomplished through legal norms according to which social organizations accept the *status-quo* (by which trade unions give up salary expectations) and the government representatives offer guarantees for a certain level of social welfare (by means of social security). The beneficial effect of this compromise consists in the participation of corporations to the legislative process, as well as to a more facile implementation of social norms. Moreover, we can talk about legal policentrism as an effect of the normative system multiplication determined by the requirements imposed by corporations or public utility foundations through the legal norms that regulated the organization and functioning thereof. Politocracy allows the setting up of corporations because these institutions can regulate and offer public services in sectors in which the state does not provide them: the physicians' association, the architects' order, bars associations, public notaries associations, experts associations, evaluators associations, farmers associations etc. Obviously, neo-corporatism as a state phenomenon generates legal modifications; see the mixt legal regime of corporations, which are subject to public law and civil law. In these cases, the polinormative system is favourable because it leads to the specialization of management; the legal regulation is accomplished by specialists, by persons who have the same specialization as the people who manage the system; physicians for medical services; professors and teachers for educational services; artists for the field of art, etc.

Normative pluralism – according to the sociocratic theory – states that certain social (structures) groups are entitled to set up normative institutions within a public area. The plural character of self regulation systems – which are specific for local communities – has been borrowed from the socialist theory of self-management, according to which society must be politically organized as a system of political centres (commune / town / region councils) economic centres (cooperative societies, mutual societies, worker councils). The possibility of setting up multiple normative systems within the state is supported by the postliberal democratic doctrine which states

that it is necessary to introduce ”economic responsibility”; the new structures of socio-economic power could be considered as institutions which are accountable to the community even though they are not subject to official legal norms. According to H. Gintis, a democratic control of the economic power structures would allow the collectivization (as a marxist concept) of property and the use of property for promoting individual rights. From an ideonomic point of view, we should reverse the relation between the individual and the economic organization of society in order to create a normative system in which work no longer remains a goal in itself but rather an evolution (a progress) of the individual within a democratic state. These sociocratic arguments form the basis of the theories regarding regulatory autonomy of local communities and the self-governing concept. Phenomenology of law states that local self- government cannot be assimilated with the notion of autonomy since it mirrors the executive dimension of normativity, i.e. the obligation to apply state legislation. A real autonomy of local authotities, which would give free leeway to normative pluralism, is possible only if ”executive responsibility” was transfered from these authorities towards social structures, as G. Boismenu, P. Hamel and G. Labica have pointed out. Sociocratic polarity also implies the problem of determining the subject of normative institutionalization, which may be a community (local, regional, national etc.) or an authority of public administration. One of the suggested solutions is to transfer normative power from public authorities to citizens or, more precisely, to certain citizen structures (committies). The so-called ”re-invention of governing” has as a starting point the possibility to distribute regulatory power and social control within community structures. Decentralization is more efficient than the centralization of legislative power because it allows communities to adopt autonomous decision and because it ensures the setting up of communities. Adopting such a normative structural model leads, according to M. Massenet, to the creation of a system of mutual and continuous dependence which would represent an alternative to the pyramid-like bureaucracy which is specific for the state. Sociocratic normative polarity manifests as an institutionalization of the relations between the existing different power centres: sociocratic supporters (who want to increase their profit), politocracy supporters (who want to maximize their decision-making power) and bureaucratic representatives (who want to augment their influence). Within a competitive system, distribution of regulatory power between institutions depends on the political force of each of them: according to this axiom the state is obliged to modify legislation in order to be able to counterbalance the normative efficiency of private institutions. The state which cannot (self) regulate its institutions is surpassed by private institutions: corporations, interest groups, non-governmental agencies. From this point of view, the phenomenon of ”agency transformation” is in its turn conclusive for legislative policentrism; the state ”transfers” regulation and control power towards private agencies, which it supports financially, totally or partially, by means of state subsidies. On the other hand, one cannot leave aside tehnical and scientific deconcentration thanks to which special institutions (moral persons of public law) have become autonomous - as far as their regulation is concerned - in relation to the state and territorial colectivities. Sociocratic normative policentrism must be analysed as a form of ”socialization” of normative power because it expresses freedom to adopt decisions from an ideonomic perspective thanks to the capacity to self manage socionomically and to the right to self-government.

First of all, *politoarchea* seems limited by legal centralism which is justified most of the times by the obligation of the state to ensure ”general interest” as opposed to normative decentralization that gives free leeway to group or individual interests. Ideonomically, the theory of normative centralism is difficult to support with arguments simply because ”general interest” is an ideal goal and it can be accomplished both in a centralized and decentralized system at a community level. The ideal of normative centralization is to centralize a community ideal so that no normativity is necessary. Socionomically, it is however proved that a right is ensured in a ”centralized” way to the extent to which the political system guarantees it as a ”decentralized” right, which means that the right is guaranteed at local level, even if by means of the confining force of the state. The state guarantees individual freedom as any other right of general interest; however, this ”general interest”

can be accomplished in a centralized way as well as in a decentralized way (under certain conditions). J. Chevallier sustains that general interest theory is used as an ideological weapon to harmonize the adherence of public administration to the state policy. Thus, legal centralism is ideonomically justified by general interest which stems out of the Christian ideal of the ”common welfare” and out of the ”general will” principle. Legal centralism comes to an ideonomic deadlock when it tries to legitimate, by means of the general interest, both normative power (the right to regulate) and normative autonomy (the right to self- regulate). Political phenomenology of law states that general interest paradoxically represents an ideonomic contradiction: on the one hand, it justifies obediance to political power (the only legitimate power which is entitled to define a collective interest) and, on the other hand, it represents the basis for political freedom (the only force which is entitled to limit power). From a politonomic point of view, we can notice that only authorities which are invested with public power are entitled to consider that an activity represents a public service; moreover, not any activity of public interest is a public service; consequently, we must accept the idea that public service expresses the will of the state, which illustrates the political nature of law. *Politoarchea* is meant to prove that political power attempts to establish what rights and liberties concur to the accomplishment of public interest and it also attempts to legally enforce them. The idea that general interest is a political basis for normative institutions comes to support the theory developed by *politoarchea* because normative institutions are in extremis normative ”services” meant to serve general interest. Thus, the normative service constitutes a legal version of the general interest concept; justice, administration, national defence, etc. are institutionalized forms of normative services that are subject to general interest. Socionomically, one can regard ”general interest” as a premise for the decentraliztion of normative power so that the state can implement its policy regarding individual rights and liberties in a centralized way at all levels. *Politoarchea* is not concerned with normative centralization or decentralization, but with the fair or unfair effects of normative power; from this point of view, the right of central authorities to take fair measures is preferable to the right of decentralized authorities to take unfair (discriminatory) measures and vice versa. Normative power cannot justify any discrimination though in administrative law certain discriminations are accepted under certain circumstances and under the obligation to observe the principles of eequality and proportionality. Decentralization of normative services has permanently faced with ideonomic centralism: as the state decentralized regulatory power within the community sphere, it had to justify its normative power. That is why the normative system is *still* centralized in areas like education, communications and information services with a view to supporting ideocracy. From a socionomic perspective, decentralization is necessary because an absolute decentralization is not possible from a social point of view, which does not mean that centralization cannot be maintained by deconcentrated institutions. The setting up of such institutions (the prefect is the typical example) has a double purpose: on the one hand, to maintain the normative power of the state through the exercise of legality control over local authorities acts and, on the other hand, to maintain state cohesion by coordinating contradictions between centralized power (territorial state administration) and local power (local administration autonomous authorities). From a politonomic perspective, the correspondence between legal decentralization and normative deconcentration is determined by the fact that administrative units have the same territorial limits as local collectivities. The more numerous deconcentrated jurisdiction prerogatives of state institutions, the bigger in number normative attributions of local powers. Thus, *politoarchea* refers to the transfer of normative power from the state to the deconcentrated institution level; deconcentrated structures have an ever increasing regulatory competence on socionomic level in comparison with central authorities which are confined to the ideonomic (concept, design, evaluation, etc.) perspective.

(b) Territorial policentrism

From a territorial point of view, normative pluricentrism implies the distribution of the regulatory power by the local (regional) collectivities which from an ideonomical point of view makes regulation to be mistaken for local autonomy. At territorial level, normative pluralism is relevant for the phenomenology of law because it mirrors the *divide et impera* (i.e. *organize in order to govern*) governing principle; this principle illustrates the territorial delimitation of a state out of political reasons; we should not forget that the root of the word ”territory” - *jus terrendi* refers to the right to frighten (to terify). With its modern connotation, the term ”territory” is an ideonomic representation of political frontiers and it started to be largely used after the French Revolution in 1789 as a political and legal system for the administrative coordination of the nation-state; *e. g.* in the French doctrine territorial units were considered as internal spaces of the national territory. Phenomenology of law illustrates the fact that territorial organization is just an application of the Roman political principle (not the application of a legal principle) because its role is basically a politocratic one. Normative multipolarity proves that the organization of the state does not depend on criteria like: ”population” or ”territory” but on political criteria. If parts of the territory were ”sovereign”, they would become states, a fact which would anihilate political power at central level (politocracy) and politocracy has always perceived itself as the sole sovereign authority. At territorial level the polarization of the legal regulatory power is mirrored by the normative regionalization phenomenon according to the principle of organizing the state into territorial administrative units which are smaller than the state and bigger than local collectivities. The policy of *regionalism* has evolved in several stages and it was determined by the development of national states within multinational empires such as the Austrian-Hungarian Empire and the Russian Empire. Regional organizations were interested in administrative, cultural and political autonomy for promoting the rights of certain nationalities. Starting with the 8th decade in the 20th century, regionalism has been more valued as a consequence of the European integration which leads to the creation of consociative democracies; at this point in our paper one should mention Denis de Rougemont, who noticed *avant la lettre* that regionalism is an element of the new European construction because it pushes *federalism* towards *regionalism*. Regionalism related to the political polarization of normative systems is important for several reasons: firstly, because regulations mirror the unbalance existing between the different parts of the national territory; secondly, because normative systems allow differences to exist between different territories as regards the regulation of cultural and linguistic rights; thirdly, because local normative systems are opposed to the normative centralism of the state. Normative plurality implies the existence on large geographical areas of many regional decision-making institutions, which comprise several territorial administrative units of the state. From a politonomical point of view, regionalism mirrors a certain territorial configuration of the state, which is easier to manage by means of local administrative structures. Consequently, from a politonomical point of view the essence of regionalism consists in applying a political principle regarding the administration of the territory on several local communities which are grouped in so-called ”development regions”. We can notice that regions are in fact institutions which have their own self-regulatory systems; from this perspective it would be relevant to mention the fact that at European level there are two forms of territorial division: *normative* regions, created by establishing borders according to legal and administrative criteria and *analitical* regions which function thrgough the association of geographical complementary areas or as homogenous regions (they are created through the aggregation of areas which have similar characteristics).

Phenomenology of normative policentrism proves that those forces which vehemently require the modification of normative systems in accordance with the principle of regionalization were and still are local (”peripherical”) political parties because they represent the interests of ethnic and cultural communities. The analysis of party systems which pursue their activity in European states proves that the setting up of new normative institutions is the result of the opposition which exists

between political trends which support decentralization and those which support normative decentralization. In unitary states, excessive concentration of political power has led to the emergence of conflicts between *center* and *periphery,* which led to a revision of constitutional principles through the extension of territorial and administrative decentralization types. The clash between *center* and *periphery* makes the object of the confrontation between centralists, unitarists or nationalists on the one hand, and regionalists, autonomists or federalists, on the other hand. If we accept the hypothesis that the center is the state, then centralism means maintaining a unique regulatory system within peripheries, too, though local communities are different from each other from an ethnical, linguistic, cultural and religious point of view; that is why national parties support legal centralism in contrast to ethnic-regional parties which support decentralization. Legal policentrism socionomically mirrors the capacity of local communities to autonomously regulate themselves, while politonomically legal policentrism mirrors the right of local communities to set upt their own regulatory institutions. This type of legal policentrism socionomically illustrates an administrative decentralization which does not affect politocracy directly especially because it does not imply political power but the functioning of normative institutions; on the other hand, politocracy is rather interested in the way in which normative institutions accomplish their political mission than in the way in which politocracy is organized and it functions. Since local (regional) public authorities are led by political party representatives, decentralization may also imply a transfer of normative but not political power; although the right to make decisions is decentralized, paradoxically, the content of decision is centralized: no matter the legal form the decision act may have, that decision is going to illustrate the local political parties representatives' will simply because party representatives are obliged to comply with the party policy. Consequently, the transfer of attributions (including the legal regulation law) from the cental to the local level cannot be regarded as political decentralization. Since this normative decentralization does not affect politocracy, the legal system is permissive for it recognizes the right of local sociocracy to set up organization and functioning norms for its own institutions. That is why *politarchea* as Robert Dahl defines it should not be assimilated with a multiplication of command centers or with the dispersion of power but rather with self regulatory systems in which public authorities are influenced by sociocracy and in which citizens can control their leaders. In this respect*, The European Charter of Local Self-Government* (Art. 3 section 2) states that the autonomy right shall be exercised by councils or assemblies which are made up of members elected by free, secret, equal, direct and universal vote and which can use executive and deliberative bodies that are suborinated to them; moreover, autonomy implies the right to organize citizens assemblies, referendum or any other form of citizen direct participation. The election of public authorities is legally regulated by politocracy; furthermore, citizens' direct participation is ideonomically a way of self-government. For politocracy it is difficult to accept a parallel, external or competing form of government which might have different results, as it is difficult to accept an enlargement of the democratic frame determined by the mitigation of government resources that might be used to defend the opposition or to accept a confinement of the democratic frame through the mitigation of the opposition resources. Consequently, from a socionomic perspective, territorial decentralization may be legally regulated through norms that reduce the volume of workload from the "center" and allow the functioning of more "peripheric" local power centres. From a politonomic point of view, territorial decentralization may be legally regulated though it cannot be politically justified as long as sovereignty implies the unique character of power (rather than its multiplication). In conclusion, we can say that legislative policentrism mirrors a normative autonomy which is politically regulated while the very power of autonomy is legally supported.

Phenomenology of law brings into evidence the fact that normative polarity has at territorial level a politonomic character since normative policies are elaborated and implemented in the territory in accordance with political will. We should not forget that the notion of "territoriality" became important during the French Revolution thanks to Paul Allies who used it to directly refer to the natural representation of political frontiers to which the legal significance of state administrative

organization was added. From an ideonomic perspective, territoriality is only a compromise between the elective principle and the bureaucratic principle, according to which political authority functions only through the agency of administration; this is the reason why ideocracy attempts to argument territorial delimitation by non-political institutions and consequently legitimate state authorities at local level. From a socionomic perspective, territorialization means dividing the state according to politocratic criteria and transfering public authority to local elites, i.e. sociocracy; thus, a "peripherical" power is created and it is exercised by local representatives and public officials etc. who must accomplish the general (state) will at territorial level. Territorial political polarization is accomplished through deconcentration governmental policies at local level; political polarity of normative systems is accomplished socionomically through self-governing institutions which are specific for any local collectivity; finally, political polarity is ideonomically justified through the theory of the local welfare which prevails over general interest. This multicentrism is considered by P. Gremion as a manifestation of "peripherical" power since both high officials and local civil servants guarantee the accomplishment of general interest since they represent the state in its deconcentrated structures. From a politonomic point of view the notion of "peripherical" power is improper because by definition power seen as a form of exercising social dominance is centralized. According to the phenomenology of law, J. C. Thoenig's opinion regarding the fact that all local collectivities acquire the statute of legitimate spaces for integrating public policies is much more useful for understanding normative polarity; in fact, the way regulatory power (and not the territory) is used may be legitimate or illegitimate in a state. Thoenig refers to the French type of territorial state when he defines the new forms of collective power institutionalization at the level of of "communes" and "departments" from a socionomic perspective. Normative polarization reveals at different territorial levels that legal institutions and regulation procedures of the "local interest" are different and often come in contradiction with state institutions which promote "general interest". Political polarity of normative systems is determined by the content of regulation; *e. g.,* in the Anglo-Saxon doctrine, different terms are used to define territoriality of a public policy: *local government*, *urban governance*, *policy networks* or *alliance for development*. Consequently, at ideonomic level, institutions which are regarded both as a central and as a local normative authority come to be considered legitimate. The distribution of regulatory power among a central and a local authority led to paradoxical situations such as the coexistence of two different authorities in the same individual – this is the case of "competition" generated by normative decentralization between different authority positions; moreover, this competition can be noticed with persons who occupy two public positions, one at central level and one at local level (see systems that allow a person to simultaneously occupy more public positions). According to the phenomenology of law, political polarity is important for it determines the subject of a regulation in a particular case – e.g., in some legal systems, such as the French one, a Member of Parliament can also be a mayor. In this respect, O. Duhamel comes with a socionomic solutions, i.e. to neglect the political dimension of normative acts since decentralization refers to the executive system not to the legislative system. Such an approach cannot be ideonomically supported for normative acts always illustrate a certain political ideology; moreover, the solution cannot be politonomically argued for normative acts generate effects only if they are guaranteed by a political and legal system.

From a phenomenological perspective, *politoarchea* can be set up through the distribution of regulatory power in the elaboration of local policies by the state through the investment of local authorities with different powers. In fact, the phenomenon of *politoarchea* appeared in the European states once local development principles were created; let us not forget that public authorities were entitled and ogliged to facilitate relations between enterprises and local institutions in order to ensure the economic and social progress of the local collectivity. As the process of decentralization spread, forms of *politoarchea* improved so that regulatory power became "specialized": e.g. in France, *regions* have regulatory power in territorial planification, professional training, etc.; *departments* exercise their regulatory authority in healthcare, social security, transport, education activities a.s.o.;

communes exercise their regulatory power for commune urbanism, schools etc. In a negative sense, *politoarchea* illustrates that the implementation of ”central” legislation depends on a multitude of ”local” application norms; *e. g.,* let us take into consideration environmental legislation in which there are a large number of technical instructions which illustrate a certain political connotation to application norms. Normally, dispositions issued by local public administration authorities comprise interdiction norms, preliminary authorizations, fines which hinder the application of central legislation. In a positive way, *politoarchea* implies regulations which stimulate the implementation of central legislation and contracts whereby the state associates with local collectivities for accomplishing common interest projects. The normative capacity of *politoarchea* is illustrated by the augmented regulatory power of local collectivities which - beyond the normative frame established by the central power - have created specific ways of adopting decisions: within towns communities, regional councils, trans-border development committees, etc. The phenomenon is illustrated in the American economic doctrine which approaches local development through the perspective of ”administrative” regions because both state and private institutions can benefit from these decentralized structures; all towns can be administrative regions and can ensure what is known as a relational economy. *Politoarchea* is also illustrated by a large number of econonomic structures which are autonomously organized at local level; moreover, from an ideonomic perspective, these decentralized structures are known as ”focal point regions” even if they are not recognized as legal persons from an administrative and territorial point of view. The concept of focal point region implies the idea that there are regions within other larger regions which have the same regulation form, e.g. commercial regulation. Phenomenology reveals the fact that *politoarchea* is also illustrated by ”public conventions” which are normally concluded at regional or local level between public administration authorities and private legal persons as public-private partnerships. From an ideonomic perpsective, the public-private partnership defines a rule which refers to the research, designing and creation of normative acts that could not be accomplished if the public and private sectors acted separately; as a socionomic institution, public-private partnership requires a set of rules as to the share each one is entitled to obtain from the resulted benefits and the responsibility each party has; politonomically, partnership is a form of settling social and economic disputes and of controlling normative policy making. What is of interest for the phenomenology of law is the fact that by public conventions several types of contractual relations – which are different from private and administrative contracts since they have a *political* rather than legal nature – become official.

Phenomenology of law has recorded essential modifications at all territorial levels; ideonomically, one can notice a change in the mentality of local authorities, which is illustrated by the issuance of normative acts that are specific for a certain community and, thus, different from the acts that are applied for other communities; socionomically speaking, one can notice the modification of community regulatory systems according to the interests of local pressure groups; politonomically speaking, one can notice that regulation for the ”public interest” is a construct limited to *a territory* and *a community*, without any interference with the ”general (or national) interest”. If we take into consideration the politonomic criterion, territorialization actually indicates a deconcentration of the public power as a reply to legal state centralism; to politocracy the aim of territorial administrative delimitation is to facilitate the exercise of power and not to apply the descentralized principles. In reality, these plans interact so that the phenomenon of legal regulation appears either as a manner of justifying a normative policy at territorial level or as a necessity to solve territorial problems by an adequate normative policy. Phenomenology reveals that the limitation of the state normative power started when legislative autonomy of certain deconcentrated institutions was recognized; subsequently, this phenomenon extended to public authorities which are elected by the citizens; finally, the state ”tutelage” was reduced to its *a posteriori* control as regards the legal nature of normative acts. Paradoxically, to allow decentralization the state enlarges legal limits in order to defend individual freedoms by means of centralized institutions: hierarchical administrative (or tutelage) control; the control exercised through the initiative of the aggrieved person; the conciliation

procedure through the agency of the Ombudsman; civil administrative liability, etc. Legal policentrism has a series of supporters of *public choice* who consider that public institutions are set up, evolve and disappear under the influence of the exchanges between individuals. Taking this opinion as a starting point, another hypothesis was developed according to which the most important factors of normative deconcentration are not political decision factors, as E. Kiser stated, but rather the administration representantives (agents) and the administered persons who regulate administrative activity as a consequence of their interaction. The idea of coparticipating in the regulatory activity was borrowed from the public option theory by state representatives for improving regulatory services and also for adapting to budgetary limitations imposed by governments. Supporters of public authority autonomy and subsidiarity consider that the application of the ”public option” principle at the level of deconcentrated institutions is opposed to the traditional bureaucratic model by which civil servants were obliged to confine themselves to executing political decisions. The results of researching ”public options” have substantially contributed to the reform of regulatory systems: they have led to transformations in law enforcement besides social *extranormative* regulation, to free election management systems which stimulate state agents adopt innovations, conventions, collaborations, etc., to focusing controlling budgetary expenses on public utility services and to improving citizens-beneficiaries relations by introducing new communication and decision- making systems. Actually, the theory of public option does not contradict the fact that politocracy determines the nature and functions of the normative system; in this respect, normative policentrism illustrates content diversity and public policy application. Public option policy can be accomplished as an option for certain normative policies which can promote policentrism or on the contrary confine it. We can give a single illustrative example in this respect: the state still prefers to centralize social security policy and support expenses for offering unemployment payments though it could use the same sum for subsidizing enterprises which offer workplace to the unemployed. From a socionomic perspective, a decentralization of state obligations means an extension of normative policentrism by setting up non-state structures which can assume both social rights and duties. From a politonomic perspective, policentrism is supported by a ”modular policy”, a concept which was introduced by E. Gellner to define the flexible structure of political opportunities in forming (modifying) collective identities which are specific for modern societeis. Modular policy has first of all an ideonomic significance for it refers to multiple collective identities, mixes, interdependence and combinations thereof which influence political phenomena. Modularity – which is specific for territorial policies –socionomically determines legal policentrism because it imposes upon normative systems rules that are specific for ethnical, racial, sexual, professional and associative communities and that determine the so-called ”volatile colective identities”, according to Krieger’s terminology.

(c) Institutional policentrism

Multipolarity of normative services does not exclude the unique nature of regulating service standards; in this respect, we mention the right of government to exercise authority in maintaining uniformity (standards) services at national level, in domains such as: educational policy in France, the Austrian higher education system or the British social security system. *Politoarchea* illustrates the regulatory centres multiplication process which is determined by the political and legal decentralization process; the legal effect of this process is the legitimate possibility of each power centre to self regulate. Self-regulation politonomically represents a transfer of the state regulatory power towards institutions, basically local public authorities. Sociocracy (local political and administrative elites) will never give up the power that has been granted to them by the state; in this respect, the most important sector is the normative one. The state, in its turn, is interested in legal decentralization for avoiding political responsibility and transfering the task of social problem regulation to local level; multiplication of decision levels represents an insignificant cost in comparison with politocracy evasion. Thus, the welfare state yileds normative activity to local

communities or, more precisely, to local sociocracy; consequently, territorial elites (represented by politically appointed persons or by persons elected by the citizens, as well as by a part of the high officials) become directly responsible for local problems. *Politoarchea* destroys state monopoly over social regulation and it makes society a democratic one because it distributes decision-making power to lower levels. Although Robert Dahl used the concept of ”poliarchea” only with a politonomic connotation, as a form of public authority control over government policies (except for ideonomy and socionomy), one has to appreciate his contribution to defining procedural democracy. A form of ”structural” *politoarchea* has started to be more and more used as a consequence of legislative authority decentralization from the state to regions and other territorial administrative units besides transfering legal responsibility from governmental to the local authorities level. Structural *politoarchea* is socionomically legitimized by the fact that decentralization allows (self)governing institutions to be more democratic, on the one hand, and more efficient, on the other hand, thanks to subsidiarity. It is known that within a legal bureaucratised system the activity is pursued in conformity with the norms established by the central power, which hinders the evolution of law firstly because political management is limited to controlling conformity of institutions and the system and, secondly, because it limits institutional innovation. According to politonomy, normative authority decentralization is necessary for the rule of law state to function, that is why many governmental policies have as a political objective the transfer of the regulation right towards local authorities; from a socionomic point of view, one can notice that community normativity is more efficient if it is accomplished through citizen institutions, simply because it expresses the others' interests. Normative power decentralization does not anihilate the power of central authority but it distributes regulatory responsibility between different political decision-making levels. *Politoarchea* creates a systems of distributing legal responsibility between different public authorities, system in which a central authority is entitled to monitore the way in which local authorities ensure uniformity; obviously, citizens must be equally treated by the law and this requires a limitation of the regulatory power entrusted to local authorities.

Politoarchea has become an ”institution” as a consequence of the fact that regulatory power was decentralized leading to the multiplication of normative public institutions and services. The distribution of normative power is a reaction to the tyrannical state which dominates civil society and imposes legal formalism. According to the phenomenology of law, *politoarchea* illustrates the fact that the regulatory keynesian model, i.e. centralized control of social institutions from top level management to the lowest hierarchical level, is still being debated. *Politoarchea* is the reaction to a political voluntarism which imposes a one-direction conception as to public policies and the way they are implemented in order to obtain the effects a wholly integrated system expects to obtain. Abandoning trust to the superiority of the state centrist system is the socionomic effect of legislative decentralization and institutional deconcentration. Paradoxically, the state intended to apply deconcentration because it is the quickest method for implementing political decisions and the most permissive form of political control. Once institutions are deconcentrated, the state has lost the right and capacity to regulate more specific domains. It is obvious that a legal decentralization is preferrable to an excessive legal system that rejects any community regulatory form or method; however, refuse to centralized legal control implies the risk of setting up anarchy for this refusal is opposed to the state and it leads to organizing ad-hoc regulatory forms. In order to conciliate state legally formalized institutions with normative autonomy, some authors, such as J. Donzelot, suggested (without using the term) an institutional *politoarchea* (formal meeting) which would ensure adhesion of social partners to a certain normative system. These decentralized ”institutions” are an alternative to state formalism and allow original societies, regions and even individuals to exist so that social and economic problems could be solved. Phenomenology of law reveals that institutional *politoarchea* was first of all created in the sphere of ideonomy; if the meaning of ”public regulation” phrase was initially correlated to collectivity, subsequently the phrase was interpreted as signifying regulation no matter what form regulation takes. Secondly, from a socionomic perspective,

politoarchea illustrates the multiplication of regulatory services distribution criteria; initially, a public regulatory institution was preferred because it implied free of charge services; however, subsequently, institutions that offer paid services were preferred (because they proved to be more efficient) even if they were set up as private persons. Finally, at politonomic level, normative decentralization created a *politoarchea* of corporations; public notary services, as well as legal assistance / mediation / consulting services are examples of regulatory power distribution from the state to corporative level. From a phenomenological point of view, one can notice a movement away from centralized normative power to multipolary regulation forms, i.e. towards the policentrism of regulatory communities.

To the political phenomenology of law *politoarchea* is also very important; its forms are set up by formalized cooperation agreements concluded between different social structures in order to obtain common objectives, including in the domain of self-government. The idea of setting up a conventional *politoarchea* is present in Leopold Kohr's theory; according to Kohr the ideal of state organization creates a conglomerate of organizations, towns or smaller regions because they are more efficient and more creative than a huge state. According to Kohr, bigger states must transform into smaller ones which need to organize themselves as a federal system, like Switzerland, which has more equal and autonomous cantons. In its turn, R. H. Tawney pleaded for the radical democratization of society by dispersing power with a view to becoming aware of the "common welfare"; one of the ways in which power can be dispersed is regulating social and economic equality. Even if power must be concentrated, the process must be justified by "general interest". Tawney actually replaces the politonomic meaning of power with its ideonomic significance when he states that power is founded on the idea of "welfare" because power, understood as authority, can enjoy more legitimacy and social recognition in consequence.

Ideonomically, self-governing supports *politoarchea* because it ensures the autonomy of local collectivities; this significance is illustrated, *e. g.,* in common law, through the concepts of *local government* or *self-government.* From a socionomic point of view, the principle of self-government implies the decentralization of administrative and financial competences from governamental level to the local public administration authorities level. The socionomic character of decentraliztion derives from the fact that public power which is exercised by local authorities is circumscribed by a political convention, i.e. delegated (or separated) competences. In other words, the degree of decentralization depends on the limits imposed by politocracy. These *political* limits define the content of decentralization, the territory / population size, the volume of resources and autonomous authorities. According to the phenomenology of law, the vulnerable point of conventional *politoarchea* is represented by the fact that any transfer of normative attributions towards local collectivities – in the context of maintaining the right of the state to pass laws – cannot generate political effects.

Institutionalized *politoarchea* is characterized by the fact that it centralizes power and it decentralizes its execution function; in this respect, *legal centralism* is the most eloquent example for the way in which public authorities, services and institutions implement centralized normative state policy in the territory. Legal centralism illustrates politocracy, the effort of government members to elaborate and implement normative policies by which certain legal principles or values could be justified. One has to recognize that legal centralism was *avant la lettre* defined by Thomas Hobbes when he stated that without a sovereign a society faces anarchy; we should not forget that in Hobbes's society it was not possible to have a *non-legal* social control system; today we have this possibility thanks to the existing ways of imposing normative decentralization. Both social and legal norms constitute premises for social order, which means that institutional *politoarchea* must ensure the correlation thereof; first of all, because fair social norms mitigate the public authorities intervention for enforcing the law; secondly, laws which ensure social equity are more easily enforced; finally, because laws which satisfy social interests have more chances to be applied. *Politoarchea*, thus, requires the organization of decentralized institutions that would allow power concentration be maintained; even if an institution is set up in order to increase the efficiency of

political power, this institution does not survive unless it confines itself to concentrating its power. As Alan Minc points out, social factors (especially psyhological and cultural factors) play a more important role in establishing precedents than in expressing subsequent appreciations that might influence the individual's decisions (or the decisions of the social group) to avoid risks; economic factors are also important for the phenomenology of *politoarchea* because they direct the individuals' decisions towards low risk investments. Legal centralism obviously implies normative policies to be adopted at central level; however, this does not cancel the right of individuals or social groups to make decisions autonomously; for example, environmental regulations entitle enterprisers to independently choose their own methods for reducing pollution.

Conclusions

Politoarchea is limited as far as *deconcentration* is concerned because regulatory power distribution is accomplished at local level by means of public institutions which are meant to implement a unique political power and maintain legal centralism and because they are invested with decision-making power in a domain which is strictly legal. Deconcentration as a way of organizing administration allows politocracy to maintain its right to adopt decisions at central level, including the right to adopt power-like prerogatives, to appoint or remove from office those in charge with the running of different institutions and deconcentrated services, to impose compulsory obligations on the institutions in the territory, to control or even to be subject to the activity pursued by these institutions etc. It is obvious that these institutions cannot be defined otherwise than politonomically since from a socionomical point of view it is difficult to justify the functionining of similar institutions while there are different legal regulations. *Politoarchea* grants a local institution the power to legally regulate at territorial level though politically this institution is subject to central power. *Politoarchea* implies institutional deconcentration since politonomically it illustrates the right of politocracy to set up its legal institutions.

The most illustrative example is the right of central authorities to appoint political persons in managerial positions within public institutions; governments appoint *representatives* in the territory to coordinate the deconcentrated public services for central administration. This *leadership* concept has, from an ideonomic perspective, a political significance since the prefect, e.g., exercises his authority in the name and interest of accomplishing the government political programme. *Politoarchea* illustrates the political transfer of social (state) leading powers at the level of communities in conformity with the existing legal norms and procedures. Socionomically, a decision adopted by a public local authority generates legal effects on the whole collectivity though it is not issued by a sovereign authority but by a local public authority: land assembly, regional committee, county or local council, etc. Politonomically, the interpretation, amendment or application of law is a formal positive legal source thanks to the political character of local autonomy and not to the legal character of self-government.

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INNOVATIVE DELIBERATIVE DEMOCRATIC APPROACHES IN TRANSITION: THE CASE OF UKRAINE

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Abstract
The article dedicates with the problem of deliberation democracy mechanism formation and development, especially for post-communist countries. Moreover, some opportunities for deliberation development according to intellectual capital of public administration are observing.

Keywords: *deliberative democracy, democracy deficit, intellectual capital of public administration, post-communists countries*

Introduction

Nowadays under the conditions of socio-economic downturns it seems so, that the democratic triumphalism that took place since the collapse of the Soviet system is almost over.
However, we need to underline that examples of Arab uprising are about seeking of and looking for a democracy, so it is still the organizational model that many countries aspire to, but of course, it has its problems and limits. A lot of scholars argue that today we have a "deficit" in developed democracies (M. Warren and H. Pearse, 2008). And we can clarify such "deficit" with a lot of examples but one of the most biggest debates in this sphere was when the EU constitution project encountered opposition, and practices and scientists attributed that to a democratic deficit in EU institutions.

And of course, such question becomes again very actual in times of economic disturbances.

So we need to find a way how to "repair" our democratic institutions and one of the most popular trends in political science now is the model of "deliberative democracy", which is currently becoming the fastest growing trend in the field.
The concept of deliberation, of course, is not new. We can remember for example, Aristotle, who argued that ordinary citizens debating and deciding together can reach a better decision then experts acting alone (A.Gutmann, D. F. Thompson, 2004).

Moreover, Athenian direct democracy - is practically the only one case in the history when the state was running by not elected representatives, but the majority of citizens.

Of course, Athens was a typical slave state, where the dominant part of the rights, including the right of lawmaking, belonged only to citizens. Direct democracy in a such form was possible primarily because a limited population of the city-polis (even in times of prosperity, the population of such independent cities did not exceed 25 thousands of people)

With such a small population, it was very easy to organize a general assembly, and conduct voting just by show of hands, moreover it was simple calculated.

History of the Athenian democracy shows that direct democracy is possible only where citizens can freely communicate with each other in real time. Technical possibilities did not allow such activities in communities larger than a polis, but in the XXI century, because of new forms of

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communication inventing, it becomes more possible to implement some elements of direct democracy.

But we cannot associate an Athens direct democracy and deliberation democracy, en rapport of all differences of ancient Greek regime.

Historically, for the first time, "deliberation" as a term was used in 1489 to refer a political discussion and further developed mostly in the UK, specially as parliamentary discussions (for instance, Edmund Burke in his "Speech to the electors of Bristol" mentioned that "Parliament is a deliberate assembly" (Payne, 1990)).

In future, the concept of "deliberation" was used by many political scientists, sociologists and philosophy scientists and scholars. But only in 1981 the term "deliberation" was used together with definition of "democracy". It was in the work of Joseph M. Bessette "Deliberative Democracy: The Majority Principle in Republican Government."(Bessette, 1981)

Hereafter, the number of scientists working with the theory and models of deliberative democracy is tremendous.

The main goal of this paper is to analyze examples of the deliberative democracy in the "old" democracies and countries in transition and to develop some proposals for its inoculation in such post-communist state as Ukraine.

In my work, I will adhere to such aggregate definition of deliberative democracy such as:

"Deliberative democracy is a systematical approach where citizens (not just experts or politicians) involved in public decision making and problem-solving, can produce collective decisions by offering reasons to one another for the sake of consensus, or perhaps to illuminate conflicts". (Fung 2005, Parkinson 2006).

So, how deliberative democracy is used in the "old" democracies and how they fill the democratic deficits? Such deliberative instruments can be: participatory budget; citizens assembly, deliberative polls etc.

For example, in the US, the Minneapolis Neighborhood Revitalization Program (Fagotto and Fung 2006), was an effective instrument (participatory budgeting) to solve local problems, increase cooperation between authorities and citizens (so improve a democracy through improving people participation) and in a result to achieve a real goals of local communities (local development). In the British Columbia citizens assembly example (Warren and Pearse2008), we can see, how such efficient process as elections, can be under discussion of common citizens. In AmercaSpeaks case, we can observe that even such technical decision as decreasing of country debt deficit proposal can be produced through people participation in deliberation process.

In general, deliberation and deliberative democracy can significantly increase a level of people political literacy; expand level of participation and credibility between authorities and citizens.

Timelines of topic

But the question of deliberation and deliberative democracy is actual not only for "old" democracies, but also its implementation can be very important for countries where democratic institutions are not so strong and must be improved. Especially, it can be very important for post-communist countries. However, deliberative democracy practices are spreading in non democratic societies, for example China. And even here, according to the deliberative democracy instruments, we can solve a current problems of local communities (for example – see deliberative poll in China, Fishkin, He, Luskin, Siu 2010).

Today, it is clear that the political development of post-communist countries can go in many different directions. Considering the post-communist and post-soviet landscape, we can observe examples of consolidated democracies (mostly successful, for example Poland, Hungary, Czech Republic etc.), some new authoritarian states (Russia, Kazakhstan, Uzbekistan), dictator (Belorussia)

regimes and a number of hybrid regimes (Morlino 2009), "stuck" in the transition process (Ukraine, Kirgizstan, Armenia, Moldova).

In some countries we can observe the final steps of liberal democracy consolidation, in others – democratic institutions are combined with non-democratic, authoritarian, in the third - the formal democratic procedures are used as a facade behind which new varieties of autocratic rule are hidden. By themselves, the political institutions, even if they are designed for optimal democratic scheme do not guarantee the success of democratization (examples of this we can observe in more post-communist countries, in Ukraine for instance). A stable and consolidated democracy is not only an institutional framework, in addition to procedures, it should be based on certain structural foundation for the supporting socio-economic system rooted in society and the norms and values of democratic citizenship, in, special kind of "social capital" (see, for example. Inglehart 1999).

Deliberation could not replace a democracy itself, but can be an effective instrument of its improving.

Analyzing the experience of leading democracies (for example, for the US, we can refer to the long tradition of self governance reflected in the New England town meetings, as documented by Tocqueville) and successfully transformed post-soviet and post-communist countries (for example in Poland), we can underline that one of the most important factors of their development is implementation of deliberative democracy instruments. In Polish case, we can remember that even first Polish post-communist constitution was successfully adopted mostly because of efficient deliberation among citizens were the first role had “Solidarność” and church.

Can an implementation of deliberation mechanisms in such a system be a real driving force which helps these countries into a way of transition to democracy?

Why is it so important to concentrate our attention in deliberative democracy in analyzing post-communist countries in general and in Ukraine particularly? I can provide here some my ideas:

It is a first world example when more than 25 countries together began a transition to democracy (and for most of them such process was successful. Here the main difference from post-colonial African transition, was that this transition mostly failed)

Post-communist countries which were definitely similar before the process of transition to democracy today are very different especially from the level of democracy institution development. Here we can observe such examples as “triple” transition, like in Poland or so even “quadruple” transition, like in Ukraine (Kuzio, 2001);

In many post-communist countries the level of public institution support is very low (especially in Ukraine. According to the last enquiries, the general public support for state government – 22.9%; Parliament – 18.7%; police – 17.4%; courts – 14.3%, for details see http://www.spa.ukma.kiev.ua/konst/article.php/20110311134938704/print), so deliberative democracy in such countries (because of wide people cooperation) can justify citizens decisions and improve legislation and accountability.

Implementation of deliberative democracy instruments will significantly improve the level of political education among citizens and create a strong “social network” (Diani & McAdam 2003) in society. The deliberation process probably could not create new democratic values but no doubt, can increase moral satisfaction and agreement among people.

Historically in Ukraine, we can observe a lot of examples of direct and deliberative democracy.

To begin with, establishing of certain democratic traditions were consistent to the nature of European political evolution in Ukraine during the Kievan Russia state (IX - XIII cc.) It was expressed in the form of concluding agreements with the newly elected knyazh (prince) and when he took nationwide oath.

A nation-wide candidate for the knyazh throne "calling", is a practical implementation of the formulated much later, idea of national sovereignty, because the community here is the source of power 24.

Moreover, in the Kievan Russia, as a form of direct democracy, a veche (town's meeting in medieval Russia) was existing. However, slavic tradition of veche is difficult to identify with the ancient tradition of the national assembly not only because of extraordinary role of veche, but also because of poor process handling and the unpredictability of its results and consequences, which sometimes had a radical nature.

During the Cossack Ukraine (XVI - XVIII century.), the general government was a military council - "meeting of all troops." It convened to address critical issues, elections of Hetman, General Government, etc. In this way direct military democracy was working. In general, this mechanism of direct meeting of all troops was working fairly effectively.

Moreover, we need to underline that all officials that time were elected and accounted for their activities to voters.

By the way, in this time, the most European states were absolute monarchies and often have very limited self-government even at the level of local communities.

So in the days, when Ukraine was the sovereign state (IX - XIII century, XVI - XVIII century), it tended to establish a democratic system and often the level of democracy was ahead the most European states.

Ukraine was among the first countries where a constitution was adopted and the absolute monarch sovereignty was rejected. This was realized by the P. Orlyk Constitution (1710), so it was for 73 years earlier than the adoption of the American Constitution. Unfortunately, its provisions were never implemented in practice.

In current independent period (post-soviet), deliberation democracy system did not become a permanent effective system of country political live development.

However, deliberation mechanism in Ukraine was considered as very necessary, especially after “Orange revolution” (2004). For instance, in the White Book (official document about the democratization of decision-making process, prepared and published by the Secretariat of the Ukraine Cabinet of Ministers in 2006), one of the main problems and obstacles in transition to democracy was recognized as the absence of a citizen involving mechanism in the management of public systemic issues through consultation. And after this conclusion some elements of deliberation democracy were implemented. Here I can mention such examples as creation of civil boards at all ministries. With their assistance, a big part of legislation were modernized and transformed according to EU practice (for instance: "The law on the police", "Law on the Prosecution" etc.) Moreover, at more local level, were create a lot of citizens boards with voting privilege. But with new president (Yanukovich), mostly of those boards were disbanded. Why? The civil society in Ukraine is rather fragmented; ties between its separate elements are not wide enough and not intensive enough. This may be a reason why civil society is not ready for constant dialogue, furthermore - for equal partnership cooperation with the government. And for today the position of civil society in Ukraine cannot be clearly defined. From one side, civil society exists and functions in the tideway of democratic developments of last decades. From the other side – it is still too weak to fulfill its functions to the utmost, to guarantee real involvement of citizens to formation of national policy.

Furthermore, in Ukraine (like in mainly of post-communists countries) there is a lack of theoretical and methodological deliberation framework, taking into account national peculiarities of local conditions and fast changes. This together with inadequate regulatory framework is one of the main problems of deliberative democracy development.

Differences appear sometimes even in very similar practical cases, for example, in Poland according to Euro-2012 preparation, deliberation polls were conducted (For example, deliberative Polling in Poznań consulted the public about the future of the stadium, a major investment connected to the city’s preparation for the EURO 2012 tournament. Therefore, a decision was made to subject the long-term strategy of managing and financing the facility to public consultation[2]) and in Ukraine, which will host the same championship too, such activities were ignored absolutely.

In fact, even in nowadays deliberation is not new for post-communists countries, but this process can be fundamentally different not only from stable democracies examples but even from post-communist countries realities. Moreover, we can observe many examples of deliberation but not deliberative democracy. For instance, previous Kyrgyz President Kurmanbek Bakiyev announced in 2010 a shift from a democratic form of government based on elections and human rights to «national deliberative democracy". As Bakiyev said: " in our kurultai, which is enriched by people's views and opinions, I see a pattern to deliberative democracy....elections are nothing more than a "marathon-for- oligarchs"...the ideology of human rights gives rise to individualism and selfishness, which leads to a decline of public morality..." (Artemjev, 2010). According to his idea, the main legislative body of such system should be kurultai (regularly meetings of patriarchs).

But such decision brought to dissatisfaction of local political elites, so experiment broke down and was one of the reasons for further revolution [1].

Conclusions and proposals

The experience of leading democracies showed that deliberation democracy mechanism can help the public administration institutes and private sector to launch an effective and long-lasting cooperation system and improve credibility and legislation.

However, during the transition to the "knowledge based economy", we need to use new methods for deliberation too.

We propose to undertake research in the area of deliberation process, especially on the basis of the intellectual capital system creation and development in public administration. Even if we are used to mentioning intellectual capital theory from the economics point of view, it can be very important in the sphere of public administration development, especially at the process of cooperation between private and public institutions. We can formulate such definition:

Intellectual capital of public administration - the sum of all the knowledge, information and experience of a public body, workforce that can create new knowledge, wealth or provide competitive, efficient and new services (or its modernization). Such new knowledge, which includes both tacit and explicit knowledge, grows with the learning process that takes place within the organization and as a result of the shared interactions between the company and its customers, partners and suppliers. It is an aggregate value and consists of three main elements: human capital, organizational capital, capital of relation.

For public non-profit organizations, this effort has special potential for increased productivity. This is so for several reasons. These sectors are human capital intensive. Human capital is the primary source for organizational innovation and renewal. Finally, we are acquiring a better capacity through ongoing brain research to tap this potential resource.

There are a lot of differences in such mechanism creation and implementation, according to national specifics.

For Ukraine such mechanism (and elements of it), in particular, can be:

At the level of villages and towns (micro level):

- election of the district police officer (sheriff) in rural areas (U.S. experience) as well as some other positions on local and district level, for example such as: district surveyor, medical superintendent, and a heads of others public utilities (equivalent experience of zemstvo (district council in Russia in 1864 - 1918) in the Russian Empire);
- electivity of local judges (U.S. experience);
- reducing the number of village and town councils deputies, together with recall and the mayor "direct impeachment" mechanisms implementation (domestic experience of military democracy *XVII ct.*).
- the abolition of district councils in rural areas and their replacement by voluntary cooperation of local communities (Czech experience);

• development and introduction of regular public discussion about important projects decisions at the local level through modern processing facilities and transfer of information (the experience of Italy and the UK);

• introducing the practice of mandatory accountability of local elected official (the experience of many European countries).

At the city level:

• strategic decisions for regional development must be based only on local referendum;

• creation of the municipal police and a electivity for city level officials implementation (for example, chief architect, chief of public enterprises etc.);

• introduction of regular reporting of elected officials.

At the regional level (except the Autonomous Republic of Crimea):

• "governors" electivity (experience of U.S., Russian Federation etc.);

• rejection of the proportional election system for regional councils.

At the national level:

• improve the mechanisms of national and local referendums, in particular - working out the mechanisms of constitutional referendum and deliberate (national and local) referendum (experience of Switzerland, Italy, Great Britain);

• recognition of the referendum as prescription of direct action, that does not require any implementation (experience of many democratic countries);

• introduction of a new mechanism of judges and courts officials election for all levels (judges of first instance courts can be selected by local residents (according to the jurisdiction of these courts). Heads of courts and judges of higher courts can be chose by judges);

• significant expansion of ombudsman rights for the abolition of regulations and judicial decisions which violate human rights;

• introduction the position of locally elected ombudsman;

• reducing the number of parliament members (MPs);

• reducing the term of Parliament, local councils and elected officials (except the President of Ukraine) to 2 - 3 years;

• development and implementation of electronic voting and other activities aimed at reducing the cost of citizens voting, and in parallel - decreasing the probability of technical fraud;

• establishing a system of voters' evaluation for activities of executive authorities and their officials (civil servants) who are appointed (experience of the EU);

Moreover, for more effective implementation of deliberative democracy elements in Ukrainian realities, we need to provide some activities in the economic sphere too. It can be, for instance:

• promotion of the "middle class" position by giving priority for small business and self-employment developing and supporting by the state (EU experience);

• transition to the socially oriented proportional income tax system (specially for enterprises, on the principle: greater profitability - bigger tax rate (experience of Scandinavian countries);

• strengthening of governmental control over big business and monopolies on the domestic market an in parallel – to increase state support for Ukrainian business on foreign markets;

• implementing a real estate tax, increasing of land tax (rent).

Notes

Here I mean a “Second Kirgiz revolution” in the 7-th of April, 2010 after which president Kurmanbek Bakiyev escaped to Belorussia.

The first deliberation pool was conducted in Poznan (Poland), where local inhabitants discussed the possible uses of a stadium and infrastructure at the conclusion of Euro 2012

("Poznaniacy decydują o przyszłości stadionu" - http://poznan.gazeta.pl/poznan/1,36037,7281267, Poznaniacy_decyduja_o_przyszlosci_stadionu.html, the date of last access – 10/12/2011);

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THE SOLUTIONS OF EURO ZONE CRISIS – A NEO-GRAMSCIAN CRITIQUE

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Abstract
This paper belongs to the area of critical studies of European Integration and tries to analyse the nature of the European states' response to euro zone crisis, during the negotiation of European Fiscal Pact. The theoretical approach is neo-gramscianism, which is focused on social forces agency in the process of integration and super-structural dimension of European Single Market. Since 1980, the interests of big capital, gathered in the European Round Table, shaped a neo-liberal dimension of the European economy, adapting it to the context of globalisation.
But this neo-liberal project was also able to capture social-democratic, trade union and centrist demands into a neo-liberal European order, called by Bastiaan van Apeldoorn "embedded" neo-liberalism. This European model has also his limits because it puts the interests of capital in front of social policies through the assurance of market efficiency by EU. My purpose here is to see if during nowadays crisis, the European elite will apply the same economic principles of the embedded neo-liberalism trying to envisage rescue plans. To achieve this, I will follow the theoretical approaches of neo-gramscian authors like Apeldoorn, Bohle or Gill and analyse the state negotiations outputs during the European Council meetings.

Keywords:*European Integration, neo-gramscianism, European Fiscal Pact*

Introduction – The limits of classical debate

In the beginning of this article I will try to argue the necessity of a new theoretical approach in the field of integration studies. I am going to do this by showing the limits of the classic and middle-range theories, and how they fail to explain the process of European integration as a whole. The proof could be seen in the evolution of those theories. "When the integration process was going well, as during the 1950s and early 1960s, neo-functionalists and other theorists sought to explain the process whereby European integration proceeded from modest sectorial beginnings to something broader and more ambitious" (Pollack 2010, p. 17). But between 1960s and 1980s, when due the petrol crisis European integration lost its strength, "intergovernmentalists and others sought to explain why integration process had not proceeded as smoothly as its founders had hoped" (Pollack 2010, p. 17).

The main critique of the mainstream theories[2] is that, because of conceptual design, they are unable to understand the real nature of power in the European Union, and by this I mean that they cannot conceptualize the power relations which are part of capitalist market structures. "In other words, these mainstream theories fail to account for the *structural power* that determines the particular trajectory of European integration"(Apeldoorn, Overbeek and Ryner 2003, p. 17).

Neo-functionalism, with Ernst Haas as the main author, represent the dominant approach in 50's and 60's and state that European integration occurs because of supranational institutions, European bureaucracy and spillover process. The idea is that, once established, the new institutions tend to modify the interests, beliefs and expectations of the socioeconomic national actors which shall unite at supranational level (forming European interests groups) to influence European policies, supporting in this way the continuity of integration process (Apeldoorn, Overbeek and Ryner 2003,

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[2] The mainstream theories are neo-functionalism, intergovernmentalism and liberal intergovernmentalism.

p. 21). Here is the first critique of neo-functionalism - that it cannot focus on the internal and external power of those groups - and because of this it cannot understand why some groups are more powerful than others in the process of establishing European Agenda (Apeldoorn, Overbeek and Ryner 2003, p. 22). Even if it recognises their existence and importance, this theory is not able to offer many details about the nature of groups. Another problem of the supranationalism in general is that many aspects remain under-theorized. For example, "there is no explanation of where transnational interests come from and why they would be so powerful" (Apeldoorn, Overbeek and Ryner 2003, p. 23), and this is possible because no explanation of how social forces shape socio-economic environment is available.

Intergovernmentalism, represented by Stanley Hoffman, is a European integration theory with the roots in international relation realism. Hereby, state interests are determined by the balance of power from the international anarchic system, while inside it is still a *black box*. The critique here is that "These national policy preferences are, however, not explained, but are taken as given" (Apeldoorn, Overbeek and Ryner 2003, p. 23).

The liberal intergovernmentalism of Andrew Moravcsik opens the state black box, establishing a theory of the national preferences formation. The nature of European integration can vary "depending upon which domestic groups are more successful in setting the agenda in the respective states" (Apeldoorn, Overbeek and Ryner 2003, p. 24-25). However, Moravcsik analyse does not go beyond the weaknesses and power of what he calls *production groups*, although it is obvious that they are favoured in front of consumers, tax payers or third world producers. In other words, "there is no interest in the structural inequalities that are constitutive of the balance of social forces and how these forces change over time" (Apeldoorn, Overbeek and Ryner 2003, p. 25). Theory is bounded by state-society relations, without consider any historical approach about the emerging of social relations. Another problem with the Moravcsik theory is that "social forces are contained within the boundaries of national states" (Apeldoorn, Overbeek and Ryner 2003, p. 25-26), almost an impossible issue in a European society more competitive and integrated in global economy.

The new approaches of European integration, middle-range theories, are by definition excluded from my analysis. "As the name suggest, middle-range theories do not have totalizing ambitions; they seek to explain aspects of a phenomenon rather than its whole" (Rosamond 2010, p. 108). My aim in this article is not to describe aspects of European integration, but the entire process. According with this, middle-range theories are no longer relevant.

The necessity of a new theory

The limits of the classical European integration theories have been located by Marxists authors since the European Community started to function. I would like to remember here Ernest Mandel, Nicos Poulantzas or Peter Cocks. The most important of them, in my opinion, is Peter Cocks due his article "Toward a Marxist Theory of European Integration" written in 1980. In this article, he tried to discover if and why integration occurs using a historical analysis of the capitalist development.

His analysis begins with a critique of the orthodox integration literature which is called fundamentally ahistorical, because of its incapacity for providing an adequate account of the roots of nowadays European integration. "Consciously or not, they avoided the question of whether integration is qualitatively different in different socio-economic formation, why it emerges at some historical periods and not others, and what the connection is between different levels of integration in distinct social systems" (Cocks 1980, p. 2). Following these basic questions, the duty of Marxist scholars is to investigate why specific patterns of integration arose in specific European eras. Cocks is trying to do this and state how those social, political and economic integration dynamics are shaped by the capitalist system. The configuration of these three phenomena, in time, "depends at minimum on the specific phase of capitalist development, the technological and administrative state

of knowledge, the level of political consciousness of the masses, and the perception and activities of the dominant political and economic classes" (Cocks 1980, p. 35).

Since its beginning, capitalism presented distinct practices like: working in a wage system, private ownership of the means of production or the fragmentation of life. But more important, it created an ideology to justify its activities and to maintain its power structure. "The bourgeois mind thus to endorses individualism, the holding of private property, market relations, acquisitiveness, competition and profit, which are incorporated as values in everything from law, to education, to religion, to literature" (Cocks 1980, p. 35). Gramsci calls this "ideological hegemony" and it represents the next step for my research.

The neo-Gramscian theory continues the Marxist tradition in European integration studies and focuses on two central concepts: super-structural[3] dimension and social forces agency. It tries to capture a real picture of the integration by showing the real forces which shape the European decision-making process (market forces) and the nature of ideological hegemony.

Adam Morton, a neo-Gramscian author, wrote that "hegemony within the realm of civil society[4] is then grasped when the citizenry come to believe that authority over their lives emanates from the self" (Morton 2007, p. 93). Further, the dialectical relation between economic structure and ideological super-structure produces, as Gramsci state, the historical bloc. In classical Gramscianism, the historical bloc is the alliance between working class and bourgeoisie realized through the cultural hegemony. In nowadays European Union the ideological hegemony is represented by neo-liberalism. But as I already mentioned, this specificity of super-structure should be based on a specific arrangement inside of the economic structure, which is shaped by social forces.

The social relations, or force relations as Gramsci called them, are in fact relations between different social groups. Thus, the relations of force operate on three interconnected levels: structural[5], political[6] and strategic[7]. Methodologically, the object of the analysis is *historical situation*, and the method of analysis is the observation of force relations (Gill 2003, p. 51). In other words, the dynamic of force relations produces certain historical events. For example, it is difficult to elaborate a general theory which could explain in the same time the emergence of the European Community[8] and European Union[9]. To conclude, those social forces are in fact market forces like: lobby groups, banks, corporations or even unions.

Taking into consideration all this concepts, European integration process can be analysed using the relation between structure and super-structure[10]. The economic structure is understood here as being shaped by the social forces agency, while the ideological super-structure is characterized by the neo-liberal model.

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[3] In Marxist theory, structure engulfs all the social relations of production, or the economic base. Super-structure symbolizes the effect of economic arrangement of a society in ideology – ideological super-structure.

[4] Gramsci divides the society in two parts: civil society and political society. "Political society includes the public sphere of government, administration, and law and order, as well as security. Civil society includes those elements normally considered private, such as free enterprise, political parties, churches, and trade unions" (Gill 2003, p. 65).

[5] It represents the formation and alignment of groups in relation to production. "This enables the examination of the question of whether *the necessary and sufficient conditions exist in a society for its transformation*"(Gill 2003, p. 51-52).

[6] "This involves an assessment of the degree of homogeneity and political consciousness among different classes and political groupings"(Gill 2003, p. 52).

[7] "This primarily involves the relation of military forces, which from time to time is immediately decisive"(Gill 2003, p. 52).

[8] It was established by the Treaty of European Coal and Steel Community.

[9] It was established by the Treaty of Maastricht.

[10] In classical Marxism, structure determines super-structure. But many neo-Marxists show that also the super-structure can influences many changes in the economic structure of the society.

"Embedded" Neo-Liberalism

For a better understanding of the embedded neo-liberalism, it is necessary to go back in the history of the European Union. Thus, we can find out two periods defined by two different historical blocs. The first one, characterized by the Fordist[11] type of capitalism, is known as Keynesian period "during which the general European regulatory framework—as defined by the Treaty of Rome and subsequent directives, regulations and decisions—primarily aimed at supporting national socioeconomic models and their development by providing an advantageous, growth and employment-friendly economic environment" (Bieling 2003, p.205). Since 1970s and 1980s, with the project of Single European Market, it was obvious that the old economic structure was changing. Then, Keynesian policies were being replaced step by step by "a new, more aggressive configuration, which basically is neoliberal, i.e. in favour of broadened and intensified market competition and monetarist anti-inflation and austerity measures" (Bieling 2003, p.206). In other words, the nature of the new economic model - neo-liberalism - is based on a reduced state intervention and a freedom of market forces.

The question now is whose interests were behind Single European Market and its neo-liberal model? The answer is simple and lays in the Gramsci concept of force relations. It is well known that neo-liberal restructuring of the European Union was possible because of European transnational corporations. "These forces, in close co-operation with representatives of the European Commission, often bypassed national governments in designing the next steps of European integration" (Bohle 2003, p. 20). The most important transnational market force was probably European Round of Industrialists (ERT), a business group founded in 1983 which contains the representatives from the biggest transnational corporations. "Through intense lobby activity at national and supranational levels, regular official meetings with the highest EU representatives, and strategic reports on burning issues of European integration, ERT has acquired privileged influence in European policymaking" (Bohle 2003, p. 21).

Using neo-Gramscian theory, it becomes clear how a historical bloc, who wants to establish the hegemony of transnational capital, is pushing forward for the European integration dominated by a neo-liberal model. "In Western Europe, social-democratic political forces, organised labour and political forces of the peripheral countries have been incorporated into the historical bloc, albeit in a subordinated position. As a result, a precarious hegemonic constellation of 'embedded neo-liberalism' has emerged"(Bohle 2006, p. 78). This embedded neo-liberalism has been understood by other authors as the European socio-economic model, something that separate the old continent from the other economic models of the world, something that make European Union unique.

Another interesting point of view comes from the founder of the concept, Baastian van Apeldoorn. He claims that "embedded neo-liberalism is here seen as a *hegemonic* project inasmuch as it seeks to advance neo-liberalism through a strategy of incorporating, and ideologically neutralizing, rival projects"(Apeldoorn 2009, p. 22). But there is also a contradiction between social policies and freedom of capital, both being included in the same European hegemonic project. Further, this contradiction has its mirror in the nature of the European multi-level governance. Thus, the process of European integration has created "a *supranational* internal market (and later a monetary union), thus transferring 'policies promoting market efficiencies' to the European level, whereas policies 'promoting social protection and equality' have remained at the *national* level" (Apeldoorn 2009, p. 26).

This structural arrangement of European internal market, understood as the asymmetric governance of the embedded neoliberal European order, "makes states adopt supply-side oriented national competitiveness strategies, which, rather than offering any shelter from the discipline of the European market, promote a thorough neoliberal socio-economic restructuring" (Apeldoorn 2009, p. 27). The result of such strategies is an economic nationalism race where member states are

[11] Gramsci called Fordism, the economy based on mass production (assembly line).

competing to provide the best conditions for the mobile capital. It means that social policies are occupying the second place in the states preferences.

The European Fiscal Pact

In this part of the article I will analyse the nature of the European states' response to euro zone crisis. I chose this case study because it is the most recent of European legislative act and because it is a reaction to the global crisis. Thus, I will focus on reform measures of the European economic governance which appears as a necessity to save and consolidate European single currency. All of those changes were implemented because European Union is not a state, and it doesn't have competences in fiscal policy: "cannot redistribute resources, issue state bonds, print money and it has no sovereign tax basis" (http://euobserver.com/7/114308).

To avoid a fundamental change of Lisbon Treaty, European leaders managed to sign a new international treaty of euro zone, where not all the EU countries are involved. "The new treaty - an intergovernmental agreement after the UK last month refused to allow full EU treaty change - is supposed to calm markets by forcing its signatories into improved budget discipline" (http://euobserver.com/82/114787). On the 30 January all the EU member states, excepting this time United Kingdom and Czech Republic, have agreed on a final form of the new Treaty on Stability, Coordination and Governance in the Economic and Monetary Union. "The Treaty aims to strengthen fiscal discipline through the introduction of more automatic sanctions and stricter surveillance, and in particular through the *balanced budget rule*"(http://www.european-council.europa.eu/home-page/highlights/the-fiscal-compact-ready-to-be-signed-(2)?lang=en).

In order to have a better image on the treaty reform, I will detail the main changes regarding fiscal dimension. The economic convergence and governance specifications will be skipped because of the low relevance for my conclusions.

The general budgets of the governs should be balanced or in surplus; to respect this principle, the structural deficit should not exceed 0,5% from GDP. In other conditions, member states shall propose a self correction mechanism based on European Commission principles.

If the Commission notices that a country deficit exceeds 3% there will be automatic consequences. Only the majority of the euro zone could cancel the decision of European Commission.

The public debt of the member states should be under 60%, otherwise another correction mechanism should be enforced. (European Union 2012, p. 5 - 8)

All of those measures become obligatory for the participant states because of the Court of Justice involvement. For example, the treaty specify the "obligation to transpose the "Balanced Budget Rule" into national legal systems through binding and permanent provisions, preferably constitutional, should be subject to the jurisdiction of the Court of Justice of the European Union, in accordance with Article 273 of the Treaty on the Functioning of the European Union" (European Union 2012, p. 2).

Considering now the purpose of this treaty, it is supposed to be designed to "promote conditions for stronger economic growth in the European Union and, to that end, to develop ever-closer coordination of economic policies within the euro area" (European Union 2012, p. 1). In other words, through budgetary discipline, a better coordination of economic policies and improved governance in the euro area, the treaty is set to support "the achievement of the European Union's objectives for sustainable growth, employment, competitiveness and social cohesion" (European Union 2012, p. 4). Beside economic austerity measures, the social purpose is also present in the text of the treaty.

The main question is now, why was this fiscal union so important? Why was it forced to pass negotiations even if UK and Czech Republic were set to stay away from it? The rush to adopt this document was obvious and contrasts all the history of dialogue and cooperation in the EU. The stake was clear: "if the euro zone were to break up, many German and French banks would collapse, hence

the Franco-German push for fiscal union" (http://roarmag.org/2011/12/eu-summit-uk-fiscal-union-banks-city/). Germany has pointed out that short time bail-outs do not represent a real solution, but a long-term overhaul of the rules. "Germany is using market turmoil as a cudgel to force more spendthrift European countries to adjust to their straitened circumstances by reducing spending and ushering in a period of austerity"(http://www.nytimes.com/2011/12/10/business/global/european-leaders-agree-on-fiscal-treaty.html?_r=2&ref=global-home).

By adopting this plan, German chancellor Angela Merkel, propose an austerity club defined by balanced budget rules inserted in every national constitution. "Germany, now the indisputable European hegemon, will use this fiscal union to extract full repayment for its banks, while London can freely position itself as an offshore banking paradise"(http://roarmag.org/2011/12/eu-summit-uk-fiscal-union-banks-city/). Uniform application of the budgetary discipline could instead have deep implications for Eastern Europe, locking the periphery into a permanent depression. The former socialist states would not have the economic tools, as well as strength, to compete with a more developed Western Europe.

I can conclude that, for this situation, the European banks are the main force in shaping the integration process. The problem was never in the public spending of peripheral countries but in the private lending of core banks. "With hundreds of billions of Euros in excess liquidity sloshing around the system, French and German banks greedily bought up Greek, Portuguese and Italian bonds and pumped truckloads of foreign capital into the Irish and Spanish housing markets" (http://roarmag.org/2011/12/eu-summit-uk-fiscal-union-banks-city/). Paradoxically, in a global crisis created by banks, states support and work with banks to maintain a neo-liberal economic system.

Conclusions

European Union finds itself today in a very difficult point of its existence. The Single European Market and the European Monetary Union, established after the Maastricht Treaty, drove European integration on a historical path that could not be modified due to the big pressure of transnational capital. The analyse of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union reveals that neo-liberal super-structure, shaped by the agency of the social forces like corporations or banks, is still the pillar of the European historical bloc. Even more, during the global financial crisis provoked by American banks, when euro zone confronted the biggest challenges from its short history, the general answer to those problems was more austerity.

For example, the budgetary discipline imposed by the new treaty could lead, in the internal affairs of member states, to austerity measures. The reduction of public spending, just to achieve some budget benchmarks, can raise unemployment levels in the public sector and reduce investment in infrastructure. The hegemonic way is simple: states and European Union should do everything to assure the best condition for the private sector, no matter what the costs are. But, as I said, if they maintain the best condition for the capital, they could disadvantage the social groups already touched by financial crisis: the poor people (who survive because of state social services) and the workers from public sector. This reality sounds like a paradox, but Gramsci's thought teaches us that this is just the result of a neo-liberal successful hegemony.

On the other hand, Apeldoorn embedded neo-liberalism is also present in the new treaty, through social purposes like sustainable growth, employment, or social cohesion. Those aspects show its hegemonic nature which is trying to encompass the socialist political dimension of ensuring prosperity, facilitating freedom of capital. But, as I already mentioned above, the primacy of capital remains the main characteristic of the treaty reform, validating Apeldoorn's arguments. I conclude this article saying that if the neo-liberal way was adopted as the only way possible to solve the crisis, it means that its hegemony succeeded. This conclusion comes to solve a recent debate in the field of European critical studies, which question whether or not the neo-liberal hegemony managed to establish the nowadays European historical bloc.

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THE PRESSURE GROUPS RELATIONSGIP IN THE ROMANIAN ENERGETIC SECURITY PROBLEM

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Abstract
Romania and the European Union started to accord serious attention to energetic security for just a few years. Although the United States warned the European states that they can become energetically dependent of USSR and later Russia, these ignored the national security.
In 2004, with Traian Basescu's rise to power, we can say that Romania elaborated a serious energetic policy, which is updated in accord with the growing changes that intervene on the gas market and in a geopolitical context.

Key Words: *energy, strategy, legislation, alternative sources, securitized subject*

Introduction

The energetic security is an annalistic theme that has existed for approximately ten years in the spotlight of the institutions in the domain, of the European Commission's administrative states, even though in the 60s commercial contracts of exchange with the natural gas subject were signed. The subject became of increasing importance due to the fact that observations were made about a correlation between the supply transport of raw materials and the political and economical advantages won by those who uphold the raw materials and transport. The dynamics between the economic and political international relations make the energetic security to be "Subject of the Day" more and more often on the European agenda.

Romania approached the energetic security as a matter of national security starting with 2005, in parallel with the change of power and its implication in the European plans for the research of alternative options of energy supply. Unfortunately, only the Supreme Council of Defense and the Romanian President are the centers of focus that decided the national security strategy in the energetic domain.

Traian Basescu secured the energetic security subject, becoming the only person to introduce the subject in the public agenda, and the only person to come up with initiatives. We appreciate the President's efforts, but we think that only one approach is not sufficient and we also think that the existence of more than one center would bring more value to the documents elaborated by the Romanian state. Also, the existence of few documentation possibilities and of few annalistic works confirms the necessity of more implication in the domain.

Studying official documents, press releases, interviews with actors, personalities from the diplomatic, business and administration domain, literature of specialty or complementary, studies realized by organizations in the domain and of the information obtained by the press, can bring us to form a number of conclusions about the connection between the gas prices and Russia's relations with the important states.

International relations fluidity in the last decades

The last 30 years brought drastic changes in international politics. The fall of the Communist Block and the Soviet Union brought a reconfiguration in the influential spheres. A large number of

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east-European states in the influential sphere reoriented to the North Atlantic Treaty and the West European poles. With little effort, these countries were welcomed in the newly configured European Union. After a short period, the newly formed Russian Federation, after reconfiguring the internal politics, was experiencing an economic boom. This brought to the comeback of strong friendships and the elaboration of foreign policies through which states the comeback of the old economic and political influential zones[2]. In today's situation and using the only reliable instrument, the energetic weapon[3] , adapting the American policies from the 50's – 60's, brought to Latin America and the Middle East, Russia created new vassals.

From the 60's, USSR wished that European states should become dependent of the energetic resources that it detains. The first big economic contracts that stated the construction of gas pipes for Germany, Austria, Italy, and France were signed at that period of time, in exchange for technology and money. Although the CIA warned the Common Market countries of the risks of becoming dependent of Siberian gas[4], its administrations signed contracts under the pressure of the large multinational companies. After years, we found that the dual speech of the 4 European states (GFR, France, Italy, and Austria): On one hand they were criticizing the USSR for its policies in Afghanistan and Poland, and for its arms policies and the fact that they disobeyed the human rights, but on the other hand, they were encouraging the large corporations to sign contracts with the USSR and to provide technology (which was under American license and broke every embargo).

In 1991, the Soviet Union left the newly founded state an inheritance of 160.000 km of pipe systems, 350 compression centers and dozens of gas storage reservoirs. The most important resources were left to Russia (80%), but over a third of the pipelines were in Ukraine (32.000 km) which realized the export to the west (100 billions of cubic meters per year).

Vladimir Putin's rise to power represented a reconfiguration in the Russian foreign policies taking in account the fact that the old tsarist and soviet principles were adapted for the 21'st century. The "European energetic pliers" strategy was perfected with the North Stream and South Stream components that today are realized in northern Europe, South Stream being in the unfunded project state because of the International crisis. The directory lines of the new foreign Russian policies can be concluded in:

1. European Union countries should become more dependent of Russian gas
2. Gigantic investments in pipelines
3. Market diversification by extending its exports to China
4. Growing the transport capacity from the ex-USSR countries: Turkmenistan, Uzbekistan, and Azerbaijan to the west
5. Creating intermediary firms in the west European states which would deal with gas imports.
6. Gazprom's association with "old business partners" in a number of firms.
7. Complete acquisition or shareholding national companies for transport and distribution of gas, for railway producers for extraction and gas transport industries, or for infrastructure firms (communications, railway transport, etc.) from as many European countries, especially in the EU in exchange for a smaller gas price.

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[2] Detinguy, Annde - Moscow and the rest of the World, The Ambition for Greatness: An Illusion?, Bucharest, "Minerva" Publishing, 2008, 8

[3] Ibidem, 187

[4] Ougartchinska, Roumiana; Carre, Jean Michel - Gas Wars- The Russian Threat, Timisoara, "Antet" Publishing, 2008, 39

We can observe that all these directions can be found in the actions of the foreign Russian politics in the last 10 years. If we analyze every detail we can affirm that European countries are very dependent of Russian gas, as shown in the chart below.

Chart: The European Union countries' dependency of Russian gas

Country	**Dependency rate**
Bulgaria	100%
Slovakia	100%
Finland	100%
Estonia	100%
Letonia	100%
Greece	100%
Denmark	100%
Belgium	100%
Lithuania	100%
Austria	75%
Czech Republic	75%
Hungary	75%
Poland	67%
Romania	52%
Slovenia	51%
Germany	42%
Italia	33%
France	23%
Holland	12%

Non EU countries

Serbia	100%
Croatia	88%
Turkey	76%
Switzerland	12%

Sources: Eurostat- 2007 report, CRS- Congress Report- the European Union's Energy Security Challenges, 2008, ECFR – Beyond dependence, 2009

Taking in consideration the investments made by Russia with its partners, the major projects finished: Bleu Stream with 3.2 billion dollars, having stockholders Gazprom, ENI, and Botas, and North Stream with 8.8 billion euros (Gazprom 51%, BASF SE 15.5%, and Gasunie and GDF SUEZ each with 9% of the actions), we can conclude that Russia realized with success a big part of what it proposed in 2001. We can add to this operation that at the beginning of 2006, a contract was signed that foresaw 2 gas transport route; on to China, parallel to the Pacific coast already being used, and one route that passes through western Mongolia and is still under construction.

The legislation overlooking Romanian policies in energetic security

Energetic security is a subject recently appeared on the Romanian authorities' work agenda. In 1998, the CDR governing adopted a Government Ordinance (GO 52/ 1998) overlooking at Romania's defense strategy, which was transformed into a law in 2000 (law 63/ 2000) in which the

Romanian President's obligation is set to realize the National Security Strategy of Romania (NSSR) and to present for approval in front of the Parliament[5]. As said in article 5: "Romania's national security strategy includes: defining its own security interests and objectives, evaluating the foreign security environment, identifying the risk factors in the national and international environment, the ways of action and the main means for assuring Romania's national security. The strategy has an evaluation horizon on a 4 year term and a long term perspective including the estimation of Romania's assigned resources to achieve its security and defense objectives. The first strategic security plan was adopted in 2001." This was modified through Law 473/2004[6] and is complete because Article 2 defines "The defense planning domains are: a) planning the force; b) planning the armament; c) planning the resources; d) logistics planning; e) command, control, and communication planning; f) civilian emergency planning."

The first National Security Strategy was elaborated in 2002. In this no element reminding the energetic problem appears but it is said that risks can appear from entities or groups from the inside of a state that is orienting its actions in threatening other states.

Until 2006, Romania did not elaborate a separate chapter destined for energetic security in the National Security Strategy. After Traian Basescu's rise to power and his prime-minister Calin Popescu Tariceanu, more and more analysis were achieved and elaborated studies that were at the foundation of the new security strategy, including energetic, successively elaborated in all these years. We can affirm that the adherence debt to the European Union and NATO, foreign political exchanges of Russia, Ukraine, European Union and its component states, EU water body access countries, Turkey and the Caspian states in the Middle East, Romania was obligated to review a few times its energetic strategy.

In 2007, the "Tariceanu government" elaborated a document that exclusively refers to this domain for the 2007-2020 period: ROMANIA's ENERGETIC STRATEGY FOR THE 2007-2020 PERIOD[7].

The directory lines that define the future energetic strategies are: energetic security growth by insuring the necessary energetic resources and limiting the dependency of imported energetic resources, diversification of import sources (energetic resources and their transport routes), growing the adequacy level of national transport routes of electric energy, natural gas, and petrol, energetic efficiency growth, promoting energy production using alternative sources, developing competing markets in electric energy, natural gas, petrol, uranium, green certificates, greenhouse effect gas emission certificates and energetic services, liberating energy transit and assuring permanent and anti- discriminatory of market and transport routes participants, international distribution and interconnection, continuing the restructuring process and privatization in electric energy , thermal energy, and natural gas sectors[8].

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[5] ***„Legea 63/2000 pentru aprobarea Ordonanței Guvernului nr. 52/1998 privind planificarea apararii nationale a Romaniei", site de legislatie romaneasca,*** **http://www.jurisprudenta.com/lege/lege-63-2000-6v622/ Art.**

[6] "Legea Nr. 473 din 4 noiembrie 2004 privind planificarea apărării", site-ul Ministerului Apararii, http://www.mapn.ro/diepa/planificare/legea_473_2004.htm

[7] "Strategia Energetica a Romaniei pentru perioada 2007 – 2020", site-ul Centrului pentru promovarea energiei curate si eficiente in Romania - http://www.enero.ro/doc/STRATEGIA%20ENERGETICA%20A%20 ROMANIEI%20PENTRU%20PERIOADA%202007-2020.pdf

[8] Strategia Energetica a Romaniei pentru perioada 2007 – 2020", site-ul Centrului pentru promovarea energiei curate si eficiente in Romania - http://www.enero.ro/doc/STRATEGIA%20ENERGETICA %20A%20ROMANIEI% 20PENTRU%20PERIOADA%202007-2020.pdf

In Prime Minister Emil Boc's Governing Program, there is a chapter 17[9] that deals with Energy and Mineral Resources. Comparing this document with "Romania's Energetic Strategy for the 2007-2020 period, we can affirm that nothing new is added.

Beginning with 2008 new elements appeared that boosts the production of alternative energy in the Romanian legislation (continuation of the EU Directive 2001/77/CE)[10]. In 2001, the Minister of Economy, Commerce, and Business Environment along with the National Authority for Regulation in the Energetic Domain showed in a public debate a draft entitled "Energetic strategy elements for the 2011- 2035 period- Strategic directions and objectives in the electric energy sector"[11]. This specifies "Romania's energetic policy should be correlated with similar documents existent on a European level to assure the convergence of our country's policy with the European Union's one in the domain."[12]

We can affirm that the Romanian Parliament does not dispose of experts in the energetic security problems, resulting that the Romanian legislation is not coherent in the domain, just in the Government's proposals, having at its foundations the National Security Strategy, the Governing Program, and the European Union's Directives and Regulations.

Analyzing and comparing NSSR, the Government's Program and energetic strategy elaborated by the Minister of Economy, we can conclude that these are elaborated by a single group of experts because they are almost identical. This group's uniqueness can bring wrong interpretations of the processed dates, implicitly at the elaboration of strategies, policies, laws and erroneous legislative proposals.

Romanian pressure groups and the energetic problem

In the Government before 2004, no politician or political party stood out through a discourse in which the energetic problem is underlined. We can remember two actions: in the communist period, an independence from the USSR was tried, by building hydro-electric power plant and coal, petrol, and natural gas power plants, and beginning the atom-electric power plant in Cernavoda. The Adrian Nastase Government privatized 51% of PETROM, a national company of oil extraction and processing which contributes to 66% of the national natural gas production[13], to the Austrian company OMV. This means that Romania cannot make a decision over the production, distribution and fuel price policies found in Romania's soil. We have to mention that the Austrian legislation allows residential firms not to declare its shareholding[14]. If no Russian corporation is a shareholder in OMV[15] (not being able to find the shareholding component for 48.1% that transacts freely), OMV and Gazprom are old business partners and together are important shareholders in large European energetic companies, with strategic importance being Central European Gas Hub (both with 30%,

[9] "Strategia de Guvernare, Cap. 17 Energie si resurse minerale – site-ul Guvernului Romaniei: http://www.gov.ro/capitolul-17-energie-si-resurse-minerale__l1a2074.html

[10] "Legea nr. 220/2008 pentru stabilirea sistemului de promovare a producerii energiei din surse regenerabile de energie" – site-ul Avocat.net; http://www.avocatnet.ro/content/articles/id_13709/p_2/3.html

[11] "Elemente de strategie energetică pentru perioada 2011 – 2035 - Direcţii şi obiective strategice în sectorul energiei electrice, DRAFT I; http://www.minind.ro/anunturi/strategia_energetica_20112035_20042011.pdf

[12] Minister of Economy, Commerce, and Business Environment- Strategic energy Element Draft for the 2011-2035 period- Strategic directions and objectives in the electric energy sector, page 3

[13]"Cat de tare putem sa ne suparam cu Rusia – Cosmin pacuraru" – site-ul dedicat securitatii energetice; http://www.sigurantaenergetica.ro/wp-content/uploads/2009/05/Cat-de-tare-ne-permitem-sa-suparam-Rusia.doc page 4

[14] KUPCINSKY, Roman - GAZPROM'S EUROPEAN WEB, Jamestown, Jamestown Foundation Library, 2009, page 18

[15]"OMV Group – shareholders structure" – OMV.com http://www.omv.com/portal/01/com/!ut/p/c4/04_SB8K8xLLM9MSSzPy8xBz9CP0os3gDf1OLQC9HZyNXA3dPD18PN19DAwjQD07N0y_IdlQEANNJ1nE!/

Weiner Borse and Centrex Europe Energy and Gas AG with 20%, but Centrex is controlled 50% by Gazprom)[16]. Central European Gas Hub wishes to be "Europe's gas scholarship", a place where transactions take place and Russian imported gas prices are set. In other words, Gazprom has access to any information regarding PETROM and can stop any efforts to import gas from the Middle East or the Caspian Sea area[17]. Remarkably, nobody opposed to that privatization, even the opposition voted in Parliament the privatization contract. Analyzing the SNP assets in the privatization day[18], we can conclude that Romania's energetic security was put in danger. Other aspects of the privatization contract's legalities are found in the Senatorial Investigation Commission Report with the purpose of investing PETROM's privatization and in SRI's informational Note "Landmarks of SNP Petrom's privatization" both in 2007[19].

In 2006 though, after the first gas crisis generated by Ukraine, President Traian Basescu brought in his discourse the injustice of PETROM's privatization contract, this speech being used by all the MPs in power at that time (The Alliance for Truth and Rightfulness formed by PNL and PD), which generated the reports mentioned earlier. The subject is being debated even in 2011, when the Romanian Senate instituted an investigation committee that analyzes the contract's post-privatization ongoing. Also, Prime Minister Emil Boc declares in May 2011 that "PETROM's privatization represents a threat to our nation's security"[20].

Another subject overlooking the national security theme is represented by alternative natural gas resources. This way, President Traian Basescu affirmed in 2006-2010 that one of Romania's priorities is to develop the Nabucco project. Because of the misunderstandings between the governments of the participating countries at this project, the firms that enter as stockholders in the company[21] that wishes to carry out this project, President Traian Basescu iterated project AGRI as the main target[22], which according to Energy Global publication analysts, could stop Nabucco[23]. According to the Romanian Foreign Ministry website, both of the projects are on the priorities list of the Romanian Government[24].

Traian Basescu launched the phrase "smart boys mafia of energy", which was immediately used by the press.

Another important actor is the press and should have the role of information distribution in society and to fine or to legitimate the political actions and decisions. Unfortunately, in the last 10 years, we can affirm that the Romanian press unprofessionalized and is subordinated to the patron's interests. Three out pf the 5 big press trusts had or has patrons implicated in energy transactions or

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[16] KUPCINSKY, Roman - GAZPROM'S EUROPEAN WEB, Jamestown, Jamestown Foundation Library, 2009, page 19

[17] Kupcinsky, Roman – gazprom's European Web, Jamestown, Jamestown Foundation Library, 2009, page 19

[18] Senatorial Investigation Commission Report with the purpose of investing PETROM's privatization, page 3-4, www.lumeajustitiei.ro http://static.luju.ro/files/iulie/21/PETROM_Raportul_Comisiei_de_ancheta.mark.pdf

[19] Romanian Information Services – note information http://static.luju.ro/files/iulie/21/PETROM_INFORMARE_SRI_pag.1_001_resized.pdf

[20] "SRR – political site – www.politicaromaneasca.ro" http://www.politicaromaneasca.ro/boc_privatizarea_petrom_un_atentat_la_siguranta_nationala-4387

[21] "Shareholders of Nabucco Pipeline: http://www.nabucco-pipeline.com/portal/page/portal/en/company_main/shareholders_link

[22] **"Five companies bid for AGRI gas project study" – News.az http://www.news.az/articles/economy/37113**

[23] **AGRI project could sink Nabucco pipeline, Energy Global;** http://www.energyglobal.com/sectors/**pipelines/articles/AGRI_project_could_sink_Nabucco_pipeline.aspx**

[24]"Dosare de actualitate – Securitatea energetica; Romanian Foreygn Ministery" http://www.mae.ro/node/1602

raw materials: Dan Voiculescu's Intact Trust, Sorin Ovidiu Vantu's Reality Media Trust, and Dinu Patriciu's Adevarul Trust. Also, these press trust proprietors are implicated in politics, Dan Voiculescu being the honorable president of the Conservative Party, Dinu Patriciu being considered an informal leader (in the last few years) of the National Liberal Party, and Sorin Ovidiu Vantu being in good relations with the Social Democratic Party's leadership. In various media analysis realized by professionals affirms that the Media Pro Press Trust is nobody's political partisan and the patron is not implicated in other patronages except for press. All these private press trusts have in their component influential economic publications, one of them holding a powerful press agency (Mediafax that is part of Media Pro). To all these, we can also add the media channels held by the state: TVR, SSR and Agerpres.

We can consider that besides influential economic publications (Ziarul Financiar, Financiarul, Bursa, Capital, Saptamana Finaciara, money.ro, econtext.ro, e-nergia.ro, focus-energetic.ro, businesslive.ro) that are read by the decision factors in the state and the private administrations, to which we can add the press agencies (Mediafax and Agerpres) we can enlist that the influential quality channels (Adevarul, Jurnalul, Gandul, Romania Libera, Evenimentul Zilei, zire.com si Hotnews.ro) and the news TV channels (Money Channel, Realiztatea, Antena 3, TVR Info). The problem is that very little of these journalist employees or collaborators specialized in the economic problem and even less in the energetic one and very little editorial managers understand the information in the domain. In other words, the role of these publications in pressuring the authorities is very small; the journalists remain to the approach of subjects tied with energy that has a social connotation, to rewriting of the press releases received and information management from pres conferences. We can remark the fact that there are very rare press- releases regarding the firms that occupy with energy transaction.

This does not mean that the big energy firms do not realize, through media, public relations campaigns, which can sometimes affect national security. A concluding example is the GdF Suez case (gas distribution firm in the south-east of Romania) that in May 2011 carried a campaign of this sort that took place in Bucharest through letters addressed to the citizens and through purchasing unmarked advertising space in quality press and TV news channels. This campaign filmy guided[25] citizens to give up the centralizes heating system and to install individual apartment heating systems motivating that in the actual conjuncture, with the growth of gas prices, individual heating systems are more profitable. Knowing the fact that that in Bucharest live 15% of Romania's population and more that 10% of the homes are here, that individual heating systems are more expensive that centralized heating we can consider that GdF Suez's action to raise its profit through the growth of gas consumption constitutes a threat to the citizen's address and a threat to the energetic security.

Subject securitization in the energetic domain

Right above, we saw that the main actor in the energetic security is Traian Basescu. His securitization problems can be classified in order of the audience whom he addresses.

One subject is that of "corruption in the transaction system of electric energy". The addressed audience were officials form the Economy Ministry that facilitate these contracts disadvantageous to the Romanian state and the employees of institutions that specialize in the ability to document, research, and prepare criminal folders and from lawyers. Motivation is a better action in the

[25] ***„Piata romaneasca - invadata de oferte de centrale de apartament", Adevarul newspaper;*** **http://www.adevarul.ro/actualitate/Piata-romaneasca-invadata-centrale-apartament_0_63595098.html**

management of national wealth and boosting the audience shown above and to act in this domain. The form that these subjects appeared in public debates is "discourse".

The second subject is that of "supply of energy from alternative sources other than Russian ones". The audience that is addressed with this theme is represented by decision factors in foreign and economic policies from EU states, countries on the coast of the Black Sea, and Russia. The subject's motivation approach is to give a certain predicament in the future evolution of the foreign policies of Romania.

Even though certain roughness between the President and the press exist, it mostly took with objectivity the themes referring to the energetic security, not bothering them.

Conclusion

We conclude that the only credible political figure because of the messages in the energetic security problems are not distorted, and is the speaking tube of the national policies in the energetic security politics, is President Traian Basescu. From one point of view it is expected from the governing parties not to occupy advertising space on a subject approached by Traian Basescu. The fact is taking place because PDL, UNPR, and UDMR do not have members that are specialists in the domain or if these specialists exist, they do not wish to argue with the President.

The poorly understood fact is that the opposition does not have a point of view on these subjects. We are certain that at least ex-Ministers and state secretaries from the Ministry of Economy in which we add ex-directors from the ministry and the domain agents that have the expertise to formulate informed opinions, to criticize or praise today's position taking in the domain. The explanation can be the following: the ones that withheld positions in past governments are marginalized by today's heads of PNL and PSD that do not take part in the expertise and experience in the domain.

Analyzing Russia's situation (where more centers of analysis and decision making exist) or Poland (European Union country) that invests and takes in consideration independent analysis centers (with Centre for Eastern Studies as an example) we can conclude that it is not recommendable that in a country with Romania's energetic and geostrategic potential to exist a single group of experts to analyze and elaborate all documents referring to Romanian energetic strategies and one politician that approaches these subjects.

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THE FUTURE OF DIGITAL ACTIVISM

MARIA CERNAT[1]

ABSTRACT
One of the first moments when the new information and communication technologies were used in a political protest was the Orange Revolution that took place in Ukraine from late November 2004 to January 2005. Ever since that moment social media proved to be an important tool of political revolt. The London protests, the Arab Spring or Moldova's Twitter Revolution are only a few of the most representative moments when digital media were used in organizing political protests. Obviously, the new communication tools paved the way for a new type of organizing collective action and political uprising. Once the Orange Revolution took place, media theorists and political philosophers emphasized the role of the new media in political reform. Most of today's articles analyzing this phenomenon share a rather optimistic perspective on the role the new social media is playing in political reform, offering a "microphone to the masses". My perspective is rather pessimistic. I think that, before enthusiastically embracing the benefits of the new digital media, we must acknowledge the indisputable dangers that threaten the ideal of liberating technology. What I try to prove in my article is that there are two types of challenges when it comes to the role the new information and communication technologies play in political protests. First of all, there are state regulations used by the political leaders to restrict access to the new technologies, to identify those opposing their regime and to use the new media as a propaganda tool. These bear direct negative influences on the way the new digital media are used. But, as I shall try to prove in my article, there is also another type of challenge that could endanger the ideal of liberating technology. The neoliberal deregulation of media led to a so-called "feudalization" of the Internet, whereby huge media trusts try to control important parts of the information market, transforming it into a closed and controlled environment.

Keywords: *social media, political protest, feudalization of the Internet, liberating technology, oppressive technology*

Introduction

Recent political events such as the Arab Spring or Moldova's Twitter Revolution were individualized by the use of the new information and communication technologies. The mainstream press reporting on social networks and social media emphasized the merits of these new communication technologies in building a collective action and political protest. The optimist wave of social media supporters created a so-called "techno-utopianism" assigning technology the central role in social progress. The main assumption of those supporting the idea that technological progress in the communication area could lead to social progress is that *better technology equals better society*. This type of reaction was balanced by more realistic studies focusing on the actual impact of social media on the political reform. It seems that the enthusiasm following the Arab Spring events was not entirely supported by statistical data. Only few of the people living in North Africa or the Middle East have access to the Internet. This is why Jon B. Alterman thought that "the revolution will not be tweeted"[2]. In fact, according to Alterman, "(…) what is striking about the political movements of early 2011 is no so much the power of the 21-st century media, but rather the power of 20th century media. (…). It was not Twitter and Facebook, but television that was absolutely fundamental to the unfolding of events, playing a decisive role in expanding protests of thousands into protests of millions".

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[2] Jon B. Alterman (2011) "The Revolution Will Not Be Tweeted", *The Washington Quarterly*, 34:4, 103–116.

As tempting as it may seem, it is not my intention to provide the ultimate answer to the question regarding the role of digital media in the recent political events. My concern is with a more general problem regarding the current challenges digital activism has to face. My article is an attempt of listing and classifying all the things endangering the use of the new communication and information technologies for democratic purposes. I side with the skeptics when it comes to the liberating force of the new technological tools. I think that there is no such thing as technological determinism. New technologies are but mere tools and their use is by no means sociologically shaped. As other media researchers have showed, liberating technologies can also be oppressing technologies allowing authoritarian governments to use them in order to trace down and repress political opponents more efficiently.

In the first section of my article I shall focus on the characteristics of the new communication and information technologies and their many uses in political conflict. Many theorists compare these new technological tools to the Guttenberg Revolution, since the Internet is thought to become a "microphone for the masses". There are multiple facets to this new technology allowing people with a cell phone to become "citizen journalists", to analyze the political events, to communicate more efficiently, to organize political protests and to broadcast their actions.

The current enthusiasm for the techno-determinist perspective can be justified if we look back into the history of technology. In the second part of my paper I shall focus on several arguments that can explain the current techno-determinist perspective. It is the merit of researchers such as Tim Wu[3] or Evgheny Mozorov[4] to focus on the idea that the historical perspective on the evolution of technology is the best way of understanding today's optimistic perspective on the liberating potential of the Internet. The third section of my paper starts from Wu's endeavor of finding a certain pattern in the way new technologies are developed, enthusiastically accepted and, then, after the industrial factor takes control over the innovation one, disappointingly abandoned, provides the setting for the third section of my paper.

It is my intention to prove that there are mainly two types of challenges digital activism has to address, namely the indirect danger represented by the neoliberal deregulation perspective allowing the Internet to become a highly restricted and almost "feudalized" environment, and the direct and obvious dangers authoritarian regimes bring forward when trying to transform the liberating technologies into oppressive ones. In the second section of my article I shall examine several situations where authoritarian regimes transformed the so-called liberating technologies into oppressive ones, using them to trace down and repress political opponents. are The case of the 2009 Iranian presidential elections or the (in)famous case of China are very good examples supporting my argument. The inventors of new technologies cannot develop them by themselves. They need the support of major private companies that in time will take over the control of the new technology, transforming it from an open access one into a restrictive and closed environment. It is common sense knowledge that the Internet was first developed as a free way of sharing information. Once huge corporations such as Google entered the scene, the Internet became one of the most successful businesses of all times. Unfortunately, this led to a sort of "feudalization of the Internet", where several Internet providers dominate the information market and the public is not the first one to gain something from this way of organizing the information environment. The neoliberal deregulated media market could by no means offer the suitable background for an objective, rational and balanced digital agora. "Rather than being an ungoverned realm, cyberspace is perhaps best likened

[3] Tim Wu (2010) *The Master Switch: The Rise and Fall of Information Empires*: London, Atlantic Books, 366 pp.

[4] Evgheny Mozorov (2011), *The Net Delusion: How not to Liberate the World*, London, AL, 408 pp.

to a gangster – dominated version of New-York: a tangled web of rival public and private authorities, civic associations, criminal networks, and underground economies".[5] When information is transformed into a mere commodity there are no ways of providing a rational place for political debates. Better algorithms can be developed in order to prevent disseminating one-sided biased information by filtering information. But who is willing to pay for such a project? Certainly not the authoritarian regimes or the software companies dominating the world wide web.

The many faces of digital activism and digital divides

In 2009 Moldova, one of the poorest countries of the Ex-Soviet Block, was the scene of one of the most effective political protests organized using the Internet. After nine years of economic crisis, the Communist Party was enjoying majority in the Parliament. In April 2009, the journalist Natalia Morar and other members of an NGO tried to organize a flash mob using Tweeter and other Internet-related communication tools. Here is what she said for the BBC news report:

"It just happened through Twitter, the blogosphere, the Internet, SMS, websites. We just met, we brainstormed for 15 minutes, and decided to make a flash mob. In several hours, 15,000 people came out onto the street. None of us could imagine that such a thing could happen, but it shows there exists a very big protest inside society and within young people. Moldovan youth are not pleased with what is happening in Moldova. Liberty is a great thing for us and we don't want to live in a Soviet kind of society."

The first remark I would like to make is that we should not fall into the trap of believing that the gathering of 15,000 people in a central square is the sole result of the use of Tweeter. The nine years of economic crisis and the dominance of the Communist Party were undoubtedly key factors in bringing people to the streets of Chisinau.

There is a big difference between digital and real political activism. It is common sense knowledge that signing up an online petition is not the same as actually participating to a political revolt. The so-called "dotcauses"[6] are surely more appealing since they do not require their supporters to leave the comfort of their homes. Most sociological studies focus on the use of the Internet for political purposes by reporting the Internet users to the total number of the population and then establishing the sociological profile (age, gender, income, etc.) of the users. It is equally important to notice that for the Internet to count as a liberating technology it has to influence a wide variety of people, not only those who are already politically active offline. Recent findings[7] prove that online and offline activities are often correlated in participative cultures but, it takes other factors besides online communication to have a real political protest.

What is important in Natalia Morar's statement is that it clearly shows that digital activism can take many forms. First of all, there is the possibility of easily communicating to thousands of people. Then, digital activism allows the live broadcasting of important events taking place. This is probably the main reason why some media researchers considered the Internet as a "microphone for the masses". In 2009, at the G20 London meeting, as in the case of the Romanian 2012 protests,

[5] Ronald Deibert, Rafal Rohozinski (2010) "Liberation versus Control: The Future of Cyberspace", *Journal of Democracy*, 21:4, 43–57.

[6] John D. Clark, Nuno S. Themudo (2006) "Linking The Web and the Street: Internet-based "Dotcauses" and "Anti-Globalization" Movement", *World Development*, 34:1, 50–74.

[7] Fadi Hirzalla, Liesbet van Zoonen (2011) "Beyond the Online Offline Divide, How Youth's Online and Offline Civic Activities Converge", *Social Science Computer Review*, 29:4, 481–498.

several footages of police forces savagely beating protesters proved how violent the boys in blue can be. In 2009 a businessman provided *The Guardian* with a mobile phone footage showing a police man assaulting a passing-by citizen who collapsed in the street. This and other video-documented moments of the political protests made it impossible for the authorities to portray the people in the street as violent troublemakers. From that moment forward it was no longer possible for the authorities to control the information reaching the public. The Internet is the place of many divides[8] but the "power of the medium is that profound tweets also appear side by side with banal ones – second by second, minute by minute, and hour by hour. It is from this perspective that Twitter affords citizen journalists the possibility to break profound news stories to a global public."[9]

These are of course important reasons to be optimistic about the many uses of the new communication and information technologies. We are now witnessing a very important moment in the history of the mass-media: a lot of people have access to it. It is no longer dominated by an elite – the professional journalists – every citizen with a cell phone can gain access to it. It is a very cheap form of communicating globally. But there are still many obstacles to be surpassed.

As expected, the fact that the Internet is not a free way of communicating with each other generates another type of digital divides[10]. First of all there is the racial divide. Marginalized populations often lack access to the new technologies of communication and information (ICT). Moreover, closely related, there is a lack of technological skills necessary to operate ICT devices. Technological illiteracy is widely spread among marginalized social categories. The poor, the elderly, women are less expected to know how to use these new communication tools. While proving to be an important source of information, there is still a long way to go before "Tweeter" could be indeed assigned the role of a "microphone to the masses":

"(…) there remain persisting digital divides in many Western countries which keep marginalized and vulnerable populations away from Twitter and are generally amplified by Web 2.0. Though new social networks and communities of knowledge are supported by Twitter, they are strongly socio-economically stratified. This keeps Twitter inaccessible to much of the news reading public, relegating the medium to the more technologically literate 'Twittering classes'. Furthermore, cases of hoaxes and patent misinformation on Twitter can have disastrous ramifications on marginalized and vulnerable populations. Ultimately, it is critical that we look beyond the *Zeitgeist* of Twitter and similar mediums as its cool, *en vogue* gloss masks the fact that Twitter is highly stratified."[11]

But the sociological findings are not the only things preventing us from becoming supporters of the techno-deterministic perspective. A glimpse into the recent history of technology may put things into a more realistic perspective.

The Net Delusion – a historical perspective on the use of technology

At this point I think it is very important to place the new communication and information technologies into a historical context. If we want to understand some of today's exaggerated reactions toward them, it is not enough to focus only on the things that differentiate them from other types of technology. As stated earlier, it was Tim Wu that provided a theoretical framework for understanding the way in which technology is socially received. The main concept he proposes is

[8] Dari E. Sylvester, Adam J. McGlynn (2010) "The Digital Divide, Political Participation, and Place", *Social Science Computer Review*, 28:64, 63–76 .

[9] Dhiraj Murthy (2011) "Tweeter: Microphone for the Masses?", *Media, Culture & Society*, 33:5, 779–789.

[10] White J.C., Mannon S.E. (2010) *The Internet and Social Inequalities*, New York: Rutledge.

[11] Dhiraj Murthy (2011) "Tweeter: Microphone for the Masses?", *Media, Culture & Society*, 33:5, 779–789.

that of "cycle". In the first stage of the cycle inventors develop a new technology fulfilling human needs. At this stage, whether it is electricity, radio, telephones or television, we witness a lot of experiments and enthusiast perception. Wu is not the first to emphasize the powerful reaction toward new technology. It is common sense knowledge that magical powers were attributed to electricity for example. After the first stage it becomes clear that in order to reach as many people as possible the invention itself is not enough. This is why, in the second stage of the cycle, the inventors themselves no longer have the full control over their inventions, since the exploitation of the new technology requires several types of other resources, the most important being, of course, the financial ones. Wu calls the first stage of this cycle the "open" stage. The second one is less appealing, since the "open" systems move toward "closed" ones dominated by a few "centralizers" which can be a single corporation or, as several cases proved, a cartel. This stage can be ended by new emerging technology or by regulation.

The Internet regulations: the two sides of the coin

There is no good answer to the question whether we should regulate the Internet or not. It is the main purpose of this article to show that no simple answer could be given to this question since whatever course we may take, we are likely to run into troubles. The future of digital activism lies uncertain, since the freedom of the Internet itself is very difficult to be guaranteed. Thus, if we adopt the neoliberal stance and transform the information into a mere commodity while deregulating the information market, we may have to accept that telecommunication and software companies establish all sort of financial constraints generating the above mentioned "digital divides". On the other hand, if we accept the fact that the Internet use must be regulated, we face the danger of arbitrary political decisions even more restrictive than the financial ones. China and Iran surely regulate the use of the Internet, especially when it comes to political digital activism, but who would agree to such restrictive and punitive regulations? I think it is fair to say that nowadays the freedom of the Internet is disputed between the authoritarian regimes and some huge telecommunication companies.

There is a little place for hope since there are notable exceptions to this rule. Although there is a lack of evidence that access to the new communication and information tools can actually improve the democratic climate, the Swedish government embrace enthusiastically the idea of finding ways to encourage digital activism. Gunilla Carlsson, the Swedish Minister for International Development Cooperation is the author of a very favorable article towards digital activism, published in one of Sweden's most popular newspapers, the *Expressen*. The title of the article is more than relevant: „Net Activists Are the New Democracy Fighters". As a result of the large scale use of Tweeter in the Arab Spring, as well as in other political revolts, Gunilla Carlsson launched a call for proposals having as main topic the way in which the new information and communication technologies would lead to democratic change in developing countries. She also offered generous amounts of money for the purpose of improving the freedom of speech and democratization. The Swedish government can be accused of being too naive and of adopting an almost techno-utopian perspective on the liberating powers of the Internet. Christian Christiansen[12] is quoting what might seem a very optimistic and encouraging government speech praising the use of social media in the democratization process only to criticize the naive perspective of the Swedish government:

„The speed with which the Swedish government appeared to accept popular discourse regarding the role of social media in the North African and Middle Eastern uprisings, and then

[12] Christian Christiansen (2011) "Discourse of Technology and Liberation:State Aid to Net Activists in an Era of"Twitter Revolutions", *The Communication Review*, 14:3, 233–253 .

converted this acceptance into a public call for project proposals on net activism, suggests an opportunistic, ad hoc political strategy."[13]

Maybe Christiansen is right in accusing the Swedish government of opportunistic strategies, but, opportunistic or not, this initiative proves an interest in the development of future digital activism. And, compared to other types of political perspectives, this is a rather positive one. Unfortunately, not all the governments are so open when it comes to digital activism.

In what concerns the Internet Regulations, the debates are more heated than ever. Ranging from full acceptance to total rejection, the opinions regarding the Internet regulation are very passionate since we are probably witnessing the moment when the future of this new technology is decided. Many researchers think that the myth of deregulation, as appealing as it may seem, leads only to lack of freedom of expression. Quoting a personal communication from Harold Feld[14], Sascha Meinrath manages to present a very vivid point of view regarding the Internet regulation:

"The Internet managed to evolve quite nicely over the last 30 years because, contrary to popular myth, the Federal Communications Commission (FCC) regulated the … out of it. Specifically, until the Bush administration took over, the FCC required the companies that owned the lines over which the bits traveled (the phone companies) to leave the traffic alone — no getting in the way of customers and the information they want to download, the applications they want to run, or the devices they want to attach to the network."

If regulating the Internet has such positive effect, why not adopting it? The problem with state regulation is a very controversial one. The freedom of the Internet equals the freedom of speech, the freedom of online association, and it is not at all easy to protect those things. The fact that the authorities regulate the use of the network offers no guarantee whatsoever that abuses will not occur. Technology cannot offer by itself the settings for a more democratic society. The case of Iran is typical here. Ever since 1996 the number of Internet users in Iran has increased at an incredible rate. The number of Internet users in Iran has mushroomed from only 600,000 users in 1996 to 36,500,000 in 2011.[15] According to the Internet World Stats, Iran has one of the highest penetrations of Internet use in the world. The virtual world served the Iranian people well, being a place where especially youth and women could express more freely than the conservative society rules compelled them to do. This offered hope for the supporters of the techno-deterministic perspective. The U.S. government's obsession with regime change in Iran made them provide technological „support" in the information war taking place in Iran. The U.S. government gave license of distribution for a program designed to bypass Iranian censorship. The program proved to be a total failure, allowing the Iranian authorities to track down its users more efficiently. The high rate of Internet penetration in Iran does not represent much by itself, since the regulations are restrictive and punitive. Once digital activism threatened to move from the online environment to the real world, the authorities have developed very strict regulations. In 2000 the Iranian authorities launched an organized filtering of websites. Internet providers were forbidden to have direct connections, they had to obtain license to operate and then begin to filter the „anti-Islamic" sites. The state control expanded and all Internet providers were controlled by the state. In 2002 a Committee in Charge of Determining Unauthorized Sites was formed, its task consisting mainly in censoring those trying to express critical points of

[13] *Loc.cit.* p. 19.

[14] Sascha D. Meinrath, Victor W. Pickard (2011) "The New Net Neutrality: Criteria for Internet Freedom", *on line* document : http://www.saschameinrath.com/files/The%20New%20Network%20Neutrality%20v10.pdf

[15] http://www.internetworldstats.com/stats5.htm

view. Advanced filter programs were acquired from governments sharing the same fears (China) and up to this day Iran has one of the most elaborate set of regulations regarding the Internet use.

This is a very important example of how regulation can be developed and implemented against Internet Users. The „open-access" supporters and the „net neutrality" supporters should bear this in mind when asking for more state regulations.

4. Conclusions

There are mainly two important dangers digital activism has to face: political or corporate control and there are no simple answers to the question regarding the Internet regulation. Only a truly democratic political government could develop regulations favoring the public. Offering the state's authorities the power to control the Internet providers is by no means less dangerous than the formation of monopolies and cartels. The deregulated information market protects the intellectual rights to the direct benefit of major media corporations while creating „digital divides" and placing the marginalized population outside the world wide web. The state control over the Internet providers protects mainly the political leaders. This leaves very little room for the public willing to freely discuss political topics in the digital arena.

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THE MESSAGE OF THE ROMANIAN CULTURE IN THE POLITICAL AND SPIRITUAL CONFIGURATION OF THE CONTEMPORARY WORLD

MARIA PESCARU[1]

Abstract

The analysis of the fundamental features that could define a message of the Romanian culture in the political and spiritual configuration of the contemporary world is a major concern because the Romanian culture occupies a special position in Europe. I t has a valuable past enough to have confidence in itself.

In the contemporary stage, the Romanian culture is a positive factor in the planetary spiritual and artistic evolution, giving it a universal destiny.

In the process of culture creation two factors attend: the individual and the society. But culture is not the same everywhere, because depending on the state of society and cultural values developed by individuals, it is understood that vary with different forms of society.

The Romanian culture occupies a special position within the European continent, as it has a valuable past enough to justify the confidence in it self and ensure a welcoming audience on behalf of the past.

The major European cultures appeared on the universal scene and they had a global influence at a time because of synchronies, the matching condition of their historical specificity and the universal imperatives of a certain age. Not geography, not demography, not weapons were determined to share the universal destiny of nations created by specific cultures, but their ability to formulate and meet the needs of a particular historical development, in which other peoples and other cultures were involved.

Keywords: *culture, cultural values, society, creation, spiritual evolution*

In a time when the Romanian presence in terms of major political and moral debate involved in the genesis process of a new world has become objective, we are asking which are the fundamental characteristics that could define a "message of the Romanian culture".

One of the features is "*the* availability for universal"[2], the ability to intuit the universal structures of past historical and cultural reality as an inner necessity of self-definition and self-assertion. Today the Romanian culture has the largest inner freedom from the old structures, as appropriate as to join and contribute to develop new structures heavily.

The second key feature of Romanian culture and our spiritual structure itself is "*the realism*"[3], which is the inner willingness to perceive the reality of life beyond just abstract patterns; to continually keep contact with it, to see and discover the deep structures of reality behind the phenomena.

Synchronies and affinities existed in the secular traditions of the Romanian culture and they invite us to meditation on its own genius, trends, aspirations, and sometimes dramatic search of the contemporary world.

The Romanian culture-European synthesis

To understand the evolution of the Romanian culture, setting the place, the role and the value of the Romanian creations within the civilization of our continent, we must start from the training reality in the Middle Ages, of the two areas of culture in Europe and of two types of civilization.

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[2] Dan, Zamfirescu, *Romanian Culture European synthesis, (*Bucharest: International Letter Publishing, 2002), 21.

[3] Idem, 22.

The first is the dominant religious culture area of the Roman Catholic Church, using Latin as the main means of expression to the emergence of the national literatures, and living the glorious memories of the Roman Empire, who unified to the late Antiquity, the Mediterranean civilization. All non-Latin peoples belong to this area, except the Romanians, and it integrated- in the 5th-9th centuries- Germanic and Anglo-Saxon peoples, further promoting the great modern spiritual revolution which was the Reform.[4]

A second culture and civilization area revolve around Byzantium, combining, in an original synthesis, the idea of the Romanian state, territory of the Eastern Empire, Greek culture as a cultural tool, and cultivating the memory and pride of the more pregnant Greek heritage from the 9th century.

The Romanian people appears later than other European nations on the stage of history, after an anonymous existence for centuries, whose main virtue was to ensure its duration, therefore, to maintain the difficult circumstances the being of the people, the language and even the name (the Romanians are the only people of Latin descent who kept the name the Romans). Mentioned by sources only in the 10th century, and living until the 14th century, the state forms of life do not allow a large deployment and any large-scale of cultural action, Romanians are building their strong state lives and the written culture flourishes only in the 14th century and a new political culture starts only with the fifteenth century. Then we started a Romanian chapter in the history of European civilization, but the Romanians, as descenders of two peoples, wrote their names deeply in the antique history and civilization.

The Romanian culture in the European culture

The entire human progress can be analyzed from two points of view: invention-creation, the latter resulting in the collective effort of those who agree with the creative genius and turns his revolutionary dream into a work servicing the humanity. Without the hard working hands of the genius assistant, without the calculation of Gorjan engineer and without the money investment of those who sponsored the work, both the highly complex art of Targu Jiu and the Sistine Chapel or the foundations of Stephen the Great would have remained mere sketches on cards creators.

The creative gesture is, then, with all its social conditionings, a social act. The company can stimulate or inhibit the progress from the acceptance and dissemination of new findings, to the creation of an entire environment that magnetizes creative energy producing real explosions, real geniuses waterfalls, or from the disinterest and bantering of the creator to climbing him on a scaffold. Hence, the possibility that the study of the individual and historical conditions appears and the stimulation or inhibition occurs by different nature to the creative act. Thus, an autonomous science is born.

The prestige of a culture never comes from outside. It is a climate irradiation from within, of pride, dignity, self-safety which the creative people emit at a time. Creators do not write for awards or abroad recognition, but write only to serve their nation which is in a happy moment for historical affirmation. The prestige of a culture does not derive from good or bad translations, but derives from the need that I feel, at some point, other cultures to enrich the spiritual power to treasure and experience that culture.

The moment that today's Romanian creator will penetrate deep down to his greatness, dignity and culture that is the actuality, he will not find other places and certificates will bear up before all those who will marvel.

Romanian cultural integration in the new European reality

Even if "the european ideea" is deeply and actively interested in just an intellectual elite, city, civic, quite small, we have no doubt that this idea will grow over time as the structure and living

[4] Vasile, Miftode, and others, *European integration and interculturalism. Development of ethno-cultural communities,* (Bucharest: Lumen House, 2008), 78

conditions of the country will change. From a predominantly intellectual phenomenon, the "European spirit" will become more and more public reality, treated in depth. Together with all democratic forces of the country, it will determine a new policy of a Christian or liberal democrat type. It is, in fact, the only real and effective alternative to current nomenclature State. Ultimately, the report must be fundamentally reversed to the centralized state, which leads, coordinates and distributes in order to stimulate and protect. Its function is only subsidiary. As the civil society develops, its role gradually narrows: minimal state-European state, as the product of a new historical development. This requires a profound change of ideological, political and social angle.

The left, right or center culture means axiological balance of values, liberalism, humanism, said Europeanism and active convergence and even synthesis of national and universal values, rationalism and critical spirit.

Three very clear intellectual attitudes can be predicted: permanent connection to the values, ideas and European culture, serious European documentation (library, university, museums, etc...), the extent of any dilettantism and amateurism, cultural achievements of Europe (like writing and value), the Romanian environment, and the people of Romanian culture.

European cultural integration, coupled with the taking of the spiritual identity, begins to increase. If until 1940, it had a predominantly "historic" and "philological" character, through important contributions in these directions, sometimes "artistic" under the totalitarian pressure began to escape, as well as in the entire socialist camp and in the "literary" and "literary studies" area.[5]

From the perspective of the new European reality (by which we understand both the present, as a result, in particular, the collapse of the communist dictatorship in Europe) and, especially, of the future one, the factors that can facilitate the cultural integration of Romania in the new European reality are essentially internal: first, a real European integration policy, taken consistently, constantly and tenaciously under the pressure of external factors, mostly the economic ones. Secondly, it requires a radical change of public spirit, leaving the isolationist mentality, specific, traditionalist, etc. ethnical, cultivated for decades here in Romania by the nationalist right, since the two world wars. Thirdly, an active policy of cultural contacts, as a necessary consequence of mood changes described above: the constant and active participation in various international bodies and literary cultural associations, congresses at international conferences (scholarships and travel), the organization of such events in our country (a long-term investment, high return but cultural) co-editing financing and translations in foreign languages (a very important objective of any active cultural policy).

Particular literary, editorial and individual initiative of the writers, men of culture, plays an important role. They can not expect only a hypothetical support of the official bodies (which often it is not coming), but they must try to integrate themselves. Some examples can also be given in this sense (in literature, criticism, literary theory, comparative), but they are still few and without external prestige and circulation. Only writers like M.Sadoveanu and L. Rebreanu, between the two wars, began to be concerned about these issues and to be translated into some languages. A persistent concern in this regard appeared, seemingly paradoxically, only during the communist dictatorship as a form of escape and direct manifestation of European consciousness repressed.

Looking deep, beyond the external factors, the key issue of European integration is essentially in Romania, the fundamental social structure. A rural and inevitably ethnic, conservative, isolationist, traditionalist, "semanatorist" Romania will not ever feel the need for Europe. Instead, it will perceive it as a serious threat to maintaining "national being". Only a city, urban, open, permeable to foreign influences, and prone to "cosmopolism" phenomena Romania can have real aspirations and "European" needs. Romania's current structure is still essentially rural, with all its negative phenomena. Only mid-range future, urban, Romanian, can effectively absorb and cultivate the European idea. It is now maintained by the Romanian intellectual remnants of the old aristocracy and

[5] Andrei, Petre, *Sociological Works, Volume II, Sociology of politics and culture*, (Bucharest: Academy Socialist Republic of Romania, 1975) 139.

bourgeoisie, how many could be saved. It is an ongoing, long, lasting, and in the current political and economic conditions still undecided. Between "Europeanization" and "privatization" it is a direct indissoluble Romanian relation, because only economic independence provides effective liberty thinking and cultural relations. In a strictly centralized state, European integration is seen as an attempt at independence and "national suverainty".[6]

Some blocking, rejecting or docile and lacking personality alignment "European" psychological factors are very considerable. The inferiority complex is still raging.

It can not be overlooked some irritating attitudes of Western "superiority complex". Some deeply mediocre, lack of competence cultural officials in the services of some embassies, institutes, libraries, unfortunately sometimes have a superior attitude, distance, some would say even "neo". The reaction of the writers, people of Romanian culture in Europe is actually consciousness, in some cases, inevitable and natural restraint, reserved, of non-cooperation.

Although the cultural gap of reference and erudition is still immense, in some specific cases, rare indeed, but existing, the question is why a Romanian author would be eternally "forced" to cite only foreign references, and a foreign author, in a certain precise issue, is not interested, in turn, in what has been published and new? Including, sometimes, foreign languages, even on the same subject? Why these references would be, in principle at least, of virtually equal quality?

The studies of "comparative literature" have, as a vocation, the study of literary relations in two ways. Why they would carry only "Eurocentric" one-way? The current European scientific and literary mentality is fragmentary, strictly specialized on strict partitions. Study and life often edit only a single author, etc... Many critics consider European comparative generalizations, summaries, general theories as dilettantism phenomena and even inferiority, etc... It is obvious that things, in some specific cases, at least, are completely different.

The uundoubtedly sincere, genuine failure to perceive the real, objective, aesthetic reactions is visible especially in the ideological sphere. Researcher and western reviewers, formed in a democratic, liberal type, where these realities are introduced for a long time and lived in the most natural way in the world, simply can not understand how, in the East, there is (or was) possible to invoke the idea of freedom, human rights etc.. He thinks, in his view (and so is) that it actually forces the open doors unnecessarily.

The Romanian foreign cultural device (but the situation is characteristic of all former communist countries to some extent) is not at all appropriate, as mentality and methods of European integration of Romanian values. Bureaucratic mentality, centralized, on the other hand makes it unable to adapt flexible total diversity in a free Europe society of literary relations, journalism and publishing. free Europe.

"Integration" does not threaten the existence of "national character" in any way. This "specific" evolves, is enriched, and is nuanced by all fertile influences and purchases of "integration". This alarm is maintained artificially and especially by the conservative traditionalists. The process of assimilation, osmosis and interdependence is universal and the Romanian literature (like any other) can not escape, according to its specific historical context and conditions.

For Romania to be made known, introductory works, reference guides, the history are needed for the general public. "In the editorial, the order would be this: novel, essay, drama. ..... Unfortunately, we relied almost exclusively to poetry.

The changing the editorial landscape is in a sense, radical. There was, first, the foreign literature category of consumption, mass, high circulation, totally unknown, for example, before 1989. This kind of translation is by far dominant. Another new category is the emergence of political essay translations, political works of reference, the liberal-democratic, and it completely unknown before. A new species is the category of memoirs, diaries, memories (including detention), unpublished correspondence. Another unusual category: large quantities of literature, esoteric, occult,

[6] Anton, Nicolescu, *National sovereignty and European integration* , (Iasi: Polirom 2002,) 142

more or less dubious. The phenomenon is, however, inevitably, after a very vulgar militant atheism. Great success and some novels or stories are full of real or alleged revelations about the "old regime", "revolution", "security", etc… It continues to appear literary and critical type operas, so called, traditionalist, but without the sales and listed audience categories. Some magazines prize the original literature today, without a great echo and influence especially on the commercial market the book.

The Romanian literature adapts to these needs with great difficulty and, so far at least, without success, hence the desperate calls for sponsorship and grants, denouncing "cultural crisis" appear.

The cultural integration can be facilitated (and assumed) by intense culture exchanges (contacts) between Romania and Western European countries (cultural agreements, scholarships, participation in international cultural events, etc...) The activity of the government bodies, institutions or other is not sufficient for this purpose. The lack of funds is a great handicap. But the biggest obstacle is the spirit of anti-Western, anti-liberal and anti-pluralist. Everything has been done can be done by the Romanian culture and Romanian culture is not simply the Ministry of Culture, but is almost exclusively the result of private, informal initiatives.

The Romanian culture between Est and West

The Romanian culture, namely the modern Romanian culture from the 18th and 19 to go directly to fund problem-is the product of Western fast synchronization. At the same time, traditional background, history, the late Middle Ages, remains very strong. The result is a characteristic situation: the confluence of two cultural spheres, without real affinity, deep, between them, modern Romanian culture is full of interference, the ambiguities and even inevitable conflicts.

Faced between West and East, the Romanian culture is dominated since the last century, by two major complexes: the west (Western) and Eastern (Oriental). "Between isolation and escape, chauvinistic and proud nationalism, the exacerbated nationalistic anger and western docile, even humble alignment, knocking on all doors in the western continent, Romanian cultural consciousness has not yet found, unfortunately, the balance and peace of mind and creative spirit."[7]

The Western psychology of seduction, of emigration, of the flight at all costs, has reached deep layers of the population. It needs a collective effort for a real political culture, including cultural distribution abroad. Objectives as competent, honest and free instruments and organs as organized, skilled and active must guide the presentation of Romanian culture and literature through systematic acts of knowledge and dissemination. We need competence and professionalism, spirit of cooperation throughout the EU, to participate with equal rights. It indicated the spirit of cooperation and team spirit in the new Europe that is necessary and that we can not ignore it or boycott it. Thinking and acting so far means not to be integrated in synchronous rhythm of the contemporary world.

The European and universal culture requires communication and circulation of free culture, continue to stimulate and intensify the exchange of values everywhere.

The European culture requires and stimulates cooperation and mutual influence. It promotes a permeable, responsive, sensitive, and open to creative and differentiation assimilations literature. Fostering friendly relations, mutual tolerance are correct and moral imperative and literary needs and outstanding.

We ask ourselves: what kind of culture is better? In what direction is the Romanian culture to turn? To develop? To be nurtured and supported? The answer depends, for a long time, our entire culture and political advancement, both official and especially the private.

We lived for decades under a culture of "left". Its effects are still felt heavily in legislative and administrative measures in language skills and clichés. Most obvious and dominant notes are the collective values, social order and norms, where the authority of a unique idea, the centralism,

[7] Adrian, Marino, *For Europe. Romania's integration. Ideological and cultural aspects*, (Iasi: Polirom, 1995), 77

conducting, planning, control, uniformity, intolerance are. The state is and remains the great patron-owner, the great administrator of culture. There is a ruling class and culture of a cultural nomenclature. It exercised censorship and cultural policy and reject pluralism as totalitarian order, split, dissidents, so the culture of hate left, fights cultural pluralism, private initiative, intellectual freedom with all its consequences: the expression of personality, originality, experimental, out of time. The principle of individual creativity essentially denies the left culture. Left ideal of culture is that all people of culture to be and remain the state officials to be better employed, directed, supervised, controlled and punished.

In Romania, the whole right ideology came back to the surface and dominated the current Romanian culture. Its exponents are philosophers, essayists, writers of great value, from Nae Ionescu to Emil Cioran, from Mircea Eliade to Constantin Noica.

Between these two compact blocks the Romanian center, frail, intimidated, isolated, without great traditions date, caught between two fires, under pressure from the left and right-wing extremism culture is a very difficult position. The center cultural values are hated in both directions, left or right: axiological balance between values, liberalism, pluralism, humanism, Europeanism, convergence and even synthesis of national and universal values, rationalism and critical spirit, a "common sense" that extremists despise, adherence to human rights and citizen[8], civil society by integrating nostalgia, direct participation and responsibility of the individual are still perfectly legitimate aspirations of any post-totalitarian society.

In Romania, in the countries of the East in general, this type of thinking and culture is neither obsolete nor exhausted, nor utopian. He is a great need, a real alternative, which alone can oppose extremes. Culture is the center but spiritual freedom, truth and real integration in democratic Europe.

The Romanian "lights" and Europe discovery

At the end of 18th century and the beginning of the 19th century, the novelistic intellectuals make a true "crisis" of European consciousness, spiritual solidarity with the first signs of civilization, culture and history of Western ideas and values, style and design dates back to life that time. The need to be in Europe, to bring it to our home was acute and urgent. This magical notion contained a global concept: admiration and inferiority complex, emulation and envy, hope and rebellion, and integration ideal, desire and progress, regeneration and rehabilitation. The true spiritual mutation, Romanian crucial moment in the history of consciousness and experiencing first phase of modernization, the discovery of Europe by the "lights" Romanian crucial raises cultural and comparative history and ideas.

European lights were indeed fertile and creative both in the spiritual and cultural Romanian space, because they determine the revelation of our own beings, reveal us in front of our own consciousness. European lights Romanian decisively help the Romanian spirit to discover its identity, to form its own aspirations, beliefs and European dimension. It suddenly had the revelation and conscience of being European. Cultural exponents of the Romanian people proclaim that they are Europeans, are in Europe, speak a European language and live in a European country.

The fundamental reality of time is as follows: for the Romanian Enlightenment, Europe was essentially a geographical or geopolitical notion but a cultural, spiritual pole. It expresses values, creations, original ideological trends: a new culture and literature, new and advanced social and political institutions, achieving a high level of progress, culture and civilization. This concept was tied to the belief that Europe radiates and gives new impetus to a cultural process, high quality of

[8] Human rights are classified according to various criteria, but the classification is used which is based on two international human rights pacts. Thus, according to those documents referred to, human rights can be divided into the following broad categories: political, economic and social, cultural. (For more details see Cristina Otovescu FRAS human rights in contemporary society, Romanian Writing Publishing House, Craiova, 2009, p. 22-23)

everything the Romanians knew before. Its meaning is equivalent to a real break, mutation and spiritual revolution.

Europe has all the characteristics of a cultural "model" in its fundamental meanings: "normative ideal, a force-idea, which proposes models, examples, paths to follow, imitate, assimilate, ideological system that organizes a whole, according to a structure basic data that fall within its scope, theoretical, abstract, autonomous plan functioning according to its internal logic, even if the image data does not take account of all Western reality ".[9] The European idea operates uniformly in all Romanian countries, with specific features, but in the same system of thought. How Romanians find, adapt and make their own picture of Europe, through a spontaneous act of adhesion, is itself functioning of the European model.

The study of the Romanian Enlightenment essentially needs a new and direct reading of the sources. They corrected many schemes, unverified general, outdated teaching exposures, repetition of commonplaces.

Much higher frequency of direct and indirect contact (reading, translation, travel, business education institutions, foreign teachers, intellectual atmosphere) is that "European model" to clarify and to state power in the first Romanian countries, Moldova and Walachia, and the end of the 18th century.

Legătura între iluminare, integrare şi recunoaştere europeană constituie un adevărat principiu ideologic. Iar aceste participări-concepute, în principiu, pe picior de egalitate-vor deveni tot mai frecvente pe măsură ce cultura română se dezvoltă în ţările noastre şi se dovedesc tot mai capabile de iniţiative şi manifestări pe plan internaţional.

The relationship between light, European integration and recognition is a real ideological principle. And these designed participations, in principle, on an equal footing, will become increasingly common as growing Romanian culture in our countries and prove more capable of initiatives and events.

Conclusions:

The basic concern for the message in the Romanian culture is the affirmation of European culture, defining, defending and popularizing the broad intellectual circles of the "European idea". By extensive and rigorous political and history studies, "European idea" needs affirmation and dissemination, clarification and strengthening of solidarity and deepening in the receptive Romanian consciousness. This preparatory and introductory stage is strictly indispensable. It still requires the removal, at least in part, an obvious gap in our journalism: methodical discussion of the "European idea" in its triple dimension: cultural - literary, ideological and political, as it reflects the culture and cultural Romanian realities.

Four objectives have priority in this respect: an affirmation of Europe's energy and adherence to this ideal in a novelistic perspective, by taking personal charge, a European point of view properly when you go through history, a militant attitude and style by the propagation of active and sometimes controversial ideas, expressed in a civilized and urban manner, exclusive idea polemics and not a people polemics, to bring a "European home" with as many ideas, values and attitudes. The basic program is being at the same time Romanian and EU in all fields of activity and with full conviction and energy.

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[9] Dutu, Alexandru, *Romanian culture in modern European civilization*, (Bucharest: Minerva Publishing House, 1978), 186

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A TRADITIONAL FALSE PROBLEM: THE RIGORISM OF KANTIAN MORAL AND POLITICAL PHILOSOPHY. THE CASE OF VERACITY

MIHAI NOVAC[1]

Abstract
According to many of its traditional critics, the main weakness in Kantian moral-political philosophy resides in its impossibility of admitting exceptions. In nuce, all these critical positions have converged, despite their reciprocal heterogeneity, in the so called accuse of moral rigorism (unjustly, I would say) directed against Kant's moral and political perspective. As such, basically, I will seek to defend Kant against this type of criticism, by showing that any perspective attempting to evaluate Kant's ethics on the grounds of its capacity or incapacity to admit exceptions is apriorily doomed to lack of sense, in its two logical alternatives, i.e. either as nonsense (predicating about empty notions), or as tautology (formulating ad hoc definitions and criteria with respect to Kant's system and then claiming that it does not hold with respect to them). Essentially, I will try to show that Kantian ethics can organically immunize itself epistemologically against any such so called anti-rigorist criticism.

Key terms: *political philosophy, ethics, categorical imperative, practical principle, veracity, perfect duty, mendacium, falsiloquium*

A very frequent objection to Kant's moral and political philosophy concerns its alleged rigorism. Thus, we are told: Kant's moral and political philosophy does not allow for any exceptions and this would constitute its fundamental flaw. In what sense however? Does it not allow for exceptions that, for one reason or another, *it should* allow for, or *does it not concede* of admitting exceptions when, in fact, doing so? Schiller[2] is a classical exponent of the former alternative, Benjamin Constant[3] of the latter (although indirectly). More clearly stated, in the latter case, the point of the objection would consist in saying not so much that the Kantian moral-political system *does not* allow for exceptions, but quite the opposite, that it does so, but it fails to admit it; given the case, I am quite puzzled by the fact that these two, argumentatively opposed, critical positions joined together in this *anti-rigorist anti-Kantian alliance*. I will not deal here so much with the *Schiller type* objection, i.e. the one linking Kant's alleged rigorism to his apparent rejection of any possibility for granting moral value to the actions which are *accompanied by* inclinations (*feelings*), criticism which, though frequent, I find rather shallow.

Kant does not hold, as his *romantic critics* would have it, that there is an essential and irredeemable conflict between reason and affectivity (i.e. that the opposition between the two is equivalent to the one between morality and immorality, so that any morally right conduct would necessarily lead to unhappiness, while any emotionally gratifying action would be doomed to *unrighteousness*). Kant only says that, when aiming at performing moral actions, we should not seek

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[2] Namely in his *On the Esthetic Education of Man*. The point of his criticism of Kant is well summed up in the following lines: *Gerne dien' ich den Freunden, doch tue ich es leider mit Neigung,/Und so wurmt es mich oft, daß ich nicht tugendhaft bin,/Da ist kein anderer Rat, du musst suchen, sie zu verachten,/Und mit Abscheu alsdann thun, wie die Pflicht dir gebeut.* (*I gladly come to my friends' aid, although i do it by inclination,/ And so I am often troubled, by the thought of not being virtuous,/There is no other way, you must try to oust them,/And indignantly hold to what duty commands* – my translation). Sattler, Alexander, *Schiller-Briefe über die Ästhetische Erziehung des Menschen*, Norderstedt, Grin Verlag, 2009, p.56.

[3] Constant, B. (1998), "Des réactions politiques", in *Écrits de jeunesse (1774-1799),* L. Omacini and J.-D. Candaux – (eds.), Tübingen, Max Niemeyer Verlag.

their moral value in the feelings, of any nature, accompanying those actions. He neither says that *we should not feel* if we want to be moral, nor that if feeling, while being moral, we are moral no longer. Roughly speaking, according to Kant, we can feel whatever we want to feel as long as we do not guide or value our *morally aimed* actions by those feelings. Why? Basically because morality, as Kant sees it, has to be *necessary and universal* while feelings, no matter how *altruistic* in intent, are always *contingent and particular* and, quite obviously, we cannot ground something necessary and universal on something that is contingent and particular.

Essentially, his point would be that any feeling, however *selfless* in its aim, is *selfish* in its nature, i.e. by its very nature of being subjectively felt, lacks the kind of universality which is required for a moral principle. We would not want to have to do, on the other hand, with a feeling which would not be *subjectively felt*. Correlatively, *feelings change*, that is good *natured feelings* do not necessarily ensure *good natured actions*: love, however *good natured* in its *being-felt*, can very well lead to morally condemnable actions. On the other hand, Kant holds, neither do the *real positive results* of a conduct guarantee its moral character. Why? Because the actual results of an action are not in the full control of the agent performing the action. One could very well *hurt* somebody while trying to *help*, just as one could *help* him, while trying to hurt him. Just as we should not be condemned for *doing the wrong thing for the right reasons*, we should not be (morally) commended for *doing the right thing for the wrong reasons*. How our intended actions actually turn out depends on a multitude of other factors over which we have limited control, or even none whatsoever. But if neither the feelings had while performing an action, nor the actual results to which it leads afterwards, account for its moral value, than what does? Kant's answer: the intent behind it, that is, *knowing of wanting to do the right thing for the right reasons*. And which are the right reasons? Those reasons which, given the context, could lead any imaginable human being to the same intent. Only actions *intended through* such reasons have moral value. But feelings, as we have seen, do not possess this sort of *unilateral necessity* with respect to the actions they lead to. They are in a state of perpetual flux, namely, they are so changing that not only different people feel different things in the same context, but the same person can feel different things in the same context and, all the more, the same person feeling the same thing in the same context could want to do quite different things. That is not necessarily bad, quite the contrary, it accounts for the feelings' *vital value*, *i.e.* for the intimacy, spontaneity and authenticity the lack of which would make human existence not just dull, but rather *improbable*. But precisely this *vital value* which makes feelings *worth being had* is what makes them also unfit for serving as moral principles. When, given a specific context, we intend to act morally in a specific way, we should consider strictly those reasons of which we know that would lead any other human being, real or imaginary, to the same intent in the same way and, consequently, myself at any other time when meeting the given context. Only purely rational reasons are capable of doing that and that is because reason is the only *trait* of the human being which is *universally shared in the same way*. That is what we could call, in Kantian terms, the *universalizability of our maxims*[4] and this notion runs through his entire moral and political philosophical system:

Act only according to that maxim through which you could at the same time will that it should become a universal law.[5]

(The Categorical Imperative, the first formulation, Variant i)

Act as if the maxim of your action were to become through your will a universal law of nature.[6]

[4] Approx. reasons for acting in a certain way in specific situations.

[5] Kant, Immanuel, *Groundwork of the Metaphysics of Morals*, Cambridge, Cambridge Univbersity Press, 1998 p. 88.

(The Categorical Imperative, the first formulation, Variant ii)

Act in such a way that you always treat humanity, whether in your own person, or in the person of another, never simply as a means, but always at the same time as an end. [7] (The Categorical Imperative, the second formulation)

All maxims proceeding from our own law-making ought to harmonize with a possible kingdom of ends as a kingdom of nature.[8]
(The Categorical Imperative, the third formulation)

Right is…the totality of conditions, under which the will (Willkür) of one person can be unified with the will of another under a universal law of freedom.[9]
(The Principle of Right, variant i)

Every action is right which, or the maxim of which, allows the freedom of the will of each to subsist together with the freedom of everyone.[10]
(The Principle of Right, variant ii)

Basically and paradoxically, we could say that Kant rejects affectivity while stressing reason as moral principle precisely because the former is not empathetic enough[11] for such a position, while the latter is. That's about it with the former, *Schiller type* anti-rigorist objection to Kant. The basic idea is that this type of criticism lacks sense because it accuses Kantian ethics of lacking something which it was precisely designed to lack, i.e. exceptions. That is exactly what the entire Kantian moral project was about: offering a systematic model of morality provided with necessity and universality, i.e. explicitly not admitting exceptions. Exceptions in what sense? In the sense of moral grounds for breaking, or at least not observing, the moral principle (whatever that may be). On the other hand, we could understand by *exceptions*, exceptional circumstances under which feelings could provide moral value to certain actions. An objection to Kant's moral philosophy based on such an interpretation of the term *exception* falls again short because of simply being superfluous. Any type of morally acceptable action has its corresponding rational maxim, by this not meaning however that it is forbidden to also have positive feelings about it. As previously said, according to Kant, we can have all kinds of feelings we may like during our moral conduct as long as they are only a non-essential companion of our actions and not their determining factor. Moreover, not all actions have moral relevance: there are also actions that are neither moral, nor immoral, they simply don't have anything to do with morality and in their respect humans are *morally permitted* to act by virtue of their feelings. In short, there is no necessary incompatibility in Kantian ethics between (rational) morality and affectivity and, as such, there is no need for the concept of *exception* in such an interpretation.

In short, this type of criticism is doomed to nonsense, basically because it addresses empty notions, by this meaning that the conceptual domain relevant to Kantian ethics (i.e. by the very definition of the terms) excludes the concept of exception (not so much in the sense of not being considered, but in the sense of being considered precisely in such a way that it does not have any constitutive consequence or effect on the moral system as such). In a Wittgensteinian formulation we

[6] *Ibidem* p.89.
[7] *Ibidem p.*96.
[8] *Ibidem p.*104.
[9] *Ibidem p. 230.*
[10] *Ibidem.*
[11] I.e. *universally empathetic*.

might have it that the logical domain defined by the totality of the atomic objects /names (i.e. of the basic concepts within Kant's moral system) and by the sum of all their potential combinations excludes the concept of exception. If you will, we could say that accusing Kant's moral system of *not admitting exceptions* is like objecting to the meaning of the term *unmarried* on the grounds that it doesn't admit exceptional cases in which unmarried persons could be married. More to the point, that is to say: in Kant's moral philosophy, the concept of exception is referred to in relation to the moral law precisely in order to define the latter in such a way as to exclude it.

Now for the second, *Constant type*, objection to Kant. As previously stated, this kind of criticism has to do not so much with Kantian moral system *not admitting exceptions*, but rather with the fact that it actually admits exceptions while not acknowledging it. Therefore, the accuse here is not so much of rigorism but rather of incoherence. I will attempt to show that this approach is also doomed to lack of sense as *tautology*. Basically, that is because, previous remarks being considered, any perspective accusing Kantian moral philosophy of not admitting exceptions and wanting to avoid the fate of *addressing empty notions*, must say that on the basis of its own, *homemade* understanding of the notion of exception. But this however is argumentatively both circular and *ad hoc*: it comes up *post hoc* with its own definition of exception and then accuses Kant of not adhering to it.

Let's be more specific. First of all, we could differentiate between two generic understandings of the term *exception* with respect to the Kantian moral system: what we could call *empirical exceptions*, on the one hand and *moral exceptions*, on the other.

In the former case, saying that Kantian moral theory admits empirical exceptions, would amount to observing that in *actual life* nobody fully lives up to the Kantian moral standards: no real human being has ever respected to full amount in his actual conduct either the categorical imperative, or its *political counterpart*, the principle of right, quite the contrary, these norms prove far more often to be disregarded than observed. The Kantian response to that is quite obvious, having to do with the difference between the *descriptive* and the *prescriptive* dimension of reason. The main difference between the theoretical reason (knowledge) and the practical reason (morals) lies in the fact that while the task of the former is to, so to say, *represent reality*, that of the latter is to *normatively mould it*, more specifically to determine our behavioral reaction to it on the basis of our specific nature (reason). Therefore, while the availability of the empirical judgments is, to some degree, affected by the measure in which they correspond to the empirical, sensible, reality, that of the practical judgments is not. That is because while in the theoretical field of the empirical knowledge reason depends in its activity, at least on some degree, on *something other than itself* (i.e. the *matter* of the phenomenon or the sensible content of our experience), in the practical one it does not. With respect to the practical realm reason is, so to say, *in itself* and must operate as such. Therefore, while what we *know* depends in some measure on what we *can* know, what we *want*, i.e. *intend*, to do does by no means depend on what we *can* do. In final analysis, for Kant, as far as pure reason is concerned, we *know* what we *can* and do what we *must*. These are the terms on which Kant established, in a more general sense, the (philosophically) famous principle of the preeminence of the practical reason with respect to the theoretical one: what we know (more specifically the necessary preconditions of knowledge in general[12]) supervene on what we *must* do (intend). That is why Kant specifies in his *Groundwork of the Metaphysics of Morals* that he does not aim to provide us with a *moral anthropology*, i.e. a comprehensive description of our moral customs (which are always culturally dependent), but with a rational practical moral system, i.e. an apriorily defined set of interlocked duties which are universally valid, that is independent of any empirical (i.e. cultural, social, historical, psychological or biographical) factors. Hence, it is quite obvious that Kant's moral philosophy is completely impervious to this reading of the notion of exception, namely as *empirical exception*.

[12] The so called Ideas of the theoretical reasons: the existence of an immutable subject of knowledge (the *ego cogito*), of an immanent unity of the entire experience (*Nature*), of a transcendent unity of the entire experience (*God*), of our transcendental freedom etc..

Now for the latter interpretation of the notion of exception, ie. as *moral exception*. As previously noted, these type o exceptions should be prescriptive and not descriptive in nature. In other words, this notion corresponds to the idea that one could find certain moral grounds for breaking, or at least, failing to observe determinate moral duties resulting from the categorical imperative. More specifically, the claim is that, on strictly *Kantian* grounds, we could come up with contexts in which the observance of a certain moral duty stemming from the categorical imperative leads to the breach of another moral duty deriving from the same principle. This would be a serious threat to the coherence of the Kantian moral system indeed. On the other hand, we must take account of the fact that Kant himself considers such situations, his solution being to say that in such cases the so called *breach* is not a breach at all but something completely different. Simply put, for Kant, failing to abide by a certain duty for the sake of respecting another is not the same as plainly breaking it, but another act altogether, which is *morally irreproachable*. But how do I decide in such contexts, how do I come to know in keeping with which of the two (or potentially more) duties I should direct my actions? At this point, at least in my opinion, the Kantian moral thought would prove to be very resourceful in offering us solutions. For example, first, we could distinguish between the duty as such and its various implementation strategies and in many cases, on thorough analysis, find that the apparent *inter-duty contradiction* is not so much a conflict between two distinct duties but between two alternative ways of performing one and the same duty, second, if needed, we could establish a hierarchy of duties so that the infringement of the *inferior* one for the sake of the *superior* one does not come out as morally condemnable. That is precisely the case with what I have earlier called the *Constant type* objection to Kant. More to the point, Benjamin Constant formulates in his previously mentioned work[13] a context in which he speaks of a so called *right to lie out of love for humans* as an alleged exception to the perfect duty of veracity (truthfulness). As such, according to Constant's example, suppose that a friend of hours shows up one night at our door asking us to provide him with shelter as he is followed by a villain. We accept. Afterwards however, the villain himself shows up and asks us if we saw the one he is looking for. What should we do in order for our action to be morally sound? Of course, we could do what regularly any normal person would do in such a case and claim that we didn't see him. However, on Kantian terms, this would allegedly constitute a lie and consequently represent a breach of the perfect duty of veracity. On the other hand, if we told the truth, we would endanger the life of another human being. To this would amount the sort of moral ground for breaking a perfect duty I was earlier speaking of and as the Kantian moral system would seem to treat this type of conduct as morally unacceptable would mean that there is something flawed about it, or at least so the objection goes. Basically, my pro-*Kantian* response would be that this type of *untruthfulness* does not constitute a lie, i.e. a moral breach of the perfect duty of veracity, but a completely different act. There are two interrelated sets of distinctions which Kant makes in this respect: (i) the one between *mendacium* (consciously making false statements after explicitly claiming to tell the truth) and *falsiloquium* (consciously making false statements without explicitly claiming to tell the truth), respectively (ii) the one between *veracity* and *open-hearted-ness*. With regard to the first distinction, it must be said that Kant characterizes only the *mendacium* as a breach of the perfect duty of veracity, i.e. *wrong*, while treating the *falsiloquium* as morally indeterminate, i.e. neither good, nor wrong (in his terms, only *congruous with the duty*, but not *out of duty*[14]).

[13] See note 3.

[14] This is one of the classical distinctions in Kant's moral philosophy. The basic idea would be that in evaluating the moral value of an action, one must take into account not just the deed as such (all the less it's actual results, as it has already been pointed) but its *maxim*, i.e. it's reason. The point is that there are some actions that, although they do not breach any moral law as such, they have no moral value because the reason behind them is not morally valid, i.e. strictly rational. In pseudo-Kantian terms one might characterize them as *contingently moral* as opposed to the genuine moral actions which are necessarily so. The former are *contiguous with duty*, while the latter are *out of duty*. The most famous example is the one in which one supposedly sees a needy person begging on the street. Now, if he/she helps him/her just out of peaty, the former's action is *contiguous with duty* (i.e. not unmoral), however it

Therefore, in the aforementioned dilemmatic context I could still choose to help my friend and not tell the truth by committing *falsiloquium* and not *mendacium* (technically speaking most of our real life so called *lies* are *falsiloquium* and not *mendacium*). Of course, to be completely honest, there still remains a problem because although not an unmoral deed, the *falsiloquium* is not a moral one as well and this would mean that in this situation, on Kantian terms, the act of helping another human being (perhaps saving his/her life) has no moral value. However, I do not think that this is an unsolvable problem, at least so long as we have sufficient imagination to think in the *Kantian spirit* and not unilaterally in his *letter*, so to say.

As for the second distinction, Kant says: *All that an honest, but refrained (not open hearted) man says, is true indeed, despite of not telling the entire truth. As opposed to him, someone who is dishonest says something the falsity of which is known to him. The statement of the latter bears the name of lie in the theory of virtue. And be it completely harmless, it is still not inoffensive; in fact it is a serious harm brought upon one's duty to himself, namely to an indispensable one, the breaching of which diminishes the human dignity in our own person.* [15] In other words, although the perfect duty of veracity compels us to tell the truth, it doesn't compel us to tell the entire truth. Consequently, in the aforementioned context, I would still have the morally legitimate option of being vague and imprecise in my affirmations, thus, hopefully, saving my friends' life.

Hence, by repeated uses of *falsiloquium* and this *limited open-heartedness* I could come up with a strategy that is both practically useful (in saving my friends life) and morally permitted (though not morally valuable).

Now, in the end, I would like to address a most common objection to Kantian ethics. When faced with this kind of moral theory most people react by claiming that *nobody would ever react in real life in such a way, at least not completely*. This is the basis for both the intuitionist and the utilitarian criticisms of Kant. Point taken, but this is not what Kant attempts to do, in fact, from his perspective, this is not what any moral theory in general should attempt to do, that is provide an accurate description of our moral behavior. As previously stated, according to Kant, moral theory should be prescriptive with respect to our empirical reality, that is, provide a set of idealized standards on the basis of which we can (i) direct our moral actions and (ii) evaluate the moral value of our actions. Behind this claim lies the stoic moral assumption of his philosophy that surely doesn't sound quite as extravagant as his other claims, namely the notion that *we should be held morally accountable only for those aspects of our being (actions, situations in which we partake, attitudes, reactions etc.) that are in our complete control*. On common sense level we tend to agree more with this fact as I'm sure that everyone has at least once in his life found himself in the bitter position of having wanted to do the right thing (help someone for example) only to find that by this he made matters worse, due to unexpected factors. So as the *real world outcome* of our actions is always determined by a lot of other factors than the ones we can control, what actually matters for the evaluation of the moral value of our actions is our *intent* and not their outcome. As such, if we wanted to renounce the ideal-prescriptive character of the Kantian theory in favor of a more *down to earth* (i.e. *descriptively accurate*) moral conception, we should be ready and able to morally cope with the idea of blaming someone for something that wasn't dependent on him on the first place, we would have to, so to say, find it in ourselves to blame Oedipus for his (predetermined) destiny. How would a political model built on such moral grounds look like, I dare not imagine, but I'm sure it

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is no genuine moral action as peaty is a feeling and feelings are not valid moral grounds (considering that the same feeling can sometimes lead to morally good actions and sometimes quite the contrary). In this context, only the former's rational respect for the needy as a human being (directly derived from the categorical imperative) is a reason that can provide moral value to the action of helping him/her. For further detail you can consult Kant's *Groundwork of the Metaphysics of Morals*.

[15] Kant, *Briefwechsel*, Vol.II, Müller, München, 1996, p.564 (my translation).

would be less *democratic* than both the utilitarian and the intuitionist critics of Kant would appreciate.

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A NEW FRAMEWORK FOR COOPERATION IN EASTERN EUROPE: THE EASTERN PARTNERSHIP

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ABSTRACT
Following its enlargements towards East, the European Union found itself near a complicated zone, which influences its security environment. Launched in 2009 at the Prague Summit the Eastern Partnership aims to provide a new framework for cooperation between the EU and other six Eastern European and Southern Caucasus countries: Armenia, Azerbaijan, Belarus, Georgia, Moldova, and Ukraine. In the same time, the Eastern Partnership attempts to provide the conditions needed to improve political association and economic integration between the European Union and these countries. In this paper I analyze the way in which the Northern Dimension and the Southern Mediterranean dimension of the European Neighbourhood Policy are influencing the political discourse found at the European level regarding the security issues. More precisely I want to identify the tools used to choose which interests are more important: those regarding the Southern Mediterranean or those concerning the Northern Dimension and how they are ranked. Further, I look at the way in which those interests are shaping the framework for the Eastern Partnership and for cooperation between the states. Are there similar approaches to the problems or different goals for this Partnership? I am interested to find out how different perceptions regarding security – those from the North, South and East are aggregated to provide an accurate framework for cooperation in Eastern Europe.

KEY WORDS: *European Union, European Neighbourhood Policy, security, Southern Caucasus.*

INTRODUCTION

In this article I will use EU's European Neighbourhood Policy to see the way in which it helps to formulate an European response to the security problems found at the regional level, within the context of its foreign policy. My theoretical approach is a neo-liberalist one, and I argue that the European Union it seeks to establish good trade relations with the countries found in the Eastern neighborhood in order to promote Western values such as a democratic political regime, the rule of law and the enforcement of human rights in order for it to ensure a peaceful environment. The article aims to present in a systematic way the instruments used in order to establish rules and institutions for the both participants in the negotiating process, and I mean by that for the European Union, and for the eastern and/or northern countries. The second aim is to show the ways in which domestic interest in the member countries influences the EU's foreign policy and interests' prioritization.

1. Looking for common interests

In the aftermath of the Second World War, some European leaders such as Jean Monnet and Robert Schuman returned to the idea of a "European Union", which was exposed in 1929 by Aristide Briand in front of the League of Nations[2]. To ensure peace on the continent Europe needed to learn to cooperate, and in order to achieve this it had to identify common interests, in order for all the states to work towards them. The first document which placed great importance on cooperation was Franco-British Defence Treaty signed in 1947 in Dunkirk, followed by the signing in 1948 of the Brussels

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[2] Bărbulescu, Iordan,: *UE de la economic la politic* (Bucureşti: Tritonic, 2005), p. 62.

Treaty, by France, Britain, Belgium, Netherlands and Luxembourg[3]. It should be noted that France, and especially Britain were the only European countries that also hold powerful armies that could be considered as subjects of a treaty relating to defense. The signing in 1948 of Western Union Treaty, which was created in order to obtain "economic, social and cultural collaboration and collective self-defense"[4] in Brussels on March 17, and amended by the Protocol signed in Paris on October 23 1954, reinforced this position. Member States have decided to integrate their air defense and to have a common command for joint exercises. This move was seen as the necessary step for greater involvement on the U.S. part in its relationship with Europe and with its defense and security, in this framework, special attention was paid to the role of West Germany in the new architecture of security and defense. In October 1950, in order to facilitate the integration of Germany, France proposed an European army which would have been under NATO's command. Further, this put the foundations for the "European Defence Community (EDC) in which Belgium, France, Italy, Luxembourg, the Netherlands and the Federal Republic of Germany were due to participate"[5]. The Treaty was signed in May 1952, but in August 1954 the French National Assembly refused to ratify the Treaty.

So here is that despite the general perception that the European idea started in order to satisfy the economic needs, the entire European project had the primary goal of meeting the security needs of the Western European states. What followed was but the continuation of this approach, but on the contrary. The defence dimension was blocked due to the personality of leaders, and I am referring to French President Charles De Gaulle, either because of shifting resources to other sectors, and I refer to the implementation of the Marshall Plan. One of the communities that would have to safeguard the continent was the European Defence Community, but it failed to become a pillar of European construction and remained for almost 50 years to wait for the attention of European leaders. The most common explanation for this is that NATO was an alliance which managed to coagulate expectations and interests of its members and provide both North America and Western Europe, security for more than six decades. The article's structure requires us to mention a brief theoretical explanation for Alliance's role in the context of bipolar system which emerged after the end of World War II. My approach here is a regional one, so the actions taken by a player at this level are possible and allowed, but not conditioned, in relationship with the system and therefore I consider it appropriate for clarity to say that the Alliance was responsible for providing security through systemic lens, but at the regional level the Europeans were able to decide that they have other interests. Let's remember that even today, U.S. and Russian Federation remain by far the most significant players in terms of nuclear capabilities, but this is not the subject of this article. What I am looking for is to explain how the EU is seeking to ensure security in the eastern neighborhood and to clarify its interests.

Even before the end of the Cold War, the Western European Union (WEU) was reactivated, although the Genscher-Colombo initiative failed in 1981 to expand the European Political Cooperation (EPC) beyond the economic aspects of security and defense sphere, but at least brought into attention this weakness in the European construction. Thus, in Rome under the guidance of French and Belgian governments have a meeting of Foreign Ministers and Defence Ministers, which adopted on 26/27 October the "Rome Declaration", reads the restart WEU. The plan aimed to "define a European security identity and the gradual harmonization of policies in the defense of members (…) continuing need to strengthen European security and the recognition that better use of WEU will contribute not only to West Europe's security, but also to improve links to common defense states the

[3] Howorth, Jolyon,: *Security and Defence Policy in the European Union* (New York: Palgrave Macmillan, 2007), p. 4.
[4] http://www.weu.int/, accessed on 15.01.2012.
[5] http://www.weu.int/, accessed on 25.01.2012.

Atlantic Alliance"[6]. I think the Rome Declaration is important because it stress that crises in other parts of the world might have implications for Europe. Thus, this statement allows WEU Council to decide which would be the consequences for Europe and to act accordingly. From that date, the Foreign Ministers and Defence Ministers, the Member States were to have annual meetings at conferences of WEU.

In the meantime at the systemic level, U.S. and the USSR began to discuss the withdrawal of nuclear missiles and at the regional level, through this meetings and fund actions we can understand that the European players tried to formulate coherent response in order to ensure their own defense. Thus, WEU Council and its Special Working Group produced a report specifying the criteria and conditions for European security and European specific responsibilities within NATO. Based on this report it was adopted at Hague in 1987 "Platform of the European Security Interests" which establishes the general conditions for a future work program and stating in its preamble: "We reaffirm our commitment to building a European Union in accordance with the Single European Act who was signed by the members of European Community. We believe that achieving an integrated Europe will not be possible unless it includes security and defense". The European security was seen as indivisible, while the Ministers committed themselves to take actions in order to obtain the "European pillar of NATO"[7]. Also in Hague the WEU had continued to attract members of the Alliance, and decided to open negotiations with Portugal and Spain which became members in 199

In this period, European security story is the story of coalition's efforts on both sides of the Atlantic, to harmonize and streamline the military defense strategies of deterrence and war in Europe. Through these years for Europe, the security threat is perceived as especially political and less military[8].

2. The end of the Cold War and its impact on the European security

After 1990, the Soviet Union's dissolution and the U.S.'s victory in first Gulf War, the U.S. now had a different position, as the undisputed hegemon of the international system. The international system had become unipolar, so it had one powerful state that had the resources to intervene wherever and whenever to defend its interests. Meanwhile, the U.S. tried to encourage and strengthen attempts to formulate a defense and security policy in Europe and the end of the Cold War brought changes not only at the systemic level, but also at regional level, where the Maastricht Treaty was signed in 1992 in through which the European Union had emerged. The economic dimension of the European construction had almost been achieved and in 2002 when the Euro was introduced, as the symbol of economic unity. Certainly an incentive in this process was and the end of the Cold War, which allowed for Germany's reunification. Putting things in a new economic phase allowed European leaders to rethink the policy of defense of the continent, and the old political project of a European defense community has been re-launched.

Another variable that affected the EU security was - at the regional level- , the disintegration of Yugoslavia. While the Cold War was named by Deutscher as "an ideological confrontation, great competition between democracy and totalitarianism, between capitalism and socialism"[9] in the early 90's the world, and especially Europe had faced a different kind of conflict, one that Mary Kaldor called "new wars". This form of conflict occurs due to pressure that globalization exerts on some authoritarian states. Such wars are fought "through networks belonging to state and non-state, often without uniform, wearing distinctive signs (....) battles are rare and most violence is directed against civilians, as a consequence muster tactics against riots or ethnic cleansing. In these wars are diminishing taxation and financing of the war is robbery, illegal trading and other income generated

[6] http://www.weu.int/, accessed on 25.01.2012.
[7] http://www.weu.int/, accessed on 15.01.2012.
[8] Kolodziej, Edward A,: *Security and International Relations* (Iaşi: Polirom, 2007), p. 121.
[9] Kaldor, M.,: *Human Security* (Cluj-Napoca: CA Publishing, 2010), p. 16.

by the war (...) as opposed to old wars, which ended with a victory or a defeat, no new wars end occurs as quickly"[10]. These new security challenges are related to the development of the phenomenon called globalization and the challenges it brings to the state. In this case, the state, the fundamental unit in analyzing the phenomenon of international relations must be able to meet these challenges.

When we want to analyze security we use most often a relational definition. This is explained by the fact that the state of security or insecurity is by reference to an external object which is in the state of security or insecurity. In most cases we should operate with a generally accepted definition of security and in most times it is referred to as lack of threats or, more precisely, as A. Wolfers said: "Security points to some degree of protection of values previously acquired"[11]. He also identifies two dimensions for conceptualizing the term. We have an objective approach and a subjective one: "an objective sense, measures the absence of threats to acquired values, in a subjective sense, the absence of fear that such values will be attacked. In both respects a nation's security can run a wide gamut from almost complete insecurity or sense of insecurity at one pole, to almost complete security or absence of fear at the other"[12]. Security refers to the individual and the main object to which it target is that the State it can be managed into independent sectors: social, political and economic. Defining the security interests is made by policymakers and in defining what they are the perceptions they have regarding threats, risks and vulnerabilities are important. These perceptions are subjective and what a policymaker can perceive as a threat to another may be an opportunity because the environment in which an individual operates can lead to "inevitable pressure"[13]. Other important concepts when we define security are threat and vulnerability. Security can be achieved by reducing vulnerabilities and preventing or reducing threats[14]. Threats can be defined as imminent dangers to national security and they come from outside the state. If threats were perceived to source outside the state, vulnerabilities arise due to the internal structure of states. Due to existing weaknesses in the structure, the state becomes vulnerable to an external threat and that is why when institutions and their operating mechanisms are developed, state vulnerability will decrease. National security and citizen security is not necessarily the same thing. Citizen may be subject to threats that have as source state[15] and the wars in former Yugoslavia could not be demonstrated more clearly so. States with a strong institutional structure and a clearly defined idea of state were appointed by B. Buzan as powerful states, the antithesis, weak states are the least institutional developed and "are structured diffuse compared with their companies"[16].

The weak and the strong states are vulnerable to threats from unconventional fields such as the ecological, economic, social and combining the threats and vulnerabilities results insecurity[17]. Threats exist in the international system because there is both anarchy and competition. The risks, they are difficult to operationalized, while also being difficult to identify and have a low probability to occur. But as a threat to turn into a threat to national security it must be of a certain type and be perceived as such by policy makers:

"Specifying its intensity, its approach in time and space, the probability of performance, serious consequences, and whether or not the perception of threat is amplified by historical

[10] *Ibidem*, p.13.

[11] Wolfers, A. 1952: "National Security" as an Ambiguous Symbol, in *Political Science Quarterly*, Vol. 67, No. 4 (Dec., 1952), pp. 481-502.

[12] *Ibidem*, p. 485.

[13] Buzan, B.,: *People, States and Fear* (Chişinău: Cartier, 2000), p. 34.

[14] Ungureanu, S. R.,: The Concept of Security in A. Miroiu şi R.S. Ungureanu (coord.) *The Handbook of International Relations*, (Iaşi: Polirom, 2006), p. 120.

[15] Buzan, *op. cit.* p. 54.

[16] For details regarding the difference between weak states and strong states see Buzan, B.,: *People, States and Fear* (Chişinău: Cartier, 2000), pp. 105-7.

[17] *Ibidem*, p. 120.

circumstances. The more intense the threat, the more legitimate national security is invoked in response to it."[18]

Weak states are susceptible to vulnerabilities that have developed institutions to ensure their operation. The combination of two factors: weak state and low power leads to a very high vulnerability and examples of such countries as Ethiopia, Uganda, and Mozambique. Real threats are difficult to identify and measure because threats are dependent on subject-object dichotomy, and that's problematic distinction between what is truly a national security threat to which results naturally from participation in the international threats prove to be difficult to control. Not all threats can be classified as national security threats. Natural threats can be assigned attributes as usual normal frequency - as threats to national security may be attributed adjectives such as dangerous, unusual[19]. The classification decision maker considers these threats primarily political criteria. Establishing threats is a difficult and extensive because if their number is high use of resources results in an unjustified paranoia and attitude type. On the other hand, if their number is lower just because were not properly identified may be greatly hampered response to these threats.

The '90 have forced the international community, and especially Europe to bring an answer to the atrocities in Bosnia, and this response was humanitarian intervention. Destabilization of the area would have been a direct threat to the European Union, and new wars tended to expand through criminal networks, refugees and the promotion of exclusive ideologies[20].

3. Towards a Common European Security Policy

In December 1998, the Franco-British summit held in St. Malo, had founded a new European policy that would be known as the European Security and Defence Policy. This Summit marked a change in Great Britain's position to the European common defense and managed to improve its proximity to the European Union. At the summit in St. Malo, it was decided to be obtained autonomous EU military capabilities, laying the foundations of European defense policy. In the Declaration of St. Malo talking about the need for EU to become an autonomous and unified on the international scene, which involved application of the Treaty of Amsterdam, the European Council was given the opportunity to take decisions on common defense within the framework of Common Foreign and Security Policy (CFSP) by the method of inter-governmentalism. To initiate the work which requires a common defense policy, the EU should build its own military force that can act in a clearly defined period of time and able to respond to international crises. This approach does not exclude obligations that Member States, namely those arising from membership of NATO and the declaration reaffirms the need for armed forces to be supported by technology and defense European industry. Although, currently insufficient, European armed forces can be extended and nuclear weapons of France and Great Britain could provide some independence for WEU[21]. Intergovernmental conferences, as the main instrument which sets out new decisions in the Union, demonstrated the difficulty in taking these decisions in areas where both individuals and states are sensitive. Conference prior to the Maastricht Treaty, which took place after removal of totalitarian regimes in Eastern Europe, showed deep differences between member states' interests.

Delegation of sovereignty was made to the Commission and to Parliament for the economic field, while the sovereignty for the field of security will be towards the Council of Ministers and that is why the national veto will lose its role. States that have fewer resources, or are on a lower position in terms of resource allocation for assuring security will be willing to cooperate or to cede sovereignty in comparison with those who have more resources.

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[18] *Ibidem*, p. 142.
[19] *Ibidem*, p. 123.
[20] Kaldor, M.,: *Human Security* (Cluj-Napoca: CA Publishing, 2010), p. 16.
[21] Conry, B. *The Western European Union As NATO's Successor*, Cato Policy Analysis No. 239, September 18, 1995, available at http://www.cato.org/pubs/pas/pa-239.html, accessed on 10.01.2012.

Main principles of CFSP can be summarized in: promoting and defending peace abroad, democracy and human rights - the fundamental values of the Union, Union's participation in building a society based on international law as a method by which the foundations of world development based on peace and stability, use "cooperation" as opposed to "taxation" - that means that conflicts can be managed and resolved international opportunities offered by multilateral cooperation, economic and social model European export due to the effects it has had to the competitively and solidarity as well because this model has kept "society" before state and market. And the last principle is that of using power as a stability factor[22].

It can be seen that especially the last principles' focus is on methods of meeting modern safety variant and not the classic model that emphasizes hard power and military factor: democracy for preventing political threats and market economy, but ensuring solidarity in order to prevent economic threats. These principles were common vision of states in terms of foreign policy. It can be argued quite simply that these measures were accepted because they are shared by all Member States, the reflections of principles that must be met to be part of the Union, being the working group and taken by the Presidium. Unlike Laeken, in discussions within the Working Group did not use the term foreign policy or the common foreign policy, but the term joint action. The difference between external action and foreign policy is significant. Action has a weaker effect compared to politics. Policy needs objectives and targets, instruments, budget and program coherence and to apply. Common foreign policy had been designed by European federalists on the similarity of the Common Agricultural Policy this is chin by European Parliament resolution on the powers of the Commission and asked it in a document dated May 2002[23].

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This new direction that the European cooperation took was deemed essential not only for the EU but also for the transatlantic partnership. Thus, a few months later, U.S. Secretary of State Madeleine K. Albright was to provide an official position on how the partnership it will evolve under the influence of the new approach. The speech preceded the NATO summit in Washington in April 1999. Her article, entitled *The Right Balance Will Secure NATO's Future*[24] it reaffirms that the primary purpose of the Alliance as defense against aggression and encouraged greater autonomy in managing their defenses and possible development of a European army. This approach is complementary to NATO and facilitates its mission, but the Americans allies assessed from the perspective of NATO, considering that it is his contribution to the efficiency of its activities and calling for strengthening its practical side. A step in this direction was taken when he developed "extraction force" under NATO's command, but made up of European power and is available to the Organization for Security and Cooperation in Europe. As the article had appeared in the aftermath of Kosovo, the author points to important lessons that could be learned by the European leaders, namely the need to reach a political agreement and high attention to be given to the political will. It seems that a case study was the war in Georgia, were have been applied the lessons in the former Yugoslavia. Another important finding of the Secretary of State is that NATO and the EU should avoid three potential problems: decoupling, duplication and discrimination. This is why the article has come to be known as "the three D". Decoupling refers to the avoidance of a fault between the U.S., EU and NATO as an organization to maintain involving sovereign states.

[22] The principles appeared in Bărbulescu, I. *op. cit*., p. 251.
[23] *Ibidem*, p. 256.
[24] Available at: http://www.iss.europa.eu/uploads/media/cp047e.pdf, pp. 24-27, accessed on 10.01.2012.

Second, duplication mainly aimed at eliminating the dissipation of resources that are used for defense, such as action planning forces, operational command structures that would not be found in both blocks. The third and final recommendation was to avoid discrimination between countries that are members of NATO, but not of the EU. The Alliance will be important for the European defence, but not central to it. Its goals will be related to the development of responsibility for the new democrat states. The idea of community and extending it to appear particularly strong in this article, and the Eastern dimension of the possible future community is also mentioned by stating that the outstanding partnership with Ukraine. Russia's role remained unchanged, but unlike the late '90s, when the article appeared, now the focus is no longer put emphasis on the Western Balkans, but the Caucasus. In terms of what in the statements of the St. Malo Declaration, we find that the European policy and security policy are perceived as a political element that has institutional coherence, however, one of its main instruments, the Eastern Partnership is seen as a way to resolve conflicts in the Eastern part of the continent[25]. We cannot mention E.U.'s autonomy in managing its security issues, without mentioning the importance of the events of September 11, which certainly had a major role in realizing the need to define and prioritize perceived threats in a framework different from NATO, but complementary to it. Probably due to the safety and predictability offered by the North of the continent, it was launched in 1999 the Northern Dimension of the policy, which includes four main actors: the E.U., Russian Federation, Norway and Iceland and covers an area stretching from Europe to the Arctic and sub -Arctic Sea to southern leaf, the Member under and near, and north-western Russia in the east to Iceland and Greenland in the west[26]. Therefore, the Northern Dimension focuses primarily on promoting and strengthening the economic dimension of cooperation between the E.U. and partners in order to achieve sustainable development. The success of this approach led in 2006 to extended areas where partnerships have been concluded as follows: medium (NDEP), Public Health and Welfare (NDPHS), culture (NDPC) and transport and logistics (NDPTL). Also, the renewal of cooperation, which took place in 2006, had set up common institutions: Institute of the Northern Dimension and the Northern Dimension Business Council. To what extent the political and economic areas helped existing institutional success of this first instrument belonging to foreign policy and security policy remains to be learned.

The E.U.'s south border was approached by the European officials in 1995 when the Barcelona process was launched, the then 15 Member States, together with 14 Mediterranean countries laid the foundation for Euro-Mediterranean Partnership. The main purpose of this policy is to ensure the security partnership by developing a common area of peace and stability based on respect for the UN Charter and Universal Declaration of Human Rights[27]. Among the common threats that the document identifies and that were agreed upon by the political representatives were: fighting terrorism through strengthening international instruments, the fight against expansion and diversification of organized crime and combating drug trafficking issues, joint efforts to prevent nuclear proliferation and harmonized action with others in order to enforce regional disarmament agreements such as areas free of weapons - including verification regimes to achieve a Middle East Zone Free of Weapons of mass destruction, nuclear, chemical and biological. After ensuring these objectives then it will be developed the economic cooperation because no economic prosperity can be achieved in an area. Measures to ensure free trade area were taken through the Euro-Mediterranean Association Agreements, which will be supported by financial assistance of the Union. The Barcelona Process –as these agreements are known proved to be a success and was

[25] Huff, Ariella. *The role of EU defence policy in the Eastern neighbourhood*, May 2011, Occasional Paper, European Union Institute for Security Studies http://www.iss.europa.eu/uploads/media/op91-The_role_of_EU_defence_policy_in_the_Eastern_neighbourhood.pdf.

[26] http://eeas.europa.eu/north_dim/index_en.htm, accessed on 28.12.2011.

[27] Barcelona declaration adopted at the Euro-Mediterranean Conference, available at: http://trade.ec.europa.eu/doclib/docs/2005/july/tradoc_124236.pdf, accessed on 27.12.2011.

renewed in 2008. Decisions in this partnership are made by sector-specific Ministerial meetings and the meetings of Foreign Ministers, who are those who set priorities. Since 2005, it has been agreed by at Barcelona summit that terrorism can be better prevented and obstructed by adopting Euro-Mediterranean Code of Conduct for Countering Terrorism and migration which has become the fourth pillar of the partnership, along with free trade area and cooperation in relevant areas of economic and financial assistance. The Partnership's funding was supported by the European Commission through the Community budget being allocated so far amount to 16 billion euros. Also, the European Investment Bank has allocated annual loans of up to 2 billion.

Building on the success of this partnership and expansion prior to 2004, in March 2003 was introduced the concept of Wider Europe. Since then the number of Member States has reached 25 and the number of inhabitants to 450 million. Different from the '90s the language in this document uses new terms that are used to refer to geographic areas that are re-defined as follows, thus, Ukraine, Moldova and Belarus used the Western Newly Independent States concept (WNIS), and for Algeria, Egypt, Israel, Jordan, Lebanon, Libya, Morocco, Palestinian Authority, Syria and Tunisia phrase applies Southern Mediterranean.

E.U. used as the key- term for its relations interdependence, saying the E.U. has thesame duty towards its citizens and towards those who are citizens of neighboring countries and provide them with social cohesion and economic dynamism. Also, to achieve political stability and economic development is necessary to promote cooperation at regional and sub-regional level which is built on common values. Through this approach, E.U. aims at forming a circle of friends to be part of in a stable security environment. In exchange for this stable climate, prosperous and inclined to favor cooperation, member states will benefit from the perspective of economic integration through access to the E.U. market and the four freedoms of the people, goods, services and capital. However, it will not pursue a possible EU accession of these states, but building the necessary environment cooperation. To encourage this partnership it mentioned the success that had with the Mediterranean policy and how the states included in free trade agreements have harmonized rules in the Union. They were-opening approach these partnerships were Russia, Ukraine and Moldova, with them being signed Partnership and Cooperation Agreements.

Based on the concept of Wider Europe it was created the European Neighbourhood Policy (ENP), which refers to a strategy adopted in 2004, driven by the fundamental decision of enlargement towards east, which caused the Union to be faced with challenges to which it had to find solutions. Through ENP it specifies and reinforces cooperation at regional and sub-regional level and at the same time proposing ways for its development. New neighbors in the East were at the same time those that could produce new threats to European security. ENP Action Plans together with each state included in the concept of Wider Europe - Eastern Europe and Mediterranean states. Programs under the Neighbourhood Policy will be supported by the European Neighbourhood.

Launched in 2009, with the summit in Prague Eastern Partnership is an initiative of Poland and Sweden and is based on the concept of common interests and respect for international law, democracy human rights and added market economy, sustainable development and good governance to its base. Its purpose is to encourage political association and economic integration between the EU and Member States. Based on the stated purpose of the Partnership, we can raise the question how can we define the interest of the E.U. as long as every state seems to have its own national interest? Even more, we known how a state is defined, but can we operate with a similar definition for the E.U.?

The Partnership is the instrument that will address especially to the eastern side of the European Neighbourhood Policy, in order to ensure no conflicts and to enforce the principles and norms of international law. To achieve these goals, will promote regional development and social cohesion, aiming at including the gap between Member States and consistency between the regional approach and what happens to the system through international instruments.

For states that wish to reach these goals will be concluded Association Agreements, and they will provide the formal framework in which cooperation will take place and will focus primarily to the economic dimension by creating free trade areas, which will create a synthesis between liberalization and regulation. Turn the adjustment shall be made by applying standards agreed by the E.U. through the European Commission. Besides the economic dimension of cooperation, EaP uses institution building, which will be completed by each participating country and will aim to improve the administrative capacity in various ways, such as for example technical assistance, training. With regard to citizens, PAE provides increased mobility of citizens and supports the lifting of visa facilitation agreements to take back their. Lifting visa will be an objective that will be discussed individually with each state participating in the Partnership and will be addressed in partnership with another initiative of its Global Approach to Migration. Since the Partnership addresses the Eastern dimension of E.U.'s border, the place where it supplies the largest amount of energy, the sensitive issue of energy security has a special place in the cooperation of the partners. Security in this field will be made by pursuing a lasting supply that is safe and stable, using this sense to better organize and streamline the process by using renewable resources. Understanding energy as an interdependent resource could be said with clarity that the Association Agreements should be based on the energy policy of the Member States and on the E.U. Strategic Energy. Decisions to be taken in this regard will be common and will lead to building an environment that will facilitate the exchange of experience and information for those countries that are moving towards reform and modernization. In turn, this multilateral framework of cooperation can form common positions and actions. The four steps of action that the Commission will take for development cooperation are: democracy, good governance and stability to economic integration and harmonization with E.U. policies, energy security and contacts between people. Comprehensive and harmonized approach to the region is strengthened by the mentioning in the Partnership Framework Document of the Black Sea Synergy as a special place, probably due to proximity to a link to east. For each State will be selected that instrument that could bring the most benefits.

Conclusions

Involving a large number of actors both state and non-State in the problems of the region is also followed during this orientation towards the East, probably in order to realize the importance and implications of problems in their area. With them are ministries and agencies, parliaments, civil society, international organizations - such as the OSCE, Council of Europe and OECD, international financial institutions, private sector and social partners. Based on the overwhelming success had by the implementation of policies regarding the Northern and Southern borders of the E.U., European Commission through to attempt to repeat this winning strategy in Eastern Europe. It remains to be seen whether such an approach by the most direct and important so far, the Russian Federal will get the same results. It is very probable that the Arab Spring will put pressure on the way in which interests are prioritized.

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IDEOLOGISTS AND DOCTRINAIRES OF INTER-WAR RIGHT-WING INDEOLOGY

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Abstract
In the socio-political context of inter-war Romania, an ample dynamic of proliferating right-wing ideology ideas was noted, emphasized by the radicalization of the intellectuals' attitude and especially of the young generation's attitude, having clear nationalist feelings.
In this sense, a nationalist ideological, militant, and uncompromising direction is being set, focused on several definitive aspects, that mainly targets the promoting and preserving of the endemic characteristic. Thus, in his statements in the '30s, Mircea Eliade shapes a nationalistic ideology from philosophical positions, based on the sentiment of a historical spiritual mission of the generation, Vasile Marin expresses himself in offensive radical terms, specific to a repudiation campaign of the existing political models and to promoting of a new form of political expression, and Nichifor Crainic elaborates a nationalist doctrine from Orthodox-theological point of view.
All these ideological attitudes, in spite of the inevitable limitations and traps of the political-ideologist scene of the 4th decade in the 20th century, remain, even though in time they have become repudiated and abandoned by even their authors, exciting milestones of a moment having an intense spiritual feeling.

Keywords: *Right-wing ideology, Nationalism, Orthodox spirituality, Anti-democracy.*

Introduction

The socio-political Romanian climate after World War I knew an intense and dynamic discrepancy of the ideological systems, focused mainly on the frameworks of ways of thinking and of reaction of a fervent nationalism, declamatory and offensive, born on the basis of political instability and ethnic and economic incongruence of the era.

In this context, the intellectuals' attitude, and especially the young generation's radicalize with deep nationalist feelings and nationalist manifestations and organization are born to promote ethnicity and to capitalize the national specific.

Leon Volovici[1], in his work ***Ideologia nationalista si problema evreiasca in Romania anilor 30 (Nationalist Ideology and the Jewish issue in the '30s' Romania)***, establishes two big directions of nationalist ideology during the inter-war period, having important consequences for the political and intellectual life. Thus, one line is represented by *constructive and cultural nationalism*, illustrated mainly by Nicolae Iorga or C. Radulescu-Motru, in the terms of an organic nationalism, moderate and tolerant towards the ethnic and social intrusions of the allogene element and, in the same time, critical and refractory regarding extremism and western values. The second direction, radical and militant, taken from Eminescu's and Hasdeu's nationalist vision, is the one of the *new nationalism*, theorized and supported through a rich journalistic activity, by Nichifor Crainic, Nae Ionescu, and a significant part of the young generation of intellectuals, (reminding here Mircea Eliade, Emil Cioran, Constantin Noica, Petre Tutea, Vasile Marin).

This ideological direction, adopted and cultivated by the young generation, having a true interest in the political area, is focused on certain defining aspects, that mainly targets the promoting

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[1] apud Leon Volovici, ***Ideologia nationalista si problema evreiasca in Romania anilor 30 (Nationalist Ideology and the Jewish issue in the'30s' Romania)***,Published by Humanitas, 1995

and preserving of the national specific: repudiation of the existing parliamentary system and the promotion of a new form of political expression, the revival of national consciousness, based on the sentiment of a historical spiritual mission of the generation, and the resizing of Christian spirituality, having deep accents of Orthodox mysticism.

From this perspective, the present paper extensively discusses, as it is outlined in the era's journalism, the socio-political and cultural vision of certain intellectuals of great importance in the configuration of nationalist ideology and of the right-wing political ideas during the inter-war period: Mircea Eliade, Vasile Marin si Nichifor Crainic.

Paper contents

The literary and scientific works that made Mircea Eliade famous as a writer and historian of global religions, does not wholly and exclusively represent the amplitude and depth of his way of thinking. His intellectual personality shows also another aspect, having as basis a rich journalistic activity, an ideological one that proved to be, in spite of mystifications and numerous future polemics, a fundamental stage in his cultural and spiritual development. Without a doubt, he proved to be a representative of great sharpness and visionary spirit of his generation.

Being one of the most influential young intellectuals of the era, honorary assistant of the charming professor Nae Ionescu, Eliade expressed, with an exceptional idea-generating force, the historical mission and decisive role of his generation, in the historical action.

The first generation of intellectuals after the creation of Romania Mare (Greater Romania), spirits of scope where Eliade establishes himself as one of the generation peaks, establishes itself early on, around the age of 20-22 on the stage of Romanian culture.

One of the phenomena specific to the cultural context of the inter-war period was precisely the hatching of this generation of young elite intellectuals, who, to the offence of older contemporary writers, will seize a great extent of the Romanian cultural life of the 3rd and 4th decades. Alongside Mircea Eliade, in this regard, Emil Cioran, Constantin Noica, Eugen Ionescu, Mircea Vulcanescu, Mihail Polihroniade, Haig Acterian, Dan Botta, Vasile Marin, Mihail Sebastian, Petre Tutea, etc. stand out.

Through his articles published during this period, in different prestigious cultural and political journals, especially in Nae Ionescu's ***Cuvantul (The Word)***, Mircea Eliade wins himself a leading position in his generation, constantly offering the rhythm his erudite and visionary thinking. The leading personalities of that era recognise, without any reservation, his intellectual capacities, his disposition towards ideological debate, as well as his passion for the dynamic of philosophical ideas, of religious and metaphysical origin.

As early as the 3rd decade, Mircea Eliade has a rich journalistic activity, intensified in the '30s, when he imposes, through an opinionated attitude and public statements, his great capacity of doctrinaire synthesis and of visionary political coherence.

In spite of the fact that he was accused and blamed of ideological wandering, through his act of joining the Legionnaire Movement (later, under different exterior pressure, he reaches the point of denying his paternity to other articles), Eliade brought a significant contribution, through his publishing during those years, to the clarification and understanding of the psychosocial and spiritual mechanism of the actions taken by the right-wing extreme.

His inclusion in the ideological context of a generation that will lead to the configuration of a vision having a certain extremism regarding politics, must be understood from the point of view of the intellectual and cultural climate of an era having a fundamental intersession of instinctive polarization of the intellectuals into antagonistic ideological areas (right-wing/left-wing). Moreover, the phenomenon can be found, even radicalised, on a large European level.

Eliade's journalistic and ideological activity from the 4th decade, disputed and unfavourably judged in the perspective of his entire intellectual representations, that has consequences practically

reflecting on the reduction of the recognition of global reputation of the scholar[2], presents itself, regarded attentively and without prejudices, as a reflection of a historical mission and, in this sense, as a continuation of national cultural values, firmly fixed on the ideological line articulated by Eminescu and Hasdeu, Nae Ionescu and even Lucian Blaga.

The first series of far-reaching articles was ***Itinerariu spiritual*** (Spiritual Itinerary), the circle of 12 columns published in ***Cuvantul*** **(*The Word*)** in 1927, by means of which Mircea Eliade configures the main spiritual lines of his generation. This series of articles outlined the ideological and cultural programme of young intellectuals, on which future movements and cultural associations were built, such as the famous association and journal ***Criterion.***

The ideas and directions of the ***Itinerariului spiritual (Spiritual Itinerary)*** are co-substantial with the values of right-wing ideology, underlining, beyond the imperative of action and the direct experience, the spiritual primacy and the criticism of sufficient reasoning, of Cartesianism and scientific positivism, as well as promotion of mysticism and Orthodoxy, in the sense of reassertion of national singularity. Eliade outlines an apology of the experiences, that have as aim "*the fertilization of the consciousness and its its transformation into a nimble one (...) in order to provoke attitude and these attitudes - spiritual positions*"[3] and he speaks of a "*spirit of the present generations*", in which dominates the integration of mystical experience and the reduction of scientific rationalism, in order to achieve a complete knowledge, an authentic, harmonious, and balanced synthesis. Great importance is also given to culture, understood as "*a bundle of spiritual seeds, mostly created by religion*"[4]. Culture develops in the spiritual matrix of a nation, mostly formed on the framework of religion or of a mystical experience. From here comes the need to resuscitate Orthodoxy as a means of accessing the metaphysical and of revealing the sacred. On the other hand, the praise given to Christianity culminates in the taking one of the tragedies of Christian life, ambivalent and creative, (*"humanity's greatest blessing is based on this dualism flesh-spirit: the personality*"[5]) which is concentrated into the unification of contraries, "*in an original synthesis of the two adverse tendencies*".

The young generation of remarkable intellectuals firmly proclaims its founding role, predominantly, of an intellectual medium, able to generate culture: "*We believe that the unity of consciences, the creation of a cultural medium, having the same preoccupations and the same values - will be achieved only by the present generation (...)*". [6]

The seeds of this vision regarding the imperatives of his generation will develop in the following years in the outlining of what Eliade calls Romanianism, conceptually regarded as a nationalist ideology of spiritual essence, incorporated and thoroughly appropriated by the inter-war right-wing movements, which, in the first ears of the 4th decade, will absorb a large part of young Romanian intellectuals. The so called "conversion" phenomenon was however achieved gradually, a major influence in this sense had Nae Ionescu, whose seduction force and charisma was a great weight factor in the development of right-wing nationalist and Orthodoxizing beliefs of young intellectuals.

The doctrinaire articles of Mircea Eliade proved to have a prolific and reverberant impact, today being grouped in the volumes *Profetism romanesc (Romanian Prophecy)*[7] and *Texte legionare*

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[2] apud Alexandra Laignel-Lavastine, ***Cioran, Eliade, Ioenscu - Uitarea fascismului*** (***Cioran, Eliade, Ioenscu - Forgetting Fascism***), Published by Humanitas, Bucuresti,

[3] Mircea Eliade, ***Itinerariu spiritual (Spiritual Itinerary)***, in ***Profetism romanesc (Romanian Prophecy), vol I,*** Published by Rosa Vanturilor, Bucuresti, 1990, pg.38

[4] idem, pag. 40

[5] ***Ortodoxie (Orthodoxy)***, in Mircea Eliade, op.cit., pg. 58

[6] ibidem

[7] Mircea Eliade, op.cit.

sau despre romansim (Legionnaire texts or about Romanianism).[8] Titles such as *Romania in eternitate* **(***Romania in eternity***)** or *De ce cred in biruinta Miscarii Legionare (The reason I believe in the Legionnaire Movement's victory)*, *Revolutie crestina (Christian Revolution)* or *Comentarii la un juramant* **(***Remarks on an Oath***)** indicate uncompromising attitudes of the assertion of the nationalist ideal and especially of the configuration of the *Romanianism* concept, regarded as a new spiritual dimension of the nation.

The intellectual, term used excessively in that era, having meanings that started to degrade and to "become political", so this intellectual which is "pure", authentic, not enslaved to any traditional political party, represents, in that period's concept of Eliade "*the only invincible force of a nation (...) the forces that sustain a country's history and feeds its mission (..)"*[9]*."* Moreover, the intellectual has a avant-garde role, being able to give birth to a system of ideas and values that can create and stimulate social dynamic. So that - says Eliade "*any political movement has its roots in the ideas of an intellectual or a group of intellectuals*". Claiming his superiority and elitism, a prophetic aspect of revolutionary prediction is attributed the pure intellectual, since "*fundamental changes are felt at the beginning by the country's intellectual elite, that a revolution has its roots not only in the demands of a social class, but also in the elites' critique of values and spiritual experiences.*"[10] The author additionally highlights the mission of the elite of creating superior values that are specific to a nation and of justifying its historical mission, making it eternal through the ability of creation. The preservation of the national particularity and the continuation of Romanian archaic values is given, in the essayist's opinion, by the two extremes of social class, the peasants and the cultural elite: "*Peasants have defended the field and the people. Intellectuals defend our rights for spirituality, its autonomy, and its universal, human values. A nation's historical mission is verified by two things: 1) the power to defend its field, its freedom and rights, 2) and the vaguer to create values. The classes or groups that fulfil these essential functions are the only ones that can be called vital groups, without these a nation risks to disappear from history..."*[11]

The intellectuals' imperative is thus, in the writer's opinion, the fundamental value of the national spirit's survival. Being the only means of assertion against foreign influences, creation is perceived as an organic, imperative need, which should reflect not only on the process of contemplation, specific to the elite ("*by contemplating, these include the world, they turn it upside down in its soul, they enrich it through their creation*")[12], but also on the event or action, understood as "*spiritual bearing*" and as an interior balance of harmonization.

In the sense of creation need as a means of survival, Mircea Eliade extends his vision to the level of the state and of the doctrine of nationalism. Creation means "*thirst for eternity*", and nationalism validates itself through creation, thus through eternity, in the sense of permanence in value in time and space. By contrast, Romania is situated among the nations that constantly renounced its creative seeds. The firm and valid direction towards a nation's "eternity" is considered to be the nationalist creators, writers, philosophers, people who create culture and not the heroes or political leaders[13], who only have a role of leading the historical path.

Especially the social insufficiencies and the minuses of the political class push through in the pages of the articles, sometimes having a mild tone, other times having a polemical and denigrating tone, but the entire ideological vision, with emphasis on *missionary work and spiritual revolution,* is outlined not only as an effect of ideological reverberation strongly felt at European level, but rather

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[8] Mircea Eliade, ***Texte legionare sau despre romansim (Legionnaire texts or about Romanianism),*** Published by Dacia, Cluj-Napoca, 2001

[9] Mircea Eliade, ***Profetism Romnesc (Romanian Prophecy),*** vol.II**,…,** pg.32

[10] idem, pg. 70

[11] idem, pg. 101

[12] idem, pg. 64

[13] idem, pg. 128

as a reaction to the unfavourable internal context towards spasmodic socio-political evolution of inter-war Romania.

The revolt against politicking reaches maximum peaks when the prestige of the Romanian nation and culture is slandered, having a strong effect on the drastic decrease of the national spirit's ability to assert itself.

But what is inexcusable and surely fatal for a nation, is, in the author's vision, "the loss of governmental instinct", strongly felt in "the entire political incapacity" and in the concrete absence of an ample, anticipatory, and reforming vision, specific to the entire Romanian political spectrum after World War I. The governmental perspective's obtuseness of the politicians, suggestively called by Eliade "*blind pilots*" who "*don't see, don't hear, and don't feel any more*" and who, in the menacing and tempestuous context of revolutionary Europe, plot "*with an unchanging voluptuousness the slow collapse of the modern Romanian state*"[14], induces Eliade the tragic, almost apocalyptic, prediction of the nation's disappearance: "*But a nation in which a leading class has such a way of thinking, and who speaks to you about qualities of foreign people - does not live for a long time. It, as nation, does not however have the right to measure up to history."*

However history acquires, in Eliade's concept, a much deeper sense, that needs to be perceived in an existential perspective, of the development of "the national being". "*There is a history that is made and a history that is consuming itself*"[15], claims the exegete. If "*the history that consumes itself*" is limited to the exterior, prosaic act of the political or economical intercession, "*the history that is made*" has a metaphysical description and focuses on a spiritual, transfiguring, and organically progressive action, directed towards finding a "*sense specific to its historical existence*".[16] That is why Eliade considers that "*it is more necessary and prolific the pure spiritual activity - rather than a political one*", since "*the thing that now interests more is not the political - but the historical. We are not interested in the victory of a political group - but the reintegration of Romania in its historical lines*"[17]. The historical perspective thus requires, in this sense, being aware of a spiritual destiny of the nation and its orientation towards its specific matrix direction of its historical and spiritual existence, direction born, as a cosmic condition of every being, out of a critical soteriological need, "*out of a great inner thirst for redemption*"[18].

"The reintegration of the nation into the historical lines" is thus achieved, firstly, through perspective and register change of the entire Romanian political spectrum, which "*crumbles*" a historical fact perverting it into "political incidents", and the recapitalization, in the same time, of "the historical nationalism", understood as an "act of spiritual creation" of a nation that has "*the consciousness to participate in a long lasting history*"[19]. The nationalism, in Eliade's vision, thus relinquishes itself from the political bonds and firmly structures itself on the primacy of spirituality and on the creative act of "national forces" able to imprint the nation with the sense of eternity and universalism.[20]

In this context, the battle of nationalism against the political sterility, the borrowed forms, and the false values, is identified with "the historical mission" of the young generation, a spiritual mission, materialized in a "spiritual revolution", Christian revolution, initiated with the aim of accession to "the salvation of the Romanian nation". "*The young movement from 1927 was born with*

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[14] Mircea Eliade, ***Texte Legionare (Legionnaire Texts)***…, pg.52
[15] idem, pg. 93
[16] Mircea Eliade, ***Profetism romanesc (Romanian Prophecy)*** …., pg. 197
[17] Mircea Eliade, ***Texte Legionare (Legionnaire Texts)***…, pg. 94
[18] Mircea Eliade, ***Profetism romanes (Romanian Prophecy),*** Vol II…pg. 155
[19] idem, pag. 193
[20] Mircea Eliade, ***Nationalismul (Nationalism),*** in ***Profetism romanesc (Romanian prophecy),*** vol.II, pg.196: "*The hardest battle and in which a nation's force of creation is verified, takes lace after the victory of nationalism.*" *This means the hour whenit tries to become universal."*

this historical mission's consciousness: to change Romania's sole, subordinating all the values to only one supreme value:" The Spirit."[21]

As a result, excessive politicking and the precarious forms of political intercessions, can be counter-balanced, in Eliade's conception, only through a predominance over the spiritual and the Christian values, and from here comes his advocacy, in the sense of a spiritual, ascetic action, of self-accomplishment. Hence we can speak about an imperative of acting, but not in a political sense, but in a spiritual sense ("*The political sense of a battle falls on a secondary plan. The battle, the action, the effort (...) receives now its new Christian, mystical sense"*[22]*),* that later reverberates itself in the larger domains of society: "*Only now, the sense of this Christian revolution is starting to be understood, a revolution that tries to create a new Romania, creating first a new man, a perfect Christian - and that replaces the old political life, through civil life, that means it restores the humanity and Christian relations within the same blood community*"[23].

Eagerly claimed in the '30s b the "Romanian youth", more precisely by the nationalist-Christian branch of the intellectual elite, the primacy of spirituality becomes, in the European context of nationalist right-wing movements, the fundamental privilege of distinguishing the actions of the Romanian right-wing extreme, in this case the Legionnaire Movement. Embedded, after the quasi-totality of historiographical interpretations, in the influential areas of western totalitarian movements, legionnareism is not, in Eliade's opinion in 1936, just a simple imitation of the latter, as it was often speculated in that era, but it reveals an essence "*so profoundly mystical - that its success would mean once again the victory of the Christian spirit in Europe*". [24] In addition, referring to the invoked loans of ideological and political doctrine from other areas, the essayist rejects promptly and concludes, "*our doctrine must result from our Romanian realities*"[25]. In his opinion, the legionnaire movement, unlike Fascism, that emphasises on the state or, unlike Nazism dominated by racial Chauvinism, proposes a revival of the endemic fund and the implementation of a new Romanian consciousness, based on the unchangeable values of Christian morality: "*if Nazism is founded on People and Fascism on State - then the Legionnaire Movement has the right to claim itself the only Christian mysticism able to lead human settlements, (...), it is first of all a Christian revolution, a spiritual, ascetic, and male revolution, as Europe has never known before.*" [26]

The emphasis on spirituality will however lead to a new approach, on Romanian field, of the long time circulated concept of "*the new man*", exploited then with a maximum insistence and by the communist totalitarianism. Quotation Eliade.

The concept of "*new man*", promoted by the Legionnaire Movement, acquires, as it was expected, clear spiritual connotations. The primacy of the spiritual, that inevitably leads to revelation, to a mystical feeling and to a new religious approach, deeply rooted into ascetic Christianity, has as a main result the cleaning of the being of selfishness or of instinctual impulses. "The new man", in the Romanian nationalist ideology, is hence an individual that accepts and knows, on the highest level, the dimension of suffering, of the permanent self-battle and self-sacrifice.

All these attitudes are, in fact, the corollary of a serene and often fatalistic acceptance of the tragic: "*Giving up earthly pleasures* - says Mircea Eliade[27], in his article ***Comentarii la un juramant (Notes on an Oath) -*** *is not a lessening of the being, a sterilization of the substance - but, on the contrary, a frantic increase of the spiritual being, a victory of the real against the fleeting, illusive, despairing human joys*". Asceticism and moral purification are regarded, by transcending or sublimation of distress, as being determined for the accession towards the dimensions of interior

[21] Mircea Eliade, ***Texte Legionarei (Legionnaire Texts)***..., pg. 50
[22] idem, pg. 44
[23] idem, pg. 51
[24] ibidem
[25] idem, pg. 95
[26] idem, pg. 46
[27] idem, pg. 45

freedom, devoid of psycho-social gearings or of individualistic limits: "*When the new man's centre of gravity falls on salvation and on spiritual development - the man becomes free. Free to contemplate and to judge work of art as it should be. Free to practice a science or technique, to research a philosophy, to value a work of art - without feeling his human being completely engaged in this activity."* The soteriological vision[28] of *the new man,* falls on the social, in the terms of a nationalist revolution that should restore moral order and replace the structure of a stale political life with new civil frames of life, created under the Christian sign of mystical living. Essentially, the spiritual lines of "the new man" converge towards restoring "the existential, historical sense" of the nation: "*a united and strong Romania*"[29], "in an organic, national state", able to capitalize its creative forces and its national spiritual specific. The anticipated victory of nationalism was supposed to broaden these spiritual outlines towards far away horizons of universalism.

From the positions of a fervent nationalism, Eliade's attitude in the '30s, influenced mostly by the right-wing ideology, strives to configure a Romanian spiritual paradigm put under the sign of a spirit that wants to be prophetic and transfiguring.

Despite the fact that Eliade's journalism with a nationalist militant theme was denied or silenced by the essayist, becoming famous in the inter-war exile years as a historian of religions, "*the imprudent acts and errors of youth*"[30], cannot be omitted during the attempt to configure the spirit of the inter-war era, because, states Z. Ornea with an obvious sincerity: "*Eliade was too big and too important for his generation to ignore his writings and attitude taking*"[31].

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Among the young intellectuals grouped around the ***Axa*** journal, having a considerable cultural impact in the '30s comes to the fore Vasile Marin, venturesome and bright, having a promising political intelligence. He was part of a prestigious circle of intellectuals, such as Mircea Eliade, Mihail Polihroniade or Victor V.Vojen, whose publishing and intellectual activity had an important role in the propagation of the right-wing ideology within the spiritual climate of inter-war Romania.

The group from ***Axa*** constituted in intellectual elites of the Legionnaire Movement, which had a journalistic and ideological contribution and which succeeded in penetrating into the so-called cultural aristocracy, imprinting the distinguished nature of the prestige to the Movement. "*Bright, ironical, and even impertinent* - said Francesco Veiga[32] in his work ***The History of the Iron Guard*** - *the members of the group, sons of middle and high bourgeoisie, overall had an unparalleled glamour, which was refined and modern*". Of course, the solid knowledge in different academic subjects (Political Science, Law, Philosophy), the rich argumentation and oratorical ease made them unique, triggering, as it was expected, a great emulation, especially among the knowledge-thirsty youth and students.

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[28] Eliade develops the significance of two concepts ***Soteria*** *and* ***Sympathia,*** understood as two spiritual tendencies for "*the reconciliation of the soul with the world*": "Soteria" reflects "the attempt of rescue, salvation, getting out into the world", and *sympathya* - "*the attempt to find support in the worls, to love the world, to search for harmony with all its existence*", in ***Mantuire, Istorie, Politica (Testimony, Historym Politics),*** *in* ***Profetism Romanesc (Romanian Prophecy)****, vol.II, pg.152*

[29] idem, pg.163

[30] In his ***Memoriile*** **(*Memoires*)** Eliade, being constrained by certain circumstances, that slowed down in a certain manner the assertion of his prestige or his assertion on the European cultural stage, confesses: "the imprudent acts and errors made as a young man forms a series of misunderstandings, that will follow me my entire life", ***Memorii (Memoires),*** vol.II, (1937-1969), Published by Humanitas, Bucuresti, 1991,pg.49

[31] Z. Ornea, ***Anii Treizeci (The '30s). Extrema dreapta romaneasca (The Romanian right-wing extreme), Published by*** Fundatia Cultural Romane, Bucuresti, 1995, pg. 211

[32] Francesco Veiga, ***Istoria garzii de fier 1919-1941 (The History of the Iron Guard 1919-1941),*** Published by Humanitas, Bucuresti, 1995, pg. 160

In this context, the captivating personality, marked by vitality and impetuousness, of Vasile Marin is outlined, a first class intellectual, considered by his generation's colleagues and by historical analysts, one the most intelligent ideologists of right-wing nationalism. In this respect, some of his journalistic texts stand as proof, texts that remained in the archives of the era's journals, as well as a biographic portrait masterfully elaborated by Mihail Polihroniade and published in the reverential issue of ***Cuvantul studentesc*** (***The Words of the Students***) from January 1937, as a requiem to the one year commemoration from his death, in the Spanish front-line.

Unfortunately, the number of Vasile Marin's sources and notes is very low, and his death, that came at an age when his personality was in full efflorescence, had suddenly disrupted the completion of a stupendous mind, who, in his small amount of articles, announced himself as a potential visionary. His intellectual capacity and his sharp intelligence could have made its way to celebrity and could have assured him the posterity's absolute reception, just like Eliade, if his destiny had not enrolled him on the line of heroic sacrifice for the proclaimed ideology, with all its contextual and historical limits.

Vasile Marin was born on the 29th of January 1904, in Bucuresti, and attended the courses of "*Sfantu Sava***"** and "*Gheorghe Sincai***"** high-schools. He stands out through his passion for reading, even through erudition, highlighting his firm vocation for ideological and political debates. He chooses the courses of Law School, where he gets involved in the student movements, on the lines of ideological nationalism. Publicist Mihail Polihroniade[33], his friend from his student years, recalls: "*A small literary circle was formed, where, besides Marin, Carandino, and I, the following also participated: N.N. Matheescu, Mircea Eliade, Ion Anghel, Balan, Petrisor Viforeanu, and so on (...). I remember even now Marin's first work, if my memory is right; it was called* ***Pamfletarii reactionari francezi*** *(****The French Reactionary Pamphleteers****). He spoke about Leon Bloy and Leon Daudet. At the age of nineteen, Vasile Marin was a formed man. He had a maturity in thinking, a certainty, a precision that we hadn't reached yet. The basis of his culture had also been established (...).*" He substantially assimilated his knowledge about the era's ideologies, about Marxism and Fascism, manifesting a unique inclination towards anti-modern doctrine, "reactionary" dogma of Charles Maurras, with whom he also maintained correspondence.[34] His works always caused lively debates, his personality dominated by rational, relentless thinking, common for the judicial field, and by clear argumentation, based on scientific premises, is replenished with an obvious aesthetic sense, easy to recognise in his arborescent and well-elaborated sentences, in his metaphoric expression, and his fine irony, that used to offer a note of allusive subtlety to his articles and filled them with a discrete lyricism of evocation. After his graduation, he starts his career as lawyer in Ion Lugosianu's practice, Minister of Romania in Rome and respectable member of the National-Peasant Party. He is noticed for his intelligence, talent, and political spirit, for which, in 1927, when the National-Peasant Party comes to power, Vasile Marin holds the position of Chief of Staff of his master, who now is Under-secretary of State. He defends his Ph.D. thesis in 1932, with his work ***Fascism*** and he is offered the title of Doctor of Laws. The book presents the constitutive organization of the Italian Corporate State. At that time, Vasile Marin's book was the only work that substantially approached Fascism, as a doctrine and political practice.[35]

Along with his enrolment in the Legion in the autumn of 1932, Vasile Marin was completely dedicated to the legionnaire belief and ideal, carrying out a ample journalistic activity at ***Axa*** journal, then, being observed by Nae Ionescu, he is employed as editor at ***Cuvantul*** **(*****The Word*****).** In addition, the great amount of trials the Legion experienced, due to altercations, often violent one, with the Government's institutions, have established him as "the Legion's Lawyer". *"As lawyer, he brings, without exaggerating, huge service to the legion. All of us remember what the spring and summer of*

[33] Mihail Polihroniade, *Vasile Marin****,*** in Vasile Marin ***Crez de generatie (Generation Belief),*** pp.95-203
[34] Vasile Marin, ***Crez de generatie (Generation Belief)***, Published by Majadahonda, Bucuresti, 1997
[35] idem, pag. 197

1933 meant. The Vaida Government (...) started a destruction battle against us. Slander, injury, insults, hits, torture, arbitrary arrests descended upon us. And finally, even though we endured - by the order of the Captain - with resignation any hit, still we were the ones on trial. The trials proceeded. From one corner of the country to the other, "the Legion's Lawyer", Vasile Marin was summoned."[36]

In 1933, when the Iron Guard is dissolved, he is arrested and locked up at Jilava, where he becomes close friends with Ion Mota, the Legion's founder and commander, translator of *Protocoalelor Inteleptilor Sionului* (*Protocols of Zion*). The strong spiritual affinity between the two will continue until their death in 1937, in the Spanish front-line at Majadahonda. Together with other six legionnaires, Vasile Marin insisted on leaving for Spain, to participate, "in the name of the Christian crusade", in the battle against the "atheistic communism" revolutionary movement. The duty of honour for protecting Christianity, otherwise a fundamental value of the legionnaire doctrine, was sensed as a fatidic calling, as an inner drive to the testimony of his belief, and it culminated in the uncompromising decision to leave for battle as a volunteer in the front-line. But his decision was sealed, even though unconsciously, by the premonitory enunciation of the sacrifice: "*Don't let Mota leave without me. I'm signing up for the seventh coffin.*"[37] The death of the two strongly shook not only the Movement, but also the entire public opinion from Romania. Serving as a power of example, the Legionnaire Movement saw, after the funerals, that otherwise were extremely ceremonial, of great ritual brilliance and reverence, an ample popularization and consideration, thus revealing its hidden power, just like the invisible part of an iceberg. Armin Heinen[38] writes in his study ***Legiunea Arhanghelului Mihail (The Legion of Archangel Michael). The social movement and political organization*** "*The official condolence declarations of important personalities from the Romanian society (*and from abroad n.n.*) have boosted the Legion's prestige. In the same time, they constituted proof of the fact that no other right-wing party can ever compete against the Legion. (...) During the funeral ceremonies for Mota and Marin, the Guard has demonstratively stated its power (...)".* On the other hand, there are testimonies regarding the impressive number of participants at the ceremony, 20 churchmen and tens of thousands of people, the convoy being one and half hour long.[39] Deeply moved by the loss of Vasile Marin, Nae Ionescu sees in his death a divine punishment: "*So when He decided Vasile Marin's death, God wanted to scold us. That is why our pain is dark.*[40]

The synthesis of his doctrinaire attitude is presented by the volume ***Crez de generatie***,[41] (***Generation Belief***) issued in February 1937, as a selection from the statements and theoretical articles of the young "martyr". The anthology is accompanied by a praising panegyric, signed by Codreanu and with an ample foreword from the mentor of the entire "philosophy of life" generation, Professor Nae Ionescu.

In the foreword of the book (a collection of articles, letters and diary notes), the philosopher considers Marin "an authority of the legionnaire doctrine", emphasising his attributes of quality and precision.

Most of Vasile Marin's articles concisely and sometimes even educationally present the theory of nationalist doctrine in contrast with the weaknesses of parliamentary democracy of the era, considered to be corrupt, decadent, and internationalist. This antinomy, nationalism-democratism, is a constant of its ideological theme, upon which sit the fundamental lines of its socio-politic

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[36] idem, pg. 199

[37] Ion Dumitrescu Borsa, ***Cal Troian intra muros*** (***Trojan horse intra muros***), Published by Lucman, Bucuresti, pg. 186

[38] Armin Heinen – ***Legiunea "Arhanghelului Mihail" (The Legion of Archangel Michael). Social Movement and Political Organization,*** Published by Humanitas, Bucuresti, pg. 292

[39] apud. Armin Heinen, quoted work

[40] Nae Ioenscu in the foreword of Vasile Marin's, ***Crez de generatie*** (***Generation Belief***), Published by Majadahonda, Bucuresti, 1997

[41] Vasile Marin, quoted work

argumentation. Notable articles: ***Democracy, the enemy of nationalism, Between democracy and the totalitarian state, Bourgeois state and the national revolution, What is nationalist politics, Abdications of the democratic state, The two student bodies, Politics*** or ***The nation against de import state,*** articles that were published between 1927-1936, in the journals ***Axa***, ***Cuvantul*** (***The Word)*** or ***Cuvantul Studentesc (The Word of the Students).***

In his opinion, the democracy, having roots in the French Revolution of 1789, is founded on instruments that exclude the possibility of promoting and preserving an authentic nationalist spirit: universal suffrage, partidism and financial power, means that entail legal formalism and economic and social individualism. These elements appear, in the author's vision, as being totally incompatible with the national fund and with the Romanian nation's interests, which are still unconsolidated. Moreover, a newly formed state, in its unification processes needs "*aggressive national politics, strongly central, pulled out from under the fluctuations of electoral orientations*"[42], because "*state management is a specialization that cannot be left to the discretion of masses*"[43] and "*electoralism does not allow selection, since the masses do not have the instinct of value hierarchy*."[44] On the other hand, the democratic regime favours the parties' battle for power, politicking, and corruption, and it mainly regulates the individual interest of the officials.

Another weak point of democratism would be, according to his assertion, electoralism, based on a crass materialism, as well as the universal vote, to which we due "*the tragic consequence of crumbling the national body*", while "*behind the curtains, the international finance pulls the strings and settles its affairs having the complete certainty of success*: ***Divide et impera****"*. This entire politics of electoral game inevitably leads to "*the degradation through unification of the collective life, and the nation that is numerically and quantitatively designed looses the sense of real and eternal value*", issue that determines Vasile Marin to consider democracy "*the solvent of nationalism*".[45] So democratism proved to be o formula that contrasts with the development process of a nation, considering the fact that the nation is in a continuous making and needs an organic evolution, followed in time as a living organism, self-conscious, while "*the geometricians' democracy, the adorers of the Rousseau cult, the state and the society are not natural products, but something artificial, a social contract, a fundamental pact, signed between individuals, who, in their turn, are equal and identical. The life of a society, of a nation, is neither logical, nor symmetrical. It cannot be restricted in formulas and nor can it be cast into patterns".*[46] The democratic individual, equal with himself, universal and abstract, is opposed to Vasile Marin's man, who is rooted in "*our land, in our history, in the national consciousness*, *in the adaptation of national necessities*"[47], and the principle of quantity, regarded as validation criterion, is opposed to the principle of quality and ethnic and ethic bases. At one point, Charles Maurras, who analysed the realities of democratic France, also stated: "*Under the name of parliamentary democracy, we have the reign of the power of money, controlled by a sort of bankers' government*".[48]

In his article ***Politica***[49] (***Politics***), Vasile Marin strengthens his argumentation regarding democracy as a possible solvent of national state congruency, presenting the example of the Austrian-Hungarian Empire, which, due to the democracy that favoured the strong offensive of the subjugated nationalities, had prepared its imminent dissolution. "*The politics of the nationalities*

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[42] Vasiel Marin, ***Democratia, dusmanul nationalismului*** (***Democracy, the enemy of nationalism***), ***Crez de generatie***... (***Generation Belief***), pg.50

[43] Vasile Marin, ***Note (Notes)***, quoted work, pg. 60

[44] Vasile Marin, ***De la formalismul democratic la nationalismul constructiv (From democratic formalism to constructive nationalism)***, quoted work, pg.168

[45] ibidem

[46] idem, pg. 167

[47] ibidem

[48] Vasile Marin, ***Extremismul de dreapta*** (***Right-wing Extremism***), op.cit., pg.182

[49] Vasile Marin, ***Politica (Politics)***, quoted work, pg. 143

enclosed in a State that is not the natural expression of their historical and ethnic being - concludes Vasile Marin - *cannot be other than democratic politics. For there is no stronger instrument for the dissolution of a state, than democracy. Numerically and quantitatively designed, abstracting ethnicity, standardizing the specificity on the basis of man's universality, democracy is the ideal regime of internationalism."* In the same article, the legionnaire ideologist bursts out ironically and quizzically, charging the parliamentary life and the democratic institutions: "*The unripe fruit, picked by the revolutionaries of the Pasoptism from the principle garden of the '89 Revolution, have been brought to mature and to make seeds in the Romanian greenhouse.*" *The results have been disastrous for the country and its people".*

The democratic regime, considered to be detrimental for the young nations, recently created, can have other consequences in countries that have a rich nationalist past and which, along their secular evolution, have given birth to a solid culture, such as France for example: "*Over the work of 40 kings can stretch the gloss of integral democratism. The national institutions, created to last forever, resist and further develop through their own lives, in the contempt of the fleeting existence of the present forms. What about us?"*[50] The ideologist estimates that the only chance to consolidate the Romanian nation would be the one given by strict nationalist politics, capable of valuing the national specificity, as a principle of the state.

Vasile Marin speaks, in this sense, of a *constructive nationalism,* creative nationalism, that has its definition given by Maurice Barres: « *Le nationalisme ordonne à juger tout par rapport à son pays natal. »* In contrast with democratic regime, constructive nationalism implies a form of governing created according to the historical context and to the social and economic needs of the nation, under the authority of individuals elected, having an exponential level, who "*summarize the characteristics and the aspirations of that respective nation*", with will and spirit of sacrifice. Being pro-monarchy, nationalism develops the framework of the society's pyramidal structure, unlike "*globalism and cosmopolitanism, which are nothing else than covers, behind which plots for the dynamiting of monarch authority and nationalist fundamentals are woven.*"[51].

The ideological system promoted by Vasile Marin, develops fundamental aspects of the nationalist theory: *the political, the social, and the spiritual.* In his article ***Ce este politica nationalista (What is nationalist politics)***[52], the author defines the political character as well as the character of the State, the psycho-social character as well as the spiritual one, from the point of view of an ethic and axiological paradigm. Thus, nationalism is "*an offensive and assertive policy. Its roles must be materialized in a national state, that shouldn't be available to the citizens It must be a prestigious state, having a historical, cultural, civilizing mission. Nationalism is a new ethic and a hierarchy of values. It promotes the national spirit above the civic one; it conditions through the national primacy all the other state related roles."*

From spiritual point of view, nationalist politics develops a set of values that are strongly transfiguring, generically named by the author *national mysticism.* The fundamental lines of this "mysticism" converge all of them to the supreme aim, the creating of a human character that is totally disengaged from materialism and the era's triviality, who passed through "*the school of heroic permanence.*" National mysticism forms "*the man of cardinal virtues: the hero, the priest, the hermit, (...) the soldier*". Perceived as a true religion, with the imperative force of profound conversion, nationalism obtains missionary accents, almost religious and military-like at the same time: "*The national army is a religious order. Our nationalism will dissolve the policy of personal interest. The term "enough" will disappear. Nobody is enough, but everybody is sacrificing himself. It's a sacrifice when you command; it's a sacrifice when you obey. The development of cardinal virtues in a man,*

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[50] Vasile Marin, ***De la formalismul democratic la nationalismul constructiv (From democratic formalism to constructive nationalism)***, quoted work, pg. 169

[51] idem, pg.170

[52] Vasile Marin, ***Ce este politica nationalista (What is nationalist politics)***, quoted work, pg. 52

this is the reason and being of our nationalism. (...) Nationalism can also be a social system to the extent that it is an instructive school of high idealism." As regards leadership, it must be subordinated to the idea of purity and idealism. Beyond the sense of responsibility, complete disinterest is imposed regarding personal, material or vain interests and a serious commitment is imposed regarding the ascetic commitments, reaching the highest quota of abnegation and renunciation in regard to any telluric instincts. "*The leading of the state must be done by people who have nothing. The elite is not a noble elite, but an elite of pure individuals. The rest of the society can indulge itself in the practice of old institutions, the leaders cannot. Out of them, the instinct of seizing and the wish to enjoy earthly goods must disappear. A state cannot be founded on the ethics of the gorged ones."*

This interior transfiguration, that crowns the legionnaire morale, practised with perseverance by the elite of the Movement, imposes another perception on life and on the value of sacrifice, going up to the liberating revelation. The author himself confesses in an emotional confession of faith: "*I have the impression that this simple, definite appreciation imprints a sort of high transfiguration to our being, which cannot be seen or touched by any personality tribulation, agitated by complexity. (...) I cast away something every day, and there were so many before! I have never suspected the immense burden of uselessness that I used to carry on by back. However, it's the first time when the unloaded burden does not produce an immediate sensation of ease, but rather a sensation of suffering. (...) I am now awaiting my big day: the day of the man in me, the man that I cramped inside for so many years. I'm just as afraid of it as a man should be when he is perfectly conscious of the thought of a second birth."*[53]

The primacy of suffering, of self-battle, leads to spiritual perfection, giving nationalism a deep sense of spiritual mysticism, often invoked also by the Captain in ***The nest chief's booklet:*** "*We pursue the spiritual reform of man, on the line of our Romanian man, to his natural being, the one that a century of another structure falsified*"[54].

Beside the spiritual dimension, nationalism involves, in the author's opinion, other aspects too, that trace defining lines of constitutional, ethical, and ethnic nature (especially the anti-Semitic character). In the Conference held on the 3rd of February 1936 on the subject ***The national status*** **in relation to the national movement [55],** Marin analyses a series of notions, establishing the connections and subordinations between them, so as all the aspects of nationalism be debated with sharpness, progressively, and systematically. In the process of evolution, from the people to the nation to the national state, nationalism stands out as a primary bond, "the only guiding thread".

Thus, starting from the term people ("*a larger gathering of people who have the same origin, who have the same religious beliefs, who stand on a determined territory, who speak the same language, and are agitated by the same spiritual metaphysics*"), he defines the nation, *as a group of people who became aware of itself",* being the only reason of the existence of a group of people, which, in order to affirm itself, creates a culture, and in order to relate to other nations, to materialize by validation, it transforms in a national state. "*From people, to nation, to state, there is only one guiding thread*", exclaims Vasile Marin. "*Nationalism is the attribute through which a certain group of people commits through a certain nature, through a certain expression in relation to the others. It's an element of identification; the representation model of a nation is its own."*

In an ample article, ***State and culture[56],*** Vasile Marin systematises the idiom culture-civilization, from the perspective of the national state. The trilogy "nation-state-culture" forms, according to his perspective, the foundation of the Romanian phenomenon. The nation, understood as a human entity, an organic whole, needs its integration in a national state, in order to promote a

[53] Vasile Marin, ***Note (Notes),*** quoted work, 56

[54] apud Vasile Marin, quoted work

[55] Vasile Marin, ***Statul national in raport cu miscarea nationala*** (***The national state in relation to the national movement***), quoted work, pg. 69

[56] Vasile Marin, ***Stat si Cultura (State and Culture),*** quoted work**,** pg. 139

specific, national culture. The state is "*its capitalization instrument, the essential principle of its force of affirmation*" and culture is "*the superior form of life of a nation*", the means through which "*it maximizes its attributes (...) through culture a nation survives its physical being*".

Correlating these defining lines, without ignoring the imperative of the fact and the historical missionary role of the young generation, "*of giving the united nation, the state it deserves*"[57], nationalism appears as "*an organic whole that binds heaven and earth*", being able to spiritually distinguish the nation.

Regarded in a historical perspective, one can reproach to Marin, as face Z. Ornea[58] does, the fact that "*he battle democracy for a long time*" and he stood on smooth positions of anti-democracy attitude, in the strict spirit of right-wing extreme.

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One of the main dimensions of inter-war nationalist ideology is Orthodoxy, regarded as a spiritual-religious matrix, that concentrates in it, integrally and representatively, the essence of Romanian national specific. The ideologist, that highlighted and built around this axis a real doctrine of the nationalism, was found alongside Nae Ionescu, Nichifor Crainic. Poet and theologian, talented journalist and formidable polemicist, Nichifor Crainic represented a strong influential point on the student years and on the intellectuals of the era. In his recent book ***Capcanele Istoriei (The traps of history). Elita intelectuala Romaneasca inrte 1930 si 1950*** (***The Romanian intellectual elite between 190 and 1950***), Lucian Boia considered Crainic one the biggest "*gatherers of young people*" or directors of consciousness, we could say, alongside Nae Ionescu and Dimitrie Gusti.[59]

Crainic's name is however associated with the journal ***Gandirea* (*Thinking*)**, the systematic centre of his ideological debates and polemics, the matrix of *thinkism*, ideological, artistic, and literary current, that promoted vigorously the conservatory nationalist concepts.

Being strongly traditionalistic, the journal initiated great debates of ideas on the subject of national specific and on the spiritual origins of Romanianism, having the declared intention of asserting a Romanian spiritual status and of consolidating its distinctive, unique values.

Nichifor Crainic was one of the most fervent journalists of the era, a great name in the writer's guild. Global and comprehensive, Nochifor Crainic's ideology predicts the mingling of the national spirit with the religious, Christian, and Orthodox spirit. Hence an entire argumentative plea on different scientific and artistic areas, searching for evidence in theology, ethnology, and ethnography, anthropology, art and folk aesthetics. But from all of these, the idea of the religious person stands out as a foundation of the socio-political cultural existence and model. Essentially, Crainic's contribution stands in the unbinding of *the religious background of tradition*, according to George Achim's phrase[60], who otherwise summerizes his place in the configuration of inter-war ideology: "*Nichifor Crainic wss the main ideologist of what can be called, using Basil Munteanu's phrase,* "*militant traditionalism*", *orientation that associated, from right-wing nationalist positions, the national idea with the religious idea of matrix Orthodoxy, a style creator in the field of culture.*"

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[57] idem, 178

[58] Z.Ornea, Z. Ornea, ***Anii Treizeci. Extrema dreapta romaneasca (The Thirties, Right-wing Romanian extreme),*** Published by Fundatia Culturala Romana, Bucuresti, 1995, pg. 56

59 apud. Lucian Boia, ***Capcanele istoriei. Elita intelectuala roamenasca intre 1930 si 1950*** (***The traps of history. The Romanian Intellectual Elite between 1930and 1950***), Published by Humanitas, Bucuresti, 2011

[60] George Achim, ***Revolte si consimtiri (Revolts and Consents)***, Published by Dacia, CLuj-Napoca, 1995, pg. 261.

The volume ***Puncte cardinale in Haos***,[61] (***Cardinal Points in Chaos***) cumulates the main valences of his ideological vision, and in order to be able to rebuild the guidelines of his concept we will appeal directly to some of the important essays of the writer: ***Tineretul si crestinismul (Youth and Christianity), Sensul traditiei (The sense of Tradition), Puncte cardinale in haos (Cardinal points in chaos), Rasa si religiune (Race and Religion), Marturisire de credinta (Statement of faith).***

One of the subjects that Crainic approaches in order to contextualize the problems of the era, is the one of the youth, regarded as a main recovery factor of national and traditional values, lost in assault of western decay. The problem of the youth is largely debated in Mircea Eliade's era and others "from the generation" such as Crainic recapitalizes the subject and gives it a new extension, by reporting it to the religious dimension.

Religion and the religious phenomenon is interpreted firstly from ethnic and governmental point of view, in the sense of systematic consolidation of the national specific, aspect that invariably gives it the capacity of authorizing and purifying collective force, in the same time on a secondary plain the relation of the individual with the transcendent. Orthodoxy represents, from ethnogenetic point of view, the security and un-altering basis of the Romanian nation, its specificity mark, thus Crainic exclaimed enthusiastic - *the Romanians are the only Latin Orthodox people and the only Orthodox Latin people".* Thus, Orthodoxy is considered as being the only primordial principle of the Romanian spiritual order, cardinal point of orientation, verified and validated by history: "*in the multi-ethnic complex of present Romania, the eastern ritual of the two national Churches is the formula for preserving the majority of the Romanian block.* (...) *Orthodoxy will be the key for understanding this history."*[62] If the historical artefacts of the Romanian people have a rich religious representation, the folk culture and art are, in their turn, born out of a creative consciousness dominated over the years by living the religious event, which confirms "*the strong presence of Orthodoxy in the Romanian soul*"[63]. The organic link between religion and culture is extensively debated by the essayist and undeniably argued: the popular creation dominated by the Byzantine style, the fine arts, profoundly spiritualized, as well as the musical and poetic rhythms answer back over centuries to the echoes of a specific Byzantine style, deeply implemented in the collective Romanian consciousness.

Religion represents, in Crainic's opinion, the matrix pot from which the cultural phenomenon and the geo-anthropological symbolic representation develops and evolves.

Nationalism is born from "*the substance of this Church mixed everywhere with the ethnic substance*".[64] In the doctrinaire spirit of right-wing ideology prevailing during this era, the mentor of this thinking naturally intertwines the ethnic and the religious regarding them as a fundamental categorical duality for the governmental statute of the Romanian people: "*The new spirit that blows over Europe is a nationalist and religious one in the same time, meaning that it wants to take into account both the organic and diverse realities of ethnic nature, and the transcendent reality of religion (...) Nationalism is the key condition for the rebirth of every nation, as its lack is the sign of decadence and death".*[65].

The revolutionary spirit and the vitalist, spontaneous, and deliberate force specific for this age, renders the youth with an enthusiastic manifestation towards extremes, towards infinity, determining the youth to adopt radical, irreconcilable, and polarizing attitudes. In the Romanian context, and not only there, as we have also seen in Eliade's articles, the social dynamic is in full

[61] Nichifor Crainic, ***Puncte cardinale in haos (Cardinal points in chaos),*** Published by Albatros, Bucuresti, 1998

[62] idem, pg. 73

[63] idem, pg. 75

[64] idem, pg. 79

[65] idem, pg. 102

extremist reconfiguration, and the opposing lines formed (Christian nationalism and Atheist internationalism, the soviet equal of right-wing nationalist movements), immanently imply the taking of a position regarding the religious idea. "*Christianity and atheism are the peaks that demand the tumultuous psychology of the young generation* - Crainic says, and - *the problem of the relation between youth and Christianity is not only today a problem of catechism and a pastoral problem where the church has the initiative, but rather a problem of attitude enforced on the youth having that era's extremist spirit.*"[66] In this sense, the Church acquires a stabilizing and ordering role within the massive accession of the right-wing youth, though this reviving its vital functions and its secure place in social life. Although in the shadows, trivialized and entirely formalized as a result of the western virus penetrating in the collective psychology, with all its material and commercial imprecations, Crainic's concept restores his vital force and his redemption, and on this basis he will formulate within nationalism "*an integral concept of life in which (*the youth, n.n*) can save its sole from the ruins that pile up all around.*" "*The Church remains with the task* - the theologian firmly points out, using the adequate styles that betray his talent and poetic expression - *to capture and filter the positive waves that burst over its threshold or to dam up the negative and rebel waves the hit its coast.*"[67]

Conclusions

The inter-war period knew one of the most expansive and influential socio-political materialization if the nationalist ideology. Supported by the largest part of the elite intellectuals of the era and theorized in nuance, depending on the tackled scientific and cultural paradigms, the national doctrine involves several facets that ideationally express the cultural personality and political thinking of its ideologists.

Thus, Mircea Eliade develops a nationalist ideology from philosophical and spiritual positions, based mainly on the metaphysical and historical dimension of the nation. In his turn, Vasile Marin represents the political offensive of nationalism, in a combative manner, undeniably marked by the limits of his ideological position. Regarding Nichifor Crainic, his doctrine is coagulated on a theological assumption, an Orthodox-spiritualistic one.

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PUBLIC PROJECTS BETWEEN NECESSITY AND IMPACT

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Abstract
The main objective of public projects is to purchase one or more social benefits, targeting communities in which public authorities responsible for implementing these projects were elected. Unlike public projects, the main purpose of the projects undertaken in the private sector consists of maximizing the profit obtained by increasing the activity and / or minimize costs. Therefore, in order to analyze in economic and social terms the impact of development projects it is required, together with analysis of common issues, highlighting the differences between public and private projects. In this sense, we see greater difficulties in evaluating public projects, which should aim at minimizing the costs - as well as private projects - also achieving significant benefits and correctly targeted to the needs of the population, meantime taking into account economic and social present situation. Cost – effectiveness analysis is more difficultly to do, as it involves to estimate some indicators, expressed in monetary units, defined by a series of mostly social meanings, such as the cost of life, the improvement living conditions benefits, etc. The choice of discount rate and project operating life involves higher risks than in the private sector, at least for large investment projects, given that these designs achieve highly valuable public assets, which have to operate a long time for the community benefit. Public authorities responsible for public projects must choose the most suitable variant of proposed projects according to the respective communities present and future priorities set, based on a thorough socio-economic analysis, highlighting the increasing usefulness for society by implementing the project and also taking into account its specific activity.

Keywords*: budgetary funds, grant, indicators, present value, public projects, ratio, social benefits*

Introduction

Classification of public projects

Public projects can be classified according to the nature of the domain wherw its will be implemented:

- social services development of any kind - health, public utilities etc. - designed to increase the quality of community life, without creating negative externalities;
- education and research and development that aimed increasing the level of education, training and professional skills, achievements in applied and / or fundamental scientific innovation etc.;
- protect and / or exploitation of the natural resources;
- security and civil protection by improving the activity of the army and police, judiciary system adaptation to cyclical demand and strategic imperatives, etc.;
- economic development of the geographic area to which it is addressed by creating conditions for implementation of leading industries in terms of value added (industrial engineering, quarrying and manufacturing, chemistry and petrochemistry, food, light, docks, etc.) or social utility (agriculture, forestry, fisheries, energy infrastructure, the IT etc.)

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Content

2. Comparison of public projects versus private projects

As technical and economic approach, between public projects and the projects made by the private sector for its own purposes, there are, naturally, many common elements, but at the same time, exist many important aspects that distinguish them as follows:

- the main purpose of a private entrepreneur is to make a profit and for this it improves its endowment, creating new jobs, etc..

Public project mainly aims to provide essential public services to the community of the highest quality and in sufficient quantity;

- funding sources present significant differences. While private projects are financed from own resources (self-financing), the loans obtaind from the financial sector and grants for the project which proves that is eligible for these grants, public projects are financed primarily from budgetary allocations, which are public funds established by the redistribution of taxes and administrative charges. Also, like private projects, the public projects can obtain loans (repayable) and / or grants, if the conditions of eligibility are fulfilled;

- the life of the projects in the private sector, the overall average, is much shorter than of the public projects. Thus, public projects in areas such as transport and communications infrastructure, civil engineering, energy, etc.. are designed to operate for long periods and therefore must meet much higher technical conditions;

- whether for a private project divergent objectives are infrequent, usually a public project must find a solution to balance the interests of the public institution and those of community, generally those adjacent to which development and / or operation of the project can be an externality negative.

For example, building a dam to control water flow can adversely affect some land and public authority which is responsible and the project beneficiariy will have to compensate losses of the affected population;

- in the political impact of projects, those private is unsignificant - perhaps only in creating new jobs and, for this, public authorities, both local and the national need to provide an appropriate environment, while respecting the law of competition. Public projects produce, however, important political effects and, consequently, public authorities have to account for, on the one hand, the interests expressed by pressure groups and, on the other hand, for the conditioning imposed by natural environment, and also political, economic etc. interests of national and / or community society, temporary or medium term, but also for the financial constraints of the project;

- private projects determined as measure of effectiveness, the rate of return on invested capital, which, technically speaking, is relatively easy to do, but, for public projects, the evaluation of efficacy is very difficult to perform because you have to be taken into account a number of social issues that can not be precisely described by measurable indicators in physical or / and in monetary units. In response to these goals, scientists have developed various models of cost-benefit analysis, which approximates the specific indicators of economic and social aspects of life.

Evaluation difficulties

Evaluation difficulties in assessing the community benefits produced by public investment projects are caused by many aspects that have to be considered, such as, for example, the following, not limited to:

- identify all the beneficiaries and all gains and losses that that project can generate and also its monetary evalation;

- poor relationship that can be drawn between public projects and the communities in whose heritage get these projects;

-absence of both national and international standards to be used as a measure of effectiveness;

- public projects are subject to, in most cases, some legal and functional restrictions, for which, to overcome them, have to be undertaken costly actions (eg, expropriation, etc.);
- public funds that is necessary to be allocated to the project must be included in the beneficiary public authority budget and thus will be subject to political influence. In addition, the design and selection of investment projects are approved by the budget authorizing officers, who are leaders of public institutions dependent on government power applied policy;
- motivating the human resources that are involved in the achievement and implementation of development projects is ignored, in general;
- the discount rate used for the analysis and selection of public project, based on financial ratios, is difficult to calculate, given the uncertainties introduced by forecasting inflation, financial market interest rates and other macroeconomic indicators.

3. Eligibility analysis indicators of the public projects

Toor analyze and select the investment projects are built based indicators - in physical and / or monetary units - and financial indicators, which are calculated using updated methods that take into account the time value of money.

In the first category of indicators are found based indicators for all investment projects, regardless whether its are determined by public or private sector, as follows:

- total amount of capital invested;
- the period of the implementation of the investments;
- the operation period of the respective investment objective;
- specific investment;
- payback period;
- the coefficient of economic efficiency of investments;
- the equivalent or converted values of the investment expences;
- economic efficiency of investments;
- etc.

Among the financial indicators, the most relevant are related to:

- the net present value (NPV), which presents the financial profitability of the project, using the updated nominal values;
- recovery period (TR) needed to cover total costs generated by the project, under the update method;
- internal rate of return (IRR), as a measure of financial risk posed by the project.

All financial indicators are calculated taking into account the trend in the currency in which other indicators are expressed, a trend that is determined depending on the chosen discount rate to determine the eligibility of the project, which in turn is dependent on cost of capital that funds the project.

Forecasted cost of capital for a public project or public / private investment must take account of some features related to public sector involvement, as follows:

- if the project financing is ensured only by the taxes and public charges, the cost of capital - equivalent to a social discount rate - will be zero;
- when public funding is ensured by budgetary allocations coming exclusively from loans contracted by public authority, the cost will reflect the effective interest rate which it pays;
- it must take into account the opportunity cost (the greatest gain that could be obtained by using another version than that objective) charged by the investment of the private sector that pays taxes and administrative charges required;
- also, it will be considered the opportunity cost of public investment, due to the budgetary constraints it faces.

In the economic and administrative literature states that in the public investment projects, capital cost must be greater, at least than the effective rate of return of the government securities issued as long-term public borrowing.

The life of an investment project in the public sector is generally tens of years, for example for a hydro dam comes to 50 years. This feature makes it obligatory to take into account the residual value that will target investment after a relatively brief period, to analyze its feasibility.

The cost-benefit rate is a crucial indicator in a public investment project. As economic and financial analysis, a public project is no different than a private one, but it is necessary to bear in mind that it never does not seek profit making but obtain benefits for the population, these benefits beeng rarely in a monetary form, at least in a first approach. Hence, one of the major challenges facing the public projects is evaluation of monetary social benenefts for the local and / or collectivities, as a result of implementation of those projects.

In termes of this key indicator for selecting public investment projects, namely the cost-benefit, it can provide three objectives:

- maximize earnings due to a specific cost items;
- maximizing net benefits, when both costs and revenues vary;
-minimizing costs to achieve a given level of benefits. This latter method is known under the appellation of cost - effectiveness[3].

The cost-benefit indicator is defined as the ratio berween the net profit project created and costs, also net generated by the project. The net benefit is determined by deducting from the sum of all gains of the all losses incurred for the beneficiaries as a result of project implementation. Net costs, known as equivalent expenditure, covers all expenses implementation, and also operation of investment obioectivului.

Accordingly, to calculate this indicator, it is necessary to identify the benefits - of any kind: economic, financial, social, etc. - and to be assigned to each items a monetary value.

Also, it will be taken into account the wide variety of costs. They can be grouped into four categories:

- costs which is attributable to internal activity of the entitity that implements the project;
- costs caused by the external environment, regarding both the technical and technological features, and production and consumption of goods and services registered by operation of the respective investment objective;
- the market development and of the monetary indicators which characterize primarily inflation and reference interest rate;
- the expected changes as a result of project implementation, about supply and demand of goods and services of the community concerned, together with the indicators that express those authorities resources and relevant inputs in the area analyzed.

A very important aspect is to determine if the proposed project is an independent one or a mutually exclusive projects. Thus, when an independent project, the eligibility methodology involves several basic steps:

- identification the net benefits and quantification its monetary values;
- determining the costs of implementation;

[3] Efficiency = results / effort, where the result is the fruit of actions taken after consumption of various resources and effort are consumed resources (materials, people, time, money);

Effectiveness = the result / outcome of planned (desired).

Effectiveness without efficiency is beneficial because consume too many resources (especially time), even if eventually get the desired result. No effective only does not pay - remove nothing best result of the resources they have at hand if you get something closer to the desired result.

Sources: http://scri.ro/eficient-sau-eficace-1001.html

- calculating the present value of benefits and net costs using an appropriate discount rate. The acceptance of the project will be make according to the budget constraints, and if the report benefit / cost in terms of updating values, is higher, at least equal to unity.

If, to achieve an public investment objective - for example, implement a program of road infrastructure, a public authority may approve several independent projects, for the different sections of the road – it will be selected only those projects that presents a benefit / cost report greater than unity.

If, to achieve an public investment objective there are several projects that meet the eligibility requirements, but only one of these should be selected, the analyst must choose which among those predicts it will bring the greatest social benefits. This project is not necessarily one that presents the greatest benefit / cost, but the analyst must justify each marginal cost with a marginal benefit / cost report higher than unit. Also, the public authority responsible for the investment project may agree to pay an additional subsidy, under the condition to provide a benefit / cost ratio greater than 1, calculated on the basis of cost growth.

In case of the presentation of projects that exclude each other, after eliminating projects that would affect competition, it is calculated for all remaining competing projects the benefit / cost ratio, that must exceed the unit to be eligible. To select among the projects remaining, they are listed in order of increasing costs and it is calculated for each pair of projects – the project$_i$ to the project i-1 from the list, the report as follows:

$$\frac{Net\ Benefit_i - Net\ Benefit_{i-1}}{Net\ Cost_i - Net\ Cost_{i-1}} = \frac{\Delta B_{i/i-1}}{\Delta C_{i/i-1}}$$

selecting from each pair of projects the second, if the ratio is greater than unity or vice versa.

Incremental increased benefits and costs will always be the same ranking of the mutually exclusive projects, whether they are used to select the criteria such as net present value, internal rate of return or the recovery period to date.

Effectiveness analysis - cost pursues several aspects, taking into account both the benefits and costs can be accurately measured with difficulty and, consequently, their monetary expression is uncertain. For public investment projects to satisfy the conditionality on the effectiveness, benefits and costs must be considered net, i.e. the benefits will lower the nominal loss of benefits and investment costs will be deducted from any income that the operator may obtain from the project.

Difficulty in determining the correct ratio benefit / cost gains are to identify and / or additional costs. Thus, in some cases, an additional benefit may be added or dropped from the cost benefits, but this interpretation leads to a different value for the benefit / cost, although it produces no effect on the acceptance or refusal of a project.

Effectiveness - cost analysis

In some public projects, benefits and losses of benefits can be measured in monetary values with difficulty, directly or indirectly. Analysis must express the benefits and costs in terms of efficacy and the method benefit / cost is often identified with it.

In this respect, analysis of effectiveness - cost ratio must seek the fulfillment of conditions:

- analysis of benefits and costs must express in terms of effectiveness and benefit method - cost is often identified with it;
- effectiveness - cost analysis must meet several conditions:
- to identify targets, shown feasible by the studies presented;
- to provide more options that achieved the objectives specified by the contracting public authority requirements;
- to define the constraints related to the project, regarding the costs, the execution and operation project period, etc..

Effectiveness – cost analysis will be accomplished in several phases:

- defining objectives;
- diagnostic analysis which presents the strengths and weaknesses points of the area are going to implement the project;
- detailing possible options;
- establishing the scope of effectiveness and the discount rate for the monetary values;
- select one of the options, in accordance with:
- established efficacy, that project choice that best achieved the objectives at least cost;
- the determined cost, i.e. the present value or equivalent annual costs for a given level of effectiveness;
- determining the efficiency of each variant;
- graphical representation of yields;
- analysis of various options against the criteria established, which will eliminate the option / options that tend to dominate;
- perform a sensitivity analysis, which estimated outputs to inputs major changes;
- development of a synthesis of all previous analyzes and conclusions

4. **Conclusions**

In the countries with democratic political system it is stipulated by the Constitution, as general government, under powers granted by the national constitution, are obliged to justify public investment decisions, including budgetary costs arising from these decisions.

Projects of a public nature are different from those performed solely for the private sector in that the entities responsible - whether central or local public institutions, financed wholly or partly of budget allocations, etc. - are forced to consider methods of funding; lack of obligation to pay corporate tax; political and social factors; etc.

Evaluation criteria and implicitly, by selecting public investment projects are currently affected in a decisive manner, by the results of the analysis of benefits - cost that used update information entry.

Also, responsible public authorities are considerably based on the benefit – cost method, because it takes into account, along with monetary benefits, also non-monetary ones - allowing a better understanding of the value added by labor, i.e. labor productivity.

It is important too to note that the benefit - cost report produces a relevant information relating to the importance of public investment priorities for the project, only if it is able to specify and to define in terms of budget impact of that project, given the budgetary constraints it is forced to cope. In this respect, if the submitted projects are independent, they will be subject, first of all, to a threshold of acceptability, only then will have to be within the limitations imposed by the responsible funding.

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RIGHT TO FREEDOM OF EXPRESSION ANALYSIS OF THE ANGLE OF PRACTICE EUROPEAN COURT OF HUMAN RIGHTS

GEORGETA MODIGA[1]

Abstract

European Court affirms the idea that democracy is not about majority rule opinion, but also implies a respect for minorities, tolerance of isolated events or eccentric approach requiring individual-community relationship from a liberal perspective. Meanwhile, the European Court's view, freedom of expression serves a dual goal: that of the fulfilment of each individual, thus representing an aspect of the general principle of individual autonomy in relation to society, at the same time, freedom of expression has a significant function instrumental, providing an extremely useful tool to ensure proper functioning of an open and pluralistic societies, and particularly a representative democracy. As will be seen in the paper, this second explanation seems to weigh heavier, causing it increased protection that the Strasbourg court to release a discussion of issues that are of public interest.

Objectives approach refers to the extremely wide range of manifestations of law, including material and technical means used for its exercise, analysis of forms of limitations on freedom of expression, whether measures which restrict freedom of expression, margins of discretion available national authorities to restrict freedom of expression that has a variable extent depending on the message content of the right holder and the value of the state a legitimate claim to justify the need for interference.

Keywords: *freedom of expression, forms of expression, restricting freedom of expression.*

Introduction

Freedom of expression is one of the oldest and most important freedoms, is known under this name or under the names of its aspects: freedom of speech and press freedom. Freedom exists only if it is not limited, but the lack of restrictions is not sufficient, freedom must also have a positive content to be supported by the values embodied in action. If freedom of expression necessary for someone to listen, to have dialogue and consequences of dialogue: normal and moderate consequences, but both necessary and predictable. Otherwise, freedom of expression can lead to no dialogue, but to chaos. The link between words and reality can be seen, for example, well into the civil society, nongovernmental organizations.

Developed in the Council of Europe signed in Rome on 4 November 1950, Convention on Human Rights and Fundamental Freedoms (known as simplified by the European Convention on Human Rights) has gradually become one of the most effective instruments of defence human rights worldwide.

She is such a tool for two main reasons: on the one hand, place the law of the Member States which have ratified the Convention (currently forty-five, forty-six soon), a place that explains the profound influence exerted the Convention on legislation, jurisprudence and practice of these states, and, on the other hand, the fact that unlike other international instruments of human rights, European Convention on Human Rights has its own supranational judicial mechanism, which requires Parties High contracting and ensures an effective, compliance with the proclaimed rights.

Of course, this system of human rights is not universal, but European. It is also true that it only covers the rights and freedoms which are essentially oriented individual rights, civil and political rights of man, excluding a few exceptions, economic and social rights (which are guaranteed by other tools such as the European Social Charter). However, the two limits mentioned above, the

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geographical and material does not diminish the special legal and political importance of the European Convention on Human Rights.

This is why the Convention is vital to know at present: it may be invoked before the national courts must apply the ultimate control of the European Court of Human Rights, which occurs not as a judge of the third or the fourth court, but a European supervisory body. The Convention is therefore founded on the principle of subsidiary, better known in general public international law.

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

Content

Freedom of expression, Article 10 devices, has a special place among the Convention rights. Indeed, it sits right at the notion of "democratic" system of values that summarizes the Convention is built. The particular importance of Article 10 was highlighted by the Court for the first time because Handyside v. United Kingdom (1979), the idea being constant in all cases and then resumed later. Thus, "freedom of expression constitutes one of the essential foundations of a democratic society, one of the essential conditions of progress and individual fulfilment and its members. Subject to paragraph 2 of Article 10, it covers not only" information "or" ideas " that are received favourably or considered inoffensive or indifferent, but also those that offend, shock or disturb the State or a segment of the population.

These are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society". European Court affirms the proposition that democracy is not confined to rule the majority, but also implies a respect for minorities, tolerance of isolated events or eccentric approach requiring individual-community relationship from a liberal perspective. Meanwhile, the European Court's view, freedom of expression serves a dual goal: that of the fulfilment of each individual, thus representing an aspect of the general principle of individual autonomy in relation to society, at the same time, freedom of expression has a significant function instrumental, providing an extremely useful tool to ensure proper functioning of an open and pluralistic societies, and particularly a representative democracy.

As we will see below, this second explanation seems to weigh heavier, causing it increased protection that the Strasbourg court to release a discussion of issues that present a public right guaranteed by Article 10 but not absolute. Paragraph 2 allows restricting its exercise if the use of freedom of speech is directed against certain values, which the state can legitimately defend, or even against democracy itself. Restrictions on freedom of expression will be controlled by the European Court but by applying a series of principles of interpretation of Article 10 of the Convention in the jurisprudence crystallized on them. Although the Strasbourg bodies (Commission and Court) have not always followed in the present case solutions approach announced in favour of freedom of expression because Handyside, is sometimes criticized the doctrine of specialty for this prominent role of freedom of speech was constantly said at least in principle, he must guide any analysis of any restraint of that freedom.

The main feature of the way defined by the Commission and Court on freedom of expression, in terms of Article 10, is their tendency to include within the scope of paragraph 1 an area of extremely large expressions of law, including means and technical materials used for its exercise. Basically, the Strasbourg organs very easily accept framing the scope of paragraph 1 and will differentiate the legitimate forms of expression that the state is able to suppress on the basis of the restrictions mentioned in paragraph 2 (restrictions must be provided by law internal, pursue a

legitimate aim exhaustively listed in paragraph 2 and to be necessary in a democratic society to achieve those goals).

Right protected by Article 10 includes, in the words of the ECHR, "freedom of opinion and freedom to receive and impart information and ideas without interference by public authority and regardless of frontiers".

It should be noted that were considered interference in exercising that freedom very different situations such as punishment of journalists for various statements published in newspapers or television shows made during the refusal of the authorities to distribute a certain magazine in military barracks, detention of persons protesters handing out leaflets during a parade or a conference on military topics, a person denied access to confidential information concerning them held by authorities, confiscation by the authorities of the paintings of an artist shown at an exhibition, a film broadcast ban the dismissal of a teacher because of his political activities in the German Communist Party, unable to create investor-owned radio or television because of state-owned monopoly in this area, denying access to the country of a foreign political leader to prevent to attend a meeting that had been invited, and others.

In the case Groppera Radio AG v Switzerland (1990), that the decision by Swiss authorities to prohibit the broadcasting company applicant to resubmit cable broadcasts issued in Italy, the government argued that Article 10 does not cover broadcasting of programs whose content, especially popular music and advertising, does not fit the notion of "information and ideas".

The Court rejected this argument and stated that Article 10 (1) is applicable and should not make any distinction based on the content of programs.

Freedom of expression occur all categories of objective, pluralist and all original creations and ideas, in any form, media or their purpose. Since she has not only mass media but also all citizens and creators of scientific, literary or artistic. Included within the scope of protection of Article 10 so words, images, sounds transmitted through printed media, the radio, television, film, etc.. Although there is still no jurisprudence in this respect, it is clear that electronic information broadcast over the Internet will be covered by Article 10.

As shown, the scope of the liberty protected by the Convention is very broad, including all forms of artistic discourse, shopping or on public issues. Of course, given the effective protection of Article 10 varies in the sense that the legitimacy of state interferences in exercising freedom of expression will be evaluated according to different value which the Court granted different messages sent by the right holders. For example, as we shall see below, forms of advertising included in the commercial speech will have a much lower protection to political speech. Important to note however that these differences are made on the land of paragraph 2 of Article 10, which obliges the state to comply in all cases rather strict conditions imposed by it.

Paragraph 2 of Article 10 allows the state to provide limitations of forms of freedom of expression provided it complies with the requirements of the Convention impose for their validity. Once established the applicability of Article 10, after it was found that there was a applicant's right to freedom of expression, the Court said that state limitations on this right is contracting Convention if fulfils the three cumulative conditions listed in paragraphed 2: to be provided by law, to at least one of the legitimate aims specified in the Convention and be necessary in a democratic society to achieve that goal. When there is failure of one of these conditions, the Court will find no violation of the Convention to pursue his other.

Interference with freedom of expression must be based on existing legislative provision in law. Of the Strasbourg jurisprudence has established that must be understood by the term "law" will be one of the so-called "autonomous concepts" whose content differs from that which could be the law of different States Parties to Convention.

Thus, the "law" means the legislative act of general normative value emanating from legislative power and a lower norm with legal force of law in the formal sense. It covered the concept

of "law" under the Convention including case law, and this applies not only to countries that have a legal system of "common law".

Especially in the latter case, the Strasbourg organs have held that the "law" under the Convention can understand both the written and unwritten law. Also, because Autronic v. Switzerland (1990) were considered as "law" under the Convention and rules chair belonging to international law.

Important is that the law which provides an interference with freedom of expression must meet two basic conditions: the availability and predictability. In their absence, found by the Strasbourg Court, Article 10 will be violated even if the interference is provided by law in force in the domestic legal order, emanating from Parliament.

European Court had the opportunity, if the Sunday Times v. the United Kingdom (1979), to affirm the basic principles which define notions of accessibility and foresee ability of the law. Thus, "it is mainly the" law "to be sufficiently accessible; citizens must have sufficient information, considering the circumstances, in connection with legal rules applicable in a given case. Second, there can be considered "law" than the norm formulated with sufficient precision to enable citizens to adjust their conduct to legal requirements, using competent advice if necessary, he must be able to provide a reasonable degree of accuracy taking into account the circumstances, the consequences that may result from an act committed by him caused.

These consequences need not be foreseeable with absolute certainty, this experience proves impossible. In fact, although certainty is desirable, sometimes it causes excessive rigidity, or the law should not be able to adapt to changes in situation. Thus, inevitably many laws using formulas more or less vague, the interpretation and application depend on practice.

The ambiguity of existing laws can be compensated by the law of the state in a consistent judicial practice, allowing achievement of the desired condition that affects freedom of expression as are prescribed by law, and thus remove the arbitrary and avoid granting a discretionary state authorities. There are areas which by nature does not allow a perfectly rigorous regulations, so that is inherent in the existence of texts with a more general law. Court accepted that in terms of, for example, defends moral or legal rules governing the field of unfair competition, the situation in which repression by these plaintiffs could be provided due to existing case law in that area.

If Steel and Others v. R.U. (1998), the European Court suggested that the mere provision in domestic law is not a sufficient, is necessary and compliance with the Convention.

After finding that interference with the freedom of expression was prescribed by law, the European Court check it following a legitimate exhaustively listed in paragraph 2 of Article 10. In this regard, it should be noted that European courts are not satisfied to accept the existence of alleged legitimate state purpose, but done themselves an assessment will be identified after which one of the objectives listed in paragraph 2 that is most relevant in the circumstances.

When you check the condition of the pursuit of a legitimate purpose is fulfilled, the European Court to take into account that inspired interference emanating from authorities at the time of its establishment, and not to the respondent State could reconstruct it later to justify As the proceedings in Strasbourg.

Possible and be retained in the same case several legitimate reasons to justify state action. For example, if Barfod v. Denmark (1989) in which a journalist was sentenced for two judges accused of lack of impartiality in the way they solved a tax dispute, the court held as legitimate in terms of paragraph 2 "the reputation of judges" and indirectly "safeguard the authority of the judiciary".

This is the most important requirement that the state must meet when they restrict freedom of expression of individuals. Strasbourg bodies have established a number of principles concerning the interpretation of this notion, because it is often decisive for establishing conclusions or violation of the Convention. Analysis need measures that affect freedom of expression, to bring to conclusion Convention compatibility with the need to highlight that it answered a "pressing social need" that caused its adoption. Also, the measure must be proportionate to the legitimate aim pursued and the reasons given to justify national authorities must be relevant and sufficient.

Conclusions

European Court rejected the argument states that have held that the requirement of necessity in a democratic society is satisfied when the state demonstrates that it acted reasonably, carefully and in good faith. Stressing the critical importance of which should enjoy freedom of expression, the Court insisted that aspire need for restrictions must be convincingly established.

It is true that a national authority is primarily the task of implementing the Convention. They are actually placed in a more favourable position than the European courts to assess the appropriateness of certain measures that restrict freedom of expression. Accordingly the European Court has recognized discretion in this area. However important to note is that this discretion is limited. It is subject to European control and named on the final state in need of law and its enforcement decisions. Therefore, the European Court is competent to ultimately determine whether a certain extent the guarantees established by art. 10 of the Convention.

Is important to note that concrete appreciation of the necessity of the restriction is made on a case by case basis, taking into account all the circumstances of the case. Therefore, the Court concludes often determined by specific issues that case, although it is possible to extract some general principles to allow anticipation attitude Court in subsequent cases, leading to the establishment of European standards that states party to the Convention must accept as minimum obligations on freedom of expression.

Margin of discretion available to national authorities to restrict freedom of expression is variable but a stretch, according to the owner of the message content, and legitimate value that the state invoke to justify the need for interference. In consequence, the protection of the convention also varies accordingly.

As we have already stated, the Court need to protect freedom of expression based primarily on the value which it represents as a means to ensure proper functioning of a democratic society. Hence the privileged position given to the free discussion of matters of general interest, and in particular press freedom when it conflicts with other values that the state can legitimately defend. Therefore, when the objective is formed infringement complaint in Strasbourg freedom speech "political" understood in its broadest sense, the discretion of national authorities is very low.

Conversely, if the right claimed by claiming concerns a speech whose content had a predominantly commercial, so transmission of information and ideas of general interest, but purely economic interests of individual discretion is much broader. In this case the Strasbourg Court is in a lesser extent willing to substitute its own assessment on the need for restriction of the state authorities. It can also argue that discretion exists for distinct artistic discourse. Once qualified as a speech that bears on issues of general interest, the discretion given to states to restrict also vary according to the legitimate aim pursued and the extent to which we can speak of an "objective definition" of it to European scale. The Court recognized that the notion of "moral" is not seen uniformly in Europe, it vary greatly from country to country depending on the specific realities of each. Therefore, national authorities decide how to protect will be subject to less stringent than the European courts, for example, the notion of "authority of the judiciary", which can be observed if more consistent in concerning Justice and states party to the Convention.

Also, because Sürek v. Turkey (1999), the Court held that when the claims in dispute, even if they concern a matter of public interest, encourage the use of violence against an individual, a representative of the State or part of population (thus affecting national security or public order), the discretion is larger than, for example, if critical discourse directed against a politician.

It must however be stated that the idea that a certain measure was considered by the Court not to violate the Convention because authorities had acted within their margin of appreciation does not necessarily mean that is basically foreign speech protection area established by Article 10, but only that, given the circumstances prevailing at that time in that State authorities have been able to legitimately use discretion to determine whether the ban. However, it should be remembered that

Article 10 of the Convention requires Member States accepted minimum standards on freedom of expression, not prevent them, according to Article 53 of the Convention, to grant individual rights law toward the increased protection provided by law of the Strasbourg jurisprudence. Thus in Handy side v. United Kingdom (1979), the Court has agreed not to violate the Convention by the British authorities ban a book on sex education to school-age children, ban motivated by moral considerations, though the same book circulating freely in other European countries.

We discussed until now how is established in the abstract extent of the discretion, depending on the nature and value of protected speech by suppressing it. To resolve the issue but a concrete, consider the European Court and other elements related to the specific example of a quality that can discourse author (journalist, member of the opposition politician, soldier, civil servant, etc.) Or injured person (politician, civil servant, judge, private person, etc..) and the means by which the broadcast message (print, television, public exhibitions, film projections, etc.) also plays an important role and specific circumstances dissemination of the disputed speech, such as, for example, that children's access was restricted material considered pornographic or not.

Last but not least, the nature and severity of the penalty for playing a key role in determining the proportionality of the legitimate aim pursued. The penalty is more serious effects on the plaintiff, the more the state will have to prove the existence of proportionality between the bond and the legitimate aim pursued.

If the sanction imposed has the effect of restricting freedom of speech more than necessary, and forms of expression affecting not threaten legitimate values apparatus, the Strasbourg organs will find a violation. Thus, the general prohibition and perpetual right to publish a person as a result of criminal conviction for collaboration with the Nazis was considered by the European Commission of Human Rights as violating Article 10 as rigid and permanently affect the individual's right to express other than political issues (causes of Becker v. Belgium, 1962).

Also, where information on the state claims it is entitled to suppress public opinion is already available from other sources, they ban can be justified in terms of the Strasbourg Court. This happened, for example, because the Observer & Guardini v United Kingdom (1991), which concerned the publication ban by the authorities by the applicant newspapers published extracts from the book by a former British Intelligence officer that contained information that was considered that, could affect national security. Since the book was published in the United States and could be readily made in the UK, the Court held that the rationale of the prohibition has ceased to exist.

Although criminal sanctions, especially those involving deprivation of liberty, are those that draw their need for strict control by the Strasbourg court because of special severity, and civil penalties can sometimes lead to exorbitant duties to plaintiffs, as happened in Because Tolstoy Miloslavsky v. the United Kingdom 1995, the applicant was convicted of libel to pay huge sums of money (1.5 million pounds).

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IMPACT OF THE REFORM PROCESS OF THE PUBLIC ADMINISTRATION ECONOMIC AND SOCIAL DEVELOPMENT OF ROMANIA

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Abstract

Romanian society is in a continuous process of change in which all the economic, social, political, civic saw a new dynamic in trying to adapt to specific conditions of the phenomenon of Europeanization (full member of the European Union).

The changing of Romanian society requires the public administration reform to be analyzed and disseminated on the following levels: strategic - by which to redefine the role of the state clearly, legally - using larger framework laws, organizational - administrative and fiscal decentralization, cultural - following a change of values and modes of action of public officials, non governmental organizations, the citizen / customer of public service.

The term administrative reform is trivial, repetitive and recurrent nets into change, public administration reform is invited to constantly readjust the organization and the action and to clearly state objectives, called sometimes the brakes released, blockages to overcome obstacles of the past which is manifested by the upward trend of the society.

Public administration is criticized especially by the public and less by governments in office. Almost general belief is that the administration functions poorly, fulfil its mission in an unsatisfactory manner, but nevertheless has an impact too on community life, economy and society.

This paper aims to identify the type of problems that other countries have had to solve and the need hierarchy and management combined in a single system. Understanding the types of problems encountered and they do other countries in this process will shorten the learning cycle for Romania.

The objectives of this approach is that the critical analysis of the relationship between public administration reform and administrative capacity based on the literature, outlining the operational model to assess the reform process in our country, the study of democratization (the stage of democratization) of public administration modernization strategy approach administrative system.

Keywords: *public administration reform, administrative system, administrative decentralization, public service.*

Introduction

The overall objective is to analyze the impact of public administration reform process on economic and social development and reducing disparities between regions for economic development, and examining the case of Romania the correlation that exists between public administration reform and improving administrative capacity. To fulfil this objective, provided that activity to develop a synthesis report on the description of public administration reform and administrative capacity based on literature

Scientific approach to research is focused on the following approach, detailed in this study:

- Analysis of specificity in relation to public organizations and private;

-Critical analysis of the relationship between reform and administrative capacity discussed in the literature;

- Evaluation of Romania's administrative capacity in the context of the Lisbon Strategy;

-Report-administrative reform administrative capacity in the context of decentralization and regional development in Romania.

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We believe that development of research on this subject, can not be achieved without emphasizing the specificity of public administration, the system works after a series of principles ("after his own order"), but is influenced by certain developments in society that is integrated. As a tool for action financed by public funds and means by which the State exercises its own functions in the administrative system, decisions are made depending on the particular set of public authorities and not by impersonal market forces.

At the same time, these priorities can be supported by a monopoly state action, on the legitimate use of force and coercion. Although public administration, in a sense identified with the bureaucracy, is subordinated to political power and ideology default party (coalition) learned to lead a company in the world, the 80 showed an unprecedented increase in the role of bureaucracy in economic life social. "Four institutions: this economy, voters, government and bureaucracy forms a closed circle of interaction between politics and economics. Voters assess his performance and economy express satisfaction or dissatisfaction with the ruling party. On the other hand, government and bureaucracy (public administration nn) set economic policy instruments that affect the economy and how to use them."

Content

A Japanese expert (Micho MURAMATSU) stated in 1982 that, bureaucracy and bureaucrats have become political actors. Bureaucratic power has greatly increased, exerting a major influence in the political systems of industrialized countries, especially in the sphere of decision.

Most programs are influenced by government bureaucrats, they are involved in the legislative process and having control over information. They are consulted in all phases of decision making and are members of various boards.

I plan doctrine, global analysis the question of similarities and differences between public administration and private administration. In this respect were two theses, namely:

- Public administration differs from private administrations;

-Public administration resembles private administrations.

First sentence, with classic character, protects the specific nature of public administration, because it works in general service, is a unit of action of political power and so can not be confused with privately.

This sentence was pushed to the extreme, the French administration, which made a distinction between public administrations and white issue private. State governments have a monopoly on the management functions considered public in nature. Unlike other services are private in nature and even if they provide the state, this is only occasionally, inadvertently, and the state does not take individual private activities is required and if so, must do to satisfy the public interest, public.

However, public administration and political power emanates from the benefit of reserved power of rulers. Thus, it acquires particular powers and privileges, causing her to become one-sided interests, namely: power of unilateral action and unilateral implementation of administrative contracts.

Such an imbalance occurs deep gulf justified interest exists between private and public sectors. There is danger that the administration to act in his behalf and therefore require the establishment of specific legal rules to which they are subject to public office. This legal framework should include privileges, and constraints of public administration workers, staff in the private unknown. Tie between public and private is performed according to the task that meets the general interest in their employees, and to make public services can not be treated as private activity, can not be privatized.

However, reality has shown that many of the activities considered by excellent public (education, health, management) have become more efficient through appropriate privatization.

Privatization of public services was, in fact, the generator element of the two concepts, argument that the state identify with private businesses. In this perspective, public administration is nothing more than a company whose organizational structures are identical to those belonging to private institutions. Such a view particularly triumph in U.S. and is justified even by doctrinal guidelines, according to which public-private process of assimilation is subject to democratic imperatives.

Thus, if you want individual rights and freedoms and administrative autonomy is necessary for public services and their appropriate agencies be subject to common law rules. Thus, public administration must carry out their duties, the same quality standards as a private institution.

Near public administrative system is based on private reasons of efficient public sector activities. Rules belonging to private management, and must be applied to public services. Concerns of cost reduction and efficiency enhancement must enter and the public sector. These requirements lead to the identification of public administration and private administrations refusal to delineate public function, the rest of the labour market.

Derogation of common law rules and legislation creating a specific lack of initiative and encouraged the adoption of a passive attitude in public administration.

Often, discussions about reform of public administration in Romania give rise to confusion regarding the meaning of this phrase. Specifically, the reform means more than improving administrative capacity. In short, the answer is that they are two different concepts about public sector organization. However, they are functionally related.

Public administration reform is a broad concept that includes all aspects of organizing the public sector, including the remark: "architecture" general ministries and agencies, organizations and local institutions, systems, structures, processes, motivations, and how their surveillance and periodic adjustment of the system.

On the one hand, administration refers to the way it is formally authorized, ordered and organized coordination of public sector activities and on the other hand, administrative capacity is an assessment of the function of the hierarchical structure of public service personnel, and thus only one of the public administration reform.

However, administrative capacity is essential for reform and for the rule, but as we have shown, is only part of the complex vision of itself can not provide the results expected from a modern administration.

In fact, simply increasing the administrative capacity may be an impediment to getting results, because it depends partly on how it is organized and conducted, and how the staffing and their behaviour on the completion of their duties.

To support the transformation of public administration in accordance with the requirements of the reform process in this area requires a coherent set of measures to be taken in a well defined period in the civil service, which aims to create a professional corps of officers public, stable and politically neutral, in local government by continuing the decentralization/deconcentration of public services and the central public administration by improving policy formulation process.

Administrative hierarchy to combine classical and modern management, creative and results-oriented organization into a unified public sector must change the "architecture" of the overall system, various forms of public sector contract work, roles and functions of agencies, re- systems and internal decision-making processes, modes and levels of participation and inclusion in decision making and policy implementation, targeting systems, performance measurement, resource allocation, accountability, supervision and control, etc..

Public administration reform includes all aspects of state organization and each of them should be checked, tested and, if necessary, adjusted to obtain the best combination of hierarchical structure and administrative capacity and effective management effectiveness and ability to get results and performance . However, management is a key issue, represents a test case and cover all

other aspects as potentially change the entire state and, in a competitive world, countries should follow the global trend as quickly as not to leave the competition.

To support a consistent and coherent reform process in the system, believe is necessary to have a stable network to promote the change process made up of the main actors. In practice, the network can begin their work of reform by trying to develop management capacity, and to find solution for inserting these capacities in existing hierarchies of the state. Step by step, the process identifies the type of problems that other countries have had to deal with each stage and will become the new concerns of public administration reform. In this way, reform will develop in time; the need combined animated hierarchy and management in a single system. Understanding the types of problems encountered and they do other countries in this process will shorten the learning cycle for Romania.

Because of global changes due to globalization and increasing interdependence between states, the traditional model of public administration was seen surpassed, unable to make good relationship between government and bureaucracy. One criticism of the traditional model was the relationship between bureaucracy and political leadership. In theory, the model assumed separation between those who give orders and those who execute. The managerial model, the main feature is that managers are responsible for its performance.

The relationship between politician and manager is more fluid and closer than before. In other words, we deal with an unrealistic formula relationship between politician and manager, but with an interaction. Perhaps one of the major qualities of a public manager is to be a bureaucratic politician, to be able to interact with politicians and outside in a way that is beneficial both for him and for the organization.

In this process, civil servants working with politicians who finally last word, but impractical separation of administration decision-making was finally eliminated. Since the 80s a vigorous public management reform movement arose and spread virtually worldwide. This reform aimed at redefining the role of the state and its relationship with citizens.

The motivation for reform was different from state to state. It comes several possible causes:

1. Lack of trust of citizens in the administration. Met in the U.S. and many Western European countries, facing a drop in confidence in government institutions. As a result they developed a severe anti-bureaucratic rhetoric and criticism of the government apparatus and the size of the state level;

2. Ideology. There and ideological dimension of the transition to reform in some Western countries, marked by the election of conservative leaders like Margaret Thatcher, Ronald Reagan and Brian Mulroney;

3. Democratization. In the fall of communism in Eastern European countries led to a profound political reform, accompanied by reform of public administration;

4. Joining the European Union. Reforms in ex-communist countries were generally followed by a second wave of reforms related to EU integration. and in other European countries to EU membership and its mechanisms have led to reforms in public services;

5. Developing. In less developed countries economic development has been and is priority number one. Under the influence of credit institutions like World Bank or International Monetary Fund, which promotes reform as a prerequisite for development, innovative ideas were spread;

6. Economic crises. Inadequate response to crises often lead states to reform. We mention the failure of the State of Western countries to manage the crisis of the 70s, Latin America repeated crises of the '90s, the economic downturn in Eastern Europe after the collapse of communism.

It can be seen that the onset of reforms have driven many causes, that in many cases there were external factors that favoured reforms (credit institutions, the European Union, etc.), public opinion and political system have come to doubt the ability of administration crisis management past or future challenges.

The word "modernize" used increasingly often in the literature, may mean, firstly, to update, try the recovery of late, moving from a state organization, characterized by inertia, one full of

dynamism , adapted to an environment found in rapid transformation. The upgrade also means adapting to modernity, to adopt modern behaviours, considered innovative in relation to the previous ones.

The question is whether we should change everything through a "reengineering" total public organization. This is not realistic or relevant ... In fact, if we look in terms of responsible public establishments, such upheaval makes sense in the medium and short primarily because their concerns have in mind primarily functioning in the best conditions possible organizations them, and not "flipping and restore the world" every morning.

Of course, sometimes there are radical changes, mainly related to policy options regarding the structure, responsibilities or activities that come to seriously put into question certain ways of acting.

This does not mean that change and modernization of public bodies are inevitably dependent on these moments of rupture. Need to modernize public service come from the fact that, currently, they are subject to increasingly more competitive, and some of their results are open to criticism.

Competition grows with choice owed liberalization that took place in the public sector. As a result, public services must position themselves against competitors and to obtain the adherence of which it is addressed and may be: citizens, users and customers.

Public service, competition operates between:

-Public interest and private interest as public interest is evident even when backed by legal and financial support and is not necessarily applied.

-Between budgets of different ministries and departments when budget negotiations take place. Always question whether priority should be given education, road maintenance, health, justice, army etc., If you must pay more money to invest, or pay for education;

-The different ways in practice, public or private, public missions.

-The different benefits of public services themselves.

Among others, the competition was determined by a series of mutations that emerged in the early 90s in the environment that acts of public organizations, of which the most important are:

- Failure of planned economy countries in providing welfare;

- Globalization of the economy has forced companies; even public ones face the increased efficacy or disappear;

- Currents of thought ultraliberal taking important worldwide and which were translated by condoning systematic critical market and administration;

- Low economic growth has led companies to seek new markets and to not hesitate to take actions that traditionally belonged to the civil service (vocational training, radio, television, telephone, health, etc..)

-Limitation of available public resources;

- Developing exchanges that changed size markets, that once were only regional and national and now became European and even world;

-National and European deregulation reduced protectionist barriers and monopolies;

- Reduction of natural monopolies due to technological developments;

- Transfer of power from national to the local authorities;

-Development of power consumers and producers;

- Information and education to allow a better knowledge and appreciation of the offers available;

-Democracy which allows expression of a greater number of expectations.

These mutations of the external environment of public service must add their criticism results as:

-Weaknesses strategy and management of public organizations;

-Bad initial materialization of social intentions.

Since the 70s, especially Anglo-Saxon economists and sociologists have questioned the public intervention.

- First, they believed that public organizations are not incited to reduce the permanent and full, all production costs.

- Second, the rigidity of public services created Organizational inhibit their adaptation to a world of increasingly complex. Their status as one of their employees, was designed to protect people against the corruption of elites and the advantages it could obtain a social group over another. However sometimes became an obstacle to change.

- In addition, precariousness of employment has a majority of employees in the private sector emphasized the gulf which separates the officers, whose jobs are secured and increased demands that they have to public service employees.

- As noted, public service is in the core of the welfare state. Times, concerned social intentions in these projects were not always materialized and are subject to much debate today, and the conception of social justice that should take.

Equal Republican motto is inscribed in the constitutive principle of citizenship in a democracy.

It guarantees the right to an identical treatment of all people, to be provided by formal rules. In this vision is still very much based procedures and action of the French model of public services, like those in our country. Either this formal equality is deeply criticized the actual results obtained, advancing the following arguments:

- The principle causes that reduce bureaucratic functioning civil responsibility, favouring routine and ultimately lead to unmet user needs.

- Trying to ensure equal treatment throughout the territory, the principle means of public service to be based on the local environment to improve service.

- The ultimate criticism stems from the fact that equal rights does not lead to its democratic goals. This school has maintained the myth of democratization of knowledge and equality of opportunity, while all studies have shown that the origin family are crucial for explaining educational success.

The question is if you have to replace the concept of equality with equity. Egalitarian growth model assumes a uniform manner of legal or social rights reduce income inequality, development of social benefits for all.

This model is in decline. Actual results were not always consistent with the original intentions. In addition, new needs with increasing aging population and exclusion of a part of the population. To this is added and the stabilization of public resources available.

Hence the idea of moving to an aspiration towards equality confusing to a thorough reflection on the notion of justice. Without going into detail, an important aspect deserves to be highlighted, namely the justification of inequality in society.

According to the principle of distinction, advanced by J. Rawls, social inequalities should be those who would most benefit the most disadvantaged.

That tends to legitimize differentiate users and to identify groups likely to benefit from the best possible social treatment. Under these changes, public service agencies are concerned. They see small herds, a part of his public dissatisfaction, some abandoned their roles, loss of monopoly. They fear privatization, and therefore very book shown to a certain type of modernization that does not work in strengthening the public service. Many of them join the private enterprise model, which considers the profit motive with its consequences in terms of jobs. They do not see why public services, whose mission is to attend the public well, would be to behave like businesses, since they do not share the same objectives.

They do not see why they required certain techniques, which ignore the peculiarities of their organization. Generally, these agents of the public still do not see the need to take into account the public on the grounds that they themselves are representatives of general interest and both are experienced technicians.

Economic transformations, geopolitical, technological, legal environment that acts of public services, but their criticism results (poor management, poor social intentions materialize concerned) have challenged the traditional way public services work.

Recent research in the public sector indicates considerable interest in TQM (Total Quality Management) as a way to increase performance.

The premise is that quality production and services are central to strategies for important public and private management. The problem is how can be adopted "TQM" in the public sector, which is his way. Certainly the road to quality is not one. This can be achieved by adopting management philosophy that matches the distinctive competence.

In one sense, TQM is a management philosophy and a set of principles designed to be used in an organization for continuous improvement. In this context, two major dimensions: measuring and participation, both to make basic changes in work processes and implement, to support improvements.

Measurement and participation correlate with internal and external requirements. Thus, to identify four common elements:

1) Measurements internally focused (statistical process control to identify quality output while setting variations, etc..)

2) Measurements focused on the outside (measurements for customer satisfaction, consumers, citizens with quality production and services).

3) Internal team and participating in group work, work involving labour organization in new avenues of improvement, improvement, re-manufacturing, services and other processes of work organization.

4) Participation of overseas contractors, including suppliers involved in manufacturing, services, or "partnership" to ensure quality of output. However, the public sectors there are three obstacles to implementation of TQM or access to quality:

a) Opposition to managerial work;

b) Conflict between the budget and personnel management policies;

c) Barriers of improving the quality, on the one hand, and innovation processes / reengineering, on the other.

Romanian society is in a continuous process of change in which the entire economic, social, political, civic saw a new dynamic in trying to adapt to specific conditions of the phenomenon of Europeanization (full member of the European Union).

The democratic system imposed by integration into European structures is functional (in terms of rule of law in Romania) when the economy and successful record as far as it develops a democratic spirit in social mentality.

As a result of accession to the EU, Romania was forced to reconsider its entire institutional structure to be able to meet the needs of implementing the acquis communitaire and after the challenges associated membership.

Most literature on the Europeanization present situation of the EU Member States and the impact they had on the membership structure of national policies and institutions. Heather Grabbe presents five categories of Europeanization process that affected and / or affect the Member States: models - models of legislative and institutional money - aid and technical assistance, setting standards (benchmarking) and monitoring, counselling and twinning (twinning); access to advanced stages of negotiation and accession process (gate keeping).

In the specific case of Romania, the need for institutional reform was obvious but the size and complexity of the Romanian public administration, together with late reform measures led to a delay in the effective administrative structures, able to cope with EU membership.

Dynamic and efficient ongoing process of institutional reform will enable the transformation of the Romanian public administration in an organization who could take over the obligations and rights arising from membership of the European Union.

Public administration can not be reformed in a short time. It is a long term process that must be implemented by several governments consecutive, in a difficult environment, competitive and constantly changing.

The structural and functional modernization of public administration in Romania starts from the need for better operation of central and local organizations and esteemed being generated four categories of reasons: economic reasons, technical reasons, sociological reasons and institutional reasons. The changing of Romanian society requires the public administration reform to be analyzed and disseminated on the following levels:

Strategic - which to redefine the role of the state clearly;

Legal - by using larger framework laws;

Organizational - administrative and fiscal decentralization;

Cultural - following a change of values and modes of action of public officials, non governmental organizations, the citizen / customer of public service.

Implementation of reform policies in public administration will consider the following conditions:

- Define the legislation creating and organizing a public authority of the principles of communication, transparency, effectiveness, accountability, participation, consistency, proportionality and subsidiary and regulation enforcement mechanisms;

- Segregation of responsibilities between public authorities - public policy, finance and public service delivery;

- Introducing a simple and clear mechanism under which the policy be developed and implemented programs, projects, action plans and bills;

-Separation of policy making level of the implementation;

- Fixing the number of civil servants in relation to the definition of public service and a quality standard for this service;

- Monitoring and evaluating the effectiveness of reform measures applied.

Democratic and effective governance is the main purpose of all attempts to reform public administration. Public administration is a vast field, characterized by problems and different approaches that generated significant debate in the theoretical and academic focus primarily on compatibility concepts of innovation, knowledge transfer and best practices in public administration.

Administration is often presented as stationary by nature and incapable, in essence, keep pace with changing requirements, different approaches a government strategy which places a large scale between perception positive and highly negative image of the bureaucracy.

Research in the field of administrative reform are closely related in recent years by promoting a new type of "management" or "leadership" in the public sector tends to question the fundamental assumptions underlying the function of traditional bureaucratic administration (Metcalfe, Richards, 1990) .

The main component of the new trends mainly refers to:

-ethics that leaves managers free to coordinate, perform and administer the issues;

-implementation of explicit criteria and performance measures;

-significant weight given to the control results;

-increasing competition due to fixed-term contracts and public tendering procedures;

-to adapt the typical private sector management;

-introduction of discipline and control resource use.

Administrative organization of the territory is to, study and determination in the state geographically, a rational distribution and efficient human activities in relation to natural resources and needs of local communities.

Delimitation of constituencies territory governments have to consider interests of traditional politico-administrative, economic and socio-cultural population. In this way, can be done in a

consistent, public administration. Administrative doctrine in recent years established three principles of territorial public administration organization, namely:

- Principle of centralization;
- Principle of deconcentration;
- Principle of decentralization.

These principles are trying to solve the two trends that are

manifested in the governance and administration of a country: unity and diversity.

Trend is of national unity and is determined by the need to live in community. The trend of diversity (decentralizing) corresponds to diversity and a social group is determined by the geographical and historical considerations. It requires specific measures for each social group.

Centralization is the fundamental principle of organization of local government and consists solely dependent on local authorities by the central bodies. From a legal perspective, the central decision makers are only applicable in the territory, and local authorities have only their execution competence.

Principle (s) concentration is actually a form of centralization and consists in recognizing the State agency, distributed throughout the country, a certain power. Basically, there are centralized at any time, because on the one hand, central government agencies are hierarchically subordinate, on the other hand, decisions are attributable solely to the state. In broad terms, we can say that deconcentration is an administrative legal regime is between administrative centralization and administrative decentralization, as a centralized decentralization distorted or weak.

What a centralized approach is that local power holders are elected by local voters, but appointed by the centre. What a decentralized approach is that local power holders, although appointed by the centre, they have the competence to solve local problems without having to submit them for this purpose, the hierarchical superior of the centre, but they are subject to its control and forced to documents comply with their supervisor.

If deconcentration, local public authority remains part of central hierarchical system. Decisions on competence of local data are taken from the central authorities in hierarchical power. The central authority to give orders and instructions to local authority decisions are going to take, given the right to control how their execution.

So, deconcentration lies near the site of application of State policies. A demobilize means to distribute more than actions performed by the state administration from the national conception of these actions and territorial level of execution of the same actions. The territorial state, prefectures, counties both directions and county services are not legal entities; they represent only deconcentrated state administrations.

But the principle of decentralization requires the existence of local people, community designated territory, their attributions, speaking in management and administration "business" community. Decentralization as a social phenomenon signifies a fundamental process of moving power from centre to periphery. He generates a lot of effects, in synthesis, include:

A. regrouping of power relations in the local environment, which becomes the centre of gravity of the administrative process;

B. location and the intersection of these relationships cause a specific administrative system that supports local power;

C. local agencies are no longer simple executors of directives from the central administration, but they gain strategic capacity for action;

D. decentralization policy generates transfers of competence, strengthening determine the activity and development of local solidarity, creating a new framework around which the various local stakeholders will be encouraged to mobilize.

The conception of the French model, demands national unity leading to a restrictive interpretation of decentralization, being considered, and finally a "means of struggle" against the

central power. The English concept, however, decentralization is a broad NRTI could understand that self-administration ("self government").

Local administrative freedom to decide and act on own initiative and responsibility, is the key feature of local governance. Administrative decentralization process means not only replacing a central decision-maker at national level with a local one, he profoundly changed the terms of reference and objectives are chosen based options and decisions. Administrative decision is, in this context, since they take the product of complex interactions with the local environment. Inserted in a certain hierarchy, local agent at the same time manifests itself as a component of political and administrative environment, which maintain mutual exchange and reversible.

The decisions he takes are product specific variables of local origin, which proves to be the central administration sometimes unable to perceive them and take them into account.

Decentralization of public administration is also a corollary of democracy. It means the administrative organization, which represents the organization of constitutional representative democracy. All these traits are, according to Max Weber's claims, the expression of a streamlining public administration, a sign of modernization.

The administrative-state model can enhance overall system efficiency as the central public administration can focus their attention on priority issues of national interest, leaving the management of local competent other.

Conclusions

Europeanization not confused with other concepts such as convergence, harmonization, integration and policy formation. Europeanization is a process, while "convergence is a consequence of it". The Europeanization should not be confused with the harmonization process, which reduces the diversity of regulations, providing a model of action. In contrast to harmonization, Europeanization leaves open the idea of diversity. The outcome of Europeanization can be variety of regulations, competition sharp or distortion of it. Europeanization is not the same with political integration. Political integration is considered to be one that gives the appearance and development of the process of Europeanization.

Location of public life, the meaning affirmation administrative decentralization and local autonomy development, allowing for a wider participation and political involvement excise citizens.

In this context, decentralization is a convenient framework for education policy, because the citizens are more involved in management and initiate their own localities, which fosters better understanding of political and administrative problems which arise at the national level.

Separation between the powers acquired by the administrative authorities and the central pool reflects the decentralized level of administrative deconcentration. Of course, decentralized regional structures designed to keep the centre reported the situation on the ground and centre to execute orders.

The fact is that the two terms should never confuse decentralization assuming a power-sharing between state and local, while the deconcentration rule and not to share power, but he is closer to citizens by installing on-site specialized services furnished with certain autonomy.

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THE ADMINISTRATIVE SYSTEM IN FRANCE

DOINA POPESCU[1]

Abstract

According to the Constitution promulgated on the 6th of October 1958, with the latest amendments made in 1999, France is a presidential republic. The three authority branches are broadly represented in the French administration: the judicial branch – French courts of law are divided into: judicial courts and administrative courts. Judicial courts are under the supreme authority of the Court of Cassation with jurisdiction to cancel judgments passed courts on inferior hierarchy levels and plays a central role in the appropriate performance of the activity.

The legislative body - normally, the legislation is voted by Parliament. French Parliament is comprised of two chambers: the National Assembly and the Senate. The National Assembly is elected for five years by way of direct universal voting. The Senate is elected by way of indirect universal voting by the electoral group. The election system is based on rules contained in the Election Code. The executive authority is divided between the President of the Republic and the Prime Minister. The President of the Republic makes the appointments for civil and military positions located at the highest state level. The Council of Ministers is responsible for appointing the positions of state councillors, prefect and public administration director. The central government is headed by the Prime Minister. Regional authorities – the regions are free territories administered by elected Councils. As far as the metropolitan part of France is concerned, there are 22 such territories, to which are added other four districts / counties which are located out of borders. The region's Prefect represents the state and is empowered to deploy legal actions in order to protect the state's best interest. County authorities – there are currently 96 de districts, to which four other territories located out of borders are added, as well as the territorial communities of Mayoutte and St-Pierre et Miquelon. There are also elected territorial entities, such as the Elected Assembly and the General council.

Keywords: *Administration, President, Prime Minister, Regional authorities, County authorities*

Introduction

The topic brought to discussion concentrates around two essential elements: on one hand, the significant influence of the French administrative system over the European administrations, but mainly over the administrative structures in Romania, and on the other hand, the controversial character that defines it, especially in the case of a nation with a rich history, discrepant and often violent.

Except for the English people, who became aware of the absurdity of absolute power with a remarkable precociousness, the French people enjoy the primacy in Europe for the courage proved against the obstacles imposed by the state as an independent system/organism, willing to developa beneficial existence for itself, regardless of the impact that this could have on the individuals that are part of it.

The appearance, themore or less ample development, and the evolution up to the remarkable present, of the French administrative law is strongly connected to the geographical limits (or benefits) specific to this nation, but moreover especially to the socio-political events that took place through centuries, convulsions that are, more often than not, useful in the general scheme for the advanced stage of modernity specific to the present-day administrative organization of the French state.

In order to reach my goals I divided my paper into three sections, the first one dealing with general aspects belonging to the structures of the public administration in European Union countries,

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including short presentations of certain important European countries systems, emphasizing also various aspects found both in the European administrative structures and French ones, a fact issued either from an imported phenomenon or from simply common evolution.

The second section describes in a more extensive way the French administration, starting from the central level, with the well-known institutions, continuing with the regional level, with traditional, but also recent organisms, up until the local level, regardless the limited range in which it is included. Subsequently, there follows a foray into the decentralization and regionalizing administrative process of the French state, and the events that determined themore and more strong extension of these processes. Of course,I am presenting, negative or problematic aspects as well, but the general perspective is a positive one, according to, for example, the Romanian state, would benefit from such an initiative, tending to reproduce, in conformity with the specific necessities in this area, the French administrative system.

Content

Public Administration Structures in the European Union Member Countries

E.U is not competent neither to bring under regulation nor to reform or reorganize in any way the public administrations and administrative structures of the member states, but the administrative and judicial systems of the member states are bound to adapt themselves to transposing and applying the exigencies of the community law.

The administrative politics of each state of the E.U is a determinant factor of the unitary practice regarding administration at its union level, and the great variety of the great variety of static structures represent one of the characteristic aspects of the European public administration.

Each state has a unique static structure, but we can distinguish common structural elements. In each of the member states there is at least one, but most of the time two or three administrative systems, under central government. In all member states there are many administrative levels, usually known as municipalities or villages. Regarding administrative levels situated between the central level and local level, there can be done a distinction between a regional governing level that exerts in certain states legislative competence, a provincial governing level (or *department, county*) and an inter-municipal governing form.

The European Union has as members federal or quasi-federal states, decentralized unitary states, but also unitary states. The EU's federal states are Belgium, Germany and Austria. In Belgium and Austria the laws issued by regions, communities and lands is not secondary in regard to the laws issued by the federal government. In Germany, there is the notion of hierarchy between the laws issued by the land and the federal laws. Spain can be described as being a quasi-federal state, although it remains a unitary state according to Spanish Constitution. The Spanish Constitution recognizes and warrants the right to auto-government of the nationalities and regions that constitute the kingdom. In practice, autonomous communities have a high level of independency. In case of conflict between the laws of the state and the laws of the local communities, the former prevail against the others always. The decentralized unitary states of the E.U are: France, Scandinavian countries and Holland. Between these states, France has four administrative levels besides the central Government, namely the regions, departments and villages. Holland, Denmark and Sweden have three administrative levels, and Finland only two.

Denmark and Sweden have two systems of counties which constitute the intermediary administrative and municipalities' system. In these two countries, the counties have responsibilities in the health care public sector. In Finland, the municipalities constitute the second level and the most important one. Holland is subdivided in provinces and municipalities. The unitary states of the E.U are Greece, Luxemburg and Portugal. In these countries, the central administration is far away from the strongest government level. There are only two levels of government in Ireland, Luxemburg and Portugal (except for the two autonomous regions Azore and Madère). In Portugal, a referendum organized in 1998 in order to establish administrative regions with executive competence did not

receive the people's approval. In Greece, there are three administrative levels. In 1994, the prefectures were transformed into "prefectorial autonomous governments" based on the democratic principle.

Great Britain represents a special case. For a long time it is a unitary state in which legislative competence belong to Westminster. Nevertheless, a radical change took place recently. The process of delegating responsibilities to Wales and Scotland lead to the creation of a Welsh Assembly and to a Scottish Parliament that exert legislative competence. This process, together with creating The Northern Ireland Assembly and its executive Committee of ministers, modified the unitary character of the United Kingdom of Great Britain.[2]

Consequently, public administrations have the form ministers placed under the authority of a minister. There can be done the distinction between state members, a case in which ministries are very vast and integrated and the member states where ministries are entities with relatively small, specialized in issuing policies, while the agencies are created in order to put into effect these policies. The majority of European countries sit in the first category. Denmark, Finland, Sweden and Great Britain sit in the second category, although in Denmark and Great Britainwe find quite large ministries/departments.

The administration of Swedish government is divided in very small *ministrials* (or ministries) and in central administrative authorities (or executive agencies). The 270 agencies are independent of the government in areas regarding the law enforcement and exerting the authority on private sectors or on local authorities. Administrative authorities have an independent position, different from the ones that the government and the Parliament have (*Riksdag*), which, to a certain extent, it is similar to with the role of the courts in certain member states. When the administrative authorities enforce the law in each case, they have the right to do it without the interference of the political authorities of the state.

Great Britain, by all account, doesn't have a written constitution in the form of a single document, but it comprises three Acts, namely: Magna Carta, Habeas Corpus and Bill of Rights. The most important trait of the British Constitution is the so-called "Parliament's supremacy". This means that the parliament can adopt or reject any law that it wants and that its decisions prevail against those taken by the courts. This aspect provides the British minister and his Cabinet a lot of power because as long as they control the majority in the House of Commons, they can issue any law they want. There are states where the regional authorities of the state depend on two or more ministries from the central level, like the regional offices of the Government of Great Britain. In some member states, the political leader are assisted by their own "Cabinet", which keep the contact with the public administration. Such Cabinets can be found in Belgium, France, Italy, Spain and Portugal. The Cabinet's staff is usually very bound to their minister or to their vice-minister according to their political choice.

2.The French public administration

According to the Constitution which was promulgated on 06.10.1958, and which was last amended in 1999, France is a presidential republic. The legislative power consists of a bicameral parliament consisting of: Senate (321 members, of which 296 represent the metropolitan France, 13 the oversea territories and 12 the French from abroad) and the National Assembly (577 members, 555 in France and 22 in the oversea territories; the deputies are directly elected for a term of 5 years). The executive power is exercised by the president, who appoints the Council of Ministers, headed by a prime minister.

The Council of Ministers is accountable to the Parliament. The head of state, the president, is elected by direct vote for maximum two terms of seven yearseach.

[2] Filipescu, Ioan, FuereaAugustin, *European Institutional* Law, page 21, Compertex SRL Publishing House, Bucharest, 1994

For the last 10 years the modalities of the division of tasks and responsibilities have changed in France.A considerable autonomy was granted to territorial authorities (regions, districts, municipalities). In parallel, the central government delegates its responsibilities gradually, through the prefect, the representative of each district and the head of all state decentralized services. French courts are of two types: judicial courts and administrative courts. Legal courts are under the supreme authority of the Court of Cassation *(Cour de Cassation*), which has the power to annul decisions of the lower levels Courts, and play a key role in the proper course of work. For civil cases, there are Law Courts (*Jurisdiction d'Instance*), the Supreme Court (*Tribunaux de Grande Instance*) and the Court of Appeals (*Coursd'Appel*), which are 22. For criminal cases, there are police courts for committing crimes, and for other types of punishments the Courts of Correction work. Administrative courts are subordinated to the State Council. It includes simple administrative courts, and according to recent reforms, there are Administrative Courts of Appeal and Specialized Courts, especially in the financial sector: Regional Court and Court of Auditors

. The executive authority is divided between the President of the Republic and the Prime Minister. Nominations for the jobs concerning civil and military activities on the highest level of the state are up to the President of the Republic[3]. The Head of the Government is the prime minister. The Government consists of a Prime Minister, a large number of ministers and state secretaries.

The Government's structure may vary. Some ministers are called ministers state secretaries and have an important role in the government team. They may be seconded by other ministers. No member of the Government can be member of the Parliament. There are about 20 ministerial departments with administrative structures quasi-permanent. Ministers and state secretaries have their own cabinets run by assistants. The Prime Minister, who is appointed by the President of the Republic, is responsible for the actions of the Government. It organizes the activity of the government and is helped by assistants and by the General Secretariat of Government. The general Secretariat of Government has a central role in carrying out many administrative proceedings involving the government. The Structures that are under the authority of the Prime Minister are: General Directorate for Administration and Public Services, Inter-Informatics Center of Administration, Information and Broadcasting Service, the General Secretariat for National Defense, the General Secretariat for International Cooperation which correlate the work of the ministries with the European legislation and ensure the implementation of decisions of the European Union. The department-ministries can be created or dissolved by a decree and the responsibility of each ministry is established by orders of the Council of Ministers after consultation with the State Council. Each ministry is under the leadership of his own ministry, which may be assisted by ministers, delegations or state secretaries. The ministry may issue orders to implement the content of laws, but also special instructions for the administration staff. Regions are free territories administered by elected Councils. For the metropolitan territory of France there are 22 plus four districts/departments from abroad. They are regions by law: Martinique, Guadeloupe, Guyana Reunion. The government applied in Corsica has several features. In these communities outside the country, deliberative assemblies and regional councils were formed, whose members are elected by universal suffrage for six years. The prefect of the region represents the state and is empowered to take action to protect the legal interests of the latter[4]. These regions have benefited from the principle of free administration of local authorities, which was first established for villages according to the Constitution, departments and oversea territories. The principle of free administration is not in itself a source of regulatory power, unless there is express legislative provision to that effect .The normative power of the region is indeed, in view of its powers, lower than that of the villages or departments and particularly than

[3] Datar, *Les contrats de plan État-Région*, page. 94, *La Documentation française*, Paris, 2002

[4] *Les collectivités décentralisées de l'UE* (sous la dir. d'A. Delcamp), page 57, *Les études de la Documentation française*, Paris, 1994

the mayor's. The regions can neither carry out nor arrogate a trusteeship to any other local authority on their territory.

Unlike the regions that have been created recently, there are still districts ever since the French Revolution. Currently there are 96 districts, plus other four from abroad and the territorial communities in Mayoutte and St-Pierre et Miquelon. There are also territorial entities such as the elected Assembly and the General Council. General Councellors are elected for six years based on an election ballot known as "Elections régionales" organized within each district. Elections are held every three years for half of the members of the General Council. Public services are developed and provided within the districts.

3. The Institutional Decentralization

The French administrative structure is formed of 3 platforms of decentralized territorial communities: the regions, the departments and the commons(the municipalities). These divisions are governed by elected territorial authorities[5]. France has 22 (plus 4 overseas) regions: 21 metropolitan regions and a special statute for Corsica, a region with its own Assembly and its own Government. Each region (the app. surface: 24.700 km2, the app population: 2. 470.000) is formed of several departments (counties, part of NUTS 2 classification). The four territories overseas (Réunion, Martinique, Guadeloupe, Guyane) derive benefit from some facilities specific to the regions. Every region is managed by a Regional Council. Its members are chosen directly through universal suffrage every six years through a mixed list of votes (majority for half of the positions, proportionality for the other half). Its President, chosen from the members of the Council, is the chief of the region's executive and the manager of the regional administrative team. Every region has, starting with 1964, a Prefect of the Region named by the Government. As representative of the state, his authority extends above all the external services of different governmental department's existent in the region. At the same time, he is also the county prefect of the region's capital. He has authority over the prefects of the region's counties, which seem to exist since 1789. France is divided in 96 metropolitan departments and four territories over the sea. A special status has the French capital, Paris, which is both a village and a department. The departments are led by a County Council, and its members are chosen half through direct universal suffrage, at every 3 years. The President is elected by the members of the County Council and he represents the executive of the department and the chief of the county's administrative team.

Villages, departments and regions collect, each for its own income, different taxes. For example, the regions collect taxes for the driving license or for the registration certificates of the vehicles, the tax for every type of vehicle (tailpiece) being collected by the departments. The actual territorial administrative organization in France (villages, departments, regions) jelled gradually after the 2nd World War, as an answer to the necessity of the constitution of the geographic field, whose dimensions could allow a real planning and politic to set up the territory and the economic development.

Conclusions

By aproaching this subject I tried to accentuate the features of the Frech administrative system, for each level, as well as the aspects that bears the institutional descentralization also on each level. Romania, although it looked for borrowing French system elements , hasn't gone on to institutionalze an administrative system yet, which, as well as the French one, to put it in the center of the European systems.

Therefore in Romania, in a future review of the Constitution, it should have in view the absolutely positive aspects of the French administrative system and in the same time it has to take

[5] Ionescu, Cristian, Op. Cit., „Sisteme constituționale contemporane", Casa de editură și presă șansa" - S.R.L. Bucuresti, 1994. page 142

into account tradition and our apropriateness when they would set measures the new country teritorially administrative organisation. For that purpose the new descentralization has to update the present system and to simplify the territorially administration by disappearing counties and setting up regions in the future years. It should allow a greater budgetary independence to the cities and villages so as the poll could better control local collectivity expenses; introducing some performance indicators of municipality, cities and villages public services The regions have to produce developing projects for the whole region in a coherent and predictable way. Regions have to coordinate in between them to assure projects coherence at a national scale among the developing regions, Not lately, regions have to take part together with the gouvern to elaborate and implement cohesion policy.

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EVOLUTION OF THE JURIDICAL REGULATION REGARDING THE PENITENTIARY ADMINISTRATION IN ROMANIA

DOINA POPESCU[1]

Abstract

To deeply analyze the evolution of the regulation regarding the penitentiary administration, one has to make an incursion into the straight modalities of the executioner punishment but also to well know the conditions, treatment and modality of the execution of the punishment in prisons all together with the obvious purpose of maintaining our citizens' safety. According to our history the conception regarding the purpose of the punishment and their modalities of execution we are in permanent evolution throughout the years, this presentation is having the purpose to demonstrate this fact.

Romanian's ratification, by the Law no.30/18.05.1994, of the Convention for the human rights and the fundamental liberties, enforced high exigencies, determined by the necessity of improving the conditions for the persons that are deprived of liberty in accordance to the international standard. The period that preceded the Romania's integration into European Union determinate the necessity of realization of process of reform in the Romanian prison system, as an integrated part of this whole process of reform in the field of justice.

Although the Romanian system tried very hard to be in line with the European Union, this process will last a long while and it is very far to be closed, the new legislation and the process have to be sustained by human and material resources which represent major problems the penitentiary administration is dealing with at the moment. The proportion between the number of personnel for guarding and safety and the number of the condemned in Romania is 1/ 4,7 much lower than in France - 1/2,7, England - 1/2,4 , Denmark - 1/1,4, Finland - 1/1,4, Sudden - 1/1,4, Austria - 1/2,6.

On the other hand, while the Europeans built a lot of special prisons, depending on the applied regimes which are the followings: - opened, semi opened, closed, maximum security, Romania is still far away from this process. More than that, our prisons gather all categories of condemned, fact that makes the scientifically individualization of application of punishment privative of liberty to develop much too slowly. The administration of the prisons – being still at the beginning of a road – must fulfil in good conditions, two main objectives: safety of the citizens and reintegration into the society of the condemned ones – this two important things must be very well sustained by the state programs for the people who were liberated from the prisons.

Keywords: *evolution, penitentiary administration, human rights, reform ,justice*

Introduction

This paper was written with a view to make an analysis regarding the evolution of the main regulation concerning the penitentiary administration, for a better historical knowledge of this phenomenon in our country and for a better understanding of the utility that this administration represents on the society. To deeply analyze the evolution of the regulation regarding the penitentiary administration, one has to make an incursion into the straight modalities of the executional punishment but also to well know the conditions, treatment and modality of the execution of the punishment in prisons all together with the obvious purpose of maintaining our citizens' safety.

According to our history the conception regarding the purpose of the punishment and their modalities of execution we are in permanent evolution throughout the years, the next presentation having the purpose to demonstrate this fact.

A definition of penitentiary administration , from an organically point of view, it is given by law no.293/2004 concerning the public servants' Penitentiary National Administration legal status

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which in clause 2 pre-scients: Penitentiary National Administration and subordoneted organisation enters to public defence institutions, public array and state national sequrity and establishes, in the sense of heteronomy, Penitentiary National Administration,'. Preponderet between Penitentiary National Administration subordonated organisations, penitentiaries find their legal commitment within law no. 275/2006 concerning penalty execution and proceedings disposed by judicial organs during the capital case, which defines it as being certain places intended for executing life long prison or prison. Apart from the legal settlement we fiind a lot of definitions of prison given by different authors: ‚Institution organised to protect comunity from those who deliberately represent a risk for it.'(Hoffman,1970). ‚A place where are held persons unable to conhabit socially, because of the high awkward they have (Pro Humain Rights Association., 1983).

Regardless of the definition that seems more suitable to us, it is obvious that prison has a social control function on those persons unable to conhabit socially because of the high awkward they have. It deals with avoiding these behaviours consequences and citizens sequrity underwriting.From a functional point of view, I rate that penitenciary administration represents the whole activities, managerial processes, theories and proceedings used for applying legislation concerning penalty execution and proceedings disposed by judicial organs during the capital case up to be within their competence. In the light of those presented , I consider it pertinent, below, to try to recompose , as much as i can, the evolution of penitentiary system in our country using historical sources, works and scripts that exist up to this moment and which, even if they offer very important information for the touched subject, do not present a chronological evolution including transformations in the field and Romanian legislation alignmet neccesary to Romania's inegration within the U.E's structures.

Content

1.The first wombs of judicial regulation to the XVIIth century

About the judicial system and penalty implementation in antique Dacia we don't have written news. On account of science and culture elements of this ancient people, as they are reflected in the antique writings, we can assert withought going wrong that they existed and functioned on the lines of social structure which commanded Dacian world. Servants patriarchal time which grew in Dacia before the Roman conquest was characterised by using servants for classical labours or public works , but relations with the lords were going off with certain human limits. After Dacia's conquest by the Roman Empire (101-102 and 105-106) emperor Traian asserted in this new Roman theme their law enforcement , implicit the guilty's punishment system , an evidence on this line being the Roman coliseum from Sarmisegetuza. The Aurelian back down in 274, ordered by the Roman emperor Aurelian, didn't create in Dacia a legislative blankness, Roman laws and rules continued to be enforced simultaneous with the punishments and justice manners applied as the natives did. The contact between the Roman Empire and Dacia continued through the Byzantium world to its conquest by the Ottoman Empire in 1453. This length of time meant centuries in which Byzantium legislation influenced the one from the Romanian's voievodeships, that up to the XVIth century functioned in all three regions (Moldavia, Walachia, and Transylvania) under the name of Jus Valachicums or Romanian Law, which was composed by Dacian Gets over which there was imbricated the Roman Byzatian law and to which there were added migratories rights elements that were assimilated by the natives. These were integrated on the unwritten people law or ‚people custom'. If up to the XVth century this Romanian law worked the same in all the three regions; after this date, in Transylvania, simultaneous with Hungarian feudal power reinforcing was asserted the Hungarian law for judging and punishing the guiltiest.

Apart from this unwritten people law there was also a written law based on the Roman emperors laws and Tarigrad as well as on the clerkly synod decree. There were prisons everywhere: at the monasteries, in the church's bell tower, away from administrations, but nowhere were organised. The first laws that were overwrought and which set things right to apply punishments

were those from the XVIIth century: ‚The Small Law from Govora' – 1640 – worked up by Lord Matei Basarab's order (1633-1654); 'The Romanian tenet of imperial law' printed at Three Hierarchs monastery decreed by Vasile Lupu (1634-1653). Although we can't talk about Romanian prisons organization up to the second half of the XVIIIth century, their origin in our country is very old. Their incarceration and the use of some prisoners to work in salt works it is found even on the period when Dacia entered under Roman domination. Romans used to dispose incarcerated people to different works as extracting gold and other precious metals as well as salt. So, from Hunedoara's area there was extracted iron, and the salt works from Ocnele Mari along Mures keep hints of galleries from that time.

2.The evolution of penitentiary activities in the XVIIIth century. The wombs of concept, constructions, and penitentiary practice modernization.

In Transylvania in that time being under the Austro-Hungarian domination, the 61 paragraph of the penal procedure approved by Josef the Second in the year 1788 shows: "every prison must be clean, dry, must have air and light, altogether not to put the health of the defended into danger".

Being under the Austro-Hungarian domination, all the cities from Transylvania – benefited of special constructions, having served as prisons, all of them having been made during Maria Teresa reign (1740-1780) and also during Josef the Second (his son) reign, from the year 1765. In the year 1790, in Romanian Countries, the prince Nicolae Mavrogheni (1786- 1790) demands that the women should not be imprisoned together with men, and when this thing is not possible the woman should be sent to a married and good man. But in spite of all these regulations, prisons remained the same: dirty and primitive.[2] These are more common measures concerning prison organization in the XVIIIth century in our country; in comparison with what we have seen in the XVIIth century, these measures mean a real progress and a beginning of preoccupation with this field. Although they have a predominant administrative state, however disposals proposed by lords for prison will bring some improvements to their awful condition aspiring to a humanization of the state in them. All these fit in with the sight of new ideas in Europe and the establishment of the most cellular prisons in Europe.

3.Penitentiary system and reform of prisons appointed according to Organic Law and latter under Romania's kings kingship.

At the beginning of the XIX century the authorities showed a greater interest for the safe and safety of prisons. They built new buildings where sick rooms were disposed with infirmaries. During that period the prince Mihail Şuţu required to be weekly informed about the causes, situations that all the people imprisoned for, he also asked that all the people from prison to be put to do the public work, in order to be better fed. It is to underline the fact that he successively reigned from 1783 to 1802 with very short breaks, he also reigned both in Romanian Country and in Moldavia.[3]

When the Organic Regulations appeared in Romanian Country in the year 1831 and in Moldavia in 1832 they contained similar provisions and stipulations, this was a step forward in the direction of the execution of the punishment: "the leading will have the in mind that the prisons will be more secure, so that the health and safety, food, clothing, lightening and fire wood will be bought from the amount of money allotted by the state. In the year 1851 the first regulation that regards beating and insult of the prisoners is drown up in the Iasi city. It was also drown up the regulation of the prison from Tg.Ocna by Anastase Panu, manager of Ministry of Justice in that period. This opens the epoch of modern legislation of the execution of the punishment that are cons emend of liberty. [4]

The regulation follows the auburnian system and makes the first mentioned lines related to the moral education of the condemned people that is to be made through religious education, the

[2] Jack Missliwetz,Recht fur Aerzte und Medzinstudenten,Ed 2 Universitaettsbuchandlung,Viena,1995,p.132
[3] *Prinţul Nicolae Şuţu*, Notions statistiques aur la Moldavie, Editura S.N., Iaşi, 1849, p. 74.
[4] *I.C. Filitti, D.C. Suchianu*, Contribuţii la istoria justiţiei penale în Principatele Române, Bucureşti, 1970,54

prisoners being also obliged to learn a trade. The Regulation of the prisons regime in the year 1874 appears which governed the regime of the punishment execution until the year 1930, during period the auburnian regime of isolation during the night and work in common during the day is instituted. General regulations for the central prisons, from 24 of May 1874, did not propose as a distinct activity the resocialization of the prisoners, but it stipulates that condemned ones must work, proportional to sex, power of work, age, learning of a job, reading of the religious books, learning.

The regime imposed was the one of total deep silence and all the games of any kind were condemned. The idea of those times was to apply a severe, drastic punishment to determinate the prisoner not to repeat the evil deed. The provisions this regulation could be compared with the Belgian Law from the year 1870 and also with the French Law from the year 1875, with even some advantages as against the last ones. According the law from 1874, the prisons were divided into: preventive prisons and sentence prisons that were at their turn divided into: correctional prisons, hard work, and detention prisons. The prisons should have been organized according to the laws but in reality they remained the same, in the primitive regime of common staying.

The administration of the prisons was under the authority of the Ministry of Interns and was managed by a General Director this situation being kept until the year 1914, when the prisons are passed under the control of the Ministry of Justice. This transition to the Ministry of Justice patronage was seen as a progress by the jurists of those times Tanoviceanu and Traian Pop. On the 1 January 1930 the Penitentiaries and Prevention Institutions Law adopted in 1929 comes into force. This law contains generally same regulations as Law from 1874, but improved by instituting of English progressive system.

This system was constituted by three phases in order to prepare the prisoners for a free life:

- Individual isolation for a period of maximum three years, depending on the quantum of punishment;

-In the second phase, the convicts were kept all together during the day and separated at the night;

-In the last phase, they worked in common during the day and were kept bedrooms at the night.

On the 21st of April 1938 appears the Regulation regarding the regime of execution of the punishment appears which the best European regulation of that period war. The idea of the social recovery of the people that were condemned was very well presented under a separate title "Educational Measurements".[5]

4.The evolution of penitentiary system up to December 1989 Revolution

Taking into account the fact that this regulation overtook developed the Law that regarded the organization of the prisons from the year 1929, one can say that quarter of a century before the publication of the Minimal Rules for the Treatment of the Prisoners (ONU, 3 August 1955), Romania had a legislation regarding the line of social recovery conformably to the subsequent next international recommendations. In the year 1944, the victory of the Allied determined the falling down of the Romanian Country under the influence of the Stalinist Russia, fact that will mean the starting point of a break for a long term, of the modern conceptions regarding the execution of the punishment. This fact was very well effected in that period of time by changing the specialty ruling personnel (majority graduates of the Law University) and by compromising of personnel by naming them servants of old bourgeoisie and also by a visible regress into applying the penitentiary treatment.

From an article that was published in the "Problems in Prisons" magazine in August 1948, entitled "Reeducation of the prisoner – one of the main aims of Prisons" results that this reeducation cannot be realized as long as "the political condemned, the fearest enemies of the work class and also

[5] .J.F.Auby .Les services publique en Europe,Presses Universitares de France,Paris,1998,p.219

of the Republic will not be treated with an appropriate hate of class and as long as moral adeptness and also the value of the condemned, victims of the old society will be neglected". The regulation from the year 1952, regarding the implementation of the regime in the prison and also the Regulation regarding receiving, guards and protection, of the condemned, from the year 1955, both approved by the Ministry of Interns, do not have any disposal related to the reinstatement of the condemned. The prison had conceptually and in actual fact the reserved mission of the physical constraint.

The Regulation regarding the application of the regime in prisons approved through the order approved by the Ministry of Interns Affairs no.4045/20.11.1962 shows the followings: using the people to the work, the respect for the discipline, the educational and cultural action, stimulation, and also rewarding. By organizing this activity it was meant to assure the accommodation to the social pulse of the ones that were amnestied in the year 1964. Taking into value the Romanian experience before the war and following attentively the recommendations that were in the Minimal Rules for the Treatment of the Prisoners that were adopted by ONU in the year 1955, at the General Directive of the Prisons, two projects will be elaborated and become the Law no. 23/1969 and the applicable Regulation approved by HCM no. 2282/05.12.1969.

Regarding the disposals from the section 4 – Reeducation of the prisoners, will be realized by work, qualification, re-qualification in a job, development of a better activities, educational and also cultural, stimulation and rewarding of the ones that likes works and give very good proves that they want to became a better people. In the article 36, in prisons are organized the following activities cultural–educational: school actions, work contest, reading books, watching TV, watching movies, reading of the newspaper, sports activities, reading the present laws, the analysis of the discipline of the condemned.

The normative acts from the year 1969, respected point by point the minimal recommendations of the ONU, with one exception: religious and moral assistance. In the year 1977, when the system in prison was in a very good direction, "brilliant" idea that a socialist society does not generates criminals, will determinate a political measure by reducing with 80% from the buildings and also from the personal (from 80 out of places – prisons, remained only 16), with all the negative consequences that we all feel the effects of even today.

5.Romanian penitentiaries at the end of the XXth century and the beginning of the XXIth

Despite all criticism that we brought in the period after the December 1989, the law regarding the execution of punishment, from the 1969, was at that time a very modern regulation – internationally speaking – which developed a very good activity of execution of punishment, comparable to other European systems.

By its effects the Law no. 21/15.10.1990, brings a new trying regarding the system. The transitional period from the Ministry of Interns to the Ministry of Justice, of all personnel, was a much tensioned moment that didn't become dramatic thanks to the maintenance of all military structure, competence, responsibilities and professional education of the personnel in the spirit of the military regulation. Romanian's ratification, by the Law no.30/18.05.1994, of the Convention for the human rights and the fundamental liberties, enforced high exigencies, determined by the necessity of improving the conditions for the persons that are deprived of liberty in accordance to the international standard.

The period that preceded the Romania's integration into European Union determinate the necessity of realization of process of reform in the Romanian prison system, as an integrated part of this whole process of reform in the field of justice. This process can be appointed at the beginning of the year 2003 when the OUG no. 56, was elaborated and adopted by our Government, this law regards some rights that the prisoners have and abrogates the Regulations of the execution of the punishment from the 15.12.1969. By this law all persons' rights who are in prisons are lined to the European standards. Although the OUG no.56/2003 opened a new process, by lining the condemned

persons to the European legislation, a major step was done on 28 September 2004, when the Law no. 293/2004, regarding the statue of the public persons from the National Administration of Prisons came into effect. In other words from then on demilitarization of the personal from prisons took place. The applicace of this law made that 12.000 military persons to be put as reserve and also as civilians they become public persons with distinct status. The rights of the public persons, and also the incompatibilities and restrictions in public functions are established in prisons. Besides the legal actual rights there are recognized the legal right of syndical association or in other professional organization, the liberty of meetings, protection against violence into the exercitation of work activities.

The new regulation creates the right of stability at work, and stipulates the conditions of disengagement, delegation, adjournment and ceasing of working rapports as well as disposal relate to the disciplinary system and disciplinary procedure.

Another major step in realization of the process of reform is made by the penal law modifications, the most important among these being the Law 275/2006 regarding the execution of the punishment and the measures that this last one imputes to the juridical organs during the penal process. Among the new elements that the low makes on provision one can mention the Institution of judge delegated for the execution of the punishments who controls and also assures the legality regarding the execution of punishments, and also they give a solution regarding the complains made by the persons in prison.

The law also regards the individualization of the execution regime of the punishment privative of liberty, so that a commission for the individualization of the execution of the punishment privative of liberty was set up in every single prison. Although the Romanian system tried very hard to be in line with the European Union, this process will last a long while and it is very far to be closed, the new legislation and the process have to be sustained by human and material resources which represent major problems the penitentiary administration is dealing with at the moment. The proportion between the number of personnel for guarding and safety and the number of the condemned in Romania is 1/ 4,7 much lower than in France - 1/2,7, England - 1/2,4 , Denmark - 1/1,4, Finland - 1/1,4, Sudden - 1/1,4, Austria - 1/2,6.

In reality the proportion personnel/condemned from our system is less than the countries that were mentioned before, as the personal of the National Prisons of Administration execute also missions inside and outside the prison. On the other hand, while the Europeans built a lot of special prisons, depending on the applied regimes which are the followings: - opened, semi opened, closed, maximum security, Romania is still far away from this process.

More than that, our prisons gather all categories of condemned, fact that makes the scientifically individualization of application of punishment privative of liberty to develop much too slowly. The administration of the prisons – being still at the beginning of a road – must fulfill in good conditions, two main objectives: safety of the citizens and reintegration into the society of the condemned ones – this two important things must be very well sustained by the state programs for the people who were liberated from the prisons.

Conclusions

I presented the settlements history regarding penitentiary administration, proving the fact that these developed from the moment when the punishment execution had only the role of law breakers termination to modern concepts according which to the punishment execution must come, apart from the preventively and vindicatory aspect, the role of restyling the personality and behavior of the convicted persons acting on more directions as to enhance their chances to readmission in society. It is the reason for which appeared as evident the necessity to work up a new law concerning punishment execution as well as of an adequate legislation for the category of public servants with a special status in Penitentiary National Administration. No matter how many advantages presented the military structure through which the penitentiaries were managed up to 2004 it is indisputable the

adopted legislation unity concerning the penitentiary administrative employees because, on the one hand it creates the sumption of manning some specialists (sociologists, psychologists, social assistants) very necessary for reaching the challenges above mentioned, but on the other hand, it establishes adequate work conditions, leaving out arbitrary, employees overcharging and stress, act meant to concur definitively to establish some normal relations between the employees and the persons deprived of freedom with direct consequences to administrative act quality. Although Romania boasted before the Second World War of a modern legislation among the European States , the down-come of our country in the Soviet reach produced a crack whose consequences we feel even now. Without denying the achievements undertaken in the penitentiary substructures after the December 1989 revolution, nevertheless I consider that these were away from solving the problems of this system in the moment of dictatorship down-come. The legislative reform made wasn't assisted with the corresponding provision of human and material resources so the appliance of the new legislation was made difficultly by the effort of the whole employees. Adopting the new legislation without the necessary financial aid determined the appearance of other phenomena which penitentiary administration deals with now - the extreme prosecution , in many cases dishonestly, of procedural rights by the deprived persons. A particular importance in realizing the reform is a correct public opinion note. The social importance of the penitentiary system reform exceeds the strict administrative frame of the Penitentiary National Administration and even of the Ministry of Law, this system reflecting in the whole world the preoccupation with society , in its whole to provide its status of moral health, public order and order by rights. Not lastly collaboration with European penitentiary administration are to bring benefits to the Romanian penitentiary system , in the past few years noticing a constant preoccupation of the National Penitentiary Administration in enrolling the common programs with other administrations of the European member states.

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CULTURAL PHENOMENA AND PROCESSES IN CONTEMPORARY SOCIETY – DETERMINANTS OF CULTURAL POLICIES

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Abstract

Cultural phenomena and processes in the contemporary society, influenced by the social development models and by the fact that the constitutive elements of the culture have become the decisive factors of social change, are the determinants of the cultural policies. They are centered on the active process of cultural globalization that emphasizes besides the assimilation of the European principles, also the preservation of the cultural dialog without identity loss.

Contemporary culture cannot be appreciated unless we know the main processes and phenomena that lately have generated impressive changes in the area of technology and means of communication. Due to these transformations we witness a change of the cultural paradigms, a mutation of values.

Keywords: *Culture, cultural identity, cultural policies, national identity, (the) cultural crisis*

Introduction

As a set of value systems that expresses aspects of the physical and social reality, but also the characteristics of the relations between these two realities, culture, social complex integrating spiritualism and intellectualism, goes in consonance with the current global macroeconomic crisis through an unbalance.

Cultural evolution, rather the development of forms throughout time is in continuous transformation. The specialization of functions and the progressive differentiation of culture are the consequences of the social, cultural and biological evolutions of modern societies. The elements of a culture can freely go from one system to another and the social systems live through a system of institutionalized values, in regard to which its members must be strongly united and attached and must adhere in their actions.

While developing as „zoon politikon" (social animal), we discharge and receive cultural information, we polish and give us the finishing touches as creative beings, defining individual and collective cultural horizons for us. Today it is unanimously accepted the idea according to which a society cannot exist in any of the historical phases of its evolution without a cultural minimum.

We do not find a society in the history of mankind that does not build itself a cultural structure centered on the legacy determined by the degree of evolution of the production forces specific to that society.

The new thinking of systems and the different forms of artistic expression existing in the contemporary culture are generated by the fundamental changes that took place in different areas of cultural creation, technical progress and political organization. Most changes happened in science and in the space of aesthetic creation, subsequently expanding in the technical and economic plane of civilization, planes without which one cannot understand the characteristics of the contemporary world.

By means of the individual and collective communication of behavioral models, acquired attitudes and reactions, it is obvious that shaping the human personality is conditioned by culture, this being the one where through social and cognitive experiences are preserved and affirmation mechanisms of the human being are set up.

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People's ability to form personal pertinent opinions that retrospect exactly to the given reality is achieved as a result of the received education, for the latter has as specific function to methodically develop and create the capacities, feelings and tastes of the individual. From a social and economic point of view, nowadays' culture is dominated by the confusion of the right and responsible choice to the confusion everyone experiments when he/she must choose the right way or option.

The frequent legislative changes in education have generated disorientation and confusion regarding the adequate construction of a social and educational curriculum, which led to the elaboration of culturally defective text books, to the fragilization of the spiritual horizon, to the alienation of the young generations from reading and to the emphasis of the advanced electronic technologies appropriation as means of information and culturalization. The educational environment is not however the only tributary of the cultural vulnerabilization of the young generation, for the family environment has a similar importance in forming and consolidating the complex system of cultural attributes, faiths, morals, feelings and perceptions.

Individuals give originality to each country or each nation and they have determined the elaboration of their own answers to the fundamental problems of mankind. These answers are just as many possibilities to progress in science, culture and civilization. The proposed and adopted solutions have made the difference, up to now, with specific contrasts being developed among individuals: starting from the attitudes they adopt regarding a certain activity to the each one's form of sensing certain norms, values or attitudes.

Development is also a cultural process not only an economic one and the density of cultural creation, especially the scientific one, has projected certain societies in the vanguard of contemporary civilization. The interest for the problems of culture is related today to the new models of social development and the fact that the constitutive elements of culture have become decisive factors of social change.

Contemporary culture cannot be appreciated unless we know the main processes and phenomena that lately have generated impressive changes in the area of technology and means of communication. Due to these transformations we witness a change of the cultural paradigms, a mutation of values. At global level there is a certain cultural competition between societies, competition in which everybody defends and develops their own interests by means of the creative contribution they bring to community.

National identity vs. cultural processes of globalization

The 20th century has determined radical changes in the area of culture, among which we can emphasize the extraordinary successes obtained in scientific knowledge, hence the major importance given to values of science, acceleration of cultural changes, the crisis of traditional values, the increase in intensity of creation, the rapid integration of cultural values in the system of social activities through mass media, the democratization of the access to culture, the expansion of mass culture, etc.

One of the most debated themes is the one of the relation between cultural and national identity and the processes of economic globalization, having special implications for the understanding of the European integration process. It is much insisted on the problem of cultural diversity. It is extremely important the recognition and awareness of the differences and identities between cultures, while trying to have an intercultural dialogue. The expansion of the European Union represents an opportunity to know the culture of different countries and an attempt for mutual understanding, beyond the economic advantages.

In the last years the academic researches as well as the ones ordered by big companies or international structures have dealt with identifying the role culture has in social development and what impact the cultural processes or phenomena have on individuals.

The visibility of culture as central factor of the development of contemporary societies is also favored by the globalization of the economies and the ascension of the means of production and communication.

The extraordinary development of industry, agriculture, transports, science, etc finds a correspondent in culture. Today we witness an unprecedented development of culture in all areas. The last decades have made available a huge mass of cultural values, statistics showing that in the world there annually appear hundreds of thousands of book titles, an impressive number of radio and TV programs are broadcasted, there are painted and shown plays as never before. We have reached a cultural explosion, especially in production and in distribution, the individual having facilitated access to all the cultural goods, being able to choose the manner in which he/she wishes to fulfill his/her cultural needs. Some cultural goods, like movies, TV programs or books are conceived to be only a result in an industrial production.

The cultural industries in The European Union – cinematography and the audiovisual, editing, music and arts – are an important source of income and places of work. The European Union has support programs for certain industries in the area of culture, encouraging them to take advantage of the opportunities offered by the sole market and the digital technologies. Furthermore, it tries to create a dynamic environment for these industries simplifying the administrative procedures, facilitating the access to financing, contributing with research projects and encouraging a closer cooperation with partners from inside and outside the Union.

Cultural industrialization developed through the means of mass communication. Of course it had major advantages, but the tendency of product making and distribution led to self consumership. The multiplication of passions justifies the reactions to the industrialization of culture, the number of collectors, amateur artists or passionate in an area or another visibly increasing. A manner of interpreting these tendencies is the analysis of subjective participation of readers, spectators and listeners to the ideal and emotional making of contemporary art works. The convincing example is the Internet, which allows the production of large ranges of goods and by means of this channel the individual can easily consume culture. On the Internet we find cultural magazines and online bookshops, cultural publications and sites addressing the amateurs.

Contemporary culture also supposes at the same time the increase of the necessary of investments in different cultural areas, in auditoriums that need substantially enhanced improvements in regard to previous years or in libraries that must be fitted with modern and expensive electronic equipments.

In contemporary society we talk about mass culture as being the direct result of mass media action, professionals studying the audiences seeking „rather to impress the public opinion than capture it", „to influence it rather than measure it". The effect of this culture consists in the uniformization of the ways of thinking and behaviors, prevailing in this area the entertainment which keeps the individual outside the problems of society. Mircea Eliade emphasized the manner in which the whole mediatic system carries a series of wasted and unproductive myths in order to orient the community in a desired direction and to obtain invisible political effects.

Modern and urbanized societies are mass societies with urban agglomerations and compared to the traditional ones, they introduce a new style of life in which time is severely segmented. From this reason there also appeared the individual's social need to spend this free time carrying out cultural activities but amusing at the same time. Specialized cultural creations have a prevalent value system, yet when it comes to mass culture we notice an increased tendency towards the commercial side. The products of this culture must be sold and their production must be profitable.

This type of culture has become a reality in contemporary societies acquiring a more and more important role in current society. The success and attraction of the new forms of mass culture combine the informational and educational dimension with the entertainment one, becoming dominant forms in developed societies, which led to the expansion and penetration of this type of culture in societies with a peripheral economic and political statute.

Today there is also much talk about a rather classic opposition, namely, culture versus technology. The first assures the difference and the second one is seen as an agent of integration. Due to the technological explosion that clutched human community but also the way in which individuals have changed their priorities and concerns, it came to talking about the decline culture has, naming this phenomenon „culture crisis".

The term „culture crisis" belongs to each person's value judgment on culture at a certain moment, judgment that can be molded but that can be influenced at any moment according to the context we refer to. This crisis can be different, in the sense that it can exist at the creator's level, the consumer's but also the culture critic's level.

Régis Debray highlighted two reasons of cultural crisis the world is going through, namely: the rapid increase of the population, but also local retirement which the technological globalization reactivates, according to a model of inverse proportionality. The more people start to resemble, the more individuals try to differ and this last effort is done through local cultures.

Cultural consumption does not represent such a recent phenomenon as one might believe, it has been debated for a long time, it is an ancient yet new theme, a complex subject that does not include only reading or the representatives of elite culture, theatre, library, museum, etc., but also the products of technology, TV, radio, PC, etc. In a world where almost everything can be quantified, culture and people's adherence to it does not get rid of measurements. And in recession times, cultural consumption decreases. At least that is the situation of Romania, reflected by a barometer elaborated by the Centre of Studies and Researches in the Area of Culture, subordinated to the resort Ministry in Bucharest.

The cultural practices are studied by the National Institute of Statistics and Economic Studies (INSEE) within the budgetary expenses of households. The first such inquiries were initiated in the 19th century by Federic Le Play. Besides the inquiries regarding consumption expenses, in the last years many inquiries were made regarding holidays or the spending of free time.

When making a technical analysis of the current development of civilization one can notice a close connection between industry and culture, some professional authors talking about an industrialization of culture or about the culturalization of industry. The industrial revolution eliminated from people's life the aesthetic dimension that the hand - made world had. With the lapse of time, it was spread the conviction according to which technique and art irremediably separated. We can however notice the connection between artistic means and contemporary aesthetic conceptions, but also that absolute frontier where technique develops.

In the work „The culture consumers", Alvin Toffler shapes the idea according to which the increase in the number of artists imposes a competition which implicitly leads to virtuousness. Toffler states that wages in art are very low. Referring to the "industry of culture" the author shows that there are two types of cultural institutions: the ones that act in the payable area (commercial books publishing, CDs production) and others that act as nonprofit institution (theatres, opera houses, museums etc). Of these types of institutions, the nonprofit ones are confronted with financial problems, they usually activate in deficit, while the ones in the payable area can be prosperous institutions.

One cannot say one culture is superior or inferior to another culture, but we can discuss the inequalities which happened in their development. Nowadays there are different possibilities of production, distribution and access to culture between various countries due to the economic discrepancies. The cultural development of poor countries cannot be limited to preserving traditions and folklore, as those are starting to become an exponent for different occasions or for foreign tourists.

„We need a huge amount of money to produce culture*"*. Therefore "cultural industry" is organized around various half - learned who present only a material interest for culture.

CONCLUSIONS

Synthesizing, we can state that in contemporary culture the generally human, moral or aesthetic ideals found a wide reflection, the individuals cultivating pride sentiments towards the national values.

Going through a period of mutual assimilation of the national and European values, but also the permanent exercise of keeping native - born values belong to an old principle of preserving the verticality of national culture. The cultural dialogue we should be suggesting to Europe, without concessions, without identity loss, without the sentiment of marginalization should come first in detriment of the assimilation of European principles as something compulsory preassigned, even though after Romania's adheraration to the European Union we have acquired its cultural policies' principle, that of absolute respect given to cultural diversity, with accent on the European common cultural heritage.

The legislation, institutional structure and adopted programs, initiated and made by Romania in the area of culture are in full agreement with the provisions of the Treaty on the European Community, as well as those of the Parliament and Council Decision regarding the starting of the Program "Culture – 2000", provisions that emphasized the improvement of spreading knowledge about the culture and history of the European states, preserving and protecting the European cultural heritage, developing non - commercial cultural changes and supporting artistic and literary creation, including that of the audiovisual sector.

The principles and objectives assumed by Romania in elaborating its cultural policies are respected just as in all European Union member states:

· *Cultural policy is considered a key component of the development strategy;*

· *Cultural policies promote creativity and participation to cultural life;*

· *Cultural policies consolidate the measures to preserve the cultural heritage and promote cultural industries;*

· *Cultural policies promote cultural and linguistic diversity in informational society;*

· *Cultural policies assure the increase of human and financial resources for the culture's development.*

The main objectives of cultural policies in Romania consider all the elements that configure cultural life - contemporary creation, cultural heritage and the dissemination of culture, they balance themes and make them compatible with the principles and objectives internationally identified, but also with the national demands and traditions. Thus, cultural policy in Romania is based on 6 main principles:

· *the principle of protecting the national cultural heritage, according to which the values and goods that belong to the cultural legacy have the quality of fundamental resources of knowing our past and present;*

· *the principle of creation freedom, according to which the freedom of artistic expression and public communication of artistic works and performances represents not only a fundamental right, but also an essential element of human progress;*

· *the principle of independence of cultural institutions, according to which initiating and carrying cultural programs and projects cannot be restricted or censored due to ethnic, religious, political criteria or to satisfy some group interests;*

· *the principle of value primordiality, according to which it is ensured the creation of material and moral conditions, it is supported and promoted the application of specific evaluation and selection criteria, the affirmation of creativity and talent;*

· *the principle of equal chance to culture, according to which by means of the harmonization of cultural policies at national level with those at local level it is ensured the access and participation of all citizens to culture, as well as the development of the spiritual life of collectivities, in all their diversity;*

· *the principle of cultural identity in the world value circuit, according to which it is ensured the protection and valorization of cultural legacy, it is supported and promoted the introduction in the national and international cultural circuit of the values of national spirituality and is facilitated the circulation inside the country of the values of universal culture.*

The European Union proposes and develops important programs to preserve and valorize the intangible heritage. But the success and particularly the authenticity of the considered phenomena depend on the good intention, honesty and, last but not least, competence of those involved in such wide scope activities.

So that the European Union to be able to develop viable cultural policies we need to solidly know the past as well as to cultivate a respect for diversity. In this sense, *Romano Prodi* states the fact that in the moment in which Europe extends, comprising the great Slavic cultural traditions, more than ever we cannot let anything from the common European identity be lost and everything to coexist in a higher and more vigorous synthesis.

Europe is the continent of numerous national communities, with its own features, cultures and languages, a mixture of complementary identities in a vital way. *Constantin Noica*, in „De dignitate Europae" (1988), presents the cultural concept through the potential of constant evolution of a individuality up to the level of assessment and recognition of the general, the construction of that individuality that will obtain unity.

Preserving the national cultural identities, the heritage of identity values and identifying the values common at European level are the only forms in which the European Union will be able to keep the ideals it was founded for, proving that globalization can determine the ambivalence of the terms „European culture" and a „Europe of cultures".

A political culture of the developed countries is supported by the United Nations (UN) by means of the General Declaration of Human Rights. The society is in continuous change and the change it displays sometimes brings unbalance and instability. Many times changes are benefic and necessary, but they should also be guided by the norms imposed by every culture.

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E-LEARNING INNOVATIONS IN HIGHER EDUCATION

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Abstract
This scientific work is presenting the ways to do computer assisted education for students, giving the good practice examples, presenting new electronic learning systems, the advantages and limits and to try to emphasize that these days E-learning is one of the most efficient way to reach education at all levels, specially higher education systems. The objectives of this paper are: to explain the contribution of modern technologies and electronic systems to educational processes, to define the concept of technology based learning, to introduce the electronic tools for education, to present good practice examples in implementing E-learning systems in higher education and corporate environment in Romania and last but not least the new electronic learning systems. Introducing the computers and ITC in educational processes facilitates them and makes the educational system modern and efficient. E - learning innovations offers a core group of professional development courses designed to help anyone achieve professional advancement and personal enrichment. The programs are founded on an extensive experience and understanding of technology-based learning environments. They focus on the most current industry practices for various learning environments and best approaches for multiple learning styles. They ensure that the students get the information and skills needed to achieve more in teaching practice and to confidently enter the distance or online classroom.

Keywords: *E-learning,technology based learning, electronic learning platform, Learning Management Systems, Integrated Learning Systems.*

Introduction

The scientific work refers to e-learning concept and it's introduction in higher education systems as support for an efficient learning.

The importance of this study resides in the fact that the introduction of ITC in educational processes, helps to modernize on one hand and facilitates on the other hand, this processes. The objectives of the study are: to explain the contribution of modern technologies and electronic systems to educational processes, to define the concept of technology based learning, to introduce the electronic tools for education, to present good practice examples in implementing E-learning systems in higher education and corporate environment in Romania and last but not least the new electronic learning systems.

The way of responding to the challenges of this theme is finding the new discoveries of the domain, presenting and adapting them to the requests of the large public, of teachers and students.

The authors have studied and used in practice the main electronic tools for education like: Learning Management Systems, Integrated Learning Systems, On-line forums, Web conferences.

In present we live in an era of technology. Technology has become an important component of our lives and we cannot develop diverse activities without it. Every day appears new gadgets or software that makes lives easier and improves the technology and software that already exists. Making lives easier is not, however, the only role technology plays in our lives.

The latest E-learning Innovations such as mobile learning (MLearning – Tremblay, 2010) or web based collaborative open environments (Lewin, 2011) makes the education more competitive but also saves resources now and in the future.

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Technology is playing an increasing role in education. As technology advances, it is used for the benefit of students and people of all ages in the learning processes.

Considering the *Handbook of Human Performance Technology (J.A.Pershing, 2006)*, the word technology for the sister fields of Educational and Human Performance Technology means "applied science."In other words, any valid and reliable process or procedure that is derived from basic research using the "scientific method" is considered a "technology." The word technology, comes from the Greek "Techne" which means craft or art. Another word "technique", with the same origin, also may be used when considering the field Educational technology. So, Educational technology may be extended to include the techniques of the educator and educators often named Educational Technologists.

Technology used in the classroom helps students to learn easier the materials presented in different courses. For example, since some people are visual learners, projection screens linked to computers can allow students to see their notes instead of simply listening to a teacher deliver a course without any technical mean.

In the same direction software can be used to supplement class curriculum, to improve the educative process by adding practical aspects to the course. Also, the programs provide study questions, activities, and even tests and quizzes for a class that can help students continue learning outside the classroom.

Technology has also become part of many curriculums, even for other courses out of computer and technology classes. Students use computers to create presentations and use the Internet in order to research topics for papers and essays, to get tests and materials for learning. Students also learn how to use the technology available to them in any type of courses but especially in computer classes. This ensures that after graduation they will be able to use the information technology in their work, which may put them ahead of someone who didn't have access to a particular technology or software in their school.

The information technology advances yearly, so the students have better access to educational opportunities. When something new and "better" appears, the "older" technology becomes more affordable, allowing it to be used in educational processes, even when schools are on a tight budget.

Technology based learning

Technology based learning is the way of learning using the electronic technology such as internet, intranet, audio and video conferencing, webcasts etc. **On-line learning** and **computer based learning** means the learning using the computer, respective the internet and modern technology. The synonymous of Technology based learning is the **e-learning** concept, largely spread at all the levels of educational process in our days. .

Educational technology may be extended to include the techniques of the educator and educators often named Educational Technologists.

The time saved and also the efficiency of using technology for educational purposes recommends it as the newest trend in the knowledge based economy and society. Making a parallel between education in old economy and in knowledge based economy.

Old economy	**Knowledge Based Economy**
Four years degree	Forty-years degree
Training and Cost Center	Training as Competitive Advantage
Learner mobility	Content mobility
Distance education	Distributed learning
Correspondence & Video	High tech Multimedia Centers
Generic programs	Tailored programs

Geographic centers	Brand Name Universities and Celebrity Professors
Isolated	Virtual Learning Commities

Table 1. Education in knowledge economy

Source: N.Gudanescu, Using modern technology for improving learning process at different educational levels, Procedia Social and Behavioral Sciences

"Educational technology" represents the using of modern technology in educational processes, in order to improve teaching and learning. Educational technology is also known as „learning technology'' or „instructional technology'' and includes web-sites, electronic platforms, educational software, educational electronic materials, interactive blackboards and videoconference systems for distance learning.

E-learning comprises all forms of electronically supported learning and teaching. The information and communication systems, whether networked learning or not, serve as specific media to implement the learning process. The term will still most likely be utilized to reference out-of-classroom and in-classroom educational experiences via technology, even as advances continue in regard to devices and curriculum.

E-learning is essentially the computer and network-enabled transfer of skills and knowledge. E-learning applications and processes include Web-based learning, computer-based learning, virtual education opportunities and digital collaboration. Content is delivered via the Internet, intranet/internet, audio or video tape, satellite TV and CD-ROM.

Abbreviations like CBT (*Computer-Based Training*), IBT (*Internet-Based Training*) or WBT (*Web-Based Training*) have been used in time as synonyms to e-learning. This system is largely used today, that's why it has to be reglemented by establishing rules and principles of functioning.

E-learning principles are:

E-learning is a way of doing education that can be applied within varying education models (face to face or distance education)

E-learning is a unique form of education that combines face to face and distance education

The importance of how is technology used in the educational process and the technical level of a course

The E-learning means the implementation of innovative educational methods

E-learning can be used in two ways; the presentation of educational content, and the facilitation of educational processes

E-learning uses a standard model of courses accepted by the educational authorities from each country

E-learning offers new opportunities of education for the users

Some of the advantages that technology and electronic tools provides are:

The modernization of the educational process;

A better communication between the professors and students;

A raising participation of the students in educational programs, university courses or training sessions;

The innovation in educational programs;

Facilitates the educational act.

The limits at least in some of the countries like Romania are:

The missing of the face to face contact between professors and students;

Difficulties in the computer utilization by the older professors or students;

The evaluation process is more stressing for the students, because the grades and qualifications are generated by the computer;

Difficulties in publishing the courses (platform contents) because of the lack in author's rights legislation.

We can say that the system is useful and helps to modernize, innovate and facilitate the educational process.

E - learning Innovations is committed to professional success. Benefits of training include:

A flexible and progressive online learning format

A collaborative and blended learning environment

Immediate, practical application

Individual mentoring and coaching

Certification through a combination of selected courses

Can be tailored to specific technologies or environments

Electronic tools for education

A few of the many electronic tools used to deliver in modern conditions the education and specialization among students are Learning Management Systems (known as LMS), Integrated Learning Systems, On-line forums, and not for the last Web Conferences.

Learning Management Systems

A learning management system (LMS) is a software application or Web-based technology used to plan, implement, and assess a specific learning process. Typically, a learning management system provides an instructor with a way to create and deliver content, monitor student participation, and assess student performance. A learning management system may also provide students with the ability to use interactive features such as threaded discussions, video conferencing, and discussion forums.

In another definition a Learning Management System (commonly abbreviated as LMS) is a software application for the administration, documentation, tracking, and reporting of training programs, classroom and online events, e-learning programs, and training content. As described in (Ellis 2009) a robust LMS should be able to do the following:

centralize and automate administration of documents, students and other useful information

use self-service and self-guided services

assemble and deliver learning content rapidly

consolidate training initiatives on a scalable web-based platform

support portability and standards

personalize content and enable knowledge reuse.

Some LMSs are Web-based to facilitate access to learning content and administration from distance. LMSs are used generally by universities (educational institutions) to enhance and support classroom teaching and offering courses to a larger population of learners across the country or continent but can be used very frequently for adult preparation and specialization at the work-place or in organized training sessions.

The virtual learning environment used by universities and colleges allow professors/tutors to manage their courses and exchange information with students for a course that in most cases will last several weeks and will meet several times during those weeks. In the corporate environment setting a course may be much shorter, easier to present as content and completed in a single instructor-led event or online session. The characteristics shared by both types of LMSs for universities and for education for adults and instruction are:

Manage users, roles, courses, instructors, facilities, and generate reports for any person or activity.

Generate Courses calendar

Offers learning path

Student messaging and notifications

Assessment and testing handling before and after following the course
Generates automatic tests choosing different ways to combine the questions
Display scores and transcripts
Grading of coursework and roster processing, including wait listing
Web-based or blended course delivery

The soft platform is not so important for the end users, they are interested in the facilities offered by the platform, easy access, courses posted, forums, tests, case studies etc. The information posted on the platforms is known as learning content.

A learning content management system (LCMS) is a related technology to the learning management system that it is focused on the development, management and publishing of the content that will typically be delivered thorough an LMS. An LCMS is a multi-user environment where developers may create, store, use, manage, and deliver digital learning content from a central object repository. In the university environment as well as in the corporate environment the content is made by courses, case studies and practical materials of study, tests and recapitulative questions sets, training modules etc. The learning materials (learning objects) are not only written materials, but graphics, audio and video materials for courses and training support. The materials are posted by the teachers, trainers and platform administrators but also by the students on share section.

Integrated Learning Systems

Integrated Learning Systems (abbreviated as ILS) are hardware and software solutions designed to deliver instructional content. The effective delivery of that content is measured, monitored, and maintained with an array of assessment and management tools that may also be part of that system.

Comparing with static online help or even animated tutorials, Integrated Learning Systems are highly interactive and designed to provide feedback as to progress and grasp of the subject matter at hand. Built-in tools further allow professors to monitor and measure a student's progress.

Integrated Learning Systems are packages of networked hardware and software used for education. Such systems provide instructional content as well as assessment and management tools. In an integrated learning system program, each student studies at his or her level, because an adaptive testing algorithm places every student at a level appropriate for the instructional process. In a number of off-the-shelf, drill-and-practice programs, no adaptive testing occurs, and the student works at whatever "level" of the program he or she chooses.

Integrated Learning Systems require a significant commitment of implementation expense, time, and effort. Researchers remain divided on their long-term value. Students using these systems have been shown to perform significantly better than equivalent control groups. Being instructional systems can be successfully used for the adults also that are in the process of learning a trade.

An ILS is made up of two components, Computer Aided Instruction (CAI) modules (often called courseware) and a Management System.

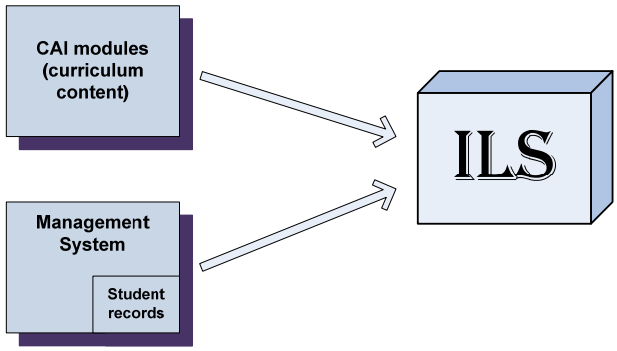

Figure 2.The scheme of an Integrated Learning System

The Management System keeps records of the students' performance and, in some cases depending on the software, moves them through the levels of difficulty as appropriate. It also allows the professors to configure all the different course options, to suit their own teaching styles and the needs of their students.

The key features of an ILS are as follows:

Each student has an individualized learning program. If they perform well, they can make rapid progress onto higher levels of difficulty. If they experience problems, they are given more practice and may also be given additional tutorials and support questions on the various skills needed to deal with a particular topic.

Professors have access to a lot of data for monitoring students' progress. This will highlight students who are experiencing difficulty and who are in need of additional support. This data is gathered automatically and can be printed out in a series of different reports.

Students performance is constantly monitored by the Management System.

Students get immediate feedback after every question. This can raise motivation and accelerate learning.

The benefits that can be achieved through the use of an ILS can be:

Significant learning gains in mathematics

Significant learning gains in English or any other language that uses the ILS

Improved motivation and attitude to work

Improved performance in all curriculum areas because of the first three benefits

On-line forums

A forum is hierarchical or tree-like in structure: a forum can contain a number of sub forums, each of which may have several topics. Within a forum's topic, each new discussion started is called a thread, and can be replied to by as many people as wish to. Depending on the forum's settings, users can be anonymous or have to register with the forum and then subsequently log in order to post messages. On most forums, users do not have to log in to read existing messages.

The talkers share their own knowledge with others, by giving them information or advices, also specialists in different domains present on the forums can give the interested ones the right data. But, in the majority of the cases when we talk about electronic educational systems, the on-line forums are integrated in LMS or ILS. These forums are administrated by the teachers and platforms administrators that manage the entire system. In the case of the teachers as moderators they have to respond to the students' questions and guide them in the way of learning the most important things for their future.

Every day, millions of users log on to their favorite online forums, communities and social spaces and interact with others to get advice and discuss everything from the latest news and trends

to their hobbies and professions to whatever else strikes their fancy. Administrators have to lead these communities, deal with difficult users, manage staff members and make tough decisions. Legal constraints, spammers and technical issues can turn the excitement of running an on-line community into chaos.

The steps to create an on-line forum are:
Creating an organizational structure
Designing and launching the community
Deciding on user options like private messaging
Promoting and attracting members
Utilizing technology to members benefit
Developing and enforcing guidelines
Choosing and managing moderators
Shutting down users who disrupt and harm the community
Involving the users and keeping the site interesting and inviting
Generating revenue

Web Conferences and Video Conferences

Web Conferencing refers to a service that allows conferencing events to be shared with remote locations. The service allows information to be shared simultaneously, across geographically dispersed locations in nearly real-time. Applications for web conferencing include meetings, training events, lectures, or short presentations from any computer. A participant can be either an individual person or a group. System requirements that allow individuals within a group to participate as individuals, when an audience participant asks a question, depend on the size of the group. Handling such requirements is often the responsibility of the group. In general, system requirements depend on the vendor. The service is made possible by Internet technologies, particularly on IP/TCP connections.

For interactive online workshops web conferences are complemented by electronic meeting systems (EMS) which provide a range of on-line facilitation tools such as brainstorming and categorization, a range of voting methods or structured discussions, typically with optional anonymity. Typically, EMS do not provide core web conferencing functionality such as screen sharing or voice conferencing though some EMS can control web conferencing sessions.

Other typical features of a web conference include:

Slide show presentations - where images are presented to the audience and markup tools and a remote mouse pointer are used to engage the audience while the presenter discusses slide content

Live or Streaming video - where full motion webcam, digital video camera or multi-media files are pushed to the audience

VoIP (Real time audio communication through the computer via use of headphones and speakers)

Web tours - where URLs, data from forms, cookies, scripts and session data can be pushed to other participants enabling them to be pushed though web based logons, clicks, etc. This type of feature works well when demonstrating websites where users themselves can also participate

Meeting Recording - where presentation activity is recorded on the client side or server side for later viewing and/or distribution

Whiteboard with annotation, allowing the presenter and/or attendees to highlight or mark items on the slide presentation. Or, simply make notes on a blank whiteboard

Text chat - For live question and answer sessions, limited to the people connected to the meeting. Text chat may be public (to all participants) or private (between 2 participants)

Polls and surveys (allows the presenter to conduct questions with multiple choice answers directed to the audience)

Screen sharing/desktop sharing/application sharing (where participants can view anything the presenter currently has shown on their screen. Some screen sharing applications allow for remote desktop control, allowing participants to manipulate the presenters screen, although this is not widely used.)

Videoconference (video conferencing)

A videoconference is a live connection between people in separate locations for the purpose of communication, usually involving audio and often text as well as video. At its simplest, videoconferencing provides transmission of static images and text between two locations. At its most sophisticated, it provides transmission of full-motion video images and high-quality audio between multiple locations. Videoconferencing software is quickly becoming standard computer equipment. Digital Camera afford the user easy - and cheap - live connections to distant friends and family. Although the audio and video quality of such a minimal setup is not high, the combined benefits of a video link and long-distance savings may be quite persuasive.

The tangible benefits for businesses using videoconferencing include lower travel costs and profits gained from offering videoconferencing as an aspect of customer service. The intangible benefits include the facilitation of group work among geographically distant teammates and a stronger sense of community among business contacts, both within and between companies. In terms of group work, users can chat, transfer files, share programs, send and receive graphic data, and operate computers from remote locations. On a more personal level, the face-to-face connection adds non-verbal communication to the exchange and allows participants to develop a stronger sense of familiarity with individuals they may never actually meet in the same place.

A videoconference can be thought of as a phone call with pictures - Microsoft refers to that aspect of its NetMeeting package as a "web phone" - and indications suggest that videoconferencing will some day become the primary mode of distance communication.

The latest Electronic Learning Systems

The innovation regarding the E-learning technologies is on one side the mobile learning and on the other side the collaborative open environments/workplaces.

3.1 MLearning

MLearning (Mobile learning) is the newest discovery in the field and represents the learning using mobile devices or in other definition: ‘Any sort of learning that happens when the learner is not a fixed, predetermined location, or learning that happens when the learner takes advantage of the learning opportunities offered by mobile technologies’.

Learner access to m-learning project systems and materials was via a microportal (mPortal), which consists of a series of mini web pages with navigation pointing to:

learning materials
mini web Page Builder tools
a collaborative activities tool (the mediaBoard)
peer-to-peer communication services (messages, chat, discussion and blogs)
the learning management system
simple help guides for the system
links to places on the Web that may be helpful or interesting for our target audience.

The mPortal also manages the ‘behind the scenes’ integration and security.

The Page Builder tools within the mPortal allow learners to create and edit their own mini web pages for viewing on mobile devices (and also accessible from a desktop computer) in a password-protected environment.

The pages learners create can contain a number of different elements including text, pictures, movies, animations, audio, blogs (a short version of the term 'web log', meaning a publicly accessible web-based journal), conversations and links to any web pages chosen by the learner.

3.2 Virtual Collaborative open Environments/Workplaces

A Collaborative Workspace or shared workspace is an inter-connected environment in which all the participants in dispersed locations can access and interact with each other just as inside a single entity.

The environment may be supported by electronic communications and groupware which enable participants to overcome space and time differentials. These are typically enabled by a shared mental model, common information, and a shared understanding by all of the participants regardless of physical location.

Communication comes in two forms: synchronous and asynchronous. Asynchronous communication includes email and shared file systems where information is exchanged back and forth in a non-interactive, sequential manner. The popularity of synchronous forms has increased over recent years driven by improvements in processing capabilities and the widespread availability of high speed internet. These include video and voice messaging services including shared whiteboard capabilities. Program sharing has also become available to allow remote users to share much more detailed information through CAD packages, spreadsheets, etc. and have access to these in real time.

Examples of good practice in implementing E-learning systems in higher education

The e-learning concept is frequently used in our country in these days. Now in Romania all prestigious companies and universities have e-learning platforms thus contributing to lifelong learning even from long distances from the educational source.

Some examples are: Universities that implemented and use the e-learning system for students distance learning like Academy of Economic Studies from Bucharest, NicolaeTitulescu University, Titu Maiorescu University which uses for the moment a moodle platform but is implementing an European project financed from structural funds which main objective is the creation of a e-learning platform, Valahia University from Targoviste and so on. Being a express request from Education Ministry that each university that organize distance courses to have a e-learning platform, many universities from our country are searching modalities to have a such platform. Because the costs are in some cases bigger than the universities financial possibilities they write and implement European projects in order to finance an e-learning platform.

An example of good practice is the E-learning system implemented by NicolaeTitulescu University.

Figure 3.NicolaeTitulescu University site: www.univnt.ro

The students can connect to the electronic distance learning platform using a browser-based application such as Microsoft Internet Explorer, Opera, Firefox etc. at http://elis.univnt.ro/ or university site www.univnt.ro through the button *"Login Student"* (left side of the page www.univnt.ro). The students will enter login information into a web page similar to the following image:

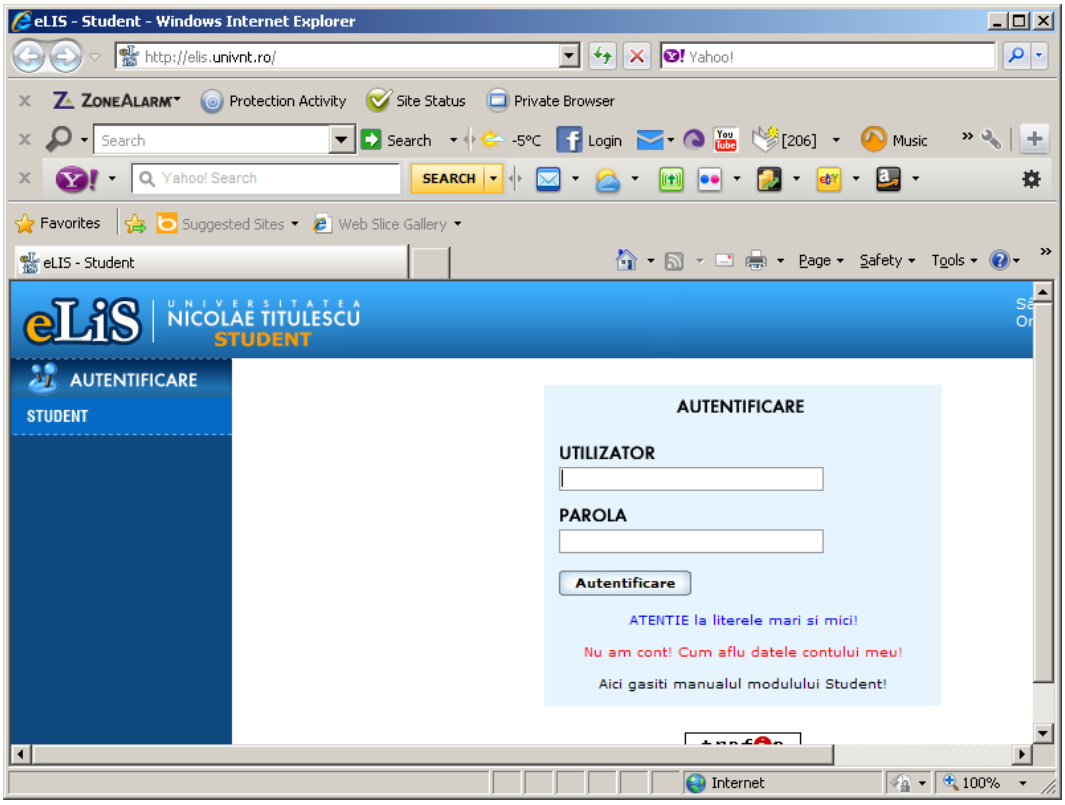

Figure 4.E-Lis Platform, Nicolae Titulescu University

Once connected to the electronic platform, students can access the following types of information:

- downloading of courses, course materials
- assessment of knowledge through online tests
- access syllabus and curricula
- the school situation
- the financial situation
- announcements at different levels (University, faculty, academic year), to provide bidirectional communication
- to address tutors, they can view their email addresses on the www.univnt.ro
- bibliography.

The advantages of electronic eLis platform are:

- the Platform enables access to the electronic course materials, assessment tests
- electronic platform provides bidirectional communication through the posts
- with electronic platform you can send messages and post announcements to the entire University, to a group or to a particular academic year. Teachers also are assigned an username and a password. They can access the electronic platform, too. Also, each teacher is assigned to a University e-mail box so this way it can ensure communication with students.

Another example of good practice is the E-learning system implemented by Ecologic University from Bucharest :

Figure 5.Start Web Page U.E.B.(Ecological University of Bucharest http://www.kopernic.ueb.ro/GUI/Desktop.aspx)

The teacher will be able to see the system access history by his students (number and login, download documents, etc.) and can choose whether it will help in establishing activating the final grade. During the course, the students have associated a teacher who will be able to view a report history for each student to access the system and can then take into account the historical mark the award. Activity Report will include student name, date and time of action (connecting to the system, disconnect, download documents, etc.).

Students can download their documents uploaded by teachers for school materials from the plan. After connecting a student in the system, among other things, will see the list of courses that is registered. When you choose a course will open a page with all the details of that course: title, description, teacher, etc. and also loaded the professor for that course.

Students can download/upload electronic files in default locations (essays, themes, etc). For each course, students can download materials and their various topics, as described in the previous paragraph. Also students will be able to upload the server various themes or essays. Once they are loaded, the teacher will receive a message informing the student that made a theme and will have a link to access that topic.

Students can ask questions to teachers in private or public system.

A student will be able to view posts related to his account and his notes for each subject.

Both students and teachers will have their mail box, where they can view past messages and they will be able to send other messages in the system. The system will also have a chat, where you can discuss general topics in real-time.

The teachers can define a set of test questions and they can choose by checking questions, those that are public, meaning that students can access as a sort of quiz to prepare for the exam.

At the date set by teachers, students will be able to pass the tests for materials studied, displaying to the final result.

Conclusions

Considering the scope and the results of this work we can conclude that the E-learning is the best way to achieve education these days, when the resources are limited by the global economic decline, because is more cheaper for the people, especially students and for the educational institutions where a small number of teachers are involved and one time buying the new technology.

Technology is making it possible for teachers to reach more to the students, allowing students the time they need to learn, accumulate, succeed, and providing our future workforce with competent, knowledgeable employees.

E-learning Innovations brings professional success and a lot of benefits.

As a future work we are designing Virtual E-learning Centers through the project "Practical training for competitiveness in the labor market". The project is implemented for the students of Economics and is created in order to meet the students' internship.

This study creates the premises to implement the E-learning type activities in the academic environment. During the ongoing project " Practical training for competitiveness in the labor market" from Nicolae Titulescu University will be put in place some of the methods described previously. This project is meant for the students from Economic Studies and implies the creation of virtual exercise firms to satisfy the internship. In this manner will be created a pilot program which lays the foundations for further research and development of future theoretical and practical E-learning models.

In conclusion the e-learning systems are useful for any type of education, at any level, but specially for higher education and adults education. E-learning systems are used also for the high school level or small children's education. The good practice example is concluding for the present work and emphasizes the importance of the information technology used in the educational processes.

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ADULT LEARNERS IN DISTANCE HIGHER EDUCATION

NORICA-FELICIA BUCUR[1]

Abstract
This paper attempts at identifying the main features that characterize distance higher education and adult education, respectively, in order to be able to establish to what extent adult learners can fit in distance higher education programs. The historical background of distance learning education, the factors that influence adult learners, and distance learning's key objectives, effects, issues, advantages, and disadvantages are to be briefly investigated in order to reach the purpose of this paper. Recent developments in Information Technology have led to a new approach to teaching and learning, especially as far as adult learning and distance learning are concerned. Thus, this study will also focus on the consequences of using technology for course design, delivery, and the perception of adult learners participating in distance learning.

Keywords: *distance learning, adult learner, higher education, information technology, interaction*

1. Introduction

Information technology has brought about change in many aspects of our lives: economically, socially and even educationally. Higher education has started to change in order to cope with new technologies, but this change has not been entirely driven by the computers era, since its beginnings can be traced quite a long time ago, in the mid-19th century with the University of London. At that time, the development of postal services made possible the foundation of distance learning that promoted the spread of higher education among the less "well-located" students. In modern times, more exactly in the 20th century, the creation of the Open University in the United Kingdom has led to the current expansion of this type of learning.

If, in the 1970s, most open universities were almost exclusively relying on radio and television broadcasts for much of its delivery, nowadays, the development of computers and the internet have made distance learning distribution easier and faster and have given rise to the "virtual university", the entire educational offerings of which are conducted online. Not only can students obtain bachelor degrees by means of this system, but they can also apply for and, in the end, graduate from master and doctoral programs. At global level, and in Romania, as well, the number of students enrolled in these programs increases every year, as the number of universities providing distance learning is on the rise.

Many of the students enrolled in distance learning programs in Romania are adults. Thus the general purpose of this paper is to establish if, at present, distance learning meets the requirements imposed by general adult learning standards. To be able to give a tentative answer to this question, one has to provide the theoretical frameworks for the two concepts to be used (distance learning and adult learning) as they are described in Romanian and international literature, and to briefly describe them from the point of view of the leading "actors" involved in this process, the tutor and the student.

2. Content

The concept of adult learning varies from country to country, as adulthood age is differently interpreted and agreed upon, mainly depending on cultural factors. In the *Pre-study on the role of higher education institutions as providers of continuous professional learning and adult education (2011)*[2]*,* conducted by the Directorate-General for Education and Culture, many examples are given

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[2] http://ec.europa.eu/education/more-information/doc/2011/higher_en.pdf

to support the idea that the concept of adult learner is provided various explanations in EU countries, depending on national educational systems. But, since the aim of this pre-study was to offer a review of the current volume of adult learning in higher education institutions and to raise a limited number of key questions in this area, the researchers had to define the term "adult learner" very precisely. Thus, in this pre-study "the term adult learner refers to all people aged 30 years or older." (European Commission, Reports and Studies, *The role of higher education institutions as providers of continuous professional learning and adult education*, 2011:4).

Age is not the only characteristic that has to be taken into account when referring to adult learning. According to Kasworm (2003), when approaching adult education, the following two aspects have to be considered as well: the status of maturity and developmental complexity (acquired through life responsibilities, perspectives, and financial independence) and the status of responsible and often-competing sets of adult roles (reflecting work, family, community, and university student commitments).

Knowles proposed a theory of adult learning, pedagogy for adults, called Androgogy (Knowles et al., 1998). There are six principles of Androgogy for adults. The first principle is the learner's need to know: "how learning will be conducted, what learning will occur, and why learning is important" (Knowles et al., 1998). Second, self-directed learning is the ability of taking control of the techniques and of the purposes of learning. Then, prior experience of the learner impacts learning in creating individual differences, providing rich resources, creating biases and providing adults' self-identity. The fourth principle is readiness to learn. Adults become ready to learn when their life situations create a need to learn. The fifth principle is orientation to learning. In general, adults prefer a problem solving orientation in learning. In particular, they can learn best when knowledge is presented in real-life context. Finally, the sixth principle is motivation to learn. Adults have high motivation to learn when the learner can gain the new knowledge to help them to solve important problems in their life.

Even if the standard vision regarding adult learners has been based on the unfounded stereotype that adults are less effective learners simply because they are adults (their learning problems being linked to loss of memory and lack of the necessary flexibility to adopt new perspectives), this theory has largely been rejected by research[3]. It has been demonstrated by research studies that adult students can make a valuable contribution in teaching and learning, and more specifically in class discussions. Academic staff often remark that adult students perform better than younger students and that they have a positive influence on the courses they read, in particular in tutorial contributions. They can also be more adept at examining and exploring their prior experience in order to make sense of new information and new situations, and at a „meaning" instead of a „surface" approach to studying[4].

One also has to establish what makes adults want to pursue higher education. Kasworm (2003) suggests that there might be three types of motivators: internal life developmental changes, external planning to create a different future life in their adult world, or a mixture of the two life-context motivators. So, adults may choose to enter university because of a divorce, children entering school, a recent job loss, or a denied job promotion due to the lack of a university degree, because they seek new life choices that will provide greater benefits and rewards or because of mixed motivators between the first and the second set enumerated.

Distance learning has gained ground in institutions of higher learning because of its flexibility and availability to learners and teachers, regardless of geographic location. The distance-learning

[3] Kasworm, C., and Blowers, S. *Adult Undergraduate Students: Patterns of Learning Involvement*. Report to Office of Education Research and Improvement, Department of Education, Washington, D.C. Knoxville, Tenn.: College of Education, University of Tennessee, 1994.

[4] Richardson, J. T. E. and King, E. (1998) "Adult students in higher education: Burden or Boon?" The Journal of Higher Education, vol.69(1), pp. 65-88.

environment has a major contribution to make to the educational requirements of the 21st century by encouraging general acceptance of the concept of knowledge as a vital element in social development and economic growth. The authenticity, quality, and competitive standards of such programs should come from reputable institutions so that those in higher education can confidently say that it will eventually lead to economic growth.

Keeping pace with changes in technology and meeting the increasing demands of the knowledge-based economy will require a highly skilled and educated workforce capable of working collaboratively to find solutions to diverse economic, social, and environmental problems. The key to success is, in large part, continuing education, which means that distance learning, with its open access and opportunities for active collaboration in an egalitarian environment, will have an important role to play in meeting the challenges of the future (Stansfield et al., 2004).

Nowadays, labour markets demand knowledge and skills that necessitate regular updating. People have started to realize the importance of education and how convenient it has become to have access to distance learning and virtual universities that allow educational experiences to be tailored to the needs of individuals or groups. In other words, educational needs are becoming continuous throughout one's working life.[5]

Various definitions are given to distance learning in the literature. Mantyla and Gividen's definition (1997) tries to be as comprehensive as possible[6]: "Distance learning is a system and a process that connects learners with distributed learning resources. While distance learning takes a wide variety of forms, all distance learning is characterized by: (a) separation of place and/or time between instructor and learner, among learners, and/or between learners and learning resources; (b) interaction between the learner and the instructor, among learners and learning resources conducted through one and more media; use of electronic media is not necessarily required."[7] In Berg's opinion (2002), the main elements of distance learning are: (1) physical separation (complete or more than 50% reduced contact time) between teacher and learner; (2) administration by an educational organization; (3) frequent use of various media, including print, video, film, computer and audio; (4) communication between student and teacher, synchronous or asynchronous; (5) often an administrative focus on the nontraditional learner.

Since the term distance learning is often interchanged with distance education one should try to differentiate between the two. According to Steiner[8] (1995) "Distance Education is instructional delivery that does not constrain the student to be physically present in the same location as the instructor. (…) Distance Learning is the result of Distance Education."

The common institutional motives for the use of distance learning need also to be investigated. Ehrman[9] (1998) suggests that widening access, sharing a wider range of intellectual sources, as well as implementing new teaching techniques could be envisaged as possible reasons for distance learning. Given these motives, he sees the challenge as extending access and enriching

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[5] For example, the European Union, through its Education Commission, has initiated numerous programs concerning lifelong learning, intended not only for individual students and learners, but also for teachers, trainers and all others involved in education and training. Moreover, EU The Lifelong Learning Programme: education and training opportunities for all has a wide scope, funding projects at different levels of education and training, as it has four main sub-programmes: Comenius for schools, Erasmus for higher education, Leonardo da Vinci for vocational education and training, Grundtvig for adult education.

[6] This definition discards the growing importance of information technology in distance learning, probably because at that time (in 1997) this technology was relatively new and less widespread than nowadays.

[7] Matyla, K., Gividen, J.R. (1997). *Distance Learning. A Step-by-Step Guide for Trainers*. Alexandria: The American Society for Training and Development

[8] http://www.dlrn.org/library/dl/whatis.htlm

[9] Ehrmann, Stephen C., "Studying Teaching, Learning and Technology: a Tool Kit from the Flashlight Program," Active Learning IX (December 1998), pp. 38-42. After June 1999, the article will be available at http://www.cti.ac.uk/publ/actlea/al9.html. Since then the article has been expanded and rewritten; a recent draft is posted at <http://www.tltgroup.org/flashlight/ActiveLearningFL.html>.

resources, while at the same time controlling costs. O'Lawrence (2007) goes along the same view, considering that universities are implementing distance learning programs for 3 reasons: (a) the convergence of communication and computing technologies, (b) the need for information-age workers to acquire new skills without interrupting their working lives for extended periods of time, and (c) the need to reduce the cost of education.

In Istrate's view (2000) distance education may be a feasible alternative due to the flexibility of the roles both the learner and the teacher have to play and to the existence of the student-oriented curriculum (the particular needs of the students are in the center of the educational activity). Through this system, students have numerous opportunities to learn, as the spatial and temporal obstacles are removed, and their learning pace is attuned to their capabilities. Moreover, Istrate emphasizes that this type of education could encompass a large targeting population, because it does not require prospective students to give up on their professional activity (job). Therefore, distance learning is designed to ensure compatibility with the characteristics and needs of the adult learner. By maintaining their jobs while attending university, adult learners are able to continue to accumulate work experience while pursuing educational goals.

In distance learning students and teachers will find themselves playing different roles than is the norm in traditional education. The teacher is no longer the sole source of knowledge but instead becomes a facilitator to support student learning, while the student actively participates in what and how knowledge is imparted. More than any other teaching method, distance learning requires a collaborative effort between student and teacher, unbounded by the traditional limits of time, space, and single-instructor effort. Distance learning is student-centered learning.

To summarize, as compared to traditional education, distance education stands out due to several advantages, such as:

- all the resources are ubiquitously available;
- the curriculum is more comprehensive, as it offers numerous possibilities for students to acquire high level knowledge from various domains;
- the number of students that can attend this type of education is considerably big, comprising those students that cannot attend traditional university courses; access to local, regional, national and international networks bring together students belonging to different social, cultural and economic backgrounds;
- learning is experienced at student's own pace and personal style, as courses can be studied or attended gradually and repeatedly; computer software are flexible, the student being able to maximize the way in which information is transmitted, learned and, finally, assimilated individually;
- the synchronous and asynchronous interaction between the teacher and the student can complement one another;
- interactive technology, easily allowing total feedback, as well as formative or summative, qualitative or quantitative assessment.

Nevertheless, there are also disadvantages, which are generally related to distance education implementation:

- distance education system development means high costs to cover expenses related to hardware and software technology, transmitting network information, maintaining equipment, producing the necessary materials;
- the difficulty to make considerable and constant efforts on the part of the students, academic staff, technical intermediaries and administrative staff;
- it is necessary for both educators and students to have good written communication skills, as well as computer skills (one of their responsibilities might be that of performing maintenance activities on their personal computer);

- the high degree of motivation that students need in order to attend and graduate from distance education (research concluded that distance education students are more prone to become "quitters", as interrelations are impersonal);
- the relatively "dehumanization" of the courses (this can be partially removed only by developing adequate interaction strategies and by focusing on the student, not on the system)[10].

Having emphasized the strengths and weaknesses of distance education, one should now be able to perform the analysis proposed at the beginning of this paper. As far as the motivation of the adult learner is concerned, this is to a great extent intrinsic, and distance education, mainly due to lack of human interaction, may cause certain problems that could be overcome only if the courses offered immediate and tangible value to the learners. Learner orientation is another aspect of adult learning which should be taken into consideration in contrast with distance learning, as adult learners learn only what they feel they need to learn. The solution might be to explicitly state learning goals as a key component in the design of distance courses; tutors and course developers need to illustrate the real-world applicability of the material and to provide adult learners with some ability to control their own learning environment.

When learning something new, most adults need to see how it fits in with (or is different from) what they already know. Distance educators should devise ways to incorporate the learners' previous experiences into new material and build in ways for learners to share their ideas and experiences with one another. As for orientation to learning, adults need immediate feedback concerning their progress. Thus, tutors and course developers in distance education should develop strategies to help adult learners assess their own progress, so they can reassure themselves they are going in the right direction.

One more important aspect that needs to be considered when analyzing the extent to which distance education is adequate for adult learners is the dispositional barrier[11]. As compared to children or teenagers, adults are much less open to the trial-and-error approach. Many adult learners will resist trying something new if it involves the risk of making an error and feeling foolish as a result. This is especially true if the person has had problems with learning in the past, or difficulties with the subject area being covered. Therefore, because adults try to avoid failure as much as possible, distance education materials could assist them in overcome this "fear", by providing simple techniques, such as making the first exercises or tests so easy that practically anyone can be successful at them. In addition, designers and developers must also be aware that providing distance learning over the Internet incorporates a whole new area of risk for many learners. The technology itself is complicated for many people, and course providers must ensure that sufficient support is available for students as they take on the challenge of learning in this new environment.

Personal learning style is also a key issue measuring the degree of adequateness of distance education for adult learning. By the time people reach adulthood, they have settled into a learning style that has worked well for them in the past. One person may prefer reading, while another does best by trying out a practical exercise, for example. They may use a global or analytic style of processing information, and they may prefer to work cooperatively or independently. Some students like to have material presented in a step-by-step, cumulative, sequential pattern that builds toward a general concept. Others learn best when they are given the concept first and then details. One possible solution might be the inclusion of global and analytical approaches in developing learning modules. Distance education course designers should provide opportunities, suggestions, and resources for independent learning and make use of techniques such as (online) role playing, simulations, case-studies. Students should be given guidance to make them aware of their own

[10] Istrate, Olimpius, *Educaţia la distanţă. Proiectarea materialelor*, Botoşani: Editura Agata, p.15-16

[11] MacKeracher, D., Suart, T., & Potter, J. (2006, May). "State of the field report: Barriers to participation in adult learning". Retrieved January 26, 2012, from the National Adult Literacy Database Library Web site: http://www.nald.ca/library/research/sotfr/barriers/cover.htm

learning styles, and, moreover, tutors should offer them ideas for ways to adapt materials to suit their own learning styles

The adaptation of distance learning to successfully meet the adult learner's needs is a process that requires a large amount of effort, especially in point of methodology. Encompassing latest research findings from various domains such as IT, education sciences and psychology in devising courses could also be beneficial for younger adults attending distance education.

3. Conclusions

The transformation of the world economy over the past several decades has put a premium on an educated workforce. The continuous development in information technology due to its enormous resourcefulness and flexibility, as well as its increasing accessibility due to decreasing costs make higher education institutions envisage distance learning as one possible alternative for the future in order to meet this fast growing demand. Adult learners need distance learning. The flexibility and convenience of distance education makes it particularly attractive to adult learners, who are constantly looking for ways to upgrade and expand their skills in an effort to improve or protect their economic position.

The purpose of this paper has not been that of exhausting the aspects to be considered when discussing distance learning as one possibility for adult learners who want to pursue higher education. To a certain extent, I have attempted to pinpoint to the specificity of adult learning and how distance learning can be tailored to meet adult learners' needs. The theoretical framework provided in this paper will hopefully serve as a starting point for a future empirical research that will analyze if the Romanian distance higher education system meets the needs of the Romanian adult learners.

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WOMEN'S EVERYDAY LIFE EXPERIENCE OF HOUSEWORK AND CARE. BETWEEN PARTENERSHIP NORMS AND PATRIARCHAL NORMALITY

DIANA ELENA NEAGA[1]

Abstract.
My aim in this paper is to explore the process by which women from a Transylvanian county understand family relations in their everyday life with respect to the sharing of the household and care responsibilities among members, mostly men and women. In doing so I will use the distinction made by Martin Hollis between a normal behavior - which can arise after some roles have been performed (the patriarchal gender roles inside the family), and the normative behavior - the one with a moral value (the partnership model of sharing responsibilities within the family). My approach will consist in the use of a gender sensitive constructivist framework, meaning that I will emphasize the way in which social actors give meaning to their interactions, keeping in mind at the same time that these interactions are developed in a coercive framework of institutions, norms, values and rules. I consider patriarchate to be one of the most important of these coercive structures, seen as a social system which perpetuates the male dominance over women in social organization, and in which fathers hold authority over women, children, and property within the family The research design is based on a qualitative methodological triangulation. Data collection was focused on two methods: semi-structured interviews and focus groups of women from Hunedoara County, Romania, living in three towns and a village. The semi-structured interviews were used to construct narratives that allowed for a relational–based research. In this framework factors such as power relations within the family, gender roles assumed by women and their partners or extended family, as well as one's own perceived social roles and cultural traditions (public narratives) will illuminate how power relations promote or disadvantage gender empowerment. The focus groups were made in order to establish fruitful and relevant lines of inquiry for the semi-structured interviews. I consider that one of the limitations of this research is the lack of a comparative framework between men's and women's understanding of the problem of household and care in Romania. The originality of this paper consists in providing new information and data about the underlined issue by using methods that try to give in-depth answers to how women see themselves as part of the family.

Keywords: *housework and care, constructivism, norms, power relations, public narratives*

Introduction. In the beginning, I would like to specify the fact that this paper belongs to an extended study on women's citizenship in their everyday lives, namely my PhD thesis[2]. The main issues corresponding to housework and care have been in connection with the ones regarding participation (civic, political, professional and/or familial). More precisely, citizenship has been first and foremost linked to participation, and the constructivist approach I have undertaken, and to which I will return at a later point, stresses the way in which the individuals, in their everyday interactions, provide meaning to the experiences and structures that shape their behavior. As such, within these interactions, the individuals evaluate their present situations and act upon these evaluations. With respect to their actual reality, the consequences of these evaluations as to their capacity as citizens become manifest in the *active* (apparent), respectively *passive* (latent)[3] *participation* or through *civic*

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[2] As stated, the present paper is part of my doctoral thesis entitled *Gender and Citizenship in Romania*, which was coordinated by Prof. Dr. Mihaela Miroiu and defended on September, 29th, 2011 within the S.N.S.P.A. Doctoral School in Bucharest. The paper stressed citizenship as practice, by operationalizing the concepts of participation (civic, political, familial, and professional) and the way in which they are signified in the everyday lives of the interviewed subjects.

[3] See Lester Milbrath, *Political Participation,* (Chicago: Rand McNally&Co, 1965); Hakan Johanson, Bjorn Hvinden, „What do we mean by active citizenship?", in Hakan Johanson, Bjorn Hvinden, *Citizenship in Nrodic*

and *political* participation. However, when we actually consider the everyday lives of women, another form of participation becomes notable, namely the familial one. This perspective originates especially with the feminist theories that criticize the public-private distinction, engendering the so called "patriarchal separation"[4] of the domestic sphere from all the others[5]. The social effects of these constructions amount to the phenomenon which the *2000 Gender Barometer*, as well as other studies[6], very well emphasizes, namely that women continue to be responsible for most of the housework and care activities.

Moreover, the conclusions of my doctoral paper regarding the way in which women understand and provide meaning to their relation to the paid work, point out the fact that this form of participation is directly related to their need for autonomy and community integration. Furthermore, these women don't see themselves as housewives, but as active persons, continuously active on the work-market. Given this permanent tension between the family and the professional life, my main question within this paper is: how do women understand and provide meaning to their everyday lives, with respect to the repartition of their house and care-work between the members of the family, i.e. men and women? More specifically, what type of explanations do women provide for the fact of assuming (voluntarily or not) the burden of the double shift workday.

Approach. With respect to the conceptual framework, my arguments essentially belong to the interpretative epistemological tradition, providing for a dynamic perspective on the social and cultural existence of the human being, i.e. one in which the agent and the structure are seen as interdependent[7]. This analysis will focus on the relationships and biunivocal influences between the agents (providing the roles with meanings) and the structures (especially the patriarchal one that basically imposes normality). The individuals are viewed as actors, as subjects capable of autonomous and responsible action, respectively of evolving, contesting and changing the structures depending on the meanings they ascribe upon them. A constructivist approach brings forth the individuals involved in the *meaningful* construction of the social reality; however this process is not isolated or independent of the exterior reality, that becomes stable, institutionalized and, ultimately, constraining.

The main structure brought into discussion in this paper - the patriarchal one - is defined by Lerner as being the display and institutionalization of male domination over the women and children in the family, as well as the extension of this domination over women in the society in general[8]. Another important aspect in the construction of my arguments is the one regarding the distinction that Martin Hollis makes between a *normal* behavior which can arise after some roles have been performed and the *normative* role, the one with the moral value. Hollis emphasizes the distinction between *normal* and *normative*, in the way that the requirements imposed by a role can achieve normative connotations as a result of the meanings actors can associate with these roles, but it does

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Welfare States. Dynamics of choice, duties and participation in a changing Europe, (New York: Routledge, 2007), 32 – 50.

[4] See Carol Pateman, *The Disorder of Women,* (California: Stansford University Press, 1989), 35 and Ruth Lister, *Citizenship: Feminist Prespective,* (New York: Palgrave, 2003, Second Edition), 73; Susan B .Boyd, Challenging the Public and Private Divide: An Overview, în Susan B .Boyd (ed.), *Challenging the Public and Private Divide. Feminism, Law and Public Policy,* (Toronto: University of Toronto Press Incorporated, 1997), 4; Susan Moller Okin, Gender, the Public, and the Private, in Anne Phillips, ed. *Feminism and Politics*, (Oxford: Oxford University Press, 1998), 119.

[5] Ruth Lister, *Citizenship: Feminist Prespective,* (New York: Palgrave, 2003, second edition), 119.

[6] See also Ruth Lister, *Citizenship: Feminist Prespective,* (New York: Palgrave, 2003, second edition), 130 – 131.

[7] See Peter Berger; Thomas Luckmann, *Construirea socială a realității*, (Bucharest: Art, 2008); Searle J. (1995) *The Construction of Social Reality*, The Free Press, New York; Brent G. Wilson, "Reflection on Constructivism and Instructional Design", in Charles L. Dills, Alexander J. Romiszowski ed. (1997) *Instructional Development Paradigms*, (New Jersey: Educational Technology Publication, 1997).

[8] Gerda Lerner, *The Creation of Patriarchy,* (Oxford: Oxford University Press, 1986), 239.

not mean that any normal or regulated behavior comes from normative expectations[9]. Thus, a behavior which can be defined as normal may not always be the normative one.

In addition to this theoretical framework, I assume a feminist approach of the subject matter, by virtue of the *liberating* potential of feminism deriving from its contestation and deconstruction of the gender differences as generating illegitimate differences with respect to a democratic society.

Methodology. In order to come in contact with the women's actual view and life experience, in addition to the theoretical framework and the previous studies, the facts have been examined *in situ*, in a complex process that, beyond the actual interviews, either individual, or in group, also involved actual terrain research, in order to become familiar with the environment in which the subjects generate meanings. With respect to the representativity and the selection of the subjects, considering the method – ethno methodological qualitative research – and the techniques involved – 96 semi-structured interviews and 3 focus-groups – I have resorted to the theoretical sampling (the subjects have been selected on theoretical grounds, in view of providing comparative data and testing the research questions)[10]. The criteria involved were: sex (women), age and residence environment (urban).

I have chosen exclusively women for these interviews precisely because they have been subjected to significant changes in the last 100 years, especially considering the experiences with the totalitarian communist regime and the transition. As such, women are, concomitantly, the "new comers" in the sphere of political, civic and economic action and the "great absents" with respect to the authority positions within the public (especially political) and also as subjects of the studies, reports and researches performed in Romania.

With respect to the age sampling criterion, it has been used in order to gain information from fully mature persons with respect to their gender experiences (labor division, gender roles, care, autonomy, dependence within family) and their professional participation. The interviews were performed on the 24 – 82 age interval and the focus-groups on the 35 – 82 age interval and this because they have been used for the stabilization of the values of the individual interviews being used mainly for the pretesting of the questions of the interview, but also for the completion of the information gathered and for the enhancement of their validity[11]. For this reason, the focus-groups have been preformed previous to the interviews and they pointed out the need for a 24 -35 age category to be introduced in the analysis, that subsequently became actual part of the interviews. I have considered necessary to clear these aspects in the methodological section of this paper, as they were designed and performed in my doctoral research. However, I must mention the fact that the analysis in this paper is not focused on the differences generated by the age of the subjects and this because, considering our subject matter, this variable proved not to have an explicative value. More precisely, I have found no relevant variations arising from the age of the subjects, fact that only strengthens the perpetuations of the patriarchal norms and their resistance to change. Noteworthy is also the fact that we are not dealing here with a "representative" sample as it is understood in the quantitative studies, as this undertaking does not aim to be a statistical analysis.

The location of the terrain study was Hunedoara county, more precisely the cities of Hunedoara, Deva and Simeria. Specific to this area is the intensive industrial development that took place both in the communist era, but also previously, process the effects of which are still apparent in the area. The impact of the massive industrialization in the communist era was mainly focused on the access to the professional field, with respect to both women and men, as women performing traditionally "manly" activities being involved in the "imposed normality" of the communist regime that, at least apparently, disregarded any gender differences.

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[9] Martin Hollis, *Introducere în filosofia ştiinţelor sociale,* (Bucureşti: Trei, 2001), 159;
[10] Petru Iluţ, *Abordarea calitativă a socioumanului – concepte şi metode*, (Iaşi: Polirom, 1997), 54 - 55;
[11] That is the reason why I have chosen not to use the results of the group interviews in this study.

The analysis method of the research data is interpretative in nature, as opposed to the ones requiring the codification of the information, therefore promoting the dynamic analyses, the interactivity between the researcher and the subject, thereby aiming at revealing the meanings deriving from such interactions[12]. With respect to the "subject" – "object" interactions I assume a reflexive feminist approach involving the interaction of the two during the research, "admitting the personal involvement of the researcher and […] considering gender not only as research object, but also as internal dimension of the entire analytical undertaking"[13].

Results of the research. In the introductory section I was stating that the professional aspect has an important role in the lives of the subjects, as most of them have a rich professional history, associated either with a single workplace, or with many, their professional continuity being enhanced and valued, while the stories regarding the periods of professional inactivity were accompanied by supplementary justifications. Therefore we are speaking of active women, constantly and intensely involved in income generating activities, both for the family and themselves. Moreover, paid work is valued by virtue of its capacity to determine a certain economic independence from the husband and/or other family members, as well as a sphere in which they can manifest themselves as professional agents, as citizens contributing to the general welfare of the family, community and society as a whole. They have the capacity of developing their abilities, of engaging in fields that satisfy their need of self respect and social acknowledgement. Last but not least, paid work is associated with the generation of social capital within the "workmate network", which is valued and used in both professional and extraprofessional contexts.

Up to this point, the picture seems to be taken out of a socialist propaganda theory advocating women's emancipation through work and "social production"[14]. However, this picture is incomplete as long as we do not also consider the activities related to the housework and care, namely if we do not ask the following questions: considering this understanding of the paid work, what happens with the housework and family care activities? Is there a link between the independence taken as an effect of the access on the labor market and the configuration of the patriarchal nucleus within the family – the labor division according to gender? More to the point, what happens with the housework and care activities of these women that speak so naturally about the emancipation through work?

Enikö Vincze writes in her work *Diferența care contează (The Difference that Matters)*: „But however we would try to justify it, the acknowledgement of the women's need and possibility to earn from the activities performed on the labor market is not necessarily followed by the change in the cultural perceptions of the traditional labor division within the family"[15] This statement also holds

[12] Matthew Miles, Michael Huberman, *Qualitative Data Analysis,* (California: Sage, 1994), 8;

[13] Enikö Magyari Vincze, *Diferența care contează. Diversitatea social-culturală prin lentila antropologiei feministe,* (Desire Foundation, 2002), 34;

[14] In "The Origins of the Family, Private Property and State" Engels wrote: "The situation changes with the emergence of the patriarchal family and of the isolated monogamous family in particular. The household administration lost its public character. It was of no concern to society any more; it became a private service; the wife became the first servant, being removed from the social order. Only the great industry of our age has reopened woman's access to the social production – and only to the proletarian woman that is. However, only in such a way that if she fulfills her duties within the family's private service, she is excluded from the social production and can earn no income; and if she chooses to take part in the social production and to live on her own work she finds herself in the impossibility of tending to her familial duties […] Within the family, he (the man) is the bourgeois and the woman is the proletariat […] And then it will become obvious that the first condition for the liberation of women is for the entire feminine sex to return to the social production." In Karl Marx. Fridrich Engels, *Opere alese,* vol. II, (Bucharest: The Printing House of the Romanian Laborers Party, 1952), 211 – 212 (my translation); Also see the „feminist authors" of the communist age, namely Mathilda Neil, *Drama eliberării femei,* (Bucharest: Editura Politică, 1974); Ecaterina Deliman, *Femeia, personalitate politică în societatea noastră socialistă,*(Bucharest : Editura Politică, 1977);

[15] Enikö Magyari Vincze, *Diferența care contează. Diversitatea social-culturală prin lentila antropologiei feministe,* (Desire Foundation, 2002), 161;

true for this research. Henceforth, I will make a short presentation of the way in which the housework and care activities are in reality, structured.

„Generally, I manage all the housework, but my husband helps me from time to time."

As Vincze said, the fact that women have access to paid work and that this activity can be regarded as a potential source of empowerment has little effect on the assumption of the gender roles within the housework and care activities. Namely, women continue to "perform" most of these activities by virtue of the cultural-patriarchal[16] norms and values which define them as main "household managers" and providers of the care services.

The questions by which I have approached the aspects related to the housework and care activities belong to the classical set regarding these aspects, but the subject has been approached in two stages. More exactly, in the first stage the subjects were asked who manages in the household the cooking, ironing, washing, cleaning as well as the care and education of children, respectively the caring of the elderly. I have sought to point out the way in which the subjects relate to these aspects in a friendly environment, without explicitly introducing the gender variable in the questions. The question that marked the second stage of the data gathering process was: "*But what does your husband do within the family*?". Regardless of age, the dominant model would seem to be contained in the statement:*" I handle all house activities, but my husband helps me from time to time".*

"(*Who handles house work in your family?*) I handle the house work and my mother helps me at some extent. (*...the children care and education?*) Yes, I handle the children's care and education as well. (*Going to meetings?*) Only me. (*If you had sick elderly in the family, who cared for them?*) Well, usually, women take care of these things as well; we haven't had any persons within the family that were seriously sick, for the time being our parents are at an age at which they don't have very serious problems, but I think that, when the time comes, I will have to deal with these things as well[…] I handle everything. When I don't feel well, as I have had surgery, I have a lady, that is very…up to my expectations, I call her and she helps me, as she is a non-working woman. […] (t*he husband*) He helps me, I don't know, by cooking. His mother, when she was young, was a cook and as he learned a lot from her, he cooks sometimes. For example, some sort of gulasz, either Hungarian or, anyway, some traditional sort of food. Otherwise…it's fairly comfortable".[17]

"(*Who handles the housework in your family?*) Both of us, in our family. So, if I need help in the kitchen my husband is always available, always helpful. For example, if I want to make sarmale, which are more difficult to cook, my husband is redy to help, if we have to go shopping, for example tomorrow I leave work at…, will you wait for me to do the shopping? Everything is all right, he helps me."[18]

"I think that he (the husband) has to become part of everything. He must know that we have no sugar, no salt, he must know that tomorrow is cleaning day, he must know that the children have no shoes, he has to be involved in all that is housework, he has to take part in it. *(Was it so in your family?)* Yes, so it was. I have involved him in everything that I could".[19]

[16] I consider here culture as a constraining structure and especially the role it plays in the patriarchal social construction. For a better understanding of the diachronic evolution of the discourse on the role of women within Romanian society also see Anthony Giddens' definition of culture in *Sociology (Bucharest: All, 2001),* 625 and also *Mihaela Miroiu, "Foreword", in Maria Bucur, Mihaela Miroiu, Patriarhat şi emancipare în istoria gândirii politice româneşti,* (Iaşi: Polirom, 2002). Another good indicator of the gender cltural construction is the *2000 Gender Barometer* realized by the Foundation for an Open Society.

[17] Interview 14, (V.D.), Hunedoara, 38 years;

[18] Interview 21(M.P.), Hunedoara, 40 years;

[19] Interview 75 (E.M.), Hunedoara, 69 years;

"(Who handled housework in your family?) Just me, in the beginning, afterwards both of us. You know that once men did nothing, nowadays they become more involved […] Now the times have changed and men handle all sorts of things at home. Not only in my family, everywhere."[20]

This type of relation to the housework and care activities is recurrent along the interviews. As such, we discover that the responsibility for these activities falls on the women.[21] Women are the ones that do the washing, cooking, ironing, as well as the children care and education and the caring of the sick and elderly within the family. The fact that men sometimes help by, does not change women's responsibility in these fields, as they continue to be the ones fundamentally responsible with the organization of the family and with ensuring its functionality conditions.

It is interesting that this gender role configuration of the housework and care activities becomes an enormous advantage for the men that, from time to time, *give a hand* with the cooking. By the rare commodities principle, the discourse of the subjects is misguided with respect to the evaluation of their contribution in the family. As such, their occasional help is presented most of the times as a real partnership within the family. We are dealing here with a contrary effect to the small gender role changes that in the context of a profoundly patriarchal world are hyper-valued by the ones that are systematically disadvantaged by this mundane configuration, namely women. In this respect, it becomes rather obvious, from the previous conversations, that the initial remarks about the labor division within the family stress the partnership – we both handle…, we both perform household activities, and the husbands must become involved – but as the discourse becomes clearer it is remarkable how, in fact, men's contributions are small given the volume and the constancy of the housework and care activities, that they are involved in the house work only at such times when the main providers of these services, the women, are overwhelmed.

More specifically, the burden of the double day shift is assumed by men, mainly when it cannot be handled only by women. As such, we find out from the subjects' declarations that men mainly take part in housework by performing activities such as shopping, cleaning, and especially general cleaning (requiring physical strength). They also sometimes cook, which they actually enjoy doing, but they usually do that only for children and in the cases in which the mother or the grandmother are away or incapable of doing it. However, these activities are contingent, and quite rare, maybe save for the shopping, activity which, on the other hand, is realized under the close supervision of women.

Maria Bucur, in a work she wrote on this research, entitled *Citizenship, Gender, and the Everyday in Romania since 1945: Work and Care,* analyzes this excessive valorization of the housework realized by men, pointing out the fact that in this way women actually facilitate and contribute to the perpetuation of the gender division of labor by the fact that they don't allow them to contribute, invoking their alleged lack of experience.[22]

Vincze also mentions this aspect when observing the low level of preoccupation by men with the domestic sphere, allegedly justified by the fact that women are more pragmatic in spirit, more skilful and trustworthy with respect to this type of activities.[23] **Thus women seem to be the accomplices of the perpetuation of their own exploitation within the family**, and this fact is all the more surprising as they are aware of the double day shift and of the partnership model of family relations.

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[20] Interview 78 (M.B.), Hunedoara, 77 years;

[21] Also see Lister, *Citizenship: Feminist Prespective,* (New York: Palgrave, 2003, second edition), 130 – 132; The Foundation for an Open Society, *The 2000 Gender Barometer*;

[22] Maria Bucur-Deckard, Citizenship, Gender, and the Everyday in Romania since 1945: Work and Care, NCEEER Working Paper;

[23] Enikö Magyari Vincze, *Diferența care contează. Diversitatea social-culturală prin lentila antropologiei feministe,* (Desire Foundation, 2002), 163;

An element that might prove helpful in understanding this type of perception is the distinction between *normal* and *normative* made by Martin Hollis[24]. In this context we could speak of the effects of the simple act of interviewing the subjects, that is of entering in the intimate sphere of the family life that can manifest by the constant relation to a normative sphere, to the desirable models and moral values, models which, this time, are not convergent with the lived normality and the performance of the gender roles. We must also bring in this equation the cultural elements that discuss the traditionally originated idealized image of the woman[25]. "The dirty laundry is washed within the family" is the motto of the clear distinction between the public and the private spheres[26] that imposes the perpetuation of the idealization of the family as the space of harmony and understanding. As such, we are faced here with two planes that do not overlap, but that, by virtue of the realization of the moral value of normativity are abusively and unconvincingly joined. The effects are the hypervalorization of men's contributions in the household, as well as the identification of some explanations supporting the auto-reflexive and autonomous assumption of these tasks by women. Furthermore, this phenomenon can also be interpreted as a manner of avoiding the dissonance resulting form the distinction of the two planes, namely that of the lived normality and that of the desirable normativity.

The irony of the discourse – a way of signaling auto-reflexivity. Although the dominant model of the distribution of the housework and care activities is the one presented above, there are also some other important aspects. One of them is the one related to the irony of the discourse regarding men's participation to the housework activities, which is very strongly supported by elements of para-language, respectively mimic and gesture language[27]. This way of communicating with respect to men's contributions within the household suggest, on the one hand, the normality of their absence from such activities, on the other, the realization and reflexive assumption by women of their position as main service suppliers within the family.

(Who handles the housework?). It depends, but in general I can say that we do that together. That is, not exclusively me or my husband, he also gives a hand. *(And what sort of activities do you perform, as distinct from the ones your husband performs?)* I cook, he takes out the garbage, does the vacuum-cleaning, stuff like that. In general we share them (she laughs). *(Who takes care of the children?)* Generally me, as he is away most of the time. He comes late from work, so to say. (she laughs)"[28]

"Well naturally, I did the housework, together with my mother, but I had a lot of help. When I came from work at two o'clock, when I was working in the morning shift, everything was ready, the food, the children brought from school or kindergarten when they were smaller […]. Until I was 42 I haven't cooked, as long as my mother lived and she helped me a lot and I miss her very much. *(Does your husband help you?)* He helps me now (she laughs) in his old age, he helps me with the

[24] The *normal* behavior deriving from the role performance and the *normative* behavior, that holds moral value.

[25] From the interviews there derives the notion that the family must be that space in which one always finds understanding and support, that includes only those who are the closest and always willing to help. With the members of the family, one can share both the joys and the hardships. The family provides guiding models, as the parents and the grandparents are the ones paving one' way in life. Generally speaking, although not perfect, your family is functional. Although some problems are due to arise, most of them are minor as compared to what "the others" face.

[26] In keeping with the definition of the two spheres in the patriarchal societies. Also see Okin's objection to the public-private distinction in Susan Moller Okin, Gender, the Public, and the Private, in Anne Phillips, ed. *Feminism and Politics*, (Oxford: Oxford University Press, 1998);

[27] See Goffman's distinction between *expressions we give* and *expressions we give off* in Erving Goffman, *Viaţa cotidiană ca spectacol,* (Bucharest: Comunicare.ro, 2007), 32;

[28] Interview 09 (A.M.), Hunedoara, 35 years.

shopping, I make him a list and he goes, he drives there and buys things, that's how he helps me. With other things around the house he is unskillful." [29]

We can infer from the interviews that these women are not only auto-reflexive but that they also constantly operate on these two planes, that they are capable of identifying them as such, and of assuming critical positions in their respect, and especially that the way in which they resort to irony indicates their attempt to reduce the dissonance of their exploitation in the family using tricks by which they explain logically, both to themselves and to the others, this configuration of reality.

Therefore, they are women who are consciously aware of the way in which the family and the power relations are structured and, more than that, of the abnormality of this configuration. From here on, by virtue of the traditional idealized image of the family, acting as a cultural constraint by imposing the perfect family – perfection of which the women are mainly responsible, "I say that the woman creates the mood of the house"[30] – the discourse is shaped rather by the model of the desirable family and not by that of the existing family. However, the irony deconstructs this structure and facilitates the disclosure of the subjects' perception of the reality, assumed as such but, very importantly, also contested.

The picture of the aware realization of the family inequalities is completed, besides the irony, by the painful experiences they had as a consequence of the patriarchal constraints, by the stories regarding their self-sacrifice for the family and especially the children, by their constant efforts to be their mother, father and friend.

"[…] I had to handle everything, the housework, to go to the radio and, when coming home, unwashed dishes awaited in the sink. That's how problems start, with small quarrels about the household. That's where the first misunderstandings start, that is where the first differences appear and then you start to be insensitive to the other's attitude, when he doesn't understand to how much work, to how much effort, the woman is subjected. I have been (subjected) for several years…I felt abused by so many problems, for they were many, and nobody understands you at work, there you have to live up, to get through any situation, to act like a man. And when coming home to act like a woman, like a woman from king Louis's time, to do everything"[31].

"It was pretty hard for me to get by and it seems to me that […] this double capacity assumed by a mother that says "I have to be both mother and father" places you somewhere above and maybe I haven't developed such a good friendship with my children […] it seems to me that I haven't managed in keeping that certain warm relationship in which the children are very comfortable, because I thought there was as much need for authority as for friendship and they probably understood more of the authority (she smiles) than of the friendship. This is how I explain it."[32]

The two forms of discourse complete each other, and while irony leaves more room for interpretation, when the stories are clear, followed by examples and, not few times, by arguments for the disadvantaged position of women within the family, the accounts are about facts and facts are hard to deny. The ingredients substantiating these accounts are related to the classical aspects of the housework, that is to the routine, dissatisfaction, invisibility and underestimation of these activities.

The generational inheritance of the housework and care activities – women's support networks. In all this struggle with the burden of the double shift workday, there constantly appears a character that not only helps, but whose help in the accomplishment of these two lines of work, i.e. paid work and housework, was indispensable. Unsurprisingly, this character is also a woman, a mother or a stepmother and very rarely, a man. Generally however, the latter's participation to the housework and care activities takes place only when there is no other woman in the family that can assume these tasks, more exactly when the extended family doesn't include a mother or a

[29] Interview 60 (M.A.), Hunedoara, 59 years;
[30] Interview 75 (E.M.), Hunedoara, 69 years;
[31] Interview 90 (C.P.), Peştiş, 48 years;
[32] Interview 64 (M.C.), Hunedoara, 60 years.

grandmother, just the same as happens with men who, in their capacity as husbands or fathers help only in the extent that the wives and mothers do not manage by themselves.

"And we lived together with my stepmother and my stepmother was a very hardworking woman and I had much to learn from her. As it is said, one steals the skills, steals much of everything. Therefore, I have learned a lot form her. Maybe she said it at the time, maybe…this is how it is with the young today, but I have learned a lot form her and especially from her mother. Her mother lived 98 years and she lived with me, I supported her. After her husband died, my stepmother also lived with me for 8 years. She was an extraordinary old woman, she was very wise. She learned to read from the Bible, she was extremely faithful and God-fearing. […] She helped me a lot, my stepmother, but on Saturdays I did the rest of the work. Naturally, she helped me, she cooked and so on…but I washed, a little cleaning by which my husband also contributed. (*Who took care of the child?*) Us and my step mother and at that time we had a neighbor that took care of her until my stepmother came and after we came from work, we cared for her. Then, she went to kindergarten and to school."[33]

"I tell you , even the house I have made it rather by myself then together with him. Because back home we have made the foundation, and then my husband left when my daughter was one year old, he went to Poland with the work. I have stayed for seven months with two children, two elderly and only the foundation of the house and there was nothing we could do. After seven months, when he came back – meanwhile I received his salary here, he received money there and I also received here, but I didn't go to work, I retained only the money I needed for the children, and back home, at the countryside, we took our food from the garden, we had a cow, sheep, birds and the money I put in the bank – when he came back we could build the house. But how? My parents helped me, my mother cooked for the masons and me an my father made the building materials and we carried them with the buckets, actually I am surprised that I have lived this long given how much weight I have lifted. And my husband came home and didn't stay more than three days, the company car came for him. And thus me and my parents did most of the work, as I lived with them."[34]

"When my child was small I have stayed home for two years and took care of him and then, I was lucky that we lived with my stepmother and for about one year she took care of him and then, when he was three, we sent him to kindergarten." [35]

Obviously, in all these interviews, the sentiment of a shared knowledge of these women's housework and care activities is pervasive. Today's grandmothers are aware of the value of the help they received from their mothers and stepmothers and help, in their turn, the young mothers and wives.

We could speak of the existence of family support networks, created by and for women for the purpose of reducing the constraints generated by the gender roles.[36] At the same time, we can speak of the existence of the double shift workday in the case of many women – the active period on the work market by the performance of both the professional and the housework activities and, in the retirement period, with house and care activities for at least two families, the main one and the one/ones of the child/children. These support networks are extended beyond the family on different events such as weddings, baptizing, funerals, which would prove the existence of women's sisterhood.[37]

We can therefore give account of the appearance of alternative solutions to the negative effects of the double shift workday, but that, at the same time, can ensure the optimal

[33] Interview 63 (S.M.), Hunedoara, 60 years.
[34] Interview 65 (A.G.), Hunedoara, 60 years.
[35] Interview 28 (S.C.), Hunedoara, 43 years.
[36] Also see Laura Surdu, „Relații de întrajutorare", in Manuela Sofia Stănculescu, Ionica Berevoescu, *Sărac lipit, caut altă viață,* (Bucharest: Nemira, 2004), 334;
[37] For further details see Phyllis Chesler, *Woman's Inhumanity to Woman,* (Chicago: Lawrence Hill Books, 2009, firts 2001), especially chapter 3 *Woman's sexism,* 124 – 166 and chapter 9 *Woman in groups,* 390 – 435;

performance of these tasks deriving from the assumption of the traditional gender roles. It is important to stress the fact that the purpose of these women support networks is not to contest the patriarchal norms, as one might think, but quite the contrary, the efforts are made towards the assumption of this state of affairs as normality and the acceptance of certain supplementary constraints, as the performance of paid work. As such, these women adapt to the patriarchal environment in which they live, but, at the same time, shape this environment in accordance with their needs and expectations.[38] Moreover, this normality is unique and it manifests as a constraining structure that, although dissonant with respect to individual normality – I hereby refer to the auto-reflexivity and realization of the normative model – has the capacity to impose its self-perpetuation.

Conclusions.

This configuration of the gender roles, both within the family and in its *immediate vicinity*, that is in the community, point out the low level of interests' politization. Even though these support networks, essentially grounded on the awareness of sharing certain common experiences, are beneficial for women, they just as much constitute the main vehicle for the perpetuation of the traditional gender roles in which women are the providers of the housework and care services.[39] Furthermore, these networks, fairly functional otherwise, contribute to the strengthening of the public – private division, in the deformed sense of the patriarchal structure[40], and to the interests' atomization. When speaking of the interests atomization I refer not so much to an alleged lack of awareness with respect to the common interests – as the abovementioned women support networks are proof of its existence – as to the lack a consistent public manifestation in this respect, fact which hinders their transposition into public policies.[41] The potential of the awareness of the common interests is diluted by the attempt to cope with the family and community problems. Moreover, the non-political nature of the coagulation of these interests is strengthened by the public – private distinction which is one of the basic elements of the patriarchal normality and which potentates the barrier between the personal and the political. The personal is private and, therefore, non-political, context in which the realization of the common interests does not have the possibility to actually contest the patriarchal system or, at least, to submit to the public agenda the gender interests but, quite the contrary, it becomes a vehicle for the perpetuation of the constraints by creating certain alternative mechanisms for the support of the interests, unframed however in the normality of the traditional gender roles.

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[38] See Cuche's definition of culture: "Culture allows the human being not only to adapt to its environment, but to adapt the latter to itself, to its needs and projects; in other words, culture makes the transformation of nature possible" – Dennys Cuche, *Noțiune de cultură în științele sociale,* (Iași: The European Institute, 2003), 18;

[39] Also see Judith Grant, *Fundamental Feminism: contesting the core concepts of feminist theory,* (New York: Routledge, 1993);

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DEVELOPMENT OF AN EDUCATION METHODOLOGY IN THE SOCIETY OF KNOWLEDGE AND COMPUTERIZATION

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Abstract:
Social changes of recent years have changed people's thinking and behavior, drawing a new generation. In this context contemporary society was launched in search of new solutions for understanding and constructing reality, approaching education for socio-economic problems. Modernization of education became a necessity and a solution in future perspective. In informatization era the psychosocial transformations of our civilization require new forms of educational organization, based on practical, strategic and divergence thinking.

Keywords: *knowledge society; education; methodology; modernization; university.*

Introduction

The world experience has shown the importance of investing in education. For this reason we decided to follow the changes occurring in education from social, scientific and economic progress. The analysis of the evolution in higher education will allow us to deduct its modernization routes. In this way we will outline the methodology necessary to connect higher education to the society of knowledge and computerization.

Studying the effects of scientific progress over society and analyzing the specifics of youth from the society of knowledge and computerization allows us to trace the directions for effective teaching interaction. Given the characteristics of the modern student we will outline the specific methodology of present university education.

The importance of the study consists in the fact that, by recognizing the need for change, it will be possible to draw the direction lines of the subsequent amendments of the education methodology.

In order to achieve the study objectives, in the survey we used the method of observation, analysis and documentation, and the education phenomena were approached through the prism of psychosocial changes.

In recent years, specialty literature resorts even more frequently to interdisciplinary approaches. Simultaneously it comes to modernizing the education system. In the specialty literature the importance of education in socioeconomic development is mentioned more often.

It is important that modernization of education addresses not only the information content, but also the teaching methodology. Therefore science education professionals have looked towards the study of youth psychology in order to develop the methodology adapted to the society of knowledge and computerization.

Development and modernization of the universities

Lately we are witnessing the process of computerization and globalization of society, following the development of new information and communication technologies. Innovation in the scope of these technologies has contributed to an evolution in the true sense of the word, that included all branches of science, and educational system. Social progress propelled education towards a natural and necessary development.

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Let's follow the change which included the educational domain, making a foray into the phenomenon of development and modernization of the universities. These institutions, born in Italy, France and England at the beginning of the thirteenth century, are spread now to all continents. Universities over the centuries have been radically transformed. Each period had to solve the dilemma that aroused from keeping the old knowledge and introducing of innovations, from the traditional system of knowledge evaluation and from the change of the assessment criteria for appreciation.

Medieval universities were institutions that spread ideas and doctrines. During this period the vast majority of teachers and students were limited to the reproduction of a science without seeking to renew or enrich it.

Even if the fields of study taught in the universities seem today purely theoretical, medieval academics were convinced that the studies were not an end in itself, but they must allow those who have had access to science to have a personal profit and to put their competence in the service of legitimate purposes from a social point of view.

The cultural contribution of the medieval universities was not limited only to the innovative doctrines of several great personalities. All those who have persistently attended them, were offered a very solid cultural base, a rigorous way of thinking, an ability to analyze and this formed for them the necessary notions in order to shape a coherent vision of the world.

The pedagogy of the Middle Age promoted mainly oral methods and was based on two exercises: reading and discussion. Reading presented an interpretation of the program texts by teachers or advanced students. The second method took the form of public discussions between students led by the teacher, who was leading and concluding the debate. Discussions stimulated competition energized the atmosphere and constituted a tool for discovering the truth. During this period, books were expensive, however teachers were forbidden to dictate, and students were forced to follow the teachers' explanations without taking notes.

In modern times (XVI-XVIII centuries), a major feature of the institutional evolution was the control of universities by political powers, because the state was responsible for teachers' salaries and for building constructions. Therefore in modern times in some countries the universities offered an insufficient and outdated education, and in others they provided a solid cultural base and were forming the original spirits. During this period, the development of education methodology was facilitated by the spreading of printed books.

In modern times, in academic education there have been a series of reforms. In the sixteenth and seventeenth centuries they were primarily aimed at strengthening the state control at the expense of the old privileges of autonomy over the universities. And later in the eighteenth century, the reforms reflected an explicable desire to modernization by a better adaptation to social needs.

It followed a period of diversification, expansion and professionalization of higher education. Performing higher studies had become an important condition for promoting individual social status, for the national affirmation, for elite formation, for scientific and economic progress at a national and international level.

During this period it appears the American university system in which education is considered the basic value of society. American billionaires want to offer to their country institutions in order to form the new elites, to affirm international power, operating by the German model, that is linking education to research. In the American universities the beauty of the premises, the luxury of the research laboratories and the abundance of auxiliary aids (libraries, sports halls, housing for teachers etc.) is combined with the opening of higher education to the masses and provided the people with the chance of getting higher education.

Development of an education methodology in the society of knowledge and computerization

Today education has gained new dimensions. As the result of a long historical development, it included the entire world and is strengthening its importance.

"Education is the key to a better future," said Androulla Vassiliou, European Commissioner for Education, Culture, Multilingualism and youth education, and investing in it "speeds up the process of recovery and equip people and countries with the competences to prosper in the post-crisis world"[2].

It is natural to ask ourselves the question "What is the current mission of universities and how should they interact with society?"

Currently it is outlining some perspective of the mission of universities. Thus, we can distinguish universities that can be considered regional, economic, social, ecological, cultural, etc. development centers. Another type of universities is the institutions with innovative specific and "business". Those are often in partnership with enterprises and play an important role in designing new technologies, achieving social orders through scientific research. And a third type of university serves society to "lifelong learning" and "life wide learning". These universities have the mission to contribute to adult education.

Current education seeks to join the current needs of the society and to create favorable conditions for the development of every personality. It is characterized by diversity and creativity, a mixture of styles and ambiguity tolerance, acceptance of innovation and change, challenge of lateral thinking and search for truth, creating reality through the exchange of experience. The society wants that modern methodologies will open possibilities for people with different types of intelligence, to seek alternative sources of information, allowing individualization of the learning process.

Modern education calls to establish individual routes for development for each person. This means that each person will determine his objectives, goals, ideals to achieve personal development, different from other people. These routes can be achieved through self-discovery and self-education provided through individual hard work based upon additional sources pre-established by the student.

At present education sciences deal with the development of educational standards, enriched with new scientific content. Experts indicate that the information provided for studies is not interiorized by the youth to the required extent and its assimilation is complicated and totally unfeasible. This phenomenon can be explained by the discrepancy occurred between the methodologies applied in the educational process and the psychological characteristics of the new generation, the expectations and even the needs of informational society.

Teachers today are against informative booming of students and pupils with answers, in order to prepare them for exams. The educational process must be different from a simple information delivery in which "our head is a perforated bucket through which holes the surrounding information flows within."[3] Teachers should understand that their role consists not only in efficiently storing information, but also in forming the students' ability to solve various professional and vital situations in order to achieve them in life.

Since sterile information flow is not received by youth, teachers are required to address the real problems of the new generation and to offer youth a framework to help them solve those. The information provided must be "dressed" in situations and contexts to help each person develop customized strategies of thinking to guide youth towards knowledge performances by the individual feeling of information.

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[2] *** (2010), *Focus on Higher Education in Europe 2010: The Impact of the Bologna Process*, http://eacea.ec.europa.eu/education/eurydice/documents/thematic_reports/122EN.pdf

[3] Karl Popper şi Konrad Lorenz (1997), *Viitorul este deschis*, Editura Trei, Bucureşti.

We must keep in mind that the computerization process of society emphasizes the reporting information towards existence. This aspect of modern society can be applied when we appropriate information by feelings. In other words, true knowledge can not be transmitted; they can be acquired and constructed by each person through his own efforts to understand, through experience and personal perception.

Because today's youth has primarily a visual-spatial and emotional thinking, he assimilates knowledge with emotional value, which is in conflict with the tradition of the teachers to transmit knowledge mainly through verbal channels, appealing to rational thinking. The present teacher's task is to help them discover and decipher the reality through different experiences in which reality takes different forms depending on the particularities of each person.

Education has become an attempt to influence, without guaranteeing the final result. The teacher became a mentor and a model of the experience of success or failure, of ideals approach and confrontation with non-values, of thinking and feeling mode.

In such a perspective is necessary to analyze the phenomenon of the computer revolution impact on education. We must recognize the contribution of new informational technologies in the formation of the society of knowledge and computerization.

Introducing new informational technologies imposed on society's informational globalization. Today, young people obtain information from various domains thanks to the Internet. The impact of new technologies upon education has changed the route of traditional communication and information; it imposes modernizing technologies in academic education and the modification of educational methods.

Current youth learns about the world around him on the Internet. It is obvious that the new type of knowledge is characterized by informational diversity and heterogeneity, by way of individual perception and lack of assessing information by eclecticism and originality. Current education will have to give up the system of systematical knowledge, organized and rigid, in favor of a huge field of information which offers the freedom to choose. The new generation of students is opting for the opportunity to personally decide how to achieve its development activities.

The new educational paradigm cultivates positive thinking (mental attitude with whom you manage to overcome obstacles and fulfill your dreams) and humanism (which places man and human values above all, cultivating the taste of meditating on the human condition in the world). Today's youth, willing to communicate, seeks to make friends through the Internet. The development of the computerized revolution conditioned youth employment to various social networks. These allow users to shape a personality many times different from the real one or to be anonymous. Knowing this aspect, the teacher needs to condition a good behavior, developing favorable interpersonal relationships and a positive socio-emotional climate, to promote students' qualities and abilities.

An inevitable consequence of changing the perception of the academic studies' mission treats learning activity as a process to knowledge production. In this context we can speak of a culture that cultivates tolerance regarding different points of view, trains creative thinking and promotes talent.

As we noted earlier, the society was exposed in a relatively short period of time to significant changes. Let's not forget the influence of media on our conscious and subconscious. Messages with a strong emotional intensity are transmitted more frequently in a short period of time. Acceleration of the rhythm of life, speed of information transmission has led humanity to the need of applying simplified thinking schemes, operational and intuitive. Consequently, the new methodology of education must keep the perspective of the overall changes that occurred at the conscious and subconscious level.

Education sciences, in the period of the society of knowledge, must resort to the media means and use the Internet to interact with the younger generation "in his language". It is recommended that teachers provide students with films and educational programs, games and interactive sites with educational character. Education must have sufficient sources to guide youth education through the Internet and to hold control of the information field.

During the current period, superior education students are taught to solve various problems related to professional activity. To facilitate this, teachers must provide students with creative thinking patterns of the great personalities. It is important to display in university education recordings with valuable national and international personalities.

Current education requires a change in the way of thinking and training to develop personal thinking. This means that at the current level of superior education the present methodology must involve interaction and cooperation of the young, take into account the over sizing information and active communication through the Internet, address the optimization of personal awareness through discussions and desynchronize of the educational process, to apply individualization of learning and motivation for personal development.

As mentioned in previous analysis, current technologies must develop creative and strategic thinking. This type of thinking works with information in the form of images and needs to accumulate logical alternatives related to an informative segment. The perspective of development of these intellectual skills are related to practical thinking and is structured through applicative exercises and solving problems.

Besides, we must take responsibility for the formation of student's moral character. Thus we will invest in the future of society and will contribute to it, so that the youth will be empathetic, optimistic, courageous, helpful, friendly and happy.

Finally it must be said that although at the foundation of the society of knowledge stands information and communications mediated by the computer, the place of the teacher is and will remain important.

Conclusions:

Following our study we found that, over the years, universities as a result of social progress have changed their mission, which determined the modification of contents and teaching methods. Education today must develop practical and creative thinking; allow differentiation of personal development and self-directed learning through modern information sources.

Analysis of changes in higher education from their apparition to date, allows us to say that it is natural and necessary to introduce changes in teaching methodology.

We found that, at this stage, is inevitable the change of educational interaction towards humanism, acceptance of divergent ideas and diversity in perception, the approach of connecting at the conscious and subconscious level.

The study results show that together with social progress it is necessary to improve academics, to modernize education methodology and the interaction strategies between teachers and students.

Following the study, we can conclude that the society of knowledge and computerization needs new educational methodology that will allow efficiency of the learning process. At present it is recommended that experts in education sciences approach the development of new methods, by doing a psychological analysis on thinking, perception and motivation of the persons from the society of knowledge and computerization.

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SECOND-LANGUAGE ACQUISITION AND THE SYSTEM OF EDUCATION

CAMELIA NEAGU[1]

Abstract:
As a branch of applied linguistics, language education or educational linguistics[2] *has had a long history dating back in ancient times. However, at present, under the influence of globalization, second-language acquisition*[3] *has become a sine qua non condition for any potential employee or employer in the knowledge society. Basically, democratic regimes and developing countries encourage language education which they regard as an important asset in the process of globalization. Moreover, the study of foreign languages significantly contributes to the development of any human being's personality and implicitly of any society by eliminating cultural biases and borders. Currently, countries which fail to understand the importance of second-language acquisition deprive their citizens of a key social and cultural development factor. Last but not least, we could say that at present the ability to speak English has become synonym with acquiring a universal language. In consequence, educational policies should seriously focus on the study of the new lingua franca*[4]*, i.e. English, while accepting as an undeniable possibility – given the rapidly changing political and economic environment – the fact that another language (such as Chinese or Spanish etc.) may replace English in time.*

Keywords*: language education, system of education, lingua franca, globalization, English for specific purposes.*

Introduction

The study of language acquisition implies the development of linguistic theories and also of pedagogical methods, which, in an ideal system of education, should complete each other and be correlated for the benefit of the potential foreign language users. In Romania, educational policies emphasize the importance of foreign language acquisition to a great extent. Still, in our opinion, this emphasis should be more strengthened in higher education, where the use of foreign languages for specific purposes is an instrument by which students and future researchers can have access to up-to-date information in their field of study.

Language is not a science in which all experts agree to what is right or wrong. Nor is there a court of critics or professors that has either the power or the ability to settle the controversial issues about language all the time. In short, there are no agreed-upon absolute concepts in the worlds of language.

It is both ungenerous and sometimes superficial to blame only the educational system, which is a carrier not a cause of the decline of our perception of a real language as this appears in digests, advertising, the radio, on television, in the gossip columns, picture magazines, comic books, the inspirational best-sellers and the cinema etc.

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[2] Bernard Spolsky and Francis M. Hult, The Handbook of Educational Linguistics, Singapore: Blackwell Publishing Ltd., 2010;

[3] According to Muriel Saville-Troike. Introducing Second Language Acquisition. Cambridge: Cambridge University Press: 2006, pag. 2, second-language acquisition "…refers both to the study of individuals and groups who are learning a language subsequent to learning their first one as young children, and to the process of learning that language. The additional language is called a **second language (L2)**, even though it may actually be the third, fourth, or tenth to be acquired. It is also commonly called a **target language (TL)**, which refers to any language that it the aim or goal of learning."

[4] See Ute Smit, English as a Lingua Franca in Higher Education. A Longitudinal Study of Classroom Discourse, Berlin/New York: Walter de Gruyter Gmbh&Co. KG, 2010.

It is true that many of our primary schools, through the system of mass-promotion, place a premium on mental laziness. It is also true that many of our high-schools proceed on the make-the-work-interesting-to-the-student theory – which hardly leads to the development of the intellect. Finally, it is true that the college, therefore, is forced to neglect its main function – which is to mentally produce mature leaders – in favour of performing the elementary education duties that are properly the province of the primary and secondary schools.

School is an instrument of our society and it also should be an agent of intellectual ferment. Unfortunately, school teaches the virtues of attentiveness to things, techniques, machines, spectator sports and mass amusement instead of teaching the virtues of attentiveness to knowledge, wisdom and the works of the creative imagination. It is also true that educators in primary schools no longer really teach the child the basic skills (how to read, write, speak, listen and figure), the non-possession of which works against the development of attention.

School – there are, of course, notable exceptions – has in general become a kind of asylum or a refuge rather than an educational institution. Our real scope is to keep adolescent boys and girls, regardless of educational aptitude, desire to study or lack of them, from running the streets, getting into trouble and becoming intolerable nuisance in the community. The easiest way to keep them willing to submit to the school's control is to provide for them a vast amount of "amusement" and work to do.

This seems a fair statement but if our culture does not desire to create rational men but rather producers and consumers, most young people today are not able to enter industry or other types of gainful employment. The best method of occupying the time of such young people is an important problem and the solution to this problem requires an extended educational period (not only 3 or 4 years in universities), regardless of the immediate value of the education as such. In our opinion, the extension of the educational schedule might prove a socially wise enterprise within modern societies.

Our system of education may have to depart from the usual academic and vocational disciplines if it is to appeal to most people in this country. It is clear that this conception of the schools is a realistic one. It simply tunes in on the wave-band of our society in general and in free countries like our own.

Increasing globalization has created a large need for people in the workplace who are able to communicate in multiple languages. Although the need to learn foreign languages is almost as old as human history itself, the origins of modern language education can be found in the study and teaching of Latin in the 17th century (dominant language of education, commerce, religion and government in much of the Western world), but it was displaced by French, Italian and English by the end of the 16th century.

The study of modern languages did not become part of the curriculum of European schools until the 18th century and it was based on the purely academic study of Latin (students of modern languages did much of the exercises, studying grammatical rules and translating abstract sentences; oral work was almost minimal).

Innovation in foreign language teaching began in the 19th century and became very rapid in the 20th century. The earliest applied linguists included Jean Manesca, Heinrich Gottfried Ollendorff and Henry Sweet. The last mentioned linguist was a key figure in establishing the applied linguistics tradition in language.

Older methods and approaches – such as the grammar translation method or direct method that had been used in the past (Otto Jespersen, Harold Palmer and Leonard Bloomfield) – were replaced by new methods corresponding to the new scientific advances. With these methods, students generate original and meaningful sentences to gain functional knowledge.

In our country, language education took place as a general school subject or in a specialized language school. There are many methods of teaching languages related to second-language acquisition theory. They refer to approach, method and technique. The structural view treats

language as a system of structurally related elements concerning grammar translation and audio-lingual method. Structural methods include the oral approach/situational language teaching.

A method consists of a plan for presenting the language material to be learned, which should be based upon a selective approach. The instructional system must be designed considering the objectives of the teaching/learning, how the content is to be selected and organized and the types of tasks to be performed; the roles of the students and the roles of the teachers.

Nowadays, blended learning combines face-to-face teaching with distance education frequently electronic, either computer-based or web-based. This has been a major point in the English language teaching over the last years.

When talking about language skills we mean listening, speaking, reading, writing and the use of that particular language; however, study skills and knowing how one learns have been applied to language classrooms with various results depending upon age, the level of knowledge within the surveyed classes and the aptitude to study a foreign language that some people may not possess.

In foreign language teaching pain and group work give opportunities for more students to participate more actively. Such activities also provide opportunities for peer teaching.

English has always become big business, perhaps the UK's richest natural resource, marketed with considerable skill and professionalism throughout the world. There are several reasons which explain its expansion: "...thanks to socio-historical developments, the military power exerted by English-speaking nations and, more recently, the socio-economic power of (English-dominated) international companies and organizations – English has become the main language of international relations and trade, international media and communications, international business and also academia. While the perspective domains are highly diverse, they are – as already reflected in the repeated use of 'international' – marked, on the one hand, by English in its function as lingua franca or common medium of communication amongst multilinguals /.../."[5]

In the last ten years, global setting of the English language has reached astonishing proportions from China's revolutionary English language policy to the publication of the Macquarie Dictionary of Australian English, as well as to the near-total Anglicization of international trade and politics, from OPEC to summitry.

We may say that language belongs to each one of us, to the child as much as to the professor. Everyone uses words even if nobody thinks of the words he/she uses. What is it about language that makes people so passionate and curious? The answer is that there is almost no aspect of our lives that is not touched by language. We live in and by language. We all speak and listen. We are all in some senses political, and so is language. We might consider that English is a universal language. The emergence of a language that could write the world is the fulfilment of a dream that goes back to the late 17th century and the beginnings of global consciousness itself.

Language is backed up by massive English-language training programmes, on international business that – in textbooks, language courses, video programmes and computerized instruction – is worth hundreds of millions of pounds to the economy of the UK. The English language is now one of Britain's most reliable exports, as Malcolm Bradbury stated. In other words today's *lingua franca* is an ideal British product "needing no workers and no work, no assembly lines and no assemble, no spare parts and very little servicing; it is used for the most intimate and most public services everywhere. We call it the English language…"[6] Any literate, educated person in the world is 'linguistically deprived' if he does not know English.

English is not simply a vital means of intercommunication for the scientific community, it also, almost unconsciously, provides the everyday basic vocabulary. Professor Yash Pal, a renowned scientist, noticed that many different standard terms are used in computer programmes and they have led to the creation of a jargon. In consequence, many speakers do not even notice that the common

[5] Ute Smit, op.cit., pag. 2.
[6] http://www.miguelmllop.com/practice/intermediate/readingcomprehension/theimportanceofenglish.pdf.

words they use are, in fact, English words. English has become the one foreign language that much of the world wants to learn. One basic force is an international need and desire to communicate. The more English-speaking the world becomes, the more important this language becomes to all societies. English is the language of the 'mass industries' – news-journalism, radio, film and television. Almost any international press conference held to disseminate information about an internationally significant event will be conducted in English.

The demands of modernization, technological change and international bank funding, still largely controlled by Anglo-American corporations, provide the main reason for global English, the language of the multinational corporations. Many multinational Japanese companies (like Nissan or Datsun) write international memoranda in English. In Kuwait, the university's language centre predominantly teaches English, much of it highly specialized.

The pressure to learn English in this environment is strictly commercial. A businessman who does not know English and who has to run to his bilingual secretary is at a serious competitive disadvantage. Everybody talks English and even the minutes of the meetings are written in English. Company executives take courses to improve their proficiency and, of course, they will warn you: "You wouldn't get a job at a certain level if you didn't speak good English." What is true of individuals and companies applies to countries, too. If people do not know English, they cannot benefit from multinational development programmes. The power of English is not confined to the invention and manufacture of new technology. All major corporations advertise and market their products in English.

English as the language of international pop music and mass entertainment is a worldwide phenomenon.

It is the non-linguistic forces – cultural, social, economic and political – that have made English the first world language in human history and instilled its driving force. Language is neutral, passive: only the uses to which it is put make it active. How comes that English can inspire astonishing affection not only among those who speak and write it as their mother tongue, but also among those for whom it is a foreign language? The richness and power of English was summarized in the 19th century by the great German philologist Jakob Grimm. The founder of comparative philology, Jakob Grimm, "... hazarded to guess more than three-quarters of a century ago that English would one day become the chief language of the world, and perhaps crown out several of the then principal idioms altogether. 'In wealth, wisdom and strict economy [he said] none of other living languages can vie with it.' "[7] But is it, in fact, "better", "superior", "more expressive", "richer" than other languages? English is highly idiomatic. On the other hand, the English language has three characteristics. The gender of every noun in modern English is determined by meaning and does not require a masculine, feminine or neuter article. The second practical quality of English is that it has a grammar of great simplicity and flexibility. Nouns and adjectives have highly simplified word-endings. Nouns can become verbs and verbs – nouns in a way that is impossible in other languages.

Above all, the great quality of English is its teeming vocabulary, 80% of which is foreign-born.

English as a world language is sustained by another elusive quality – its own peculiar genius. The arts of speech and literature have been perhaps the special contribution of the English people to European culture.

Today, in this new global state, English is probably finding more variety of expressivity and more local colour than at any time since its "golden age". Spoken and written, it offers a medium of almost limitless potential and surprise. As we can see, English, as a second language of many speakers in countries throughout the world, is more likely to survive to inevitable political changes of the future.

[7] H.L. Mencken.*The American Language*. New York: Cosimo, Inc., pag. 372.

As for our country educational system regarding foreign languages, especially English, researchers and professionals testified as to the existence of a language system, which is part of our education. This is the reason I am asking myself why our curricula use the foreign language mostly optional, sometimes only in the first year of education?

The main policy arguments in favour of promoting foreign language education are the need for multilingual workforce as well as intellectual and cultural benefits as a consequence of greater inclusion in global information.

Conclusions

All in all, it is vital for educational policies to include second-language acquisition among its main strategies. Thus, it would be desirable and advisable for foreign language teachers and professors to place the verbs *to think*, *to compare* and *to understand* at the core of the didactical process. Of similar importance it is that those who teach English / any other foreign language and those who lecture on language education should encourage learners to preserve their linguistic and cultural identity. In this respect, we would like to comment on the importance of translations for the dissemination of knowledge and the consolidation of cultural identities. Thanks to second-language acquisition (and we refer here to the effort of translators to adapt unknown texts to other more widespread languages), 'marginal' cultures (such as the Romanian culture) can be known all over the world. In this respect, we would like to quote George Steiner who noticed that "The new status of Eastern Europe has occasioned a veritable tide of translations into English and into the relevant languages. Czech, Polish, Hungarian and Romanian literature are beginning to reach the Anglo-American world-audience. In turn, Western texts, long forbidden, are being imported."[8]

Finally, we would like to underline the fact that today's knowledge society cannot exist outside second-language acquisition. In the ever continuously changing political and economic environment, culture – and together with it language learning – is permanently altered by the newly created concepts and devices. If English / Chinese / Spanish or any other language is spoken by the majority of the world population and gains the statute of a lingua franca in the future, perhaps the old myth of Babylon will become obsolete.

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THE COMMODIFICATION OF ACADEMIC RESEARCH AND THE KNOWLEDGE SOCIETY

MARIA CERNAT[1]

Abstract
The knowledge society is best defined as the society where production, distribution and use of knowledge play the central role in the social matrix. The possession of technological means of production has been replaced be the possession of useful knowledge, and most theorists embrace this change thinking it could offer us hope for a better future. But does it really contribute to the development of a better society? The main objective of my article is to offer a realistic answer to this question. The perpetuation of the capitalistic way of production in the academic world leads us to the situation where ideas and scientific articles are being commodified. In theory, the knowledge society is build on the idea of producing, disseminating and using information for the well being of the people. I claim that this is a very naïve perspective on how our current knowledge society is actually functioning. Since information is so easy to transfer one could expect that all the members of the society could benefit form it. As my article will show, this is not in fact the case. Not everybody is able to produce and use knowledge. Since what we are experiencing is the commodification of academic articles only few people are able to produce and use knowledge. This way the knowledge society becomes a closed society where only a privileged financial elite has access to the latest academic research.

Keywords: *academic research, academic freedom, commodification of ideas, knowledge society, commodification of academic articles*

Introduction

Cultural relativism started to erode humanities and social sciences foundation at the exact time where the free-market system entered the scene. In a previous article[2] I focused my attention on the role of the university in the era of a commodified knowledge. This article is a continuation of the idea that interesting as it may seem the term "knowledge society" is nothing but an appealing label for the "society of commodified information". There are optimistic perspectives on the role of the university in our relativistic and commercial society. For instance "this battles [the cultural ones] can be seen as renewing the moral purpose of the university as opposed to simple eroding the very possibility of the university having a moral purpose."[3] The author considers that the fact that nowadays universities are cosmopolitan is in fact an advantage, a challenge to be met:

"The university is the institution in the society most capable of linking the requirements of industry technology and market forces with the demands of citizenship. Given the enormous dependence of these forces on university based experts, the university is in fact in a position of strength, not of weakness. While it is true that the new production of knowledge is dominated by an instrumentalization of knowledge and that as a result the traditional role of the university has been undermined it is now in a position to serve social goals more fully than previously when other goals were more prominent."[4]

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[3] Gerard Delanty (2001) *Challenging Knowledge. The University in the Knowledge Society*, SHRE & Open University, p. 210.
[4] *Op. cit.* . p. 229.

While Delanty's analysis on the negative forces influencing today's universities – instrumentalism and relativism – is very precise and well documented, the methods the university is to survive the dominant market forces in order to fulfill social goals remains unclear. Simply expressing the desire that the university regains its freedom in the era of academic capitalism in order to become a key player in the global arena cannot count as a clear way out of the trap of instrumentalism and relativism. In Delanty's very optimistic perspective the university should offer us a sense of global citizenship helping to create a global community. The current realities shows just how far are we from such an ideal. The main purpose of my article is to show that transforming academic articles into a commodity transforms the global academia into an information market that has nothing to do with a meritocratic intellectual community. In the first section of my article I shall discuss some of the most controversial aspects surrounding the copyright of academic articles and also some of its most relevant effects on faculty members. In the second part of my paper I shall prove that Romanian academics as well as other academics are literally forced to publish their articles in internationally indexed journals. While this offers great visibility for academic research the access to such articles is restricted through very expensive fees. This creates a very unfair system of exclusion that is not at all justifiable in terms of production costs. The third section of my paper will be dedicated to the analysis of some of the most important social and academic effects of this capitalist way of academic texts production.

The copyright: a cluster of rights regarding abstract objects

The copyright laws refer to a very interesting type of objects: the ones that do not diminish through repeated use. The literature passionate reader may even claim that there are novels that revel their true beauty after several readings – that is after repeated uses. Having the possibility of collect a specific amount of money for every use of a *token* of an abstract object *type* seems like the best business one can imagine. No wonder the debates surrounding today's legislative efforts of protecting the intellectual property are so heated[5]. When academic texts were produced in the era of mechanical reproduction the publishing houses spent much money in the production and dissemination process. Once Internet has become a service available world wide the dissemination of academic articles is virtually free of charge. The huge opportunity provided by the world wide web was soon to be ignored by those trying to gain as much as possible from the intellectual work of academics. It is nowadays harder to protect the intellectual products and this is why the publishing houses and media corporations are desperately seeking more punitive and restrictive laws to protect their way making profit. This article is an attempt to focus on other values that should guide the academic life. If profit is all that is important a lot of other things such as meritocracy, inter-cultural dialogue, better communication and interactivity are lost. The Internet makes if harder for those profiting form the copyright laws to protect their abstract objects but it makes it so much easier for academics world wide to share and communicate their ideas. There are probably exceptions to this rule: the high costs of research in natural science makes it more acceptable to protect the scientific findings. But this is clearly not the case for humanities or social sciences. On the contrary: the incredible communication platform represented by the internet is actually a mean of progress. Humanities and social sciences are actually gaining form the constant dialogue between academics and any tool facilitating such dialogue should be welcomed. If more academics world wide could gain access to excellent journals in humanities and social science that it would be easier for a great number of faculty members belonging to very different cultural environments to engage in the

[5] In 2012 Romania along with many other European countries signed Anti-Counterfeiting Trade Agreement – a series of regulations protecting the intellectual property. This decision was criticized by important organizations in the civil society since it is though to be a way of protecting media corporations and not the public or the artists.

dialogue. As long as it is so expensive to read the mainstream academic journals this is only a remote ideal.

As Andrew Alexandra[6] points out, when talking about copyright there are two types of rights involved: "control" rights (the possibility that someone is recognized as the author of a certain paper; the right protecting someone's text from being altered or used against the author's intentions) and "commodity" rights (the right to profit from the reproduction and dissemination of the article; the right to transfer the right to profit from the reproduction and dissemination of written articles). In the era of mechanical reproduction it was almost impossible to reach the public without the aid of a publishing house. The use of Internet made it possible to reach the public directly. But things were not so simple. Instead of having publishing houses we have international databases indexing academic journals and imposing restrictive access through expensive fees. Alexandra's claim that "the development of electronic publishing on the internet, however, means that in academic publishing as elsewhere it is becoming possible to cut out the "middleman" who have mediated between producers and consumers: the original holders of copyright are increasingly in a position to send their work directly to readers." But this is not the case of academic articles. As I mentioned earlier, most prestigious journals are now indexed in several databases that gain important amounts of money from the reproduction and dissemination of intellectual labor. So the "middle man" was not at all easy to be "cut off". The producer of academic text is often the last to be profiting from its own intellectual labor. Some universities consider that as long as an academic published papers while being the university employee, he has no right to profit from the reproduction and dissemination of its work. The famous academic incentive is "publish or perish", so, most academics are compelled to publish as many articles as possible. But, they are not always allowed to profit from the reproduction and distribution of their texts. The university they work in takes all the credit and all the profit from the academic copyrighted material.

There are important "side-effects" to the way nowadays copyright laws are conceived. First of all there ethically controversial aspects related to the fact that academics are compelled to publish as many papers as possible. But this is not for the sole purpose of intellectual progress. In many cases the university they work in is the only one to profit from the right reproduction and dissemination of academic articles. If this is the case it is only fair to assume that more articles means more money and not necessarily more scientific progress. But this is not the most negative of the side-effects I am trying to highlight here. The biggest problem of this way of transforming the academic texts into an information market is the system of exclusions it generates. In 2011 the Romanian Central University Library was able offer it's readers access to the most important academic databases such as Sage, Francis Taylor, Emerald, etc. Up to that point it was virtually impossible for Romanian academics to gain access to the latest research studies since the access fees for those databases were very expensive. Even now, only Romanian academics living in Bucharest can benefit form this information platform. This example touches the most controversial aspect related to the way the copyright laws are conceived: academics living in poor countries do no have access to latest results in scientific research since they cannot read the most important academic journals in their field of expertise. The media corporations, the owners of international databases and publishing houses are surely benefiting form this way of transforming the knowledge society into a commodified information society. But the rest of the people engaged in this system, academics forced to publish even though they cannot fully profit form their intellectual labor, the academics living in poor countries are not.

[6] Andrew Alexandra (2002) „Academic personality and the Commodification of Academic Texts", *Ethics of Information and Technology*, 4, 279–276.

The producers of knowledge are located in the richest countries and it seems they have no intention in sharing their findings and ideas with less fortunate peers living in poor countries. Gaining access to the academic market of ideas is a question of how much money you have in your pocket not how smart you are. The commodification of academic texts leaves outside the mainstream research a lot of brilliant academics lacking the financial resources to become an important players in the intellectual arena. The intellectual community is thought to be a place were meritocracy is represented at its best. One could expect that once the production costs of reproducing academic text lowered so much as a result on internet connection the a digital academic environment would welcome academics lacking the financial resources of their peers living in rich countries. This was not the case.

In fact today's regulations actually fight against the possibilities our current technology is offering us. The Anti-Counterfeiting Trade Agreement is an international law protecting the intellectual property that has been the subject of very pertinent criticism. First of all the Wikileaks site provided evidence that most countries were negotiating a law protecting the intellectual property behind closed doors. The negotiations were secret up to may 2008 when the text of the law was published on the Internet. Soon after this disclosure the mainstream media treated the subject extensively. The main problem is the internet is a global network and all the problems related to it are also global. Different states have only local solutions to a global problem. The ACTA was the subject of secret negotiations between states partly because there is no international institution having the task of generating international regulation regarding the use of the internet.[7] And, since this is an international problem, local solutions or solutions resulting from secret negotiations between states are clearly no long term solutions. Perhaps this is the typical case were technologies move faster than our institutions ability to regulate them. But this is no excuse for the lack of an international debate on the ethical issues regarding the copyright laws in general and those regarding academic texts in particular.

The case of Romanian academics

In 2011 a new law of national education was adopted. This law changed entirely the evaluation and promotion criteria for the Romanian academics. What I am trying to emphasize in section of my article is that under the current regulations only academic texts published in internationally indexed journals are acceptable in order to get a good evaluation. If we look at the promotion criteria we find out that all that matters if the research activity. Under the previous law[8] the teaching activity used to count for something in the academic evaluation.[9] The first criterion of evaluation consisted in the teaching activity performance. The actual law says virtually nothing about one of the most important academic activity. The quality-assurance process presupposes that every academic should have the self-evaluation, peer evaluation and the student evaluation. But all those evaluations are not really relevant to the promotion criteria. The institution authorized to establish the promotion criteria for the academics, The National Council for the Certification of Academic Titles, Certificates and Diplomas, does not mention anything about the teaching activity. All the criteria regard the research activity and especially the publication of articles in internationally indexed journals. The whole burden of getting access to the international databases is put on the shoulders of the universities. They have to grant their employees a good research environment by providing

[7] Most of the civil rights activists harshly criticized this trade agreement. What is interesting is that so much effort is being put to the task of protecting intellectual property and very little is being done against more violent crimes committed on the internet. No international negotiation regarding child pornography on the internet is yet being done. Once the internet allows people to connect world wide we worry so much about the media corporations profits and so little about the children. This fact cast a very disappointing light on our current political leaders priorities really are.

[8] http://legislatie.resurse-pentru-democratie.org/84_1995.php

[9] www.aracis.ro/uploads/media/Metodologie_aprobata_1418-2006.pdf

access to the international databases. Moreover, there are only a few databases for every scientific field recognized by the But is this requirement realistic? First of all there is a problem regarding the restrictive number of databases for each theoretical field. For example, if someone whishes to get promoted in sociology there are only five databases recognized as being relevant for that particular theoretical field. Sage publications, Emerald, Oxford Journals are only few examples of databases that are not present in the short list selected for the above mentioned theoretical field. This is not really a problem since the most important journals are indexed in multiple databases. But the most important problem is how to grant access to all academics to the research resources. As stated earlier this burden is placed exclusively on the university's shoulders. If all the universities in Romania were private, this would probably make sense, but, since most of them are publicly funded than this doesn't seem financially prudent. The best way for granting access to international academic databases is through a publicly funded national program. This way a single subscription would be bought for all the public universities. But such a decision solves the problem only for our country. Nobody can argue that there are not brilliant academics living in poor countries. In the era of mechanical reproduction of academic text perhaps most of them relied on their best fortune or other arbitrary forces. Today's advances in technology allows the dissemination of academic texts world wide. Unfortunately the place of ideological restriction has been taken by the financial restriction. Romanian recent history was market by a very dark episode where totalitarianism prevented everyone trying to read and do research especially in the humanities or social sciences field form getting to the foreign academic journals. When trying to write an article most people spent an incredible amount of time often risking their freedom to gain access to mainstream academic journals. Unfortunately things did not dramatically change once democratic regimes were installed in Romania. There are of course huge differences. We are not prosecuted for reading mainstream journals and with the help of the friends living in richer countries we can finally document our articles. The current trend resulting from Romanian academic regulation is to gain more visibility for the research done in our country. Nobody can argue that this is in fact a very positive aspiration. But the financial restrictions Romanian academics have to face have to be taken into account.

3. Conclusions

The very low disseminating costs of academic articles in the areas of humanities or social sciences should make us hope for a virtual meritocratic academic community. The financial restrictions imposed to academics living in poor countries represents a clear obstacle preventing us from achieving this goal. The negotiations regarding the future fate of academic articles should not be the result of negotiations between states behind closed doors. Since so much energy is being mobilized to protect the intellectual property it is only fair to assume that part of that energy should be spent in order to find better ways of sharing ideas and research findings among academics world wide. Maybe such an endeavor would not be to the benefit of publishing houses but values like scientific progress and inter-cultural dialogue would be, by no means, better protected in a real knowledge society. Emphasizing only the protection and not the sharing of intellectual property is the best way to build a commercial society where the money are the ultimate value everybody should accept. Transforming the academic texts and journals form an academic arena where ideas are exchanged into a information market that privileges only those academics rich enough to participate to the dialogue is by no means the best way to build the "knowledge" society.

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Online resources:

- http://legislatie.resurse-pentru-democratie.org/84_1995.php
- www.aracis.ro/uploads/media/Metodologie_aprobata_1418-2006.pdf

LEADERSHIP AND CHANGE, A MUST FOR CRISIS PERIOD IN HIGHER EDUCATION INSTITUTIONS

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Abstract
Leadership is always a matter of focus for both scholars, private and public institutions, especially nowadays when the whole planet is suffering from a worldwide financial crisis, which has lead to an international uncertainty. The present drastic changes of the social environment forced higher education institutions to respond and this conducted to the appearance of the leadership change issue. Current times can be considered as very difficult ones for educational leaders, especially since they are continuously faced with shifting environments, new provocations, new stakes and in the same time, new threats. In order to remain competitive in the global market and also in order to become prepared for the changing international environment, academic leaders must change. The present financial crisis is shaped by a sense of urgency and reality. Due to the fact that it affects plenty of people and various countries, it is also characterized by transboundary effects. Taking into consideration these circumstances, the necessity for quick crisis solution occurs. Accordingly, the aim of this project is to investigate the leadership problem in the academic education area during the present financial crisis. The researcher found it appealing to study the effects of external circumstances on higher education leadership. The conducted analysis discusses possible guidelines for a higher education leader to use especially in crisis situations as nowadays. The researcher plans to answer the following question: what must be analyzed when developing a model or method that can be used as guidance when leading in crisis times?

Keywords: *leadership, crisis, higher education,academic, change.*

Introduction

The concept of leadership is still of actuality and importance[3], in spite of "its too many definitions, and deliberation, all contain some common process elements like personal commitment, relationship building, vision creation, ethics, and vision into reality as few examples"[4].

The contemporary world is defined by complexity and precipitation, shifting values, and therefore a change in crises. According to Jackson & Parry, "leadership represents the process of influencing all the activities that a certain department of human resources makes towards achievement an objective"[5]. Another aspect that should be taken into consideration is the interpersonal process between a leader and his followers. Lundgren sees leadership as "a process made up of three factors: leaders, followers, and the relationship between these two factors"[6].

For a leader to be able to influence followers, a basic method is to "create a vision, since this is the only manner to have a realistic, credible view, attractive future for the organization"[7]. This can

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[3] Bennis, Warren and Burt Nanus, *Leaders: Strategies for Taking Charge,* Collins Business Essentials, 2007.
[4] Zomorrodian, Asghar, "New Approach to Strategic Planning: the Impact of Leadership and Culture on Plan Implantation via the three Cs: Cooperation, Collaboration and Coordination", Proceedings of ASBBS, Volume 18, Number 1, Las Vegas, (2011): 1128.
[5] Jackson & Parry, *A Very Short, Fairly Interesting and Reasonably Cheap Book About Studying Leadership.* (London: SAGE Publications, 2008) 12-13.
[6] Lundgren, Mikael, *Lecture Leadership and rhetoric*, *An introduction to classical rhetoric*, Kalmar: Linnaeus University, 2010.
[7] Bennis, Warren and Burt Nanus, *Leaders: Strategies for Taking Charge*, (Collins Business Essentials, 2007): 82.

be applied to both academic organizations and to business ones as well. Based on the above issued mentioned, the problem of this article is that *higher education institutions must try and achieve successful leadership for achieving environmental competitiveness and increase their performance on crisis period.*

Due to this feeling that the crisis is global, due to this change of the character of a crisis, solutions must be found. Thus, a change in handling a crisis becomes a must. Hence, the present article contributes to this issue by focusing on the principle of academic crisis leadership.

The major objective of the present analysis is to determinate the necessary tools and techniques in order to guarantee successful higher education leadership during crisis period. Secondary research objectives are: to find out leader and employee perception about change and leadership through crisis; to determine, through literature review, the key incursions that conducted to a successful leadership redesign, to evaluate the implementation of leadership model in crisis period within the higher education institutions and to observe leadership change in crisis period within academic institutions.

The main purpose of this article is to carefully examine the leadership conducted in crisis times. The researcher's major intention is to provide/ set up a model that can be of great use as guidance for an academic leader who finds himself/ herself leading in crisis situations. Also, the leadership redesign must be implemented in higher education institutions, since they are undergoing obscure times with a very confused vision of the future[8].

Implementation of the study

In this part the researcher will explain and justify the approach to meet his final aim. Also, the method for the gathering of data for the research will be presented.

Background

The Asia Crisis (1997) and also the Russian Default Crisis (1998), represent the biggest two crisis that the whole world ever experienced, apart from the financial crisis of 2007/2008 which was the third major financial crisis which occurred during the last eleven years. The present international financial crisis appeared in the United States of America, but its effects have been witnessed by numerous instances globally.

On the national level, Romania, a developing country has also been affected by this crisis. Thus, bad consequences have been experienced by institutions nationwide. The public sector has been particularly exposed to the financial crisis worldwide and the Romanian public institutions are no exceptions.

Accordingly, Romanian higher education institutions have been exposed straightly to the crisis, and key implications for Higher Education have been: harsh public cuts, the cancelation of new tenure posts, the suppression of many currently offered tenure posts; the decreasing of public investments and the reduction of private funds donations or cooperation from behalf of a tormented private sector, donations meant for research, development and testing. Thus, as economic troubles started to develop and put its mark on the academic world, academic leadership's abilities and structure[9] were questioned.

In this uncertain context, the employees of the higher education institutions unexpectedly found themselves within a medium that is highly changing day the day as a consequence of the crisis. It is clear nowadays that these changes caused an insecurity, which conducted to a certain sensation of vulnerability of the employees due to the troublesome situation. Even at present, it is appropriate

[8] Guigné, Anne de, *"2010, année de convalescence pour les banques". Le Figaro*, February 15, 2010.

[9] Kabouridis Georgios.& Kakarelidis, George, "Academic leadership in Greek higher educational institutions under economic and social crisis", 2nd WIETE Annual Conference on Engineering and Technology Education, Pattaya, (2011):70.

to admit that higher education employees are not secure about their work especially now, when things are drastically changing.

In this crisis period, when an employee does not feel secure, he/she may develop an imperative request of support from the nearest leader be it rector, dean, a leader from the Senate. Accordingly, academic leadership in crisis times requires "consultation, reflection, consensus, and a process orientation"[10], the 3Es being stressed: "efficiency, effectiveness, and economy as the leading values in the governance of public higher education"[11]. According to De Boer and Huisman, three variants can at the same time be found in a single university: oriented towards efficiency, oriented towards market and oriented towards users[12]. Human resources inevitably request or search guidance in these situations. Whether as citizens or as academic institutions employees, most of the time people are looking for somebody to present them ways to proceed, make up a pattern for them to act in accordance with and to generate meaning for problems they face day by day. Be it consciously or unconsciously, willingly or unwillingly, academic employees need a person whom to follow in both secure and unsecure times, they need a *leader*. Also, the academic organization should never be seen as a closed system. Thus, a higher education institution can be affected not only by internal factors but also by external conjunctures[13]. In this respect, the researcher considered it interesting to analyze academic leadership in unsecure times and explore the manner how a leader in a higher education institution affected by the crisis may act. The main question resides in the fact of whether or not leadership differs in periods characterized by crisis or stability.

Methodologyof the study

The research will be highly analytic and it will have a qualitative nature. The major purpose is to establish both challenges and determinants that conduct academic leadership change in crisis time, and to wisely manage these factors in stimulating higher education leadership and thus reinforcing the successful performing of crisis leadership.

Qualitative study represents an exploratory research which tries to examine a less known area, inspect the major dimensions of an issue, make suppositions, and comprehend outcomes or operational research due to in-depth analysis of interviewee responses either in a group or single. Thus, the researcher interviewed six higher education institution employees and their leader. The interviews held were a combination between in-person interviews, telephone interviews and correspondence over email. In the table below all the interviewees are being presented:

Table 1. Presentation of the interviewees

	Gender	**Education**	**Position within the educational institution**	**Prior experience in educational institution**	**Type of Interview**
The leader	M	PhD.	Leader of the department	Yes, almost 30 years	In person
Interviewee A	M	PhD.	Manager	Yes, almost 20 years	In person
Interviewee B	F	PhD.	Manager	Yes, >20 years	phone + email

[10] Ferren, Ann S., Kennan,William R. and Lerch, Sebastian H., "Reconciling corporate and academic cultures". *Peer Review*, 3, 3, (2001): 9-11.

[11] Currie, Jan, De Angelis, Richard, De Boer, Harry, Huisman, Jeroen and Lacotte, Claude, *Globalizing practices and university responses: European and Anglo-American differences*. Westport, Conneticut: London: Praeger, 2003.

[12] De Boer, Harry and Huisman, Jeroen, "The New Public Management in Dutch Universities". In: *Toward a New Model of Governance for Universities: A Comparative View.* Edited by Braun, Dietmar and Merrien, Francois-X., London: Jessica Kingsley Publishers Ltd., 1999.

[13] Hersey Paul & Blanchard Ken, *Managment of Organizational Behavior: Utilizing human resources Fourth edition.* (N.J: Prentice-Hall, Inc, 1982): 6-7.

Interviewee C	M	PhD.	Custom manager	Yes, >30 years	phone
Interviewee D	M	PhD.	Custom manager	Yes, many years	phone + email
Interviewee E	F	PhD.	Custom manager	Yes, many years	phone + email
Interviewee F	M	PhD.	Custom manager	Yes, >30 years	phone + email

Benefits of the study

On the one hand, for nowadays academic leaders, practitioners who want to improve and this change their leadership style, the benefits of the study are:

It offers a framework as far as academic leadership is concerned.

It identifies the relevant characteristics for a crisis academic leader.

It makes people become aware of challenges encountered in the change of academic leadership in crisis period and also getting abilities in order to manage them. This should lead to trying to avoid challenges by acting proactive.

It is meant to back higher education institutions which have already begun the leadership change, but are facing problems, to distinguish domains that have not been paid enough attention while redesign leadership. In this manner, an educational institution can pin point the domains of disturbance and thus aspiring to solving the problems.

Since most academic employees are affected by the decisions made by their leaders, this research might be useful for academic leaders to improve their crisis leadership skills, especially since "the ever-increasing complexity and interdependence of today's world calls for a critical transformation in leadership"[14].

On the other hand, although the hereby study does not pretend to be exhaustive it does intend to analyze the most important literature written on the researched issue, which can be for the benefit of the researchers. Thus, for researchers a benefit of the study is the fact that it provides a framework for the crisis leadership within a higher education institution, which is done through a literature review and also through empirical study.

According to the above mentioned framework the author evaluated the implementation of crisis leadership within higher education institution.

The research identifies domains for further analysis, and thus can be seen as a beginning or commencement for further research.

Limitations

As the researcher has already mentioned, the present crisis is still an ongoing process and even at present, its outcome remains unclear. In the same time, the crisis is also shaped by a high turmoil, an enormous number of parties affected, as well as high degree of various perceptions. Mainly because of these issues, the researcher finds it necessary to constrain the analyzed objective of his work and therefore to establish some concrete limitations.

First of all, the researcher has chosen to investigate the impact the current crisis period has on a specific higher education institution. The focus of this study lies thus, on the leadership conducted in a specific University situated in Timisoara, Romania. In this purpose, the researcher has studied the leader of the educational institution and some selected employees.

Another restriction the researcher finds and wants to mention consists of the fact that the current crisis is still going on, so is still in progress. Hence, the necessity arises that most of the information gathered, which represents a basis for the study in the article, only makes reference to the data available until the first of January 2012. The main issue is the fact that, in a crisis changes easily

[14] Yip, J., Ernst, Ch. & Campbell, M., "Boundary spanning leadership: Perspectives from the executive suite", *A Center for Creative Leadership White Paper*. (2011): 4.

occur daily, an interruption in information collection being rather essential to maintain the composition and thematic consistency of the article.

Due to the complexity of the whole subject, another critic regard on the present work entails that the various opinions presented in the analysis comprises only the major issues of leadership. Therefore, the researcher disregarded issues which can be seen only as peripheral matters. Hence, the researcher decided to focus in the evaluation of the academic leadership of the West University of Timisoara in the crisis on several major issues, out of which the most important is the leadership aspect.

An additional restriction of the research is represented by the fact that leadership is not an issue which can be expressed by numbers. Moreover, findings concerning the leadership problem in this research cannot be quantified by clear measurements. Additionally, we transfer classic analytical principles of crisis leadership to the present crisis. Weick considers that this transformation can limit the sense making if the primary frames of references are not suitable to the present situation[15]. In our case, this restriction could lead to misjudgments and distorted results.

The last critics the researcher would like to mention, is the fact that the current work focuses on examining the leadership issue in the crisis from the perception of one academic institution from Timisoara.

Summary of the empirical findings

The analyzed participants have been working for a long time in the academic sector and during their careers they accumulated personal experience which has contributed to their personal maturity.

The leader was described as an emotional and optimistic scholar. All employees consider leadership a relational art especially at the academic level, employees being offered plenty of freedom of action in order to accomplish their tasks. Because of the uncertainty that the crisis created, took place a change of focus on tasks, which in return implemented a change of the academic leadership. Part of the interviewees seemed to be satisfied with the leadership so far, while others asked for a different leadership approach, mainly because the uncertainty affected them. The leader did see this request and accordingly, shifted his focus, even if not for all cases. The academic leader firmly thinks that leadership is shaped by circumstances, but he states that his openness and honesty in relationships does not change due to crisis times.

The leader and his personality traits

The leader described himself, and was described by interviewees A, B, D and F, mostly as an innovating person and therefore quite focused on creating new perspectives for the university. Further on, other characteristics associated with the leader were optimistic and self-confident. Accordingly, the leader was perceived as owning a great amount of self-knowledge, thing that the employees confirmed as well. After discussing several times with the leader, his statements about being positive and optimistic were confirmed. In the same time, he appeared as a helpful person, a finding confirmed also by interviewee D who stated that the leader is very interested about his colleagues.

During the research, several studies were analyzed, researches that implied certain features that a leader should have, such as: self-confidence, stress tolerance, engagement and knowledge. A leader, who appears to be self-confident and positive influences and inspires followers to achieve goals. As an employee, it is easy to listen to and to be impacted by a leader who is both positive and optimistic. In our case, due to the leader's long experience within academic leading positions, we are not entitled to question his knowledge. Therefore, we take for granted that the leader has experience

[15] Weick, Karl, Sutcliffe, Kathleen M. & Obstfeld, David, "Organizing and the process of sense making", *Organization Science*, Vol. 16, No. 4, (2005):409-421.

and knowledge in academic leadership, which, according to Yukl, is a must for a leader[16]. Being an innovative person implies that a person is very motivated and creates new values of new products and services according to the crisis period. Interviewee A talked about this feature of the leader by confirming the leader's necessity of constantly being triggered and challenged. The same person also claims that the leader transfers his innovational spirit to the other members.

We realized that all interviewees perceive the leader in slightly different ways. This is natural, since various perceptions of a person's character represent a consequence of the individual upbringings and backgrounds. As a consequence, the employees are impacted differently by the personality traits of the academic leader.

The effect of external circumstances

Researchers consider the external circumstances, in our case, the financial crisis, affects the stability of the institution. Changes appeared in this stability will in turn affect the other subsystems, the academic leader and the employees, and all these will have high impact on leadership. Most of the time, similar effects of change in the stability are to be found both in the leader and the follower's acts. On the one hand, when everything is stable, both leader and followers are confident, which makes leadership use either "supportive" or "delegating" style. On the other hand, when in crisis, negative effects can occur, from uncertainty to insecurity.

We consider that the pyramid of Maslow can be easily evaluated in situations of crisis. The Maslow theory proves that the change in the needs of the followers because of a situation of uncertainty/crisis implies a leadership change. It is vital for every person affected by crisis to try and get a sentiment of security. Crisis times could lead to the pyramid's dislodgement and thus turning unstable due to a change in the needs of the academic employees. In this context, the main goal of the academic leader is to maintain the pyramid stable all the time, and be sure that his colleagues/employees are secured and have a sense of belonging to the University. The moment when the leader senses a change in the needs of the employees, he or she must step back and reconsider the aims of the academic leadership. The employees from the study are mature and ambitious and this signifies that their needs of self- esteem are very high in stable time. Taking this into consideration, it is highly important for the leader to keep the basic needs in mind when leading his followers in crisis times in order to keep the employees in a steady level of needs. The University where the study was done, did not discharge anyone because of the crisis up to the date when the research was conducted, which means that the major basic needs (psychological, feelings of security and belonging) of the employees have been assured.

For achieving these feelings, employees must find in their leader empathy and desire to discuss and also answer questions. According to the data gathered, the leader manages this task well. According to the interviewed employees, the leader took the time to answer general concern when the situation requested it, and showed support. Nevertheless, some feelings of discontentment were traced in some statements about the leadership. According to these statements, the leader did not, in all cases, consider the security of the Maslow pyramid.

Papworth, Milne and Boat state that the leader has to take on a flexible style of leading[17]. This comes in opposition to the basic fact that a leader must lead consistently, and use a single style of leadership in similar situations. The leader states that he is able to change his leadership style when needed, but firmly adds that his openness and honesty represent the basis of his leadership.

[16] Yukl Gary A., "Managerial Leadership: A Review of Theory and Research", *Journal of Managment* Vol. 15, No. 2, (1989):251-289.

[17] Papworth, Milne & Boak. "An exploratory content analysis on situational leadership". *Journal of Management Development;* Vol. 28 No. 7, (2009):593-606.

The degree of maturity of the employees

The degree of maturity detected within the persons who took part to the study is quite similar. Judging from the answers received, all employees seem to be self-confident and looking for challenges to improve their results. Interviewees C, D and F stated that the daily tasks are done under high proper responsibility without much interaction with the leader. Also, employee E states that she takes proper initiatives, while employee B goes even further by designating herself manager in need.

All interviewed employees appear to have great experience, high education and well-reasoned answers to our questions, reason for which we will put them all in the highest maturity stage when the external world is stable.

When speaking about the present crisis time it appeared that interviewees A and E need greater support from the academic leader. Thus, according to interviewee A, during the worst times he felt a need for stronger personal support from the leader. Interviewee E stated to have desired for greater clearance. According to the theory of situational leadership this high support from the leader implies a decrease in the degree of maturity of the follower. Employee F said that more structure in the objectives performance would have been advisable but did not affect him very much. Interviewee B and C have also been impacted by the crisis times, but did not want a growing need of support to the same extent.

CONCLUSIONS

In this part of the article, the researcher draws conclusions from his findings and summarizes them in order to respond to the goal of this research. Also he presents further findings that are of high interest even if they do not meet the purpose of this particular research.

In analyzing the leadership in crisis situations, firstly the researcher referred to the impact of external circumstances. Thus, it was found that in the outside world, crisis is interfering in the internal institutional stability negatively. As a consequence, the employees within the higher education institutions are affected which in exchange affect their performance and thus the entire institution. From the research, it was found out that the degree of maturity of the employees tends to decrease when crisis strikes and times become unstable. The crisis and unpredictable times from the outside of the higher education institution makes the employees experience the feeling of insecurity and in this particular case, their characteristic basic needs are no longer satisfied.

Secondly, the researcher referred to the impact of personality traits of the leader. According to the research, it appears that the personality characteristics of the leader have effects on the employees. In the same time, it was found out that the employees see the leader in quite various ways, and the researcher though this was due to the fact that they had different upbringings and backgrounds. Accordingly, the features of the leader have different impact on various people; a characteristic that affects one employee in a negative way can affect another employee positively.

The researcher also established a guideline to leaders when leading in crisis times. It was found that it is the responsibility of the leader to equilibrate the exterior world with the inner educational organization in order to keep it stable in uncertain times. By this, the employees are being restored confidence of their security and of their basic needs being satisfied. Also, the leader must be aware of that he or she has personality characteristics that affect the other employees. It is of high relevance that a leader identifies which personality characteristics affect each employee and to what extent. If the leader plans to use these personality characteristics efficiently, the leader would stress the ones recognized as having positive effects on the employee and minimize the traits that may be conceived as negative. This knowledge will be of great advantage for the leader when motivating his employees to perform and to continue to satisfy higher needs.

In this period of crisis, when the degree of maturity of an employee is constantly decreasing, it is of major relevance for the leader to have recognized his or her personality characteristics that are of high importance for the employee. If the academic leader does this, he/she has a better chance of

helping the employee to increase his or her degree of maturity. At the moment when the maturity degree gets back to normal, the former internal institutional stability is being re-established.

When analyzing situational leadership as it has been described by Hersey and Blanchard the researcher tended to add some particularities to the theory. Thus, since the original theory does not make reference to the impact of external circumstances, or to the impact the personality characteristics of a leader have, we consider that the first theory must be completed. After studying the conclusions from this research, the researcher created an adding of the original theory. Thus, the existing model by Hersey and Blanchard was completed by two things: the impact of external factors and personality features of a leader.

This new modified model can offer a general framework for the leader in terms of academic leadership in crisis times. This model can be of use for any leader who wants to adapt or redesign his or her leadership in order to perfectly adjust it in crisis times. In this study, this modified model was used in order to gain a full perspective on the leadership conducted in the higher education institution of study.

It is of high importance for a leader to try and be flexible without having preconceived opinions about which leadership style to use. Thus, it is of great importance for the leader to pay attention to each and every circumstance and recognize each employee and external environment conditions for being able to correctly choose the leadership style.

It was proved that the relationships between the academic leader and the employees in crisis times were very different. The researcher found from the study that there is a great diversity in the relationships between the leader and his employees, and this is a rather common situation. In a work relationship employees and leaders affect each other. How well the relationship proves to develop is partly a result of the personality traits of the employees, the degree of maturity, the conducted leadership, internal circumstances within the higher education institution, or simply a match of different personalities.

One thing of great interest to look further into could be the effects on the entire academic institution if the leader has different relationships with the employees. We thus recommend the Leader-member exchange (LMX) theory by Graen George and Uhl-Bien Mary for further research.

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"EUROPE NORMAL" OR "EUROPE CRISIS": A CULTURAL CONSTRUCT DRILLED INTO POPULATION?

DRAGOS LUCIAN IVAN[1]

Abstract

The unequal weighting of cultural views within the current European context stemmed largely from a preference for more quantitative type analysis which lack the ability to explain the changes that lead to today's reality and tomorrow's future. We argue that the demographic formation of today's European society has been accompanied by the formation of a new type of cultural model. The contrast between the "Europe normal" as we were used to perceived Europe and "Europe crisis" as currently Europe is depicted clearly depends also on a change in the cultural construct . We argue that the development of a new cultural model has been accompanied by a new type of population development. It can be seen that in its pervasiveness, cultural change, threatens to undermine economic development, inscribed in the European policy. The current more robust cultural model comprises the cultural life of the European citizen. This study wishes to fill a gap in today's research. We desire to widen the scope so as to capture the place of the cultural European model within the order of things which is no longer clearly fixed and legitimated by the same binding cultural system of beliefs and values. This abstract is naturally a sketch and deliberately so, but the study promises to be less condensed and more complex. We seek to indicate central and pertinent developments in the European framework.

Keywords: *cultural model transition population European*

Introduction

Few areas need more expanding than the study of population in the current context of globalization and the current economic crisis. The EU is confronting an economic crisis, but which has deeper roots in the social. It is our opinion that this is the starting point of an economic crisis with roots into a social crisis. If any research can have the desire to attempt to chart the complex map of population in the context of globalization it needs to employ systematic and different approaches to any research. Until now the study of demography and cultural studies have been selectively used according to the way in which the researcher has perceived reality. We wish to encourage research on population based on the clashes and common ground between demographic research and the research of cultural models that impose a certain type of behavior. Albeit we consider necessary that in this context of trying to use such distinctive methodologies we consider it necessary to exercise more cautiously and conjecturally this type of research. The expected overall result should materialize in a synoptic view on where we are now and where it is likely for the current context to be going. By understanding the importance of a cultural model in people' life we can forecast their future decisions and we can better apply and create policies meant to foster social cohesion and social support, which might cure the current social crisis with a powerful impact on the economic. Europe has to deal with the aging of population which leads to increase social spending, in a context of shrinking working force, which means less small and medium business and less money from taxes. There have been voices that lobby for a shift from the European continent to the Asian and American continent. Their power has a population source and many are keen on researching the new "celebrities" in the current international scene. In the context of globalization we still believe in the importance of the EU as a global player, backing the following statement" Europe has been the

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continent that built the first economical region of the world. An economical edifice raised gradually, with a purely pragmatic attitude in mind, so much so that its allure grew in time"[2].

Dominated by the classic demographic transition theory, the settled view of demography has since been profoundly challenged by a series of successive theoretical influences, derived, also, from cultural studies and, perhaps most critically, from the debates in and around new perspectives to guarantee a lively and productive research climate for some time to come.

Our methodology involves an historical perspective on the evolution of population in both Western countries and Eastern countries and the variable of social security expenditure and the moment in which East and West started to have direct contact. We recognized that despite the existence of the Iron curtain cultural exchanges have taken place, but in a limited amount. We believe that we are dealing with a process of acculturation, but with limited acquisition, limitation that triggered a demographic crisis also in the Eastern part of Europe.

Moreover, we argue, that the findings of demography and cultural studies, of these two separated research traditions, are not so far opposed as is usually supposed. Albeit they express change in different terms, they both agree on its existence and view it from a different angle. They agree about the degree of power that can be attributed to the changes that take place in Europe, but it's a difference in the nature of these changes. We believe that an acceptance of a so called incompatibility of a meeting between the two may close means of research of both theoretical and empirical critique. We understand the need for a sufficient diverse of contending perspectives so as to be able to guarantee a lively and productive climate of research. The meeting between cultural studies and demography is meant to reflect a multifaceted reality, as truthfully and objectively as possible. Thus, again, we would like to underline that in this case competing interpretations although are provided by wrongly considered rival perspectives, the evidence deployed by both is similar. Questions about the demographic change in Europe are therefore more likely to be resolved by generating both empiric and theoretical argument.

MAIN BODY

Demography is generally discussed as if it were exclusively a phenomena linked with only predictors like urbanization, infant and child mortality, migration, industrialization, freedom of movement. We agree with the statement that "According to the population projections published by Eurostat in 2010, meaningful demographic changes in the age structure of population in Europe are forthcoming"[3] but we wish to add further information regarding possible ways of investigating this situation. Indeed, this assumption is embodied in the vast majority of demographical studies in most scientific approaches, but it also being challenged through comments by Susan Watkins, Barbara Anderson, John Knodel. Our concern will be with the impact of a little understood variable, cultural setting or cultural model, on the rates and shape of demographic transition that mostly is represented by a decline in various regions of Europe. Inevitably, such a topic covering so broad a canvas will be highly selective. Hopefully, it is intended as an antidote for the conventional approach to demography, which has become a major concern in Europe. The cultural setting is tacitly portrayed as autonomous and isolated from demography. This approach has dominated demographic and cultural research for so long. To some extend the demise of the classic demographic transition theory facilitated the extension of this field of research. Through increase permeability between the two fields of research we believe the resources of the two can be harness to the advancement of knowledge in the broader benefit of human development.

[2] Paul Dobrescu, Geopolitica, Editura Comunicare.ro, Bucuresti, 2008, p. 122

[3] Cinzia di Palo, *The demographic challenge on pension systems: empirical results from Italy*, Review of Applied Socio-Economic Research, Issue 2, 2011, www.reaser.eu

The role of the cultural model has therefore received very little considerable attention, both from critical perspectives theory and from that of developmentally-oriented action research. We believe that the cultural model in Eastern countries was also the informal source for social support for the individual. The connection between the cultural model and traditional sources of social support is a systematic one in the case of Eastern countries. Much recent research has been focused more upon the evolution of the traditional family in an attempt at explaining the demographic decline in the Eastern countries, which in the beginning were seen as the promise "demographic land", sources of experienced and trained young specialists. We understand the importance of the family in this process of demographic transition, but we believe that cultural change plays an equally important role. The decline of the traditional family[4] has been noticed also by Beck. His theory and research paradigm has been further developed by Gernsheim. Thus, it is still the case that very little is known about actual cultural model effects in relation to demography. Much more attention needs to be given to the processes by which this process happens so as to be able to interpret, translate and transform these experiences into knowledge. It is our hypothesis that we need to draw more from a micro-analysis at small groups and individuals so as to be able to engage with and to illuminate the macro-analysis.

The rise of a new elite, strongly linked with the development of our society towards economic growth, has tended to destabilize the demographic structure by generating or in some cases exacerbating tensions within it. The development of a new cultural model had a destabilizing impact in another, more indirect way. The new cultural model encouraged people to exploit their control over family issues in the benefit of economic targets, so as to build economy, which provoked a demographic reaction throughout contemporary Europe. Market forces succeeded in containing the rise of the population against the background of growing prosperity and the assertion of a new dominant cultural model. The operation of the free market, with its accompanying rise in education costs, childcare costs, living costs, responsibility both self imposed and law imposed towards raising a child, led to a progressive transfer from a traditional cultural model which proposed a numerous family to a more reluctant to an extended family cultural model. It also led to a new economic dependence on money that encouraged the creation of a family or eliminated an early desire for a family, inhibiting the emergence of the old cultural model. Significant changes have occurred since the new cultural model has taken effect.

The possibilities and limitations of the autonomy of individual preferences for a specific cultural model within the society cannot be considered without reference to the economic base. The effects of the introduction of a cultural model that has been constructed having as a center the economic core have already been related to the family policy of the individual. In another sense, people are primarily limited by a form of social control, through reference to living standards, cultural taste and accessibility to infrastructure, coupled with cultural acceptability. Cultural decisions are rooted in straightforward notions of business and economic efficiency and cultural acceptability. Paralyzed by the ferocious economic conditions in a contemporary society in a crisis, people respond by minimizing all possible risks, hedging all bets and the cultural model of the time sees any new member of the family, like a child as a risk.

Rather, the general conclusion must be that demography is indeed bound with, and bounded by, the interest of the dominant cultural model in society, but that these interests are constantly redefined according to a process to which the persons themselves contribute. We can conclude that the external cultural model locks the person into a situation of a latent presence. Consequently, the capacity of influence of the cultural model, if not even its capacity to control, rests on an understanding of the powers and consequences which may for the most part remain latent. The politics of accommodation with the cultural model is played out at different levels: between the

[4] Beck-Gernsheim, E., *On the way to a post-familial family: from a community of need to elective affinities'*, *Theory, Culture and Society*, 1998, vol 15, no 3–4, pp 57.

individuals, between the individual and the group and between the society and the individual. Within this accommodation, the limits of control are in a constant negotiation. Through these negotiations different interests are served. The precise nature and the implications of the cultural controls have been only loosely defined and interpreted. We agree with Giddens that underlines that traditional sources of support are no longer available[5] for people in Easter countries, but we have a more nuanced view upon what these sources of support are.

Cultural studies arguably incorporate a stress on experience. The stress on experience is seen as a sort of humanist position. Cultural studies conceive society as a complex expressive totality. That is why we consider that the change of the cultural model in Eastern countries is equal with what Giddens calls "lifting out of social relations"[6] which inevitably has lead to an economic crisis, more visible right now, but with a core made out of a social crisis which puts in danger the very existence of the European Union.

My primary purpose in this essay has been to create an illustrated summary encapsulating the central areas of debate concerned with the reality-defining role of cultural studies in a demography type research. Yet I have also stubbornly sought, but I must admit in a lower key, to debate the degree in which today's reality is conceived and represented using only traditional methodologies. We wish to guarantee the validity of positing a duality between the plane of demography and that of cultural studies. Although, confirming the place of traditional identifiers in the effort of explaining the social reality, we believe that cultural studies should be brought into line. We believe that it is not difficult to easily identify a number of demographic inadequacies that can be explained by taking into account the uneven and less than total consume of the Western cultural model by the Eastern states that newly adhere to the European Union. In the first place, we consider that by baldly confronting the reality of demographic decline in the Eastern countries, which were in the beginning perceived as a source for young and professional workforce, able to help the EU in maintaining its economic development we can better understand what proper measures can be taken to address this sensitive and civilization frightening issue. The current distance between the quantitative and number based research of demography and cultural studies mainly focused on social and human aspect may lead to a different light upon the problem of both cultural and demographic transition which explains the current economic crisis, which will apparently be followed by a social crisis. Obviously, we must continue to make a distinction between the two elements of analysis, with different methodologies, but we should regard them as paramount in understanding today's reality.

In many ways, the Western cultural model is an economic one. The Western cultural model is also a control mechanism. It allows a certain type of society to develop and be prosperous. The possibilities and also its limitations become apparent not only in the Western society but especially in the Eastern unprepared society. While in the West it has to deal with the variable of population, which has not taken into account, in the Eastern countries it has to deal with the lack of social cohesion support sources, that were responsible for both population issues, but also strongly linked with economic efficiency. The individual in Eastern countries was paralyzed by the competition in which the Western dominant cultural model and the Eastern cultural model engaged. This struggle is illustrated in particular by the presence of a cultural transition, which emerged in Eastern countries in the early 1990s.

It is our belief that the development of a society is strongly linked with the institutionalized cultural model. The cultural model of a people has been long intertwined with that of the people consuming it. There have always been grounds for exploring the cultural significance of a model followed by the people inhabiting an area. However, the case is particularly acute at present because of the changes that have taken place on the European continent. Obviously, it has been a significant rise in transnational contact between Western Europe and Eastern Europe. In turn, nowadays,

[5] Giddens, A. ,*The consequences of modernity*, Cambridge: Polity Press, 1990.
[6] Giddens, A. ,*The consequences of modernity*, Cambridge: Polity Press, 1990, p. 21.

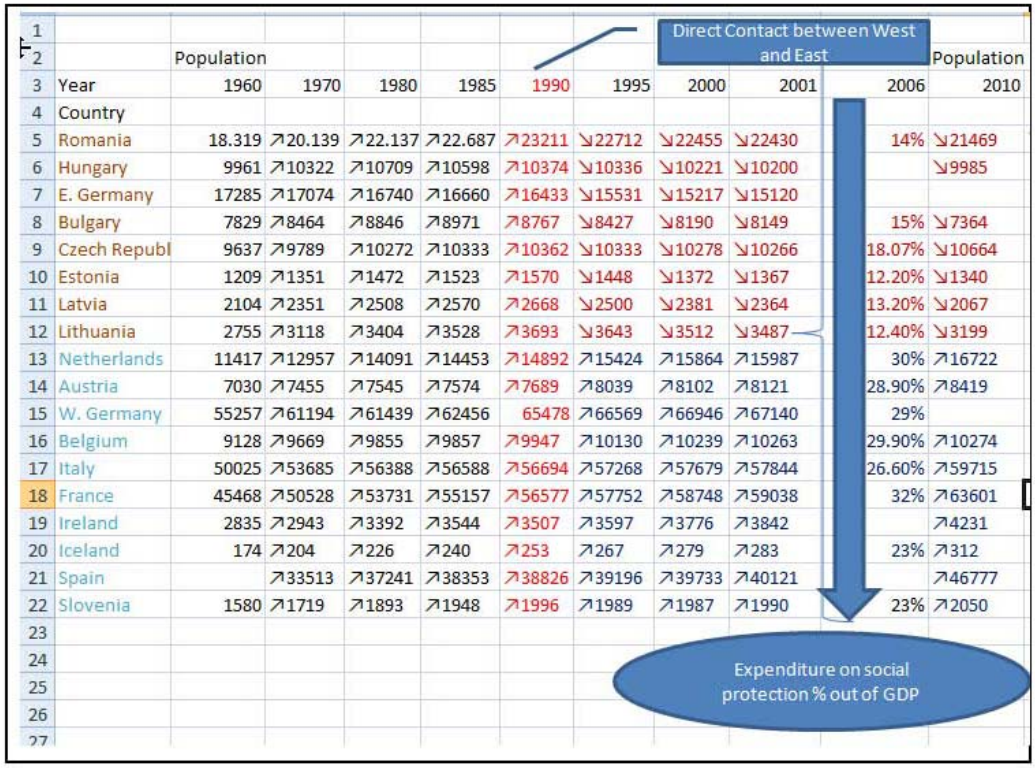
Europe's reality raises some crucial questions about cultural identities and its economic, demographic evolution. This situation points to the desirability of a multidimensional and even a multiperspectival research so as to be able to understand what happened.

The first concern is to talk just a little bit of the difference between Western and Eastern Europe before the URSS break-up. Historically speaking we had in the past a different reality. On one side we had the Democratic Bloc characterized by a high level of democracy and freedom of speech. On the other side it was the Communist Bloc which in short can be described as a low level of democracy at best and mildly putting it, a serious lack of freedom of speech. Within this framework it is very interesting to distinguish a similarity, the presence in both cases of an hegemonic cultural model that was applied in the day to day life. The noticeable difference is that in the case of Western Europe the cultural model was won and not given. It was constantly re-won and re-negotiated transforming the cultural model into a perfect terrain for conflict over meaning. The dominant European cultural model was not imposed, but rather a set of policies and laws both written and individually assimilated were created through the multiplicity of streams of meanings that resulted into an ascendant acknowledged and citizen support practice. In Eastern Europe, the cultural model was given, not won. It was the result of direct intervention and through a conscious attempt at manipulating the outcome of routine attitudes and working practices. People learnt the conventions and society's codes of "how things should be done" through replicating the given policies and laws. The constant growing intervention of the state in the private life of persons has tilted their behavior towards certain patterns. For example the state was not really that interested in spending and investing in social security because the cultural model in Eastern Europe assured constant social security through inter-personal relationships. The economy was not in the situation of offering much support for taking care of those in old age, because the family had this responsibility. At the same time there was no need for investing in childcare, special periods for women to have maternal leaves, because it was understood that the cultural model that existed in Eastern countries would take care of this by enforcing tacitly a certain pattern of behavior towards the family. Grandparents would act as childcare assistants, actively helping with their upbringing. The vast majority of young people were able to settle down and have a family because they were relying on the support of their parents. The Eastern cultural model also relied on the existence of a special type of family that would provide social capital for its members. We can identity two types of social capital sources in the theoretical break between West and East. On one side we have the network, born in the west which began to occur with the emergence of the Western cultural model of social cohesion and the family as a source for social capital. Mircea Brie further engages this topic of networks "The field of cultural cooperation tends to become „multipolar", as the concept of "cultural networks" is introduced. These networks have begun to shatter old structures and support identity, communication, relationship and information (Pehn, 1999:8)[7]", opinion with which we agree in this article being one of the hypothesis in explaining the current situation of Eastern European countries. This relationship between family and social capital[8] is not a new idea, but its change in the Eastern cultural model of life has been not sufficiently stressed. In fact, we are debate the problem that stems from the lack of social capital for people in Eastern countries. The role of social capital is crucial both in social prosperity and social order. Presently, this is no longer just a family issue, but we are in danger of acknowledging a growing sense of social exclusion. There might be some research that might consider this statement going too far, but lets consider a more nuanced discussion. It is obvious that the Western cultural model dominated the Eastern one. In this case we have in our contemporary one a case of cultural consumption, but not a total reproduction of the cultural model. The dominant western cultural model

[7] Mircea, Brie, Ioana Horga, Europe: A Cultural Border, or a Geo-cultural Archipelago, Eurolimes, vol. 9 The Cultural Frontiers of Europe, Spring 2010, Oradea University Press, p. 153-171.

[8] Edwards, R., *Present and absent in troubling ways: families and social capital debates*, The Sociological Review, vol 52, no 1, pp 1–21.

was not functionally adapted in the Eastern countries because not all of its elements presented interest. In this case some cultural elements that handled much of the social cohesion existing in Eastern countries have not been reproduced. I have borrowed the principle of "reproducing the dominant ideology"[9] or in this case the dominant cultural model from Althusser. The real sting of this situation is the fact that social exclusion appears the moment the person finds himself without an entity capable of offering social capital and social cohesion. This is the case in Eastern countries were the previously established cultural model handled the need for social cohesion and social capital of the individual. Once the old cultural model was replaced by the Western cultural model, which supplied social capital through networks not family, through financial support and direct support from the welfare state, not the family, the Eastern states did not adapt. Social exclusion becomes another factor in the influence upon the population of Eastern states. People more and more feel socially isolated and can no longer rely on informal sources of support, nor formal social of support. Formal sources of support[10] are present particularly in Western culture, but were not totally transferred in Eastern countries.



	Population									Population
Year	1960	1970	1980	1985	1990	1995	2000	2001	2006	2010
Country										
Romania	18.319	↗20.139	↗22.137	↗22.687	↗23211	↘22712	↘22455	↘22430	14%	↘21469
Hungary	9961	↗10322	↗10709	↗10598	↗10374	↘10336	↘10221	↘10200		↘9985
E. Germany	17285	↗17074	↗16740	↗16660	↗16433	↘15531	↘15217	↘15120		
Bulgary	7829	↗8464	↗8846	↗8971	↗8767	↘8427	↘8190	↘8149	15%	↘7364
Czech Republ	9637	↗9789	↗10272	↗10333	↗10362	↘10333	↘10278	↘10266	18.07%	↘10664
Estonia	1209	↗1351	↗1472	↗1523	↗1570	↘1448	↘1372	↘1367	12.20%	↘1340
Latvia	2104	↗2351	↗2508	↗2570	↗2668	↘2500	↘2381	↘2364	13.20%	↘2067
Lithuania	2755	↗3118	↗3404	↗3528	↗3693	↘3643	↘3512	↘3487	12.40%	↘3199
Netherlands	11417	↗12957	↗14091	↗14453	↗14892	↗15424	↗15864	↗15987	30%	↗16722
Austria	7030	↗7455	↗7545	↗7574	↗7689	↗8039	↗8102	↗8121	28.90%	↗8419
W. Germany	55257	↗61194	↗61439	↗62456	65478	↗66569	↗66946	↗67140	29%	
Belgium	9128	↗9669	↗9855	↗9857	↗9947	↗10130	↗10239	↗10263	29.90%	↗10274
Italy	50025	↗53685	↗56388	↗56588	↗56694	↗57268	↗57679	↗57844	26.60%	↗59715
France	45468	↗50528	↗53731	↗55157	↗56577	↗57752	↗58748	↗59038	32%	↗63601
Ireland	2835	↗2943	↗3392	↗3544	↗3507	↗3597	↗3776	↗3842		↗4231
Iceland	174	↗204	↗226	↗240	↗253	↗267	↗279	↗283	23%	↗312
Spain		↗33513	↗37241	↗38353	↗38826	↗39196	↗39733	↗40121		↗46777
Slovenia	1580	↗1719	↗1893	↗1948	↗1996	↗1989	↗1987	↗1990	23%	↗2050

Figure 1

In the table below named FIGURE 1 we have followed the population of several Western and Eastern countries. Population is represented in millions, for example 1.000=1.000.000. It can be noticed that till the 1990s moment both Western and Eastern countries enjoyed positive demographic

[9] Althusser, L., Ideology and ideological state apparatuses, London, New Left Books, 1971.

[10] Warr, D.J.,'Gender, class, and the art and craft of social capital', *The Sociological Quarterly*, 2006, vol 47, pp 499.

growth, after the moment 1990s while Western countries continued to experience demographic growth, Eastern countries have started a severe demographic decline. Actually, we understand the many benefits that came with the existence of the European Union, we only wish to underline that Eastern countries need to do more to fit better in the EU world. The variable of social security was introduce and we can see that the higher the expenditure the higher or stable the demographic variable is. It seems that in Eastern countries the total expenditure on social security is still at low values, this leads in turn to the decrease of the population. Social spending was never to high in Eastern countries, but its cultural model helped social stability to be kept through special practices and particular behavior. Once this system of social support broke down it was not replacement through a more formal social security expenditure. The difference is seen in the case of Slovenia, which actually experience demographic growth, but the social security expenditure variable is the highest among Eastern countries, in the same category as Iceland. We have used countries which are from all categories of population: small size population, middle sized population and large European countries for both Western and Eastern Europe. We have used countries in both categories that have an high emigration rate and a low one.

Next, we can take a look at the economic situation that raised quite a barrier between East and West. The economic needs of each European hemisphere were perfectly aligned with the cultural model which determined people's behavior. For example, in the West the cultural model imposed that people, having plenty of economic opportunities should focus on their career. Once financial success was assured they could afford paying for childcare and would have special benefits that would ensure they could afford to have a family. At the same time, according to the work and its financial efficiency you would be rewarded in your old age. The Eastern cultural model was based on inter-personal relationships. The bigger the family, the higher were the chances for parents to have somebody to help both physically and financially in their old age. Both the number of children and their geographical closeness was important, not so much their economic power. The support was expected to arrive not so much from the state, through its own system of pensions and rewards for a working life, but from your own family. Obviously, the tensions between the Western Pole and the Eastern Pole were also of an economic nature. On one side we have the prosperous economic states in the West, which proliferated the welfare state. They could afford the construction of the welfare state due to economic success. The promise of a welfare state encouraged people to focus more on the economic aspect of life. This created a constant flow of career oriented people which fused instantly with the economic nature of the state. In short, the development of a living cultural model for persons living in Western Europe became intrinsic to contemporary citizens and is bound up with issues of social power and social behavior. We wish to underline that the differences were not present at the level of the individual, but at the level of the context.

In the new context, the old certainties that managed the evolution of population and the social relationships that maintain the demographic growth disappeared. The cultural model that dominated people's behavior, that of sharing housing with several generations, the grandparents had an active involvement in the housework activities and in the raising of children, the children lived with or near their parents so as to provide financial support and to help to decrease the financial burdens while confronting old age. Unfortunately, it was not replaced by a coherent welfare type state model for supporting population in a search for economic growth. Although both Western and Eastern countries have the same problems demographically speaking.

CONCLUSIONS

It is an interesting context to witness in one's life time the rise of a new cultural model, leading to a new type of society. Eastern society is characterized by a shift from the old cultural model centered on social dependence to a cultural model that prizes the individual's human capital, not involved in a dependence network, not at the same degree at least. While in this period policy

makes have to understand that they need to create an efficient formal social security support to replace the no longer valid traditional informal one. In doing so the need for increasing expenditure on social security is actually an investment in long term growth and economic stability. Current figures on social security expenditure and currently even cutting down the budget of this activity may lead to a depletion in population. For Romania, specifically, it can mean a shrinking market which will be less attractive for exporters and investors. Loss of population can also mean less power and leverage on the international political stage. Let us not forget that even in the European parliament each country is represented according to the number of people. Not properly catering for the new cultural model means that the population will bring forth less active individuals into the workforce and more people needing social support.

This type of cultural model plays a key role in a knowledge driven production and planning society centered on economy. In this view, cultural change is the driving force of social change as a prerequisite to economic success. Pivotal to the conceptions of the Western cultural model is the personal development of the individual and its efficiency as part of the economic world. This in turn is central for the citizen's satisfaction with life, higher general health and the existence of the welfare state. Many of the social processes present in the Western world are economic in character. This cultural model has been propelled by the constant search for new sources of profit and out of the need for growing efficiency. Due to the direct contact with globalization, people in western countries were involved in global networks which extended far beyond their immediate physical locations. With the fall of the URSS and the Communist Bloc, Eastern countries entered into a process of socio-cultural adjustment. We believe that Herbert Schiller captured the proper term for this situation, namely "cultural imperialism". The Western culture dominated the Eastern culture and a process of acculturation took place. The process was far from being even, but we agree with Robins "For all that it has projected itself as trans-historical and trans-national, as the transcendent and universalizing force of modernization and modernity, global capitalism has been in reality about westernization – the export of western commodities, values, priorities, ways of life." Bechnar helps us to elaborate this idea, underlining the importance of the meeting between the two cultural models "when culturally disparate people come into continuous direct contact with each other, the cultural differences tend to become salient and origin changing". No doubt the first wave of change was of economic nature. The dynamic spread of western cultural model implied firstly economic contact. We can call this first contact the mercantile phase. The mercantile phase gave way to a more direct influence, the western cultural model that was perfectly suited to the economic model sought and succeeded to impose its cultural form in tandem with economic power. This in turn added up to a general decentering of western cultural model about economic progress, social relationships and social behavior. As we stipulated earlier, this process is not an even one. The type of welfare system existing in Eastern societies broke down without being replaced by the type of welfare system present in the Western culture. This can be seen in the following image that underlines the level of expenditure on social security.

The existing cultural model regarding family relations were inadequate in the face of the new complex, in contemporary times overlapping past system. Once the competence and autonomy from the economic life of the past cultural model that framed social behavior meant to sustain the population was undermined there was nothing left to sustain demographic increase. Because the meeting between Western cultural model and the Eastern cultural model triggered an uneven process, some of the powers of the social relationships that in a way represented "the welfare state" in the East were not fully carried out to a replica of the "welfare state" that existed in the west. This is not to suggest that the western influence was not positive, far from saying such a thing, but we wish to underline the need for a complete understanding of the importance of a complete cultural model, able to regulate the complex mechanism that is society. Subsequently, with a lacking cultural model, that does not regulate social life through its balance between economic progress and cultural development the productive dynamism of a society suffers. Today we begin to understand that Eastern societies

lacking a social regulator, have lost one of the most important factor in economic development, population. This reflexivity involves the knowledge that we hold regarding social life. Social life is a constitutive element of economic development. The western cultural model of living and of progress has been considered and rightfully considered an emancipatory project, trough which people had the opportunity to reach economic progress and a better quality of life. But the receipt for success was not complete. With an incomplete cultural model, society has encountered several problems. The initial advantages present in Eastern countries: a young population in comparison with the western countries, a large portion of it educated and active, was gradually lost. We believe we point to a rupture in the understanding of the link between economic ambition and the sustainability of social relationships in a state. It seems that we are dealing with a break off of dialogue between economic aspirations and social aspirations. Our stress on discontinuity is an aspect of our questioning of the current cultural model present in Eastern countries and the problems it creates.

Cultural studies have an undeniably material aspect in so far as it is possible to help in identifying the demographic crisis that takes place in Europe. Social formation is facilitated for instance by culture that is why we believe special care should be placed on either "securing the identity matrix"[11] or properly understanding any cultural model that comes into contact and is consumed by a population. Perhaps in order to further prove our point that cultural contact can be dangerous if not properly mediated we can bring into question the relationships between Orient and Occident, a subject brought also into question by the perspective of "the clash of the different cultural concepts"[12].

We cannot state that the existence of a cultural model and a specific demographic evolution is a purely random encounter. We start by referring to this encounter as an entrenched and enduring pattern of European interconnectedness between the two realities. As a consequence culture can come to have a serious demographic impact. This does mean that culture represents a significant producer of real material conditions ox existence. The cultural model becomes embedded within the more expansive set of social existence under the constraints of historical conditions. What distinguishes our view is our new differential emphasis on the dynamics of demography as a consequence of a historically specific cultural model. A cultural model is never a neutral existence. It is worth dwelling on this as one of the stages in clarifying the dynamics of European demography. We believe that this research takes into consideration future trends in Europe. Nowadays, a lot of attention is given to the international relations that are built around the major players, more to individuals and less to the key part played by the masses. Demography and living cultural models shape also history as much as individuals or political relations. We consider that our research helps in determining future trends according to which visionary policies can be constructed as the following author considers as well: "When we debate Europe, we are accustomed to debate the big issues (and most probably those regarded as traditional): trans-Atlantic relations, the diplomatic relations with Russia, China and with Asia as a whole. In other words, we debate the links with the major players. Less attention is directed towards the future tendency, the reality of tomorrow which will certainly become more important; a tendency that will most likely become permanent and will exercise a powerful influence that can't be measured today.[13]

[11] Malina Ciocea, *Securing National Identity in a Globalizing World,* Comunicare.ro Publishing house, 2007, pp. 36

[12] Ioana-Mihaela Firicel, *International Terrorism – A Serious Conflict Between the Occident and The Orient,* Romanian Review of Social Sciences(2011), No. 1, www.rrss.univnt.ro

[13] Paul Dobrescu, *Viclenia Globalizarii – Asaltul asupra puterii americane,* Institutul European / in English *"Globalisation's Deception - The Assault on American Power"The European Institute,2010, p. 268.*

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THE EXPLORATION OF THE SELF IN PICTURES. PHOTO-THERAPY

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Abstract
We are living in a world surrounded by images; everywhere we go we are overwhelmed by commercials, plasma screens, posters etc. We get lost in these "perfect" pictures, we dream about that perfect body, that perfect sunny holiday and that perfectly happy family. We spend time consuming those pictures, but we don't spend time to see ourselves as we are, to discover our inner self. But, can we discover ourselves in pictures? I believe so, but only when the pictures are created and not consumed. When pictures are created, creation becomes therapy and the result of the work becomes a means of self discovery and exploration. There are many examples of artists using different media like: sculpture, painting, installation, video that create pictures making use of their own body/face, of their own lives, of their own dreams, hallucinations or obsessions. This is a good way to bring their problems out of the subconscious, to use them in a creative and playful way, to visualize them and to share them with the world. The paper intends to explore the possibilities of self discovery through creating pictures, and in what proportion this activity can become therapy, art or both. The analysis will focus on the possibilities of accepting and comprehending oneself by taking pictures of oneself; on how genuine self-portraits can overcome the individual conflict between who one actually is, what one believes people's perceptions of oneself are and who one thinks people want one to be in order to be accepted or even successful.

Keywords: *self exploration, self portrait, art therapy, photo-therapy, subconscious.*

Introduction

As far as we can go back in time, any artist's work has been envisaged as the mirror of his experiences, thoughts and ideas. More often than not, the artist has purposefully used his own life or body, and plenty of examples from contemporary art can be given to support this idea. Throughout art history, one can easily notice that most often the artists' inspiration source has been represented by certain obsessions, traumas, and painters such as Edvard Munch or Francisco Goya are well known illustrations of this fact. The question is what would have happened if these artists tormented by such obsessions, depressions etc. had not found art as a means of escape, if they had not channeled all their repressions and anxieties in their works? We think that in many situations what gives birth to creation is exactly this overwhelming amount of thoughts and inner torments. Also, it is puzzling that especially such negative, intense experiences can turn into art, into something "beautiful" or "harmonious". If all these feelings had not been expressed, if they had not been discharged by being turned into an artistic object, one would have probably witnessed more suicide cases. Emil Cioran himself, in the interview given to Gabriel Liiceanu for the documentary "The Apocalypse According to Cioran" stated that his writings had been a real form of therapy, which had helped him go on.

Content

This paper attempts at emphasizing the approach in which studying various cases of artists and the way they work can represent a departure point in devising a self-cognition system for every person, so that this method of setting oneself free through art, through creation would not exclusively be destined to persons that have the "artist" statute. This starting point related to the use of art as

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therapy will be exemplified by artists whose works are particularly their own biography, a documentation on their own lives.

Therapy through art is relatively new, as it started to be used as such towards the middle of the 20th century. This psychotherapeutic discipline has double meaning, either referring to therapeutically producing a work of art (in this case the emphasis is on the process itself) or to the interpretation of a work of art created by the patient (in this case the emphasis is on the product and on the symbols used).

Apparently, the British artist Adrian Hill is the one who seems to have used for the first time the term "art therapy" to describe the therapeutic effect of producing images. Hill discovered the beneficial effect that drawing and painting can have in the process of recovery after tuberculosis. The values of art therapy are to release the creative energy of the inhibited patient through this captivating activity that involves both mind and fingers. In the sanatorium where he had been treated for tuberculosis, Hill suggested patients to start doing art; this was the starting point for his work with patients, based on art therapy, documented later in his book *"Art Versus Illness"* in 1945. Artist Edward Adamson joined Adrian Hill, applying this therapy form in insane asylums in England, where he opened workshops for patients to come and start paint. Adamson militated in favour of the patients' freedom of expression, being against interpreting their creations by specialized persons; for Adamson these interpretations would have signified only the psychotherapist's projections on the respective work.

Among the first psychologists that have encouraged self-discovery through a creative method was the famous Carl Gustav Jung. Self-exploration achieved by Jung brings about change as far as the type of analysis that he approached is concerned. He encouraged all his patients to start a self-cognitive and self-exploratory process. Patients were instructed on how to use their active imagination, on how to talk to their innerness and on how to paint their fantasies[3]. Thus, Jung himself encouraged the activity of transforming emotions into images: "Emotional torment can be differently solved, not by intellectually clarifying it, but by giving it visible form. The patients that have certain skills for drawing or painting can express their state of mind by means of an image. It is not important for it to be technically or esthetically satisfactory, but it should allow fantasy to go wild and the entire thing to be accomplished as well as possible."[4]

The means of expression generally accepted and used in art therapy have been predominantly painting, drawing and molding. Despite publications related to the therapeutic aspects of photography (Cornelison and Arsenian, 1960) or video registration (Alger and Hogan, 1967), numerous supporters of art therapy have remained skeptical about using these artistic means.[5] In 1981 Jerry Fryrear together with Bob Fleshman approached the theme of cooperation among different artistic branches in their work *"The Arts in Therapy"*. Fryrear noticed that throughout history, among the different artistic branches there has been connection, more often than not inseparable, this tendency being ever so more apparent in contemporary art.[6] Thus, skepticism about the new artistic means – photography and video – has been moderated by the fact that these technologies include: movement, directing and body presentation. In his paper *"Photo Art Therapy"*, Fryrear accomplishes a synthesis of his previous papers, *"The Arts in Therapy"*, and two more publications about photo-therapy (1983) and video-therapy (1981). *"Photo Art Therapy"* demonstrates that not only does instant photographing include various aspects from visual arts, but it also contributes with new artistic features that could offer various therapeutic possibilities. Both Jerry Fryrear and the coauthor of the book, Irene Corbit, use photography in their therapeutic practice. What they do is photographing their patients in order to study their posture, and then using the

[3] *Red Book. Liber Novus*, Carl Gustav Jung, p. 205
[4] *Collected works*, Carl Gustav Jung, Vol.8, p. 78-79
[5] *Photo Art Therapy: A Jungian Perspective*, Jerry L. Fryrear, Irene E. Corbit, p. V
[6] Idem

respective photographs for the so called "self-image confrontation".[7] Moreover, they invite their patients to construct their own images and to pose for the photo camera, by imagining various moods or feelings that characterize themselves. The importance Fryrear and Corbit give to posture, to the way in which people sit in front of the photo camera becomes therapy, as our mind reacts to the expression our body gets, our body turns out to be a visual experience that changes according to emotions, moods etc. At the basis of their therapy there lies the creative process of change, which is described by the two authors as "visual transition." One of the experiments used by Fryrear and Corbit is the "self-portrait box" which explores the multitude of a person's facets. On each square of the cube, there is a self-portrait of the artist that tries to capture the various characteristics of one's personality. These images are accompanied by six more, which disclose more intimate sides of the respective person. This process encourages the articulation of the multiple aspects of one's personality that we choose to exhibit or not in front of the others.

The two psychotherapists' entire practice promotes the idea of bringing moods, experiences, so far lying beyond the conscious, by means of visual expression. Thus, worries, frustrations, fantasies, memories etc. get a concrete form. "It is easier for people to confront, discuss, change and treat a concrete referent, as compared to an abstract idea. Giving the abstract a visible form, the client creates a referent which is tangible. It has form, colour, dimension and can be directly confronted, discussed and changed in a visible manner. By means of a photograph, a client can create a photographic posture which is visibly the form of an emotion or memory (…)."[8]

Among the other characteristics of photography as therapy, enumerated by the authors of *"Photo Art Therapy"*, one could refer, on the one side, to the efficiency put forth by the rapidness of taking a photo as compared to painting or drawing, and, on the other side, to the lack of the possible frustration that a patient might have related to one's ability to draw/paint.

Nowadays, almost everybody has access to a photo camera, which has become very easy to use once they have been digitalized, thus self-exploring by means of self-portrait photography is at anybody's hand. This art democratization allows each person to discover oneself through creative means related to the visual arts domain, which, in the past was exclusively reserved to gifted persons or to persons specialized in this field. Therefore, "photo-therapy" can be "a means of disclosing, expressing, comprehending some fragments that belong to our inner self."[9] Although we rationally know that photographs are not "real", that they "do not say the truth", as they stand for specific choices, constructions, decisive moments, however, we provide them with meaning. Nevertheless, many people think that it is in the power of photographs "to say" the truth. Precisely this contradiction and this tension become extremely productive in the therapeutic process. Looking at their pictures, being witnesses of their flexibility, one considers obvious that "truth" is a construct, that identity is fragmented in many "truths". By becoming the individual is set free from constantly looking for an immutable "ideal self", and, at the same time, it allows one to understand the self as process and evolution.[10]

This self-exploring method through photography, art or creation brings about, besides the satisfaction caused by one's own creation, a ludic dimension which is emphasized in psychotherapy. Psychotherapy lies at the intersection of two ludic spaces – the one belonging to the patient and the one belonging to the therapist. Psychotherapy means two persons that play together. Consequently, when playing is not possible, the therapist's effort is channeled towards making the patient able to play. Playing is trusting and it belongs to the prospective space (what existed at the beginning) between the child and the maternal figure. Only by being creative, one can discover our truthful self.

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[7] *Photo Art Therapy: A Jungian Perspective*, Jerry L. Fryrear, Irene E. Corbit, p. VI

[8] *Photo Art Therapy: A Jungian Perspective*, Jerry L. Fryrear, Irene E. Corbit

[9] *The Photography Reader*, Liz Wells, part eight, chapter 37 "Photo-therapy. Psychic realism as a healing art", Rosy Martin & Joe Spence, p. 402

[10] Idem

Self discovery, together with self-expression, is very useful in our opinion, to the extent that in nowadays society, we are bombed with images, chimeras of an idealized body, an idealized personality or the perfect family. "The spectator is drugged by spectacular images"[11], thus becoming more and more difficult to discover who one really is. Because of the reasons that have just been enumerated, a conflict is born between what a person really is, what he/she wants or could improve about his/her own person and the desire to comply with the standards imposed by society and by the entire gallery of seducing images promoted by mass-media. As Gaston Bachelard stated "personality lives in a rhythm of conciliation and aggression, related to the game between self-love and other-love." In this conflict generated by the disagreement between desires, aspirations, ideals and what it really exists – the confrontation with an image created by one's own fantasy can be revealing. A simple self-portrait photograph could contribute to accepting a type of reality. Thus, a representation of one's own face, which is not idealized and lacks any artificiality or make-up, could be the first step to an authentic self-introspection. This courageous attempt could, however, bring an artist to a vulnerable position, to the extent that the respective artist does not only produce an introspection through his/her works, but also he/she introduces his/her personality in front of the world. In this context, one can say that Rembrandt's work represents an inventory of his self-change, the creator of the work of art being also the subject of the work of art.

As we stated earlier in the paper, we will use the work of some artists to exemplify the way in which art can be a means of setting a person free from one's obsessions, fears, frustrations.

We will start by referring to the Dutch artist **Ed van der Elksen** and his novel made up of photographs ("photonovel"). The idea of a novel made up of photographs was developed by Dutch photographers in the 1950s. Photography was used as kind of diary, thus endowing documentary photography with new features, turning it into something more spontaneous and more personal, directed on the intimate space and focused on the life of the photographer more than on the life of other persons. The most famous novel based on photographs is that made up by the Dutch Ed van der Elksen in 1956, named "Love on the left bank".[12] This work of art is based on a series of photographs depicting the photographer's female and male friends that lived in Saint Germain-des-Pres, Paris. Before this work was published, van der Elksen made a photo-essay (the photos were annotated) that appeared in "Picture Post": "This is not a film. This is a story from real life, about people that really exist."[13] The story contained in this photo-essay was slightly changed, so that it could have become a book with documentary photographs. The decision to make a filmic story was obviously taken to serve a commercial purpose.

Nan Goldin is an artist that also very well exemplifies the interpretation of the work of art as diary/documentation of one's own life, as she photographed her homosexual or heterosexual friends and her life partners in intimate situations. Thus, in her documentary photographs, Nan Goldin depicts aspects of sexual orientation ambiguity: homosexuals, lesbians, travesties. Her photographs do not judge, they just portray an aspect that belongs to reality. The heterosexual couples, which Goldin most often reveals during sexual intercourse, are considered either as expression of completion and perfect union, or as expression of possible frustration, lack of communication between couple members. One of the photographs that suggests lack of resonance between the two, the discontinuance of the couple, is the one in which Goldin lies in bed and looks at her boyfriend who is smoking a cigarette in the foreground, which is closer to the viewer; their eyes do not meet; the line that divides light from shadow might suggest the wall that was raised between the two, woman and man, who are incapable of getting harmonized, to recreate the archetype of the complete being.

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[11] *Societatea spectacolului. Comentarii la societatea spectacolului*, Guy Debord, traducere si note de Ciprian Mihali si Radu Stoenescu

[12] *The genius of photography*, Gerry Badger, 2007, Quadrille Publishing Limited, p. 121

[13] *The genius of photography*, Gerry Badger, p. 121

Another artist who could exemplify the manner in which the work of art becomes intrinsic to the artist him/herself is **Marina Abramovic**, the well-known performance creator. Marina Abramovic's art is an extension of her own life; she discloses herself with complete sincerity, going beyond her physical and mental limits.

Francesca Woodman, likewise Marina Abramovic, uses her own body as a means of artistic expression. In most of her photographs, Francesca presents her body nude, in various situations that symbolize her inner quests, confusion, ambiguity. By means of her body, Francesca Woodman initiates a dialogue with herself, which becomes a symbol of receptivity, a meeting point between her and the rest of the world.

Lee Friedlander, an American photographer, has made more than 400 portraits in 50 years. The oldest were made in his youth and they are very direct, except for a few traditional family portraits. During his early artistic stage, Friedlander created the series with mirroring, reflections, shadows of his own figure caught from unusual angles. These self-portraits function as a diary that depicts how a person is changing as he/she is getting old. Among his most recent self-portraits one can find the ones in which Lee Friedlander is in hospital, the artist photographing himself before and after his bypass surgery.[14]

Yayoi Kusama is another good example for the way in which art can become therapy and a means of expressing obsessions, hallucinations etc. The Japanese artist uses various media – installation, sculpture, video – to create a type of art generated by her hallucinations caused by the obsessive neurosis Kusama has been suffering from since teenage years. The moment she was labeled with this diagnosis, the artist decided that, most of her time, she would live in a mental care institution in Tokyo, in the vicinity of which there is a spacious studio where could work.

Kusama claims that she started to have short hallucinations ever since childhood, under the form of floral patterns (which started with a vase of flowers) that started to spread out in the entire room, then changing into "threatening" dots.

Painting was the first medium the artist used to express these obsessions, which could get a material, concrete form this way. The work she created helped Kusama keep her psychiatric condition under control.

Kusama confronted with a latent phobia of sexual intercourse, which generated a series of sculptures illustrating phallic forms that she exhibited in mirrored rooms in order to construct an infinity illusion. The artist denied the erotic charge of these sculptures, assigning them totem significance that helped her control her anxiety about this symbol.[15] From the same perspective, the Japanese artist's performances can be rather considered as a type of exorcism than as a means of sensuality celebration through art – "once sexual frustrations have been made distant, there will not be an exaggerated accentuation of the sexual theme, the artist being free to channel her creative energies into real art."[16]

The trauma that generated the artist's illness partially originates in the familial context in which she grew up, that is a rigid, traditionalist background, with an authoritarian mother who used to severely (both physically and psychically) punish her daughter for any unusual behavior and who used to discourage her daughter's interest in art. This aspect is revealed in one of Kusama's early paintings, in which the artist's mother is portrayed in a "tempest" of dots.

Yayoi Kusama's works are based on repetition, which creates a hypnotic effect on the viewer. According to Freud, the value of art lies in its power to trigger "a narcotic effect, offering both the artist and the viewer a substitute, or a means of escaping reality." Nevertheless, the Japanese artist's work can be characterized by mimesis, as a mirror of her own innerness and as a means of

[14] http://www.guardian.co.uk/books/2012/jan/22/lee-friedlander-in-picture-review
[15] *Contemporary Art and Classical Myth*, Jennie Hirsh, Isabelle Loring Wallace, pg. 94
[16] Idem, pg. 95

introspection. The result of her work is a "mimetic" reflection or her ego. [17] As Kusama declared: "I do not consider myself an artist; I am looking for art in order to cope with the disability that started in my childhood."[18]

Conclusions

From the distinctions made and the illustrations offered in the body of our paper, one could easily noticed that the cases of several artists might exemplify the manner in which art can be both a means of expressing and releasing frustrations, obsessions, memories, traumas.

Being related to creativity, imagination, instinct, subconscious, art therapy has become a curative method that has also excellent results with persons that do not have artistic training. By expressing negative emotions in a work of art, one produces detachment, so that the author-person will succeed in looking within him/herself from another point of view; at the same time, the feelings that caused him/her negative moods will transform into something tangible that can be made real and accepted.

The purpose of this paper has not been to exhaustively document the history or the forms of art-therapy. It is rather an invitation to consider the artistic phenomenon from multiple points of view, focusing on the psychosocial perspective. In this manner, one can understand the motive and the effect of an artistic act at psychical level. It represents a vision by means of which art is perceived as a form of self-discovery, comprehension of the authentic self.

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ORGANIZATIONAL DESIGN AND CHANGE. THE EVOLUTION OF TRADE UNIONS ORGANIZATION FORMS IN ROMANIA AFTER 1989

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Abstract

The study: „Management and organizational change. Evolution of union organization forms in Romania after 1989" propose as subject of analyze a type of organization which, through its affiliation to the civil society and through its role conferred by low, becomes the key for the proper functioning of the labor market. Along with the change of political regime from December 1989, the trade union organizations were put in a position to cope with a triple: reorganization, learning a new social role and public image reconfiguration, including cancellation of the association (inevitable) with the "ancient" trade union. The study proposes three major subjects: defining the term union organization accompanied by possible interpretations of the role of this type of organization at the society level – „collective voice", counter pole , political actor, collective negotiator, transnational and promoter of the class struggle, the last role not being characteristic to a democratic society; the description of the syndicate organizations evolution in Romania, after 1990; the argue of the necessity of an organizational change felt by the unions, under the impact of some factors depending on socio-economic and politic changes.

Keywords: *trade unions organization, organizational change, employee, social dialogue, globalization*

Introduction

From the relational point of view, the labor market suppose the regulation of labor relations between employers and employees, between the employers' bodies and the trade union organizations at different levels of economic activity (at national, sectoral or economic unit) Basically, on the labor market there are three large groups of interests; interests of the capital (represented by employers bodies and their associations), of the labor factor (represented by the syndicates) and of the state.

The subject of the present study is part of the interest aria of the organization sociology and aims to analyze the trade union organizations evolution, in the context of the socio-economical and political changes that cross our country in the last twenty two years.

Such an approach is absolutely necessary, given that the organizations which represent the employees' interests in the labor relations are un important part of the civil society and, also, social dialogue partners with employers bodies and institutions of the local and central public administration. Hence the main objectives of this study: emphasize the role of the trade union organizations type in their relationships and in the social dialogue; the identification of the directions in which these organizations in the last twenty two years.

The study was developed in three main directions: (a) defining the trade union organization term, together with possible interpretations of the role of this kind of organization at the society level– „collective voice", counter pole, political actor, transnational collective negotiator, promoter of the class struggle, the last role is not specific to a democratic society; (b) the evolution of the trade union organizations in Romania after 1990; (c) the need for organizational change, felt under the impact of factors related to socio-economical and political factors.

The data underlying this study are the results of the researches that the author coordinated and attended, beginning with 1997, in cooperation with various trade unions federations and confederations in Romania.

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The Romanian literature doesn't treat this subject very often, maybe because these organizations have a distorted, mainly negative, associated more with street movements, with strikes, social disorder, and less with the idea of social dialogue and constructive partnership. Or, the lack of structured, coherent and fundamental information is as well detrimental as the propagandistic abundance practiced before 1990.

However, the existing contribution in the international literature are very different , the approaches from sociologically or in the economic or political sciences. We mention, in particular, the studies made available to those interested by the European Trade Union Institute.

1. Organizational change in the context of post-industrial society transformations

The mechanism of organizational change, its key factors, the context and the moment when an organization decides to restructure itself, the effects generated by these transformations within the environment in which the subject evolves represent as many challenging topics for the analysis of organizational behaviour in relation to the substantial social, economic and political modifications that have characterized the last two decades. These topics are even more challenging for the subject of our analysis is the trade union organization – i.e. a type of organization which "enjoys" a not quite positive image and which has been associated in Romania in the last 20 years rather with street protests, strikes and social disorder than with the image of a constructive social dialogue partner.

For approaching such a topic it is absolutely necessary to refer to the main evolution trends recorded in society, trends which are differently reflected over the environment in which each organization functions. In this respect, special literature most frequently mentions: globalization, innovation (particularly, innovations in technology and informatics technology), market restructuring and increase in competitiveness, geopolitical transformations, demographic modifications, major modifications of the workforce structure and its characteristics, limitation of resources (basically, energetic resources) etc.

Globalization is a concept used for defining a system of complex processes, sometimes contradictory ones, with a variable dynamic, which may have the following major effects:

Internationalization of goods and services markets, of monetary and financial markets, as well as of the workforce, a fact which allowed the liberalization of commerce, the free circulation of capital, technology and workforce. When national markets were not integrated, social experience has indicated that this fact did not lead to a decrease of the gap between them;

The very fast spread of new technologies, especially of IT and communication ones. This had, as a main effect, a globalization of knowledge without leading, however, to a dilution of the development differences which exist between different countries from various parts of the world;

The increase of corporations power, also due to the quick penetration of new markets, which have become accessible after the political regime changed (see European states from the former socialist bloc);

Integration of national states within a political and global system which had as effect the transfer of new economic, social and political decisions from national governments to supra-state structures;

The modification of certain social behaviour patterns and life styles through assimilating "imported" (and most often non-differentiated) social and cultural products alongside with the other phenomena which are associated with globalization.

Even if there is no general definition upon which the majority agrees, one thing is certain: globalization leads to an ever increasing interdependence of economic, social, political and cultural phenomena so that the facts and events that are specific for a country, a region or a system have direct and indirect effects, which are more and more complex in other economies, countries or parts of the world.

The effects of globalization are basically visible in the way economic organizations function – they had to react fast, modifying their structure, management concept and strategies in order to correspond to the new challenges. In this context, trade unions have also been obliged to adapt themselves "on the spot" and to reconsider their objectives, strategies, as well as the ways of representing their employees' interest before the employers.

What are trade union organizations?

The price which a society must pay when it undergoes a period of political, economic and social transformations - as the years that have marked the history of Romania during the last 22 years - is also a terminological one. The disappearance of an epoch inevitably brings with it a partial or total renunciation to anything that might, even indirectly, remind people of the previous reality – laws, institutions, systems of norms and values, personalities, as well as their representations, symbols, holidays, rituals etc.

Social sciences are mainly exposed to linguistic modifications, which tend to be more evident and deeper since each historical period and regime has its own series of specific terms by which it defines its identity in an as accurate and suggestive (persuasive) way as possible.

The concept of *workers' movement*, integrated after 1990 in the category of "to be avoided" words, is one of the most interesting examples of manipulation instruments which one can use when analysing history and society. Romanian historical literature after 1947 obsessively associates the idea of workers' movement with the idea of socialist movement (which it identifies, in its turn, with the communist one), justifying the latter through the former one, while implicitly establishing certain ideological limits. On the other hand, special literature from the former communist space does not repeat this mistake since it makes a clear and pertaining distinction between the workers' movement, the trade union movement and the social-democratic, socialist and communist doctrines.

The term *movement* (with the meaning that we use in this paper), as the Encyclopaedic Dictionary defines it, refers to "an action which brings together a large number of people that support a common idea and purpose."[2] We can speak, and we are not wrong, of a cultural, religious, artistic, environmental, liberal, conservatory, etc. movement. Thus, the workers' movement is a historical reality which cannot be contested and which is much older than the history of the Romanian Communist Party; its objectives are more numerous than the ones set by the framework of the Unique Party. It is true that for a certain period of time, the workers' movement (including the trade union movement) was regulated by the Romanian Communist Party, but we should not confine ourselves to this period.

For clarifying the terms, we are going to consider *trade unions*[3] as organizations which are set up for defending the rights provided by national legislation in collective and individual employment contracts or in collective employment agreements as well as in the international covenants, treaties and conventions Romania is a party to in order to promote its members' economic and social interests.

Trade union organizations are set up thanks to the right to free association, a constitutionally safeguarded principle in all democratic regimes in the world. Moreover, freedom of association and freedom of expression represent fundamental principles upon which the activity pursued by the International Labour Organization relies; these principles are set forth in the 13th Part of the Versailles[4] Treaty on 28 June 1919, as well as in the Declaration from Philadelphia[5] regarding the

[2] *** *Dicţionar enciclopedic*, vol IV, Bucureşti, Editura Enciclopedică, 2001.

[3] See the Law on social dialogue no. 62/2011.

[4] Provisions set forth in the 13th Part of the Treaty of Versailles are fully comprised by the Saint-Germain Treaty concluded on the 10th of September 1919 (Article 332-372), in the Treaty from Trianon concluded on 4th June 1920 (Articles 315-355) and in the Treaty of Neuilly concluded on 27th November 1919 (Articles 249-289).

[5] Adopted at the 26th session of the General Conference of the International Labour Organization, which was organized at Philadelphia on the 10th of May 1944.

goals and objectives of the International Labour Organization. Any of the 175 member states of this organization are obliged to ensure the legal framework necessary for the setting up and functioning of the structures that represent the employees', as well as employers' interests (see the case of employers' associations).

In order to reinforce the right to setting up professional associations and the freedom of exercising this right, the International Labour Organization has adopted the Convention no. 87/1948 on trade union freedom and the defence of the trade union right.[6] According to the document, "employees and employers have the right, without previous authorization, to set up organizations as they may wish, as well as to affiliate to these organizations on condition they comply with the statutes of the latter" (Article 2). Organizations have the right to elaborate statutes and administrative regulations, to organize their management and activity, to freely elect their representatives, to devise their activities on condition that they observe the law (Article 3 § 1 and Article 8 § 1). In its turn, "national legislation shall not aggrieve the guarantees provided by the present convention" (Article 8 § 2), while public authorities "shall restrain from any intervention that might limit this right or hinder its legal exercise" (Article 3 § 2). Employees' and employers' organizations are granted the right to constitute themselves as federations and confederations which can affiliate themselves to other similar national and international organizations.

Thus, the principles which represent the basis for the organization and functioning of trade unions (largely understood as employees' organizations) are: "a) trade union freedom (which is both individual for it recognizes an employee's right to freely adhere to a trade union, withdraw from it whenever he chooses to, and collective since it recognizes the possibility of certain trade union groups to associate or affiliate to another trade union group; b) trade union pluralism (which derives from trade union freedom since it ensures the possibility to set up more trade unions within the same branch of activity, domain or unity); c) trade unions independence (understood as independence from the state bodies, which forbids any intervention from the public authorities that might limit or thwart the exercise of trade union rights and freedoms, independence from political parties – since trade unions are non-political organizations, as well as from any civil society organization)".[7]

In Romania, the present Constitution provides that "citizens may freely associate in political parties, trade unions, employers organizations, as well as in any other form of association" (Article 40). In compliance with these provisions, trade unions are defined by law as employees' organizations, "set up for the defence of the rights provided by domestic law in covenants, treaties and conventions to which Romania is a party, as well as in collective employment contracts, for the promotion of the professional, economic, social, cultural and sport interests of those organizations".[8]

No matter what definitions one gives to trade union organizations, they are merely the synthetic expression of the different ways of understanding the role played by trade unions in the relation system between employers' organizations – trade unions – states in a certain society. If we analyse the way in which representative organizations of employees function in different countries, we shall see that one can talk of trade union models. These are inevitably marked by the economic,

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[6] Adopted at the 31st session of the General Conference of the International Labour Organization on the 17th June 1948, held at San Francisco and entered into force on the 4th July 1950. Up to the 31st of December 2001, the Convention had been ratified by 139 states, Romania being one of the first 20 states which committed itself to applying the provisions of this document (28th May1957).

[7] Ion Traian Ştefănescu, *Dreptul muncii*. (Bucureşti: Editura Lumina Lex, 2000), pag. 51.

[8] The law on trade unions no. 54/2003, published in the Official Gazette no. 73 / 5 February 2003, Article 1. The former law (no. 54/1991 on trade unions) set forth that trade unions are "non-political" organizations; this phrase was eliminated from the present form of the law after a series of debates on this topic, which had as result the idea that the meaning of the term "political" is quite broad and , moreover, thar trade unions define and put into practice their own defence and promotion policy regarding employees' rights; in consequence, the statement that they "do not have a political character" is not true.

political, social, cultural and historical, as well as geographical particularities of any country, and lead to the appearance of different forms of trade unions.

A first interpretation of the role of trade unions is that they are a " **collective voice**" which expresses the employees' point of view as to working conditions, salaries etc., and by means of which one can protest through specific means whenever there is discontent. This means that bidirectional channels of communication are created and maintained basically between trade unions organizations and management and also between these organizations and state institutions so that there is a permanent exchange of opinions on the employees' main problems.

A second interpretation is represented by the phrase: "**trade unions as a counterbalance pole**". The main role of the salaried representatives is in this case to balance the management objectives of the economic unity, which basically are based on profits, with their own interests, which are basically social, so that the results of the economic activity are "fairly" distributed. "As a result, it depends upon the trade unions capacity to counterbalance profit and equity so that the state is not obliged to resort to regulation measures".[9]

From another perspective, trade unions (alongside with employers) organizations are viewed as "**political actors**" within our society and represent the economic and social interests of their members, including their participation in the creation of normative drafts, mainly on trade unions. This requires that there should be a tri-party organization system: trade unions – employers' organizations – Government/other state administrative institutions; it also requires the legal recognition of the fact that trade unions and employers organizations may intervene in the elaboration of normative acts (for expressing advisory opinion and so on).

Globalization of economy brings about a new possibility of approaching the role of trade unions organizations, i.e. the role played by the **transnational collective negotiator**. The creation of multinational companies, which are organized on the principle of decentralization, namely the decentralization of the production unity and/or services which are offered in several countries, enjoying a more or less degree of autonomy in the decision making process, has led to a relatively similar reaction on the part of trade unions. Globalization of economy has also generated a decrease in the power of trade unions whose influence is most often limited to only several professions and to the territory of a state. On the other hand, enhanced financial resources of multinational companies, their capacity to move production to another state, the possibility to transfer workforce from one area to another, the presence of decision centres which sometimes are not located on the territory of that country represent as many threatening factors for the negotiation capacity and the importance of trade unions. Consequently, trade unions reacted against this situation; the solution is represented by the setting up of international trade unions and the secretariats thereof so that finally a trans-national collective negotiation system could be created. At the same time, national and international confederations collaborate with the International Labour Organization, as well as with other international or regional political bodies, with a view to encouraging the adoption of certain regulations that would limit the advantages enjoyed by multinational companies in their relation to employees and to the trade unions which are located on a certain state's territory. It is difficult to establish whether this pattern will function since there are many obstacles that might intervene: economic, social and cultural differences between countries; legislation differences as to work relations; the retention of trade union leaders who consider that the setting up of regional or international trade union structures constitutes a power transfer from their country abroad and thus a weakening of their organizations force within their national territory; the preponderantly negative perception of foreign employees in that state.

According to another approach, coined as Marxist, trade unions are "**promoters of class fight**", respectively organizations which, besides other organizations, represent the interests of the

[9] Dennis Briscoe, Raoul Nacamulli, Miriam Rothman, transl. Industrial Relations Around the World: Labor Relations for Multinational Companies. (New York: Gruyter, 1993), pag. 4.

subordinated class in its fight against the exploiting class, in the evolution process towards a better social order. On the one hand, trade unions must settle social problems and, on the other hand, they must pursue an intense political and educative activity for making the trade union members aware of their role in the creation (or, if the case may be, consolidation) of a new society. This interpretation is losing more and more ground due to the new post-socialist political and economic context existing in Eastern Europe.

Except for the last explanatory model (which is not characteristic of a democratic state), the other ones do not exclude each other, but rather represent facets of the role currently played by trade unions organizations in different countries.

The evolution of trade unions organizations after 1990

The setting up of trade unions organizations. Political changes which occurred after December 1989 led to the disappearance of the former centralized power institutions and thus of the former Romanian General Trade Unions Association, generating a complete lack of organizations that could protect employees' rights before those who became employers in the new economic and social context. In fact, due to the impetus of that period few could predict the appearance of new work relations and the necessity of creating employees' organizations that could integrate and exercise their role in the new work environment. This explains the adoption of the solutions that were suggested at the moment: the appointment in each enterprise of a Council for National Salvation that would be invested both with administrative powers within that economic entity and with powers related to the employees' interests representation; these solutions would be seen today at least original if not utopic but, anyway, at the moment they seemed correct and efficient.

Nevertheless, at the end of 1989, political events could not thwart the normal evolution of the new trade unions. The arguments regarding the necessity of their existence in the new Romanian democratic society are both objective and subjective.

(a) From an economic point of view, the new system required the pluralism of property forms, in which private property became dominant. The owner of the property was profit-oriented and assumed his right to adopt decisions in relation to the encountered risks and within a competitive environment; the coherence of the system is ensured through the market mechanism, the existing economic and financial levels and the legislative framework. Most of the merchandise is transacted on a supply and demand market and the price is the result of free negotiations between buyers and sellers without the administrative intervention of the state and without any other pressure. Under these conditions, workforce becomes an object of transaction on the market (without, objectively speaking, being considered a merchandise in itself), a fact which brings about the necessity of creating organizations that can negotiate employment and payment conditions for employees and that can promote their professional, economic and social interests before employers, the associations of employers or before other institutions.

(b) In case certain employees' rights are aggrieved, provided that these rights are set forth in domestic legislation, collective employment contracts or in the international treaties and covenants Romania is a party to, the defence of these rights lies with trade unions organizations.

(c) Trade unions represent a social dialogue partner whose role is well defined in the bi- and tri-party organizations that are set up in a democratic society.

(d) Last but not least, the material and financial legacy of the Romanian General Trade Unions Association had to be managed and put to good account to the benefit of those who had contributed to its setting up in time, respectively to the tax paying employees and trade union members that had been active before December 1989. The quite consistent patrimony could not be included in the state proprietorship either, as it could not be shared, fragmented or destroyed; on the contrary, it had to be transferred to an organization whose role was similar to the previous association.

The first attempts to reorganize trade unions could be noticed during the last days of December 1989,[10] when the National Provisory Committee for the Free Trade Unions Reorganization was set up; several former members of the Romanian General Trade Unions Association (it is true, not the former leaders but the second wave of the former national trade unions association) got involved in this structure. From a certain point of view, their presence was natural thanks to the organizing experience and the information they had about trade unions and their way of functioning. On the other hand, the reorganization activity pursued by the new Committee was soon labelled as an attempt to preserve, in a disguised way, the former trade unions structures.

Contested or not, the National Committee basically attempted to achieve three objectives: managing the patrimony of the Central Council of the Romanian General Trade Unions Association,[11] devising a statute framework based on new, democratic, principles, which would constitute a model for the new employees' professional organizations[12], and reorganizing territorial structures.

The first two months of 1990 represented an intense activity for the reorganization of free trade unions in economic entities/or per fields of activity; at the same time, initiative groups prepared the activity programme and conference/congresses for the setting up of similar organizations.[13] The political interests and confrontations of that period could not ignore these newly created organizations which enjoyed the adhesion of an important number of persons. At the moment it is difficult to evaluate the extent to which trade unions objectives intermingled with political objectives; however, it is sure that certain trade unions organizations constantly declared that they got involved in the political activity,[14] while others, on the contrary, benefited from the advantage of being present on the public sphere and clearly departed from this kind of activity stating that their claims are exclusively economic and social; on the other hand, trade union leaders from different economic units officially became members of the newly set up parties – declaring, however, that this is a strictly personal option which does not have anything to do with the organization they manage.

In January 1990 the first central trade union was set up at national level, i.e. the "Frăţia" Confederation of the Independent Trade Unions, its nucleus being made up of the "Frăţia" Drivers Trade Union and the "1 Mai" Trade Unions of Ploieşti and "Policolor" Trade Unions. In March 1990 the National Confederation of the Romanian Free Trade Unions[15] was created (known by Romanian as C.N.S.L.R.) and it comprised federations from education, commerce, textile industry, leather

[10] The "Tineretul Liber" newspaper signed on the 25th of December 1989 the action known as the "1May" Free Trade Union of Ploieşti for the distribution of typical adhesions forms for 7,000 members; the "Adevărul" newspaper mentions - in its issue on 23rd December - Mr. Mircea Adrian's initiative, a worker in the production section of the Metallurgic Research Institute who, together with 14 workers and engineers, encouraged the setting up of a free trade union for workers in the field of metallurgy. On the 30th of December, through the agency of the same daily publication, the Provisory Committee for the Typographers' Free Trade Unions Reorganization published fragments of their program and suggested that February would become the month for organizing the Conference of the Typographers' Free Trade Unions.

[11] In March 1990, by statute, the National Committee for the Free Trade Unions Reorganization declared itself the successor of the Romanian Trade Unions General Association, thus taking over its patrimony through absorption.

[12] According to the statements of some persons who were directly involved in the activity of the National Committee, the conceiving of the framework-statute followed the models of the International Free Trade Unions Confederation and the Solidarity Trade Union of Poland.

[13] Newspapers record the creation of the first federative structures – the Federation of the Romanian Journalists and Typographers' Free Trade Unions, the Federation of the Education Free Trade Unions, the Federation of the Miners Free Trade Unions of Uricani, The Jiului Valley, the Romanian Medical Assistants Federation of the Free Trade Unions, The Navigators Free Trade Union, The Radio – Television Free Trade Union, The Federation of the Romanian Factory Railway Free Trade Unions, the Federation of the Romanian Free and Independent Engine Driver Trade Unions, the Federation of the Underground Mechanics Free Trade Unions etc.

[14] See the Free Radio-Television Free Trade Union run by Dumitru Iuga

[15] Recorded at the Sector 1 Court of First Instance, Bucharest, Judge's Ruling no. 782 / 16th March 1990. Its leader was Victor Ciorbea, who at the time was the President of the Federation of the Education Free Trade Unions.

trade, fabrics industry, rubber, mechanical engineering, metallurgy and agriculture. "Cartel Alfa"[16] National Trade Unions Confederation set up in June 1990 comprised seven professional federations from the main industrial sectors: chemistry and petro-chemistry, mechanical engineering, metallurgy, mining, electrotechnics, electronics etc.

This does not mean that all trade unions organizations, as well the federative ones, were affiliated to one of the three national structures: there existed a multitude of organizations which considered that none of the large confederations represented their interests, preferring a large number of associations and alliances, many of which existed for a short period of time, depending upon the short and middle term interests of those who created them.[17]

One of these inter-federative unions, The National Trade Union Block[18] agrees with other three organizations ("Electron", The Post Office and Telecommunications Trade Unions Federations and the Typographers' Trade Union Association) to start negotiations for the setting up of a new confederation. The suggestion becomes reality in November 1991, when the representatives of 13 federations reunite in a Congress for deciding the setting up of the National Trade Unions Block as a confederative national trade unions organization.

In June 1993, delegates of the National Confederation of the Romanian Free Trade Unions[19] (C.N.S.L.R.) and "Frăția" Confederation of the Independent Trade Unions joined in a common Congress and decided to fusion the two different national trade union structures; thus, the National Confederation of the Romanian Free Trade Unions – Frăția[20] was set up. A year later the Romanian Confederation of the Democratic Trade Unions was created.

The experience of the next years proved that the principle of trade unions pluralism was not in contradiction with the idea of coagulating the trade union movement; moreover, cohesion does not do anything else but bring extra force to organizations in their relations to social partners. That is why, in 2000, C.N.S.L.R. – "Frăția" and the National Trade Unions Block started negotiations for merging; the idea was not new and (apparently) there were enough premises for applying it, many of the included federations representing employees from similar domains so that the subsequent merging thereof was possible; at the same time, the two confederations shared the same doctrine visions (social – democratic) and they also had the same international affiliation. Nevertheless, in the autumn of 2001, negotiations came at a cross and B.N.S. delegates at the National Conference decided to give up the merger project and to proceed with the consolidation of the confederation. The idea of unification is reiterated at the middle of 2004 without coming to an agreement.

At present, in Romania there are more than 180 trade unions federations and more than 10 confederations. As to the confederations, only five of them are representative: The National Trade Unions Block, the National "Cartel Alfa" Trade Unions Confederation, The National Confederation of the Romanian Free Trade Unions – Frăția, the Romanian Democratic Trade Unions Confederation and the "Meridian" Trade Unions Confederation.

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[16] « Cartel Alfa » C.N.S was set up on the 7th June 1990; it received legal personality on 26th November 1990. Its President is Bogdan Iuliu Hossu.

[17] In 1993 there were more than 25 national confederations with legal personality.

[18] It comprises the following trade unions: CONSTRUCT, CONSENERG and CONMAS.

[19] Recorded at the Sector 1 Court of First Instance Bucharest, through the Judge's Sentence no. 782 / 16 March 1990. Its leader was Victor Ciorbea, who at the time was the President of the Federation of the Education Free Trade Unions.

[20] Victor Ciorbea and Miron Mitrea became co-presidents of the largest confederative organization in the country. However, the "marriage" of the two does not last and in October 1994, Victor Ciorbea submitted his demission from the leading position of this structure and set up the Confederatoin of the Romanian Democratic Trade Unions, with a Christian – democratic orientation (he took a part of the professional organizations that were "torn" from the mother-organization).

Stages in the trade unions organizations development

1990 – 1991- "Strong" trade unionship. The first two months of 1990 were marked by a real "euphoria" of the claiming movements that were most often concluded in the street; the claims were mainly aimed at material and financial resources and dialogue between governing organizations and trade unions organizations and they were quickly "consumed" in the favour of adopting more radical methods. Large meetings of the industrial workers from important factories in Bucharest and in the country, of drivers, of employees from the Romanian Railway System and the Underground etc. were quickly organized and filled in the squares of the Capital City – this became, in fact, a common situation in Bucharest.

Trade unions organizations soon noticed that owned an efficient pressure instrument (the mass of employees) and intensely speculated their position in relation to the state institutions. On the one hand, the advantages consisted in the large number of trade union employees and the relatively quick rhythm in which trade union leaders[21] became specialized in their specific activities; on the other hand, the advantages were represented by the weakness of certain state institutions and by the sometimes incoherent policy on economic restructuring and privatization. At the same time, one cannot neglect the social factor which favoured the given context – after years of prohibition, people suddenly discovered the "taste", "show" and "force of the street", and they started to get involved in a series of such events due to their need to be "in the middle of the events", to "directly participate" in the events; this made it easier for the trade unions to convince the population to "come in the street" (a thing which is much more difficult to do now and which requires more costs).

The implication of the political factor was added to these problems so that trade unions organizations started to be "courted" from the very beginning (thanks to their force) both by the governing political parties and by those from the opposition. Questions such as to what extent is it correct for trade unions to get involved in politics, under what form and up to what limits can this be done – represent a much too complex matter of argumentation and counter-argumentation for us to deal with in the present study. What is certain, however, is the fact that Romanian trade unions organizations quickly "tasted" from the political fruit, in a more or less visible way, supporting different political parties or alliances.

At present it is difficult to prove to what extent trade union movements from 1990 – 1991 (as well as the ones which were organized later) were influenced by economic and/or political factors. It is a certain fact that miners' protests organized within the above mentioned period showed the extent to which trade union movement can be manipulated so that it departed from its normal goals; this is proved by the fact that later on, when similar events occurred (at Stoieneşti, 1998), the large central trade unions clearly detached from the miners' attempt to reach Bucharest, probably accepting that the miners' claims are natural but the manner in which they tried to impose them was illegal and, in consequence, could not be supported.

Starting with 1991, legislation on work and social dialogue came into force as a result of the negotiations between the state and trade unions representatives; these negotiations lasted almost one year. It is true that trade unions representatives repeatedly criticized the inexistence of some real consultations, considering that the government did not take into consideration their claims.

Law no. 13/1991 on the collective employment[22] contract was the first way of legitimating the regulations of working conditions, payment and other rights and obligations that derive from labour

[21] Trade union leaders underwent a quick period of training in various domains – from negotiation techniques to the assimilation of essential economic, legislative, financial and organizational management; they obtained support and benefited from training programs organized with lecturers from international trade unions organizations or from different foreign countries (with the inherent advantages and disadvantages of an intensive training program, sometimes placed on an insufficiently consolidated foundation).

[22] Published in the Official Gazette on the 9th February 1991.

relations. Basically, this law represented a step forward as to the conditions required for concluding, executing, modifying, suspending and ending the collective work contract. It has been later on proved that the limits imposed on this law were determined by the lack of representativeness criteria on the parties involved in negotiations. If for the employers organizations representatives it was simple since they were appointed by the Chamber of Commerce and Industry (for concluding contracts with the companies from the same domains and at national level), when it came to trade unions, the multitude of organizations made it difficult for the negotiation team to be established coming to the absurd situation in which two work contracts were concluded at national level. At the same time, the law did not provide clear surveillance mechanisms for the observance of the contract clauses, a fact which obliged trade unions to make use of multiple forms of protest for demanding this claim.

The law on salary income - The Law no. 14/1991[23] - and the law on collective work conflicts are considered by trade unions leaders as two of the most serious obstacles against the trade unions movement. On the basis of the first normative act, the government was entitled to thwart salary raise for a period no longer than a year. Although this provision has an economic ground, it constituted the reason of many actions initiated by the employees' organizations.

Law no. 54/1991 on trade unions[24] was the first attempt to regulate the creation and functioning of trade unions organizations after December 1989. Besides the clear advantages brought about by the provisions of such a normative act, the law favoured the atomization of the trade union movement allowing the setting up of a professional federation through the association of at least two basic organizations within one field of activity, whereas a confederation could be set up with at least two federations from different areas of activity. A simple calculation shows that with at least 15 members in an organization a central trade union organization could be created for 60 employees.

1992 – 1996 – Protest period. The firsts three years of this period are characterized by general strikes and protest actions common to the national trade union C.N.S.L.R., „Frăția" (unified from 1993), „Cartel Alfa" and B.N.S., regarding especially the salary growth, the living standards, the employment maintain, the redundancy elimination; among them there were also protests regarding politics. For example, in Juin 1992, B.N.S. organized a marsh and a protest in the capital, demanding early/anticipated elections.

On 15th September, the National Trade Union Block sign a Collaboration Protocol with CDR that undertakes to sustain the Romanian Democratic Convention in the futures elections, following that, after victory, the candidate Emil Constantinescu choose his counselors from the unionist group.

The 1993 begins in force for the union movement: early strikes of workers in railways, subways, health, etc, culminate with the general strike from may 1993, attended by six central trade – C.N.S.L.R., C.S.I.„Frăția", B.N.S., „Cartel Alfa", Univers and Ceres. Although claims were especially economic and legislative, often people from the rally demanded, as a last solution, Vacaroiu Government demission, allowing the association of the protest movements with the political manipulations.[25]

Although the social dialogue has become a slogan of both parties, reality showed that the social dialogue was not really used by either part: the government accused the syndicates pressures and the syndicates leaders gave more importance to the methods based on force and less to negotiating methods (to do not forget that the high number of the syndicate members which could be involved in streets protest is still actual). In this context, requesting to the central trade unions to

[23] Published in the Official Gazette no. 32 / 9th February 1991.

[24] Published in the Official Gazette no. 164 / 7th August 1991, at present repealed by Law no. 54/2003.

[25] For example, after the strike, PRM leaders accused the confederation representatives that they will create a "syndicate dictatorship", their political action being controlled from abroad

constitute a dialogue parliamentary commission with syndicates at the Senate and Deputy Chamber level was not a success.

In the autumn of the same year, the protests began again, when the government did not respond affirmatively to the requests regarding the minimum base salary and the salaries indexation.

When, in December 1993, the political parties have filed a motion of censure against The Cabinet Vacaroiu, B.N.S. triggered an action for picketing the Parliament (probably, under Protocol signed cu CDR), while the meeting Chambers debated the motion.

The year 1994 was also characterized by trade unions protests (subway employees, Resita Steel Plant) and general strikes organized by three main trade confederations.

1997 – 2000 – A new approach of the social dialogue. The government installed at the final general elections in 1996 proposed an accelerate economic and political- social reforms; or, the new prime minister[26] new very well that he needed the support of the trade union organizations, which, although they didn't have the force of the 90thies (and were sufficiently rooted in the political space), needed to play the interface role between the governmental decision and the different categories of employees. Therefore, the concept of social dialogue had to be approached in a different way.

The Economic and Social Council was created [27] - a tripartite institution aiming the debates, the consulting and negotiations between the social partners to obtain approval of the legislation regarding the development and restructuring of the national economy, the privatization of the economic agents, work relationships, salary politics, social protection and health care, education and research, etc. The apparition of the Government Decision no. 89/1997 favored the tripartite dialogue in each county.

Health Insurance Fund passed in the administration of the National Health Insurance[28] designed as a tripartite body. The next year, the National Agency for Employment was created as an institution responsible for the tripartite administration of the unemployment fond for the implementation of passive and active measures for employment.

Although the tripartite institutions were created especially because the union organizations requested to (for example, the idea of C.E.S. was lanced in 1994), very soon after that the trade union organizations were overcome by the complexity of their attributions because they didn't have neither promotions strategies for the employees through this decentralized institutions nor experienced representatives.

The fact that a number of central trade union federations had signed cooperation agreements with the new political Power has not prevented them to punish the inobservance of the agreements settlements. When Ciorbea Government didn't took the social protection measures for the rapid privatization process, the social protest began again – strikes of employees from the steel field, mechanical engineering, education, health, research, post, electricity etc. In the same time, as an organization form, the union trade organizations renounce to organize protests in the Capital, adopting the method (less expensive and more convenient) of the simultaneous protests in different towns of the country (December 1998, March 1999, April1999, January 2000 etc.).

The Government accorded high attention to the mining sector restructuring, considered rightly "a sensitive area", both from economical and social point of view and imagological: the syndicates from din Valea Jiului and their leaders[29] were considered powerful organization from long time ago, and associated with the idea of brute force, social disorder, violence, material etc. So, the solution applied was aimed mainly to close the unprofitable mines and in parallel to accord various and consistent subventions and facilities in view to determine the Jiu Valey Trade Union League to not

[26] Mr Victor Ciorbea, ex syndicate leader, president of CNSLR, and of CNSLR-Frăția and afterwards of CSDR
[27] Bz Lwo no. 109/1997
[28] In base of The Health Social Insurance Low no 1455/1997
[29] Especiallz the president of Thea Minins sindycate League from Valea Jiului, Miron Cosma

open labor conflicts; all these without according high importance to the immediate and long term consequences (on the finance source for this restructuring).

From the economic reform point of view, the year 1998 signified the release of the process to restructuring the self governing management organizations – electric and thermal energy, transports, gas, railways etc. Or, this fact represents the touch of the „hard core" of the trade union organizations (the most compact structures, with a big number of members and with significant financial resources), leading to the immediate and widespread reaction of them. The division of the ancient RENEL, With all its negative consequences for the employees and for the population determined the syndicates members from the others self governing management organizations (especially from the natural gas field, the next target) to do all their best to attest the risks of such measures – repeated negotiations with the governors, arguments similar to those occurring in the restructuring process practiced in other countries, use of media channels to make their views known, picketing (the headquarters of ministries, parties or governments housing),[30] meetings, general strike threat, etc.

After the simultaneous protest from 10th December 1998, from Bucharest and Brasov, the executive proposed to the syndicate to sign a moratorium which, on medium term, has not produced the expected effects of any of the signatories. .

Next years were characterized by a series of protests either the federations or the confederation level (separately or commonly).[31] The protests regarded legislatives modifications (Pensions law, Professional risk assurance low etc.) institutional modifications (establishment of labor courts, the abolition of the State Property Fund), budget modification (consulting of confederations regarding the budget project elaboration the modification of the budget for year 1999 in order to allow the application of the table tickets law and the salary indexation law), fiscal modifications (reduce taxes), introduction of sanctions for those who use illegal work etc.

The fifth miners protest represented a new event which cast a "black light" on the trade union movement, confederation leaders detaching from the miners action, but not strong enough and not fast enough to separate the LSMVJ image and of its leader from other organizations.

Without being voided of protests, year 2000 (electoral year) lead to the repositioning of the rapports between the main union organizations and the political parties. The experience of the inefficient collaboration CDR and PD, the visible fragmentation of the old government coalition, the fragility of ApR and PSDR determined C.N.S.L.R. – Frăția, B.N.S., C.S.D.R., „Meridian" Confederation and their main federations to switch to PDSR (in fact, for the first confederation it was just a reaffirmation and a revitalization of the relationship with this political party). The pre-electoral agreements with the Social Democracy Party provided the introduction of some syndicate representatives on this party list, in order to constitute a social-democrat union pole in the Parliament.

2001 – 2004 –attempts of political implication. Year 2001 brings an innovation in the trade union politic – concluding the first Social Agreement between the syndicate, the body of employers and the Government, agreement containing clear and precise clauses, terms and responsibilities that obliges all signatory parties. The form of the partnership between the social partners is not a Romanian innovation, being practiced for a long time in various European countries, with results more or less notables. But the perception of the syndicate members on this collaboration is rather negative, given that the trade union organizations didn't knew to prepare the "explicative land" and were satisfied with the leader accept that was given in different meeting, national conferences or

[30] At 22 of July 1998, the members of B.N.S. syndicate picketed the houses of The Democrat Party members, because at that time, Radu Berceanu was the Ministry of Industry and Commerce and Traian Băsescu the Transports ministry)

[31] Meetings, advertisement strikes and general strikes of the employees from construction machinery , transports (CFR, RATB and Subways, metallurgy, defense industry, health, research, education, wood industry , energy, gas, public officers etc.

congresses. The entry of some leaders of the syndicate in the Parliament and the accordance of some important executive functions for the ancient syndicate leaders in Nastase Cabinet, the Social Agreement is seen not as measure to find solutions for the employees' problems but as a measure to obtain some personal advantages for those in the echelons of union trader. The negative reaction of the members determined two confederations – „Cartel Alfa" and B.N.S. to do not sign a new Agreement for 2002, requesting separate negotiations and eventually to conclude another documents in other terms.

The protest forms (meetings, strikes, picketing) didn't disappeared but they diminished as number and as intensity; they demonstrated, on one hand the employees diminishing trust in the syndicate capacity to resolve a series of problems, and on the other hand, the scission existing in the Romanian union trade movement (in March 2003, although they presented similar demands list and although they announced the same day to protest, C.N.S.L.R – Frăția meeting was separated from that organized by „Cartel Alfa" and B.N.S., at one hour and 1 km distance of each other, only just to demonstrate the identity difference between the union trade centrals).

The new syndicate law, adopted in 2003[32] brought a change that a lot of trade union organizations were unable to fructify: a trade union organization could constitute itself with minimum 15 persons from the same profession, even if they work for different employers. It would be a good opportunity to attire the employees from the small economic units and a first step in the trade union clotting movement.

The electoral year brought for the public opinion, an initiative of the trade union confederation that generated many for and against comments: the creation of a political party which sustain and promote, in the political decision plan, the interests and the legitimate aspirations of all Romanian workers. After a series of consultancy of the own syndicate members, The National Union Block, set up, at 21st February 2004, the National Democrat Block Party (PBND), which was considered as a political instrument necessary to realize reforms in a country which desires to become an authentic state of law governed, as the occidental states, by right, fair lows, which correspond to the aspirations of the majority of the Romanian people. In view to respond to the main critics regarding the new political party, BNS declared in many times that, the two organizations, even if they are support each other, they are independent, the decisions are taken independently, the confederation keeping his trade union identity, with specific objectives and features in order to achieve political aims. Following elections in 2004, five PBND representatives, have acquired the parliamentary standing, as a candidate on the list of The Greater Romanian Party, with which the BNS political party concluded a pre-electoral agreement. [33]

2005 – 2008 – the begin of the organizational restructuring. The elections from 2004 were gained by the PNL –PD coalition, which candidate as Alianța D.A. The designed Government under Prime Minister Tariceanu, announced in early 2005 the intention to modify the Labor Code, leading to a violent reaction of all the confederations. The proposals of the Labor, Social Solidarity and Family Ministry, most of them unfavorable for the employees, and the short terms (justified also by the real or not pressures of the International Monetary Fund motivate) for the negotiation, leaded to the meetings and protests common to the five trade union centrals, which had a very good and respected program.

The union trade confederation reaction represented a proof of their maturity and of their competent reaction capacity, in favor of the employee's interests that they represent. Negotiations with the Government representatives and those of the employer's body demonstrated the capacity of the syndicates to sustain their point of view with pertinent arguments in the economic, legislative, social field, with reference to the European Directives and Recommendations and to the compulsivity

[32] Low no. 54/2003 of trade unions, published in the Oficial Gazette of Romania no. 73 from 5th February 2003
[33] The Block National Democrat Party transformed, afterwards, in the Christian Social Union

to harmonize the national legislation with community patrimony in social protection and employees' rights field.

In view to emphasis their position; the five union trade confederations initiated protests in all country: – meetings and picketing organized within a good, common and totally respected program.

For the first time after 1990, over 840 representatives of the affiliated union trade federations affiliated to the fourth confederations – BNS, CNSLR – Frăția, Cartel Alfa and C.S.D.R. – went, in March 2005, to Bruxelles to participate at the euro-meeting organized by The Labor European Confederation (CES) and the International Confederation of the Free Union Trade (CISL), affirming their affiliation to the international union trade structures, the total accord regarding their requests, and hoping to an aid, more than a formal one of the European trade union groups in favor of the Labor Code in force in Romania. These are considered the first steps in view to coagulate the Romanian union trade movement, but the next years demonstrated that, this desire is still impossible to accomplish.

2009 – present – looking for a new identity. Governments that have succeeded in the last three years haven't represented an easy period for the syndicates. Because of the financial crisis, the political power adopted legislative measures (most of them assuming the governmental responsibility) that affected significantly the force of the employees representative organizations.

Although, the syndicates complained permanently the absence of the social dialogue, the true is impossible to contest: they didn't have the force and the means to impose their own point of view.

The modifications of the Labor Code, the salary restrictions in the budget sector, the elimination of the national labor collective contract, the social dialogue low are examples of normative act which supposed a more rapid and efficient intervention of the trade union organizations, especially federative and confederative organizations.

The attempts to create a pressure through public manifestations such as strikes, meeting, marsh, etc were disturbed by the syndicate leader reticence regarding the efficiency of these methods. The difference between the syndicate leaders' declarations regarding the number of persons which will participate at such events and the reality inflamed the idea of the trade union incapacity to constitute a pressure force for the actual political power

Design and organizational change

The social and economic evolution imposed a new "lesson" for the trade union organizations: training and reorganization of their activity, identification of objectives according to the changes appeared in the Romanian society. Practically, the trade union organizations have been facing with some changes which they were not prepared for. For example:

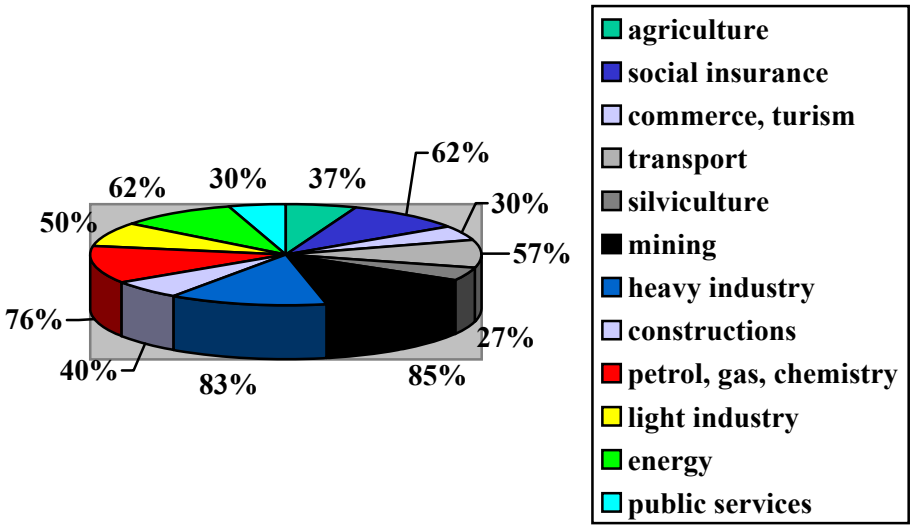
The diminution of the number of members, phenomenon due, on the one hand, restructuring economic sectors, and on the other hand, limiting confidence of employees in the syndicate force to oppose salary modifications, loss of jobs, etc. The advantage offered by the legislation regarding the constitution of the union organizations was not used, so they remained without the human and material necessary force.

After 1989 there are not exactly statistics that presents the number of syndicate members and the organization structure on age, sex, professional level, residence area etc. These dates may be identifiable at the basic organizations level but there are doubts about their veracity.

At year 1991 level, the number of the syndicate members went beyond 5,2 millions, appropriate to a rate of syndication of approximately 90%. In 1995, the forth biggest union confederations declared over 4,5 millions of members: C.N.S.L.R. – Frăția 2,1 millions, „Cartel Alfa" 1,1 millions, B.N.S. 750 000 and C.S.D.R. 600.000. These numbers would correspond to a syndication level of over 76,8%; in reality the value was less if we take into account the number of members which were paying the fee. In year 2000, with ANOFM help, they tried to realize a census

of the syndicate members but the results were not public. From the commentaries about this statistics, it seemed that the number of persons affiliated to an union organization didn't exceeded 1,5 millions.

Figura 1 - **Degree of syndication in economic sectors**



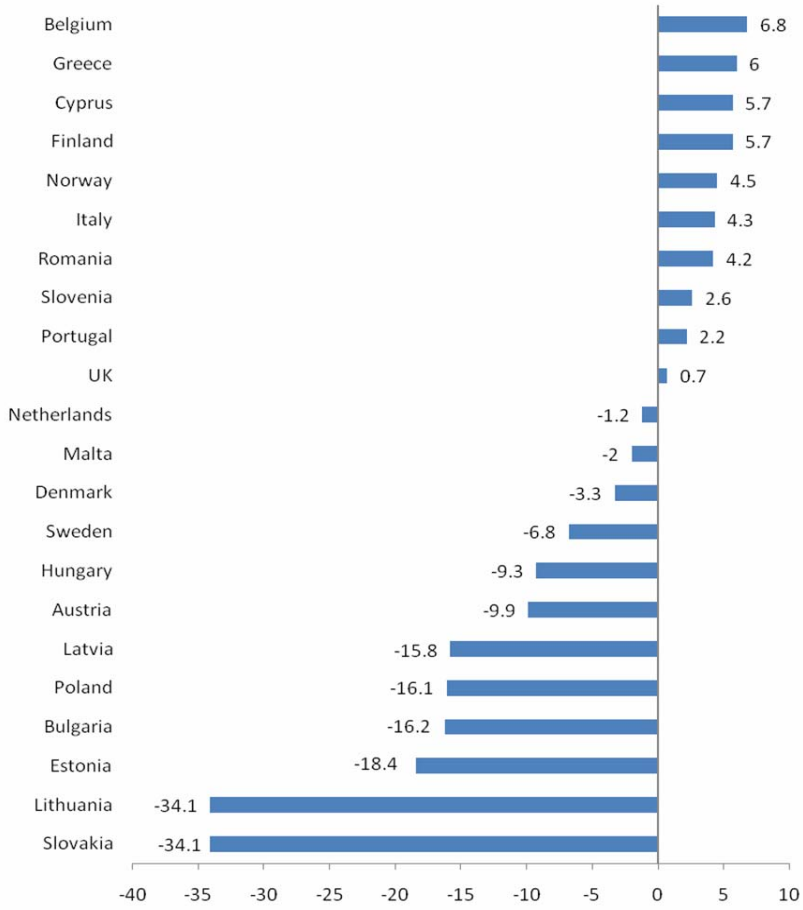
Source : *** Promoting principles and fundamental writes of workers and consolidating of the trade unions from. (Bucharest: Tipografia Print Paper, 2002), page 25

Actually, the small degree of syndication is emphasized in areas where the transition to the market economy is more intense, and the private propriety gets a share increasingly higher.

At the same time, there are a series of other areas where the union activity is inexistent- the financial and banking one, the private insurance one, the informatics one. Generally, is difficult to syndicate persons that work in professional areas having a high remuneration degree and benefit by other non-financial advantages or those which work in the outside areas of spaces that require concentration of workers. In other situations, although it is not explicitly declared (because it represents a flagrant violation of Constitution), in the private sector there is a management practice of the foreign companies in Romania, which are doing all their best to avoid the constitution of trade organizations by their employees, although that in their own countries, this is a common practice, even a sine-qua-non condition.

Romanian situation from this point of view is not an exception, especially the ex socialist countries recording similar processes. An analyze of the number of union members evolution in European countries, in the period 2003 – 2008, shows that, there are countries where the number of syndicate members increases, but growth is between +0,7% and + 10%, while in countries where the number of members decreases, the percentage rage is greater: between – 1,2% and 34,1% (see figure 2). Romania record a percentage of 4,2%, but we have to take into account that these data refers to the period before the financial crisis.

Figura 2 - Percentage modifications of the number of trade union members in European countries, between 2003 - 2008



Source : European Foundation for the Improvement of Living and Working Conditions. "Trade union membership 2003 – 2008", (Dublin: Eurofound, 2009), page 10 [34]

The privatization of some fields, determined , for the first time, the union federations and confederations to negotiate the collective labor contracts with the representatives of the big transnational organizations (GDF Suez, EON, OMV etc.), facing with some tough negotiation phases comparing with the „negotiation with the state as employer". More than that, they became part of international syndicate structures (ex. European works committees), role that they had to appropriate themselves quickly and without major errors.

From this point of view, it starts to feel significant differences between the representative organizations of workers that have as social dialogue partner a private company and those that

[34] European Foundation for the Improvement of Living and Working Conditions. "Trade union membership 2003 - 2008" Accesat 20 februarie 2012
http://www.eurofound.europa.eu/eiro/studies/tn0904019s/tn0904019s.htm

represent their employees from the budget sectors. The firsts begin to feel a stronger need for restructuring the union activities and even the union organizations. From the need to cope with the private employer pressures, these organizations start to search for coagulation forms –, for example to constitute trade alliances between federations from similar activity fields. Syndicate leaders gradually discover that the activities they develop suppose not only vocation and charisma, but also a certain specialization - the activity of a syndicate leader tend to become a profession.

The negotiation process gets out gradually from the formal field (still present in the unions from the budget sector), a more detailed knowledge of the legislative, fiscal, taxes, etc problems being more and more necessary.

The need for support from the syndicate members from the basis organizations becomes again very important, so those from the management structures of the federations and confederation look for modalities to re-establish the communication channels with those from the hierarchy base. The syndicate leader starts to become, also, gradually a manager. .

The diminution of the financial and material resources is a reality that unions felt more and more intensely. The diminution of the numbers of members generates a proportional diminution of the shares, so the unions begin to focus toward other legal forms (provided also by the trade union low) to obtain the material and financial resources necessary for a proper functioning.

Legislative modifications, especially in the last three years, adopted mainly by the government responsibility assumption, without taking into account the objections, proposals or protest of the unions leaded to the idea that the union organization power diminished, which resulted in the increasing of the degree among public opinion

Corruption accusations against persons from the union organizations management, rightly few in number, have been skillfully exploited by the political power. Thus, the negative image transfer from the accused person to the entire union structure that this person was leading, led to a loss of public image of the entire trade union movement.

Conclusions

This study aims to become an argument in support of the idea that unions are social actors who can be appreciated as equilibrium factor or, contrarily, as an element of disturbance of the normal labor market and, implicitly, of all society, but they can not be ignored.

One of the European industrial relationships "rule" is that the social partners, respectively the body of employers and trade unions, are note simply lobby organizations or pressure groups which do all their best to achieve their specific representation objectives. Their mission includes, besides traditional goals, a responsibility for the public welfare, playing a very important role in functioning and structuring of the labor market as well as in the social security system.

National and international legislation confers to the trade union organizations a series of rights that have as effect the direct and the indirect intervention on the labor market. They have the right to negotiate and to conclude labor collective contracts, to intervene in the normative activity at national level, having a consultative role, to pronounce on the employer's programs that involves collective redundancies, to defend the interests of their members, interests arising from the low and from the collective labor agreements, before courts and other public and state bodies, by their own or chosen defenders etc.

The functioning mechanism of the union organizations (and body of employers) and the social, economic and political impact represents, a subject of interest to the sociological research and beyond.

In the future studies, the role of the union organizations could be analyzed in some coordinates: the corrective coordinate, the pressure coordinate, the consultative coordinate and the partnership coordinate.

The corrective role is realized especially through the quality of the trade union organizations to negotiate the collective labor agreements, starting from the national level to the unit level.

On certain segments of the labor market, labor owners don't negotiate any more individually their salary and the other conditions of employment, syndicates do it for them. This situation presents a series of advantages for the employee, the union organization becoming a "unique voice", a compact force which may be imposed in the relation capital possessors – labor possessors. Thus, the inconveniences coming from the dispersed employees against employers are limited. In turn, the employers respond with similar organization form, such as the meeting between labor market demand and labor market supply can take new, distinct issues.

The corrective role of the unions function closely linked to the **pressure** one. In terms of visible differences between different industries, closely linked to the number of members, to the financial and material force, to the quality and preparedness of the leaders, to their relationship with the employees, the union organizations are capable to exercise significant pressures to obtain, on short, medium or long term the rights that they consider favorable for the members they represent. Pressure instruments are distinct, from the legal protest forms to the lobby practiced by the unions, especially at federative and confederative level besides the state institutes and a closer relationship with the political factor. Not infrequently, the effects of these pressures proved to be on short term favorable to the employees, but negative on medium and long term, not only for the unit or the unit group in cause, but also for entire branches or even at the national economy level.

Logically, the main reasons for exercising some forms of pressure from union organizations are related to: salary problems: - setting salary scales, indexation and compensation denial, asking for salary rights, not according holyday bonus, not according restaurant coupons; modifications in organizational structures, collective labor agreements negotiation, refusal of the collective negotiations etc.; not detaining the conditions for developing the union activities, the immixing of the employers body in the union activities development, the lack of transparency, the non-compliance of the collective agreements negotiate at a higher level; the lack of social protection measures at the economic agent level, founds for social actions, compensatory payments, aids, etc etc.; work conditions; time work.

The most visible (and the most obvious) manifestations of the syndicate pressure are the meetings, the marshes, the strikes, and the obsessive information of the public about these manifestations, leaded in time, to the simplistic and exclusivist association with the list of demands more or less exaggerated, presented to the authorities or imposed by force by force and by social. The trade union major objective tend to demonstrate that the pressure exercised by them may have various forms, not necessary violent forms or instigation forms, this pressure aim is to ameliorate the economic, social, professional, cultural etc, problems.

The consultative and partnership role of the syndicates is emphasized especially in situations where they are placed to represent employees interests in a number of advisory bodies, bipartite or tripartite, created in order to have an institutional framework in which the social partners express their points of view regarding the legislative measures, the strategies and programs that aim economic and social fields. Institutions with tripartite administration were set up; these institutions give the possibility to the syndicates to participate directly to the management of essential sectors of the society– training and employment, pensions and other social insurance etc.

In Romania, for the year 2012, we can say that, there is legislative framework governing the organization and the functioning of institutions and social dialogue structures– it remains to achieve the most difficult thing: to become a functional one.

The social dialogue between the union trade organizations, the body of employers and the government represents a difficult social exercise, given the multiplicity and the complexity of each party interest. To be functional, it must be based on equality, strength, and openness of each partner, otherwise it remains a formality, "a mimed ritual", without real effects in the socio-economical plan.

As long as the social partners from Romania will not perceive in this way the role that they have in different social dialogue institutions, the constructive consensus and the social peace climate

are simply illusions. And last, but not least, the good functioning of the social dialogue represents one of the principle criteria for Romania to integrates in the European Union.

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HOOLIGANISM – CONTEMPORARY SOCIAL PHENOMENON

MARIA LULESCU [*]

Abstract
The proposed scientific theme is going to approach and study the hooliganism phenomenon as a contemporary social matter, in terms of conceptual and etiological.
The present work has four main purposes:
(1)- that of explaining the meaning of hooliganism social phenomenon;
(2)- that of discovering the origins of hooliganism;
(3)- that of knowing which are the causes that encourages the occurence of the hooliganism;
(4)- that of knowing how to control and minimize this phenomenon.

Keywords: *Hooliganism ,Violence in sport, Hooligans, Supporters, Crowd's Psichology.*

Introduction

More often we have encountered in mass media the term of hooliganism or hooligan. This should determine us to question somehow this phenomenon, being rather new for Romanian society, but rapidly growing. Thus, in the frame of this project we are going to analyze the hooliganism meaning, its roots, the causes which determine its manifestations in contemporary society and which are possible prevention and control methods. This can be attained focusing especially on London sport teams, but secondary we are going to study the hooliganism which has started to turn up in Romania as well.

What does hooliganism mean?

According to the Explanatory Romanian Dictionary, hooliganism implies grossly encroaches upon all the behavioral norms. Also the definition includes public order and moral disturbance through behavior showing lack of respect and decency regarding social interaction/brutal behavior or attitude which are manifested by overstepping the other citizens' rights and liberties, through aggression, dangerous and harmful behavior. [1]

There is no definition of hooliganism related to football. This term has been introduced by mass media, and lately, this label has been applied to more and more often violent incidents where supporters have been involved. According to majority of researchers, hooliganism in football is associated to any violent manifestation when supporters are implied.

Representing a collective form of violent behavior in sport, hooliganism should be understood better by a thorough knowledge of **collective conduct** and the **group categories** present in contemporary society.

Collective behavior implies a certain type of emergent action (spontaneous and guided by norms created by participants) and disregarding institutional norms (ruled by other norms, most of the time different from those socially accepted). Among its characteristics we can mention: the purpose, the participants degree of organization and its duration. The aims of these actions might be explicit (externalizing participants feelings) or instrumental (achieving some rights or advantages). Regarding the degree of organization of the participants manifesting this type of behavior, a distinction is made between non-organized collective conduct (spontaneous, without an appointed leader) and those highly organized (having an action program and an official leader). Between these two extremes there is **intermediary collective conduct**.

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Their duration is also variable; some may last a few hours, as is the case of some events, other may last a few days, weeks or more (racial tensions or social movements).[2]

In order to establish which **group categories** are, it is very important to know and define what a group is. Thus, a group/crowd/mass is a temporary gathering of people, in a close assembly, either by chance or after an agreement, driven by a common interest or objective. Having common interests, similar objectives, implying some people presence at the same place and time, does not represent enough conditions to create connections, relationships for a structure. Sociologically, the notion of **crowd** covers a variety of gathering forms, defined by lack of homogeneity, cohesion and organization, emotional response to situations in which it is involved in. There is a fortuitous **crowd**, defined by a reduced degree of emotional and organizational interaction, gathered by chance and whose existence is in fact momentary. People found in this crowd have in common a momentary aim. Examples of this type include: a crowd waiting at a bus station or in front of a theater booking office.

The crowd whose behavior is conducted by mediating some ruled expectations of traditional or contractual models is a conventional one. The crowd which has no clear defined objective, but reaches a collective behavior as a result of mutual stimulation of effects, is an expressive crowd. For example a dancing, mourning or joyful crowd.

The range of reactions which might define a crowd lay from ecstasy to destructive aggression, including nervousness, anxiety, panic. According to the efficiency of social control and the stress created by dysfunctional or by a state of no moral principles in a situation, the crowd might be passive or active. Crowd sociology studies social and cultural conditions of behavior inside a gathering, the link between reactions frequency and their amplitude and the type of political, economic and social organization; factors and ascendancy which contribute to pass from non-defined group, having mostly a chaotic action, to a structured collectivity; the action of social mechanisms used to manipulate and the predominance of a psychological profile in a determined form of social organization.[3]

However, two main categories of incidents might be labeled as 'hooliganism':

a) Spontaneous incidents, most of the time minor, produced by supporters on stadiums or nearby (the type of incidents which take place, for example, in most cases in United Kingdom, when a team plays 'away'.

b) Premeditated violent actions, when usually there are implied organized gangs (or crews) gathering sport clubs fans. The incidents sometimes take place far away from the stadium and long time after the match was played.

The origins of hooliganism

Hooliganism is an often manifested phenomenon nowadays. It started around 60s-70s in United Kingdom, where it is supposed that football originated. Hooliganism is manifested by public order disturbance, especially by football fans, usually supporting rival teams.

Rivalries on the pitch usually generate even bigger rivalries outside, where the club's fans gather to fight. This is, without any doubt, a brutal attitude, maybe a manifestation of frustrated people, which unfortunately, has appeared in Romania too. Dougie Brimson relates in his book, *Barmy Army*, that he has known doctors, lawyers, businessmen, taxi drivers, journalists and even policemen who are hooligans.

Thus, it does not matter what they do for a living. The hooligans have a sort of double life, becoming totally different when they gather to support their favorite team. They gather before any match, establish their territories, routes and make plans so that everything to go according to their plan.[4.]

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[2] http://www.dictsociologie.netfirms.com/Termeni.htm

[3] Idem

[4] http://ultras.sportlocal.ro/eseu-despre-huliganism.html

Dougie Brimson considers that through hooliganism someone might detaches from all the problems he or she has and might throw all his or her frustrations in brawls against rival gangs. Thus everything in this respect become a sort of fashion. Gangs even have names, meetings and history.

For example, *The Headhunters*, the hooligans from the Chelsea football club, are one of the oldest and best known from British and international football. Their most important opponents are Milwall, West Ham and Tottenham fans. [5]

Hooliganism in United Kingdom is like drink-driving. Some of them either have practiced or know someone who has done it, but do not take any measure to stop this sort of behavior. It is the same with hooliganism. If someone is caught it is not assumed that he or she is an offender, but just had bad luck.

Moreover they do not consider their behavior an offense. Actually, hooliganism is nothing else but an offense much more serious than drink-driving.

Anytime this sort of behavior might have dreadful consequences for those implied in such situations, and they are aware of the consequences and make everything for a flawless action. Once being part of such gangs, their life is no more secure.

Motivation for their behavior cannot be easily established. For them, a T-shirt having their logo's team does not represent anything more than the blood on the face of person in front of them. Everything is a game for them.

And most of all is the fact that in a game like this someone might die in the arms of his opponent. This means that they do not want to stop. If a gang is brutally beaten by another, it will not go to complain to police, but will take revenge next time.

Hooliganism is called 'British Disease'. Unfortunately, this devastating phenomenon has spread across Romania and we can notice that among hooligans there are mostly uneducated people, who have no connection with football and have no idea about the legalities. One of the reasons they assault most of the time innocent people, reaching almost deadly aggression, is the fact that they want be noticed and to get the others attention. For a while, we have not recorded a big number of casualties implying criminality, but we are not far away from the United Kingdom.

There is a big difference between a supporter and a hooligan. A supporter is the person who comes to see a match, buys a ticket and has a favorite team, wears the clothes colors and symbols of his favorite team, encouraging it; a hooligan is a braggart, with a great inclination to violence, who comes at the stadium without knowing anything about the event, having rebellious thoughts, which are then transformed in violent deeds, sometimes fatal.

As we have previously mentioned 'hooliganism' phenomenon was referred for the first time by the end of 60's in United Kingdom, reaching a peak in 70's and 80's. Football violence on stadiums could be traced back in time since XIX; for example, in 1880 in Derby, when following a match an emergency state was set up and two horseback squads were called to intervene and face the unruly crowd. Invading a pitch by spectators has become a common practice after 1880, but this type of action cannot be analyzed due to the lack of proof. It cannot be precisely stated if this type of phenomenon emerged in 70's -80's or simply it has become more mediated and obviously exaggerated. For example, after a careful analysis of incidents during Sweden - England match (September 1989) it became clear that media coverage of the disorders was exaggerated and irresponsible. A calm period followed after the very violent incidents on Heysel stadium (39 casualties) and Hillsborough (96 casualties).

Recently in England, hooliganism phenomenon has decreased as a result of measurements taken according to Taylor's report in 1900. Safety measurements, such as numbered sits, and especially video surveillance have contributed to a substantially decreasing of the number of incidents inside the stadiums (especially in Premiership). More than that, the number of arrests for

[5] Http://sadak.ro/2009/02/huliganismul

offenses associated to football matches has been greatly diminished after the end of 80s, this happening while the number of spectators has been continuously increasing. However, this does not mean that the hooligan action number or gravity has been reduced. Many football-related violent manifestations have 'moved' outside the stadiums, with the opportunity to become more extreme.

The fact that destructive incidents take place now on different areas means that they are less reported to police and the possibility to keep them under control, restraints or arrests are more diminished.

As we have mentioned from the beginning, there are two types of incidents labeled as 'hooliganism'. First, the spontaneous ones, have a low violence level, and take place around stadiums and, usually, when British teams go abroad. These types of incidents are rarely encountered on the British island considering the great number of spectators who attend matches in England.. However, when abroad, British fans have been often involved in violent actions (Marseille 1998, Charleroy 2000, Slovakia 2002, Albufeira 2004, Stuttgart and Koln 2006, Rome 1997,2007). Most of the time media coverage of these incidents presents British fans mostly as victims of local supporters and seldom as aggressors. Usually the media states that the main causes of these incidents is the fact that hooligans take part to these official trips having clear intention to fight and they succeed to involve the other spectators in incidents, usually under alcohol influence.. However, analyzing the incidents during 1990 - 2007, published under the title "*Dealing with English Disease*" (2007 Pennant Book) this statement is questioned, considering external factors, such as: police attitude and intervention, provocation and so on. The second category includes incidents emerged from hooligan groups from United Kingdom. Internally, this is continuing to be a major problem, most of the clubs having"dangerous" fan groups. British police is always preoccupied by the problem represented by rival groups, always looking for confrontations, this in conditions, as it was mentioned earlier, the 'fighting area' is more and more difficult to be surveyed in the new conditions.

3. Cause of hooligan behavior

In order to answer this question we have to look into collective behavior. This shows how people change their behavior when they are in a crowd. Collective behavior is a type of spontaneous behavior, guided by fortuitous norms, sometimes diverging from those generally accepted, generated by the participants in a given situation[6]. This is a wide area of research which studies the collective behavior response in various circumstances and difficult situations. From one point of view this might mean a study of coordinated and organized social movements; on the other side, it defines apparently spontaneous emergence of a common behavior[7].

Throughout history, many social psychologists have been interested by this subject and have discussed it in their papers. Among the firsts who have been preoccupied to study mass psychology have been Gabriel Tarde and Scipio Sighele (*The Crowd Criminal*), but they have studied the problem only from criminality point of view[8]. The first who defined a mass was Gustave Le Bon in his paper about mass: '*Mass Psychology'*. He defines mass as a gathering of people, no matter their nationality, profession or sex and led by an event which made them to be together. However, is not enough that a number of persons to be at the same place in the same time; in order to become a mass they need to have a common purpose[9]. He has suggested that all individual reactions are lost in the crowd and a so called 'collective soul' emerges, which make them feel, think and react in a totally different way that they would feel, think and act if they were alone. Mass are formed due to

[6] Septimiu Chelcea, 2008,p.81
[7] Norman Goodman,1992, p. 426
[8] Gustave Le Bon, 1985, p. 7
[9] Idem 4, p. 9

anonymity (which allow diminished personal responsibility) contagiously (ideas rapidly rumored in the group) and through suggestibility[10].

Vierkandt (1928, p. 42) defines a mass as polar opposite of individual. It engulfs elites, aristocrats, intellectuals and so on. Mass could contain anyone, once people are together.

Many detailed studies regarding mass riots, crowds and similar collective disturbances, among them belonging to Gabriel Tarde and Sigmund Freud, develop the mental contagiousness hypothesis already stated by Gustave Le Bon.

A sociological approach of the collective behavior is present in the *scheme of added value* by Neil Smesler (*Theory of collective behavior*, 1963); also R. H. Turner and L. M. Killian have been preoccupied by this theme (*Collective behavior*, 1957). Turner supported the idea that norms have the most important role in a mass. In this there is an under-group where the norms emerge from, which are then internalized by the remaining members, thus their actions are justified through framing in those norms[11].

Moreover, in the great Max Weber sociologist papers we find a mass definition: a mass is a group of people situated at the external side of an establishment who takes a certain attitude towards it in a crisis situation. It derives from a temporary dissolution of communities and masses. A mass, in a social system, is considered a lack of system, a gap and finally, more as a collectivity attitude than a social one[12].

The French psycho-sociologist, Romanian born, must be quoted too: Serge Moscovici with his paper '*The Masses Epoch*' where he stated that a crowd is a social animal which has broken its leash, a group of people in continuous turmoil and agitation. It is also an unforgivable and blind force, able to remove any obstacle, to sway mountains or destroy age worth work[13].

Another definition belongs to Norman Goodman: the most important and dramatic form of collective behavior, a temporary and unorganized gathering of people very close to each other, possessing a common center[14].

We are quoting Anthony Giddens definition too: a crowd is that numerous gathering of people who interact with each other in a public space (a part of urban daily life)[15].

Last but not least, A. P. Nazaretean's definition: a crowd is a gathering of persons who are not united by common aims, a unique structure regarding organization and decision, but are connected through common center of attention and the same emotional state[16].

The characteristic psychological process of masses is the lack of individuality. This is a state defined through diminished self-evaluation activity and evaluation fear. The lack of individuality gives way to anti-normative and uninhibited attitudes[17]. It appears mostly as a consequence of inability to identify the participants.

Bhumer (1969) identified four types of masses. The category which we are studying is the most active and is included in the contestant type. In this type of gathering a uniformity of reactions takes place (The law of action uniformity). Members of a group have a safety feeling inside the mass. Masses, as Gustave Le Bon states are impulsive, versatile and irritable. Other way said, masses can suddenly change their state, emotion, to something totally opposite, without a pertinent explanation, and considering their impulsiveness we can explain their deeply irascible reaction.

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[10] Oxford, Dictionary of Sociology
[11] www.gioconda.ro
[12] Serge Moscovici in Adrian Neculau, 1996, p. 400 (Weber 1949, p. 369)
[13] Serge Moscovici, 2001, p. 11
[14] Norman Goodman, 1992, . 427
[15] Anthony Giddens, 2000, p. 23
[16] A. P. Nazaretean, 2006, p. 23
[17] Postmers and Spers apud Stefan Boncu, 1999

There are also theories which explain mass dynamics. Among them, we are going to mention the following:

3.1. **Contagion theories**[18]

Initially stated by Le Bon, contagion theories explain mass behavior as a result of a collective soul, individual identity is lost due to contagious spread of situational generated emotions. Under anonymity and momentary emotions, people transfer opinions and responsibility to the collectivity. The crowd has its own life, no matter attendee personalities or existent social norms.

This sociology-psychological perspective was amplified by Bhemer (1951) who supports the idea that emotional states a crowd is going through are a result of people around. These emotions are accepted without an attentive selection and spread around emerging emotional level and focusing attention toward a common target.

3.2. **Convergence theories**[19]

In a psychological approach, convergence theories explain crowd behavior as an action of some like-minded people having the same emotional and mind state, driven into a situation and then commonly acting due to some similitude in their personalities. The first convergence theoreticians advocate that a crowd releases primary emotional impulses from social restriction which have controlled them so far. Others (Allport 1924) support the idea that the social shallowness more than contamination is the major trigger in a crowd behavior.

3.3. **Emergent norm theory**[20]

Turner and Killian do not think that crowds are irrational gathering of people, driven by spontaneous emotions or predispositions. Their point of view is that a crowd behavior and action can be explained by those social norms which appear through collective interaction during a collective event. This explanation is named emergent theory norm. Turner emphases that careful studies on different types of crowds show that the participants are not sincere, they are considerably different in respect to their reasons, attitude and behavior and in their involvement in a certain event as well.

3.4. **Mass psychology**

Firstly, a crowd represents a gathering of people which is characterized by new features, different for each individual. An organized crowd is characterized by lack of conscientious personality and its feeling and thoughts are driven to the same direction. Thus, thousands of people, under some sort of strong emotional state, for example a national or international sport event, might get the features of a psychological mass.

This theory has its origins in the paper "Mass psychology" belonging to Gustave Le Bon, and studies mass from psychological point of view.

The theory of mass psychology approaches the most encountered feelings in a mass, and the consequences of this type of collective sense[21].

Impulsion a very often encountered feeling in a mass, because almost entirely driven by subconsciousness, a person reaches the point where he or she acts randomly according to instigation. Mass impulsion is a result of external spurs. If alone, a person is able to control his or her reactions, but a mass has no such ability.

Versatility is another characteristic feeling. Masses are extremely versatile. There are numerous examples, such as mentioned before, during and after a sport event, when crowds go from

[18] Norman Goodman, 1992, p.428

[19] ibidem

[20] ibidem

[21] Gustave Le Bon, *Mass Psychology*, Scientific Edition, 1991, p. 23,

a state of bloody ferocity to a heroic one, in the case their team is the winner. Found under momentary instigation, crowds might go through a whole range of most contradictory feelings.

Irritability is a feeling generated by the number of people in a crowd. A feeling of undefeated power is transmitted to anyone in the crowd and an individual losses the notion of impossibility and most of the time this feeling of irresistible power drives to violent actions.

Intolerance is represented by feelings that make a crowd not to accept any contradictions, which determine a fast change from a positive state to a negative one. An example could be a public gathering where the smallest contradiction risen by a speaker is immediately received with furious shouts and violent reactions, sometimes requiring public authorities interventions in order to prevent speaker's lynching. It was noted that besides intolerance, it is present more evident authoritarianism, especially for Latin crowds compared to the Anglo-Saxon ones, where the individual feeling is predominant[22].

Suggestibility is another state very present in crowd. A crowd is many times in a state of favorable expectation for certain suggestions. First suggestion is immediately adopted through a contagious process, then the idea tends to become action, everything depending of the nature of excitement.

Credulousness is also an exaggerate feeling present in a crowd, as improbability is not acceptable for a mass. The simplest event lived by a crowd can easily become distorted. A crowd things through images and a exhibited image, display itself any other images without any connection with the first one. Collective observations are the most erroneous of all and represent a person's bare illusion, who through contagion influences the others[23].

4. Methods to struggle against hooliganism

Can hooliganism be stopped?

There is little probability, that sometimes violence to be eradicated from sport. Anytime, when large crowds of people, mostly men, sometimes under alcohol influence meet, there are potential reasons for conflicts, either a football match is or not involved. Throughout time, many methods have been tested to keep under control hooliganism, including tough sentences, legal actions or actions involving police crews (Football Intelligence Unit). In the, so called, peak period of hooliganism, ('70s – '80s) many governments adopted drastic measurements which proved a limited understanding of hooliganism problem. Most of the measurements worsened the problems, creating more and more tense relationships between fans and police. The only 'positive' outcome was 'driving away' violence out of stadiums. The action has reached its peak with ID plan (a way of identifying supporters based on cards) described by Lord Justice by a simile "using a sledgehammer to break a nut". The method was canceled after the disaster on the Hillsbourgh. Other attempts to prevent hooligan actions have included very severe laws as 'Football Act 2000' endorsed in order to stop those suspected to be hooligans to travel and take part as supporters at matches held abroad. These kinds of measurements have had a negative effect upon ordinary supporters. More than that, even the utility of interdiction (Banning orders), which was obviously had the purpose to reduce the number of violent incidences where British supporters were involved, was questionable because most of the time the people implied were recognized hooligans. However, it must be emphasized that violence on British stadiums has been greatly diminished compared with last decades, stadiums being today safer places than a city central area on a Saturday evening.

In my view, in order to prevent the phenomenon, we should start to educate our offspring from early childhood. If the youths were appropriately educated, focusing on damages this phenomenon can produce, everything would finish at some point in the future. The number of hooligans would gradually decrease and young generation would reject this type of attitude and they

[22] Gustave Le Bon, *Mass Psychology*, Scientific Edition, 1991, p. 34-35,
[23] Gustave Le Bon, *Mass Psychology*, Scientific Edition, 1991, p. 25,

would be protected by such a virus. Fewer and fewer would follow these types of groups, and the hooligan groups would be diminished, and would not produce the same effects we can see nowadays. The problem cannot be resolved like a mathematical one, on the spot, or using an equation. All legal and coercive methods that public order possesses must be used.

The importance of education has been brought to attention because, generally, the lack of proper education represents the most important factor that generates violence on stadiums.

The main and most important elements in human personality formation are settled in childhood when he or she is educated and prepared for life. Besides family, school plays an important part in education, preparing an individual for real life, helping people to define their personality and properly react in society. Teachers are those who should try to offer their students the necessary knowledge, so that they would be able to choose the best way, as coaches train sportsmen for great performances.

We can ask ourselves why those children who have practiced sport since early childhood, even sport performers have a strong personality and healthy life principles. A realist answer would imply that these people have been educated in the light of fair competition.

Sport implies ambition, physical fight and physical strength, tenacity and success, optimism and health, as quoted in Latin saying "*Mens sana in corpore sano*", (Healthy mind in a healthy body). Any sportsman and sportswoman is able to receive the victory and defeat as well.

Unfortunately, teachers have no more authority over their students. Recently media have been presenting more and more often cases involving students bullying teachers during classes. It seems that in Romania violence appears since secondary school. Physical education classes have been transformed to social education classes.

Thus the lack of physical education generates the absence of team spirit, organization, initiative, determination, ambition, perseverance, punctuality; selflessness has been replaced by selfishness and individuality.

Physical education envisages a harmonious development of the whole body and soul, strengthens health and harnesses physical qualities (Cretu, 1999, Jinga&Istrate, 1998).

This is the first 'type of education' which greatly influences the whole, body and mind. Physical education affects biological side of human being and its social part as well.

This influences human being at any age and answer to double needs:

Individual

Social

Health state of the human body

Its normal development

Lengthen life span

Biologic health is one of the essential values which merges with nature and human mental health in the value system of a society. Through this double necessity, physical education and sport is hereditary and ambiance conditioned.

Conclusions

Contemporary societies evolution emphasizes the fact that despite the increasing number of methods and specialized institution interventions in controlling criminality and offenses, in many countries there is an obvious recrudescence and increasing number of violent and aggressive offenses even in economical areas, banking and finance, such as fraud, blackmail, bribery and corruption. Violence, however, is not a new phenomenon, its appearance and evolution being closely linked to people, groups, organizations and even human society evolution. This is one of the reasons some researchers and specialists believe that violence is a permanent human feature, close connected to human essence and society development.

To sum up, hooliganism represents a contemporary type of violence in sport, but we cannot evaluate this phenomenon in a pure form. Most of the time hooliganism is present through primary physical violence which degenerates into conflicting, collective, community violence which is even more difficult to combat.

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A SOCIETY OF THE POSTABUNDANCE, FROM THE CONSUMPTION'S REDUCTION TO THE GROWTH OF THE SPIRITU AL SATISFACTION

MIRELA CRISTIANA NILĂ STRATONE[1]

Abstract:
One close-up view of the consumption reduction on global scales involves beyond the economy reasons analysis, a analysis of the causes and sociological effects of this phenomenon too, in view of the invitation of some concrete and general directions of the necessary at his real value. In view to the reach of the proposed aim there have been followed as aims:
the presentation of some initiatives already in existence but inadequate to the definition of spiritual and material needs;
the prominence of the needs of the individuals to preponderant reinvest in the spiritual needs satisfaction and in the material satisfaction restriction at the basic needs;
the promotion of the mainstream of the consumption reduction;
the redefinition of the simplicity in combination with the markers which are substituting symbolical the opulence. The aim of this paper consist in the testing to sustain the move centred on the so-called voluntary simplicity, in the view of the global society reorientation to the abnegation of the material accretion to the benefit of the environment conservation on a side, and on the other side in the view of the spiritual life enrichment of the individuals, which will get on a form of a post abundance society.

Keywords: *the society of the post abundance, the reevaluation of the material needs, the voluntary simplicity, the radical simplicity, the reduction of the engines*

Introduction:

The problems approached in this study inscribe in the paradigm of the crowd consumption and they are centred on the reduction idea.

The unprecendented level where has the consumption reached reclaims the search of some clue alternatives of environment psychological, sociological problems, which this has generated in a straight way.

The themes presented here aim two main purposes:

The first purpose aims the description of the major cultural agent of voluntary simplicity and his action in a differenced way and namely:

- the reduction of the "consumption engines" by the voluntary abnegation in a gradual and selective way of the unnecessary consumption;

- the radical simplifiers which are reducing the consumption more powerful then the first ones, chosing the work and the big incomes abnegation in behalf of the free time and of the incomes sizeable smaller, but enough for a confortable living;

- the holistic simplifiers, the most decided which are drastic reducing any consumption, without selection, reaching extreme manifestations, convinced that they are acting to live spiritually better and promoting the anticonsumption.

The second aim proposed refers to the explication of the need to create a new current in the social culture, that one of the society valued cultural from simplicity and the any kind abuse abnegation, a society of the post abundance.

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The concern of the proposed study is reflected in the description of the main ways of chosing in a voluntary manner of a simplified lifestyle, to reach a certain freedom kind, gradual from case to case.

This aspect is marked out by the briefly review of the socio-psychological implications broken out by the chosing of the prosperity abnegation obviously in a smaller or bigger size, after the section where are the volunteers inscribed.

In the speciality literature are already studies and opinions regarding to the future of the voluntary simplicity. The consequences on social plan regarding the detached attitude from the adhesion to a lifestyle which is reducing the consumption and reorientates to the strict necessary, sometimes also this reevaluated, reconsidered, are very important for the environment and the social justice.

Related to the speciality researches, I have here presented only the main steps, which have been initiate to reach a lifestyle released by the overflow and ready to assimilate more in spiritual plan.

Content:

In the fight for a better life from qualitive viewpoint, the friendly atitude visage of the environment and a certain social economy equality in which the poor persons to receive from the rich persons the surplus to content their base needs, all in a voluntary mood, it is constituting like a new force in the creation of a new society of the voluntary simplicity.

The voluntary simplicity is constituting the core, the key, in the transition to a simple life, in which is making, is spending and is consuming less, but is living better.

The voluntary simplicity is going anti the ostentative consume and not anti the base consume. Therefore, she has adepts in the developed countries and not in the thirth world's countries.

With all, for the growing of the life's quality is welcomed the force of the postabundence society, which tryes to convince the persons that the reconsider of the life's mood by the diminution of the ostentative consume lead to a really freedom.

A certain society of the postabundence haven't constituted yet, but we can talk about this concept in the context of the future, even already there are pre-requistes of his constitution.

In the Roumania of the 2005 year, it's improper to talk about abundance, because the social phenomenon which rules "the welfare" it is named by the poverty and he is in a continous rising.

But how the model is whished to be assumed in the most of the occurrences from the americans, likewise in this case, we are heading for the attention to the american society which strives shy so far to the "voluntary simplicity", in distinction of the roumanian society in which the simplicity is for the most of the people a imposed parameter.

The voluntary simplicity represents a choice to the consumption, like an aim of the capitalism and it is relegating at the free selection of the individuals to limit the costes allocated for the expandables and for the services.

A very important aspect is that as regards the voluntary simplicity it is regarded the consumption, not the input. Accordinly, by and large it enters in discution the individuals which already have the base needs satisfied and they are submiting to desist at he synthetic satisfactions, generated by the pressure of the commercial art. In this meaning Abraham Maslow, one of americans doctrinaire in social psychology, affirm that the voluntary simplicity represents an option for the societies mighty developed and not for the third world.

The voluntary simplicity has constituted by the long of the history a mood of life, whose militants have always followed a special fundamental freedom on spiritual base and they have thicked substantial the rowes of the supreme motion versus the consumption.

From the guardes the following of the anticulture were doging to consume and to produce a little "The enjoyment, the meaning and the aim of the life were followed by contemplation, the communions with the nature, drawing near the others drogs, sex and inexpensive products"[2].

In the 70' the westerly society have displaced the values from the material, prosperity and physic security to the life' quality.

The determationed agents of the life's quality have eyed like "postmaterials values"[3] and is regarding a great liberty, a powerful soldering , at a comunitary level, as a administery more democratic.

With all more and more societies with a population growing are promoting the prosperity like an principal aim intern. The pasing under a form of promotion from the base satisfaction needs(covert, meal, clothes) to the consumption and even to the ostentatious consumption to underline the social statute is accentuating with how much the societyes are more rich.

On the analogy with the poverity we could say that the passing from the necessary to the ostentatious can be comparated with the parallel from the absolute poverity, which presumed minimum absolute of the physic survivor and relative poverity, this presumed on a side, the population of a country as referring system, or on the other side the difference between the poverity of an individual from a developed country, vis-à-vis from the poverity of an other country of an another individual from a country from the third world.

So, the relative poverity can flirt with the ostentative consumption in the conditions in which an individual which owns ownerships and luxury cars, is too poor to presume an special picture, or a special jewel, or an ownership on the Moon.

Coming to the voluntary simplicity, she is presenting like some degrees of intensity, going from modest levels(moderate simplifies in the abundant life's diction) to more accentuated degrees- the loud simplify (the suggestive reorganization of the life's mood) and in finally to the downshifter simplify.

- *the moderate voluntary simplicity*

This forme of the simplicity is presenting in the case of the financial assured, which renounce voluntary to different input possessions, which are constituting in luxury articles. They could have them without efforts, but they chose to renounce at them, therewith keeping an opulent life's diction: he is wearing cheap clothes, they are driving old cars(to be not confused with the epoch cars). Some of them are renounceing to the fashionable parties, they are spending their holydays at the modest mood, they don't dispose of secondary residence or luxury media transport: private planes or yachts which they could have them.

In fashion the moderate voluntary simplicity is reflecting in the choice of the practical and simple clothes, commuting the sophistry one. But this doesn't means that will be favourite the vestimentars things of dozen with small excepts. It will be chosed sign board's products, for example: the products of Prada's sign board will be favourite to the Christian Lacroaix's products.

As regards the surrouding, the habitations are less: decorated and charged, only in preceding decade. The furniture and the ornamentals are less complicated and ostentatious.

The people are dubing specialy in comfort and quality, the extravagance and the design of the lightly cars commuting by simple things.

Anyway it must be pointed out the following individuals of the moderate voluntary simplicity accept "the rejecting of the symbols of the success temp time to vount signs of the poverity in a way in which they don't let any track of doub that they are stinking rich"[4].

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[2] Etzioni, A. – *The monochrome society*, Ed. Polirom, Iaşi, 2002, p. 69.

[3] Inglehart, R. – The Silent Revolution: Changing Values and Political Styles Among Westwrn Publics, Princeton University Press, Princeton, 1977, p. 3.

[4] Brooks, D. – Conscientious Consumption, in the New Yorker, 23 nov. 1988, p. 46.

Amitai Etzioni says about the people who are acceding to this type of simplicity that "they reduce the enginees"[5]. The reduce of the enginees isn't practiced only by the individuals who are financial assured, so the rich ones and the ones from the middle class. The moderate voluntary simplicity is gushing at the level of the people from the middle class by the renouncening of sophisticate parties and variety of minues quantity simple dates when is consuming reduced products. The hireds of different firms are striving too to a understood simplicity in different mood from a situation to an other; some of the loyers renounce to the additional hours so they renounce to the additional finance, as well as at a dozen of estimation from the boss, the hireds have a day on week when they dress with a carriage less elegant, even sport, renounceing at the business carriage, the same in many cases with the elegant carriage.

The renounceing of the additional finance by the renounceing of additional hours of work is explain by that the individuals are economizing the time for the improve of the life's quality: for example the time which they gave formerly to the additional hours now it will spend it with the family, will practice sport or they will travel, or they will occupy of charity acts.

In Roumania the big mass of the population from the middle class couldn't renounce to a part of cash income, but they could recalculate the priorityes as subject of consumption. Not only the middle class could necessitate this thing but in special the top class. About the down class we can't talk about this category of Roumania's population of the 2005 year and she is in majority and situating to the level of the absolute poverity. Intersting is to look for metods or technical orientation of this paupery segment to a growing of the life's quality.

- *the radical voluntary simplicity*

The radical simplifycaters are those we are meeting to in the riches line but in the life of those existed in the medium blankets of the developed societyes. These are reducing the enginees more stronger than the moderate simplifycaters, in the meaning that they don't follow, the recognition of their statute of rich persons but this doesn't means that they will renounce at a decent livelihood.

Hireds good payed, like directors of firms, success loyers, chose to renounce to the financial part majority which they own by the donation of this one to the segments of the destitute population or different others modalityes, and they remain with the economyes of modest category, in the perimeter whom are enroll the consumption.

The voluntary demands of retirement before the date, expecting a reduce allowance in these cases, in the view of the diminished accretion of possession of input of the allotment to a expended in the family's occupancy of the elimination of the stress represents the expression of a silent rebellion vis-à-vis of the negative influence of a culture based on the cantitative accretion unselective and they consum proper.

"The people who are reduceing in a voluntary and suggestive mood their finance are striving to be some simplifycaters more radical than those who are moderating only the life's style, because a considerable mitigation of the finance goes sometimes to a simplification more comprehensive of the life's mood than the reducing selective of the enginees, regarding some articles of input".[6]

Reporting to the roumanian society from present, couldn't be the talk of a radical simplification, excepting an population segment, reduced as number, this being done by rich individuals. In the conditions in which in Roumania of the 2005 year are manifesting deficiencyes under the aspect of the decency reported to the livelyhood's level of the social and medical protection of all the categoryes of the population , etc., the onset of the radical simplification at rank of phenomenon is a utopia.

Beyond of the riches which try the drastic reduction of the enginees and they exactly succed more or less this thing, are the individuals who wish the radical change of their proper life's mood, but they don't have luck.

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[5] Etzioni, A. – *The monochrome society*, Ed. Polirom, Iaşi, 2002, p. 72.
[6] Ibidem, p. 75.

These are strong dependent with the objects with which they've encompassed, manifesting an pathological affection, vis-à-vis them. Among them only the awakes attain to ask for help of speciality and only a small part will succed to come back to a simple and a clean life's mood. These will necessitate continual supervision and help from the cures.

- the downshifter voluntary simplicity

The most bitters individuals versus the consumption are the downshifters, adepts declared of the moving for a simple life. This moving is of small span and a little curdled. With all they are benefiting of an proper organization, developing programs, proper networks of communication.

The downshifters simplifycaters are those who are moving from the luxe zones of the big cityes, or the centers strong urbanized, to the perypheryes, in outskirts weak urbanized, or more shore in the rural medium, justifyng the necessity to live simple.

The american documentary with the title: "Escape from Affluenza"[7] was promoting in 1998 the thema based on the idea to live better with less.

In Roumania the situation is presenting essential different: those who are moving from cityes to villages, to peripherys, do this to live cottages more luxurios, to detain more extensive clearances, no case to have a simple life.

The individuals who are benefiting of this luxury are the big and the small riches good situated financial, cause they must cope to the daily transport to the work place, thing realized of course with a luxury car.

In our country there are not conditions to live decent of not good, with less spend, produced and consumed, far to the "run riot world". So, each must to glorify his work's dutyes, couldn't renounce at the salary. Many who can presume are living in abound, based on amounts good invested. So, in the roumanian society from the 2005 years the move from the city to the village represents the transition to the supreme luxury, clean air, comfort on the base of some serios financial possibilityes. The poor people who live in modest zones or poorly are foreed to accept the life's mood, not far simple, but poor and enjoyned by the actual social-economic conditions.

In other words the riches of the american society adepts of the downshifter voluntary simplicity renounce to the abound to retract to better(more simple, more healthy) with less, while the financial potentates roumanians are retracting from the civilized countries to live better(more sophistical, more abounded, more complicated, so more unhealthy) with more.

It can affirm that for those who have assured the satisfaction of the vital needs, the voluntary simplicity represents a renouncing to the abundence in the sight of the improver of the life's quality, while the poor people situated at the deadline of the absolute pauperization don't have at what to renounce, keep going to live in accidental conditions

Social effects of the voluntary simplicity

The voluntary option to spend less and to consume less for a simple life, represents without discutions the optimum solution in the sight of the rid of the stress of the ballast, nonchalant of his nature.

All the society have to win by the rear of the reducing of the consumption. In this way, two are the directions prevailed which do the object of the major sociology analysis: the environment and the transition to a special equality between individuals at social level.

1- the simplifycaters and their relationship with the environment

If it took volume, the voluntary simplicity could concludive redound at the enviroment's protection. By the reconsider of the life's standards, the voluntary simplifycaters could produce and

[7] John de Graff, Vivia Boe (producers) – Escape from Affluenza, Public Broadcasting System, 8 July 1998, (op.cit.).

consume suggestive less. This conduce to the employment reduced by the raw material, and the production reduced by the dump goods[8].

On the other side, the voluntary simplifycaters are really read to recycle, in comparison with the others members of the society. Advanced studies have proved that those who are chosing the way to a simplified life, are opting for civic activities, of recycling of mutual help and activities which expect consume.

The life style based on the consume reducing and the growing of the satisfactions clung of the freedom, love and health, opposite to the ecological life style have been created the premise that the voluntary simplicity terms and the ecological life style to become mutual changed. In this conditions is clear that the deputies of both the currents are mutual supporting and they have common aims.

Of course it can affirm that the voluntary simplifycaters have a benefity, friendly attitude, vis-à-vis of the environment.

2- the realization of an socioeconomic equality between the individuals

Because of the fact that the arieds modalityes to apply the democracy at governamental level have miss more or less the sensitive success, haven't something else but to demonstrate that the globally society to fix the base socioeconomic equality of her members need a new force. This force could be even the formal one from the voluntary simplifycaters. Her big advantage consists in that with the base voluntary isn't administer by coercion extents. An alleged engine of this society of simplifycaters isn't feeded from the outside and doesn't necessitate consume, but feeded and afferimed from the inside, from the wish to renounce to the surplus in the favour to those who presents poverties in the possibility of the satisfactions of the base needs(meal, clothes, refuge,etc).

At the first vision these conjectures seem untouched aims, but very important is that voluntary simplifycaters exist, act and they are multiply. This thing happens slow but shore, without the practicing of the politic forces, without consume of raw material, without the conflicts creation to centred on ethnic, religion, kind or culture. The unentity of these barriers represents an another chance to equality.

As have shown in the visage paper, in Roumania is almost impossible, acceding to the voluntary simplicity. With all, the reducing of the consumption isn't an squalid factor with more the need of the return at the ancestral values remain the base pylon of an tangible equilibrium only at the side of the nature.

Conclusions:

The main directions approached in the presentd material are aiming the material accretion over the necessary, which is pushing the individual to a namely release from this one, as he would disclaim the ballast, for the essential content and really valuable.

It has been followed the description of the abnegation action of the consumption, which beside the virtue to offer a simplier lifestyle and therewith psychological more rich, it has the virtue to sustain in a decided way the ecological movement at global level, of environment protection, by the conservation and the keeping of the ground and underground resources, and more important the reduction of the pollution level.

From here is detached an another need, that to surprise on future the rate between the followers of the voluntary simplicity and the ones of the involuntary simplicity, considering the exacerbated size of the global economic crisis and implied the recession of the discrepancy between rich and poor by the growth of the poor number and the emphasis of the poorness, the reduction of the rich number and the emphasis of their richness level, and not the last the drastic size reduction of the middle social rug.

[8] The consume of the raw material could reduced if for example it could produce more bicycles than cars. The going with the bicycle, the free going, even the functional automobiles but unostentatious could redound at the economy of the raw material and it could realize an important advance as regards the pollution.

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THE SOCIOLOGIC APPROACH OF FEMININE CRIMINALITY

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Abstract:
The present study is part of a much more cognitive approach, which tries to study resocialization and the social reinsertion of women who are under freedom privation penalty. The present material contains a short historical evolution of the sociologic theories of crime, then plunging towards feminist theories, in order to approach the gender problematic concerning the delinquent woman.. The first objective is to demonstrate the necessity of a wider approach in analyzing the genesis of the crime, through the re-evaluation and reconsidering the factors with a crime risk and placing them in an equal position in the social environment. Another objective of this study is to emphasize the importance of the gender role concerning the expectations of the society from the feminine population's side. The present study is focused on the contribution of placing the research of feminine crime research on a basis characterized by unprecedented generality, under total influencing conditions, with orientation towards gender problematic.

Keywords: *Crime sociological dimension, Crime risk factors, Social control, Feminist theories, Gender problematic*

Introduction:

The domain the present study refers to gets the social dimension of the crime phenomena, materialized in the evolutionary conceptions which outlined the specific paradigm.

The feminine crime, a quite complex crime segment, needs a separate theory mentioned in this study, by passing from the evolutionary analysis of the theoretical and crime approaches to the feminist theories.

By fitting the feminine crime segment into specific theoretical formulas, we can understand the unique importance for the study of the feminine crime genesis.

The delinquent woman commits one and the same crime in a two way direction: one time by breaking the penal norms, as any delinquent and second time, by transgressing the gender normative, penal deviance being accompanied by the gender deviance; the delinquent woman acts generally against the normative and desirable values of the society, and particularly, against feminism.

Thus, the conflict, determined by biological, cultural, economical, social factors, etc. and together with these ones, they will be studied through the light of gender dimension, because in spite of the fact we militate for chance equality, the two sexes remain tributary to their biological nature.

A futuristic approach in the study of crime genesis is focused on giving up the method of concentric circle and distributing the attention towards each social segment where there are crimes either in dormant or active and their research under all aspects.

The already existent contributions in the specialty works lead to the necessity of a unified conflict approach of crime.

Such a theorization already exists and it is concentrated on reconsideration and including the biological factors in the conception resulted from the integration of representative theories.

The present material wants to be of contribution to a foundation of a theoretical-paradigmatic base, which allows for complete analysis ways of feminine crime genesis.

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In the future, the study of feminine crime genesis will be focused on analyzing gender problems, without neglecting the social structure role of races, collective consciousnesses or of cultural values.

Consequently an exhaustive approach of the discussed phenomenon will be possible only on the base of re-evaluation of all categories of determinant factors, of their social-historical evolution and reporting them to an evolution ecological paradigm, out of which specific research methods can be configured.

Content:

1. The vision of the collective conscience

Starting from Durkheim's work, the consensual approach appeals to a certain "universality" as regards both the behavioural deviation and social control and a vision of the collective conscience regarding the criminal act.

This type of approach is characterized by a static character of the society, where universally valid laws aim at avoiding conflicts through reconcilable methods, the final purpose being to obtain social order through consensus and reduced sacrifices.

The method of the concentric circle

Burgess and Park underlined the study of the social disorganization in point of ecology, elaborating and making use, on this occasion, of the theory-method of the concentric circle at the level of Chicago city.

Thus were analyzed the characteristics of geographical areas in point of cause of balance and lack of balance between biotic and social.

The two researchers say that the environment is the result of balance between a certain geographical area and the economical possibilities of its inhabitants. They explain the transgression of the law as a result of the characteristics of the transition area, inhabited by unskilled workers, who are poor, so the cause of the transgression of the law can be found in poverty.

Clifford Shaw and Henry McKay took over from Burgess and Park the theory of the concentric circle, studying the proportion between the rate of juvenile transgression of the law and the different habitats in Chicago.

The results of the survey showed that the rate of delinquency persisted in time, no matter the race and the ethnic group, which have changed in the meantime, only the economical position and the cultural values of the delinquent groups remaining constant.

At the same time, the methods and techniques to commit offences were transmitted throughout the time, so delinquency is a social, studied behaviour, transmitted by previous groups to subsequent groups, characterized by the same economical and cultural status, aspect that received the name of cultural transmission.

Shaw and Mc Kay proved the economical and social causality of delinquency, this being considered a normal state, under certain social and economical circumstances, in an area such as that described before, that is habitat no. 2 (the two researchers took over the model of forerunners Park and Burgess, about natural urban habitats – habitat 2 being the key one, the transition area) in the concentric circle applied as a method of research of juvenile delinquency in particular.

1.2. The proportion between culture and criminality

This vision is centered upon the study of the proportion between culture and criminality. One starts from the idea that certain individuals internalize the norms and values that are not desired by the society and are opposed to those dominant, subsequently they become negatively socialized, circumstances under which delinquency appears.

The theory of differential associations was formulated by Edwin Sutherland. In 1939, in his work „Principles of Criminology" was introduced the concept of "differential associations" because, on the one hand, the word "differential" is used in Romanian in the fields of mathematics and technique, and on the other hand, one aimed to render as truthfully as possible Sutherland's

conception. He sets as the basis of his theory the principle of learning, which he takes over from Tarde's theory of imitation. He reconsiders the whole life experience of the individual in order to explain historically and genetically the criminal behaviour, forwarding a series of hypothesis in this respect. The key principle of differential associations reduces itself to a non-delinquent person becoming delinquent, having as cause an abundance of judgments favorable to the transgression of laws to the prejudice of judgments unfavorable to their transgression.

Underlying the ambivalent character of groups existing in society, Sutherland stresses the idea according to which criminality would be a resultant of the differential organization of social groups.

Together with D. Cressey, were laid the foundations of principles that represent the essence of the theory of differential associations:

- the criminal behavior is learnt;
- the criminal behavior is learnt in interaction with other persons, through the process of communication;
- the most important aspect of learning the criminal behavior appears in close, intimate, personal groups;
- learning the criminal behavior includes both the techniques to commit crimes and the specific directions of reasons, impulses, rationalizations and attitudes associated with the criminal behavior;
- the above mentioned directions are learnt by the medium of positive or negative norms;
- a person becomes delinquent because of the excessive contact with situations favorable to the transgression of norms, to the prejudice of those unfavorable to this aspect;
- the differential associations can vary as frequency, duration, priority and intensity;
- learning the pattern of the criminal behavior resembles to learning the pattern of the non criminal behavior;
- both the criminal and the non criminal behaviors represent an expression of the same general needs and values.[3]

Sutherland's theory mainly characterizes by:

- the content of what is studied includes specific techniques to commit crime and in general, appreciations favorable to the transgression of law; these are cognitive elements, rather ideas than behaviors;
- the process through which learning takes place implies associations with other persons within intimate personal groups.

On the occasion of the elaboration of this theory, Sutherland offers a more adequate explanation of the causes of relativity.

Thorsten Sellin takes over the basic idea of Sutherland's theory, concerning the learning of attitudes or criminal norms and formulates the theory of cultural conflicts, centred on the cause of these attitudes or norms. He says that the transgression of the law must be analyzed as a conflict between the norms of different cultures.

Sellin made a distinction between primary conflicts, expression of discordance between the norms of two distinct, different cultures, and secondary conflicts, which appear between the groups of the same society, or when one culture divides into a variety of cultures, each promoting its own norms and values.

In the work „The Culture of the Gang" (op. cit., New York, 1955), Albert K . Cohen takes over Sutherland's conceptions and the central idea in Merton's researches, that is stress is a product of social structure, that produces behavioral deviation, in order to explain birth, location and features of the delinquent subculture.

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[3] Banciu D., Rădulescu S.M., Teodorescu V. – Present tendencies of crime criminality in Romania, Lumina Lex Publishing House, Bucharest, 2002, page 158.

A. K. Cohen alleges that delinquent subcultures are born at the outskirts of the great American cities and have the origin in differences between classes, religion, education level, as well as parents' aspirations.

Concerning the characteristics of subculture, Cohen considers it as being non utilitarian (delinquents do not steal out of necessity, or desire, they just steal), malicious (a so-called pleasure for the ailment of other individuals causes to delinquents the expression of the delinquent behavior, as well as an extravagant desire to defy rules, a form of negative non-conformity), negativistic (the norms of the delinquent subculture are generally opposed to a certain types of crimes, have a varied activity), short term hedonism (for delinquents the moment is important, the own future too little), group autonomy (the gang or the pack leads after its own rules or norms, without cooperating with social institutions, to which they oppose and whose influence they resist to, persisting into the atmosphere of the group – it is a form of introversion).

Cohen issued the theory of delinquent subcultures, and later, together with Short, have extended the central idea of this theory, including in their research, besides the low class delinquent behavior also variants of the delinquent subculture of the middle class society and not lastly, the feminine delinquency. All these were considered to be the foundation of some new and future theories.

1.3. Crime at the border between targets and means

Theories that are in the perimeter of this current, make use of the concepts like: social system, statuses and roles assumed to these ones, social structure, functions and dysfunctions of the society, being focused on an analysis of the social-economical organizatorical action of the socializing and integrating possibilities of individuals to norms.

Robert K. Merton reconsidered the concept of normlessness from the point of view of the social deviation, developing the theory of normlessness. In the work "Current tendencies of crime and criminality in Romania", 2002, the authors Dan Banciu, S. Radulescu and V. Teodorescu expound Merton's conception, in which "normlessness appears as a result of the tension between the goals that cultural models of the society propose and the lawful means allowed by the system of social organization" (page 66 in the quoted work).

So this discordance appears as a result between the highest goals that society proposes (see the American society, where success and glory are "necessary" goals, their lack determining the depreciation of the individual) and the real possibilities, differing from one individual to another, to attain one's purposes. Through the analysis of this discordance, Merton creates a paradigm, that treats the ways of the individuals'adjusting to the environment, managing to highlight five of them as being representative: *conformism* (those who accept both goals and possibilities to reach them that society offers, no matter the result); *innovation* (individuals who accept the high goals proposed by the society, but reject the lawful means to attain them, because they are not sufficient to finalize the action engaged in view of reaching the proposed goal); *ritualism* (this conduct is adopted by those limitating to lawful living possibilities they dispose of, being willing to give up higher goals – these are the ordinary people, who do not want to overstep their own condition); *avoidance* (they generally are normless individuals, who give up goals and better possibilities and take refuge in subsidiary groups, adopting their subculture); *rebellion* (rebels are those who reject both goals and means replacing them with others and fighting for them).

Merton underlines the fact that the environment where the individual lives is decisive both as regards social aspect (social relationships) and the cultural one (the whole system of norms and values that humanize the human species in time and space). The conclusion is that those belonging to disadvantaged classes do not have access to high statuses and try to reach the desired social positions by adopting an antisocial behavior.

This theory has the credit of highlighting the discrepancy between goals and means, as well as the types of adopted behavior from means to attaining the goals, but it also has limits, since it

characterizes in general the tendencies of the American individual, so the habitat of application is defined.

Combining the basic idea in the theory of normlessness – Merton – with the basic theory in the theory of learning – Sutherland - , Cloward and Ohlin elaborate the theory of the differential opportunity, at the basis of which we find a study concerning the means, opportunities, illegal possibilities accessible to those resorting to a delinquent behavior in order to attain their goals. We find the culture that characterizes such a behavior to authors Cloward and Ohlin as a *delinquent subculture,* characterized by a certain compliance with norms and negative values which suppose quick wits and a degree of diplomacy; *subculture of conflict,* expressed between individuals that failed both in conventional and delinquent society, based upon violence as a form of general behavior; *subculture of refuge* belongs to those who cannot respect either norms or negative values or violence, but resignation, ecstasy given by hallucinogenic; the impossibility to have access to lawful and unlawful means at the same time pushes them towards refuge.

1.4. *The action of positive and negative social control in the study of the delinquent behavior*

The American sociologist Walter C. Reckless tried an explanation both regarding the normal, positive behavior and the deviating one.

Consequently, trusting the social control, he elaborates the "theory of abstinence", which intends to be a combination between the *inner control system,* beneficiary of a strong self-control, self-restraint, trust, optimism etc. and the *external control system,* made up from the means that the close background disposes of in order to keep a tight rein on him, to prevent him from choosing illicit, illegal means to attain goals and to offer him socially desirable alternatives. This theory tries to clarify how negative and positive tensions act on the individual, how they work together with the socializing ways he went through, but does not succeed in offering an explanation about the difference of labeling in the case of the same offences.

Elaborating the theory of social connections, in the centre of which there is the more or less intense relationship between the individual and the society (especially family, friends, environment), Travis Hirschi promotes *attachment* (the obligation that a person feels towards those he appreciates, to behave conventionally), *commitment* (the individual's investment in conventional values, compared to the possibility to invest in unconventional values, alternative that usually leads to delinquency), *involvement* (consequence of commitment, it leads to the exclusion of certain opportunities), *belief* (the strong internalization of norms and desirable moral values leads to the diminution of chances to choose a delinquent behavior). By this theory, Hirschi aimed to explain the advantage following from the choice of a conventional behavior to the prejudice of an unconventional one, stressing the causes of compliance to norms and desirable rules, all in the light of social relations.

2. The conflict, determining factor of social deviation

2.1. The proportion between primary and secondary deviation

The interaction tendency starts from the idea according to which society is made up from groups that differ both as regulations, values and definition of compliance and deviation, as specifies the Romanian sociologist *S. Rădulescu*, in "Deviation, criminality and social pathology".(quoted work, 1999)

Lemert and Tannenbaumy laid the foundations of a theory called "the labeling theory", according to which deviation is considered an attribution to behaviors different from the conventional ones, a social reaction.

According to *Frank Tannebaum*, this social reaction leads to the "dramatizing of evil", application of punishments with loss of liberty and association with much more dangerous and more skilled criminals, which consolidates the future delinquent career.

Edwin Lemert realised a parallel analysis between the social reaction and its effect as compared to the deviated behavior (*secondary deviation*) and the expression of the behavior as such, the fact in itself (*primary deviation*). He seeks to explain the process through which, as a response of

the others towards his behavior, the individual makes the passage to his new role (the one of a delinquent), that was assigned to him.

According to the theory of labeling, the choice of the delinquent career has as causes both the social reaction, concretized in sanctioning, stigmatization, isolation and social segregation and the internalization of labeling by the individual, all these leading finally to the acceptance and practice of a delinquent behavior tending towards professionalization.

It is absolutely necessary that, whenever we talk about the theory of labeling, we should mention what are the *fundamental thesis*[4] of *H.Becker, J.Kitsuse* and *K. Erikson*, which study the consequences of the theories promoted by Tannenbaum and Lemert:

a) Definitions classifying the conducts in deviating or acceptable (normal) behaviors are subjective and relative;

b) Social negative reactions towards acts of transgression of norms are not automatically released – the social reaction cannot be anticipated, it has a problematic character;

c) The key process that must be followed in the investigation of deviation is the labeling of the behavior as being deviating and of individuals as being deviating by the public (into this category also falls the respective individual, as a person who observes and appraises his own behavior);

d) Labelling an individual as being deviating, from the perspective of the undesirable, social and moral character of his conducts or acts, has multiple negative consequences for the consolidation and worsening of his deviating character.

Once the label was put is difficult to be removed.

The application of the label of deviating to a person who transgresses the rules is not an accidental process, but is strongly influenced by a series of circumstances, such as the public accusation of the deviating person;

The application of the label of deviating has strongly consequences concerning the self perception of the individual and his definition as being an authentic deviated.

Besides its merits, this theory has, as any other one, its limits, like for example ignoring the causes of crime actions and the generalizing the idea according to which the labeling determines invariably the amplifying of crime actions.

2.2. Radical conceptions

In 1973 "The New Crime Science", with Ian Taylor, Paul Walton and Jock Young as authors; the is focused on Marxist principles, considering the economic factors as primary in producing the conflicts, under the conditions in which the law is applied in a differentiated way according to social class.

The authors have emphasized that the new crime science approach needs the analysis of remote and immediate causes of the crime action, the crime action itself as well as the close and the remote origins of social reactions, its effect upon perpetuating crime and the nature of deviancy. This work had a much lower effect than the expected one.

Richard Quiney has tried to promote a social theory, based on Marxist concepts. He supports the concept of a complete equality in front of law, for this being necessary the replacement of the capitalist society with the socialist one, which is intended to be the only and the necessary condition in order for the individuals to share equally the material benefits, everything leading towards a new human nature. (see the concepts of Nicolae Ceauşescu, who taking over the Marxist-Leninist ideas, promoted the creation the new mankind, physically and psychically perfect, equal with others, an individual without problems, happy and totally integrated in the society which he wanted to be a communist one).

In the work „Critique of Legal Order: Crime Control in a Capital Society" (quoted work., Little Brown Boston, 1974) Quiney develops „The Theory of Social Realities" through which he

[4] Rădulescu S. M., *Deviance, criminality and social pathology*, Lumina Lex Publishing House, Bucharest, 1999, p. 133.

intends the creation and the sustaining of a socialist society. His theory provoked strong critics, being considered a mystic one, who in stead of looking for explanations and answers, starts with conclusions which he deduced from his own faith in the communist society, as being the ideal one.

3. Futuristic sociologic vision in crime science

3.1. Differentiated approach of biological, psychological and social factors

The evolutionary theories start from the idea according to which different biological, psychological and social factors have different effects upon individuals, according to present particularities of these ones in various stages of life cycle.

The relation between age and crime was analyzed in a divergent way, through a *longitudinal research* (this brings into discussion the "career criminal", that is the individual who commits crimes on a long period of time; it is also focused on the behavior of a group of individuals in a certain period of time, which determines the establishing the influence of the previous behavior upon the present and the future one, as well as the possibility of applying different models for behavior explaining in certain stages of life cycles), as well as through a research called *„transversal section"* (the attention is focused on different individuals with crime tendencies, that are compared in same time).

3.2. The unified conflict approach of crime

According to these tendencies, the integration of some theories is being monitored, knowing the fact that theories treat different aspects of a common phenomenon, with the target of explaining completely the antisocial behavior.

Thus, the unified confliction theory of crime has, for the beginning, the general social structural characteristics, continues with the processes through which individuals from similar social structural locations get the skills of similar behavior models, so that in the end to finalize through the approach of the report between these behavior models and adoption processes and the application of penal laws.

John Braithwaite has inspired from the theory of labeling, from the theory of learning, control, of differentiated associations and of subculture, issuing the theory of reintegration by blaming, a new concept, according to which the blaming is reduced to *stigmatization* (when because of blaming, the individual is complying to the imposed model and takes refuge in marginal subcultures) and *reintegration* (those who apply blaming do not exclude the blamed one from their group, but on the contrary, they support reintegration, determining the awareness of the committed crime).

Braithwaite demonstrates in his theory that reintegration leads to the decrease of crime, while stigmatization has a contrary effect.

Brian Vila issues an evolutive ecological paradigm, a source for all the theories which might explain the crime phenomenon under all its aspects, both at a micro and a macro level, taking into considerance an essential conditions: reconsidering and including the biological factors in all theories.

In Vila's conception, the theories, which have been initiated until present time, would be only partial, because each in its turn approach the fractioned crime phenomenon, in the way that an application of these theories cannot be found, either from historical developing of causality, or from the research reduction not only to a micro level, or in the case of more general approaches at a macro level, or only the environment factors are taken into considerance; the idea is that the explanation of the complexity of human behavior has failed under all its aspects and this is exactly what Vila proposes: a paradigm characterized by an unprecedented generality, focused on a total and unlimited influencing in a double way (micro-macro), but also focused on change and its problematic.

Feminist theories concerning the criminal behaviour

The feminist theories, regardless that it express positive or negative aspects about life, activity and attitude of woman, are theories of the considered gender.

The gender problematic, besides the socializing and identifying with gender role, an aspect concerning the respective crime type. Differentiating the crime behaviour under biological aspect led to the necessity of elaborating a feminist theory accordingly.

Until present time, such a theory tends to be built based on the analysis of causes and effects of inequality of chances between sexes.

A general theory is not by far clearly defined. More than that, it has to express among others a synthesis of all the existant feminist theories, these being based on the causes of chance inequality.

In 2001, Danner sustained the idea according to which the feminist theory was focused on the understanding, describing and explaining the human experience and social life as well, monitoring the social changes capable to anihilate gender discrimination. For this reason, he considered that personal life and social life are genetically determined.

Feminist theories criticize the social order as well as masculine traditional theories. As any attempts of theoretical classification, this one has, besides the merits mentioned above some certain limits like for example lack of total objectivity, exaggeration in analyzing techniques as well as exclusivist orientation upon the feminine segment.

An essential aspect is represented by the fact that the feminist theories concerning the crime behaviour which is ”inspired” from crime theories.

Feminist crime science is based on the model of feminist movements from the 60s and the 70s, triggered by the need of protection and promoting women’s rights.

In the attempt of explaining and analysing the feminine crime behaviour, the researches resorted to the ethiology of crime. This process has evolved in such a way it got to the reporting of each sex towards collectivity.

Studying crime and deliquency within feminist theories, Daly (1998) approaches the problem from four different perspectives e:

- *the relation between genesis and crime*
- the social determinism of organized crime, of crime gender differecies (*crime genesis)*
- the determinant role of ethiological factors specific to domestic violence, as well as the characteristics of a crime gender-gap *(track genesis)*
- the role of genesis in selecting the undesirable behaviour (*life genesis*)

In constructing the feminist theories in crime science, a major role was held by the issued explanations about the crime bahaviour of women. These causes were approached from bilogical or psychological experience until the 70s, when the first explicative theories about crimes committed by women, theories focused on a sociologic causality. They emphasize the freedom aand emancipation.

The freedom theories appeared as an effect of movement for women’s rights. They have emphasized the opportunities appeared in the public sphere for women who overpassed the private sphere of home and family. These opportunities assume clearly the movement of the masculine gender towards the feminine behaviour, so a masculinizing of this one. The consequence was, of course, the increase of crime rate among women, because they took over from men, in the same time with the desirable model and the undesirable social one. An important role was held here by the lack of concordance between the stereotype of gender as the ideal feminine role and the real role which women have socialized with outside the private space. More than that, this role has reached in certain situations an extended level even in the private spehere, being one of the factors who led to the increased number of men as victims of domestic violence.

The evolution of feminist theories

The liberal feminism

The liberal traditional thinking was the fundament on which the first feminist current, focused on ideas as:

- freedom and equality of chances for both sexes
- equal rights for women in all domains of activities
- the exclusion of women discrimination at the working place

- juridical equality both in what concerns the evaluation of the feminine crime actions, as well as in what concerns the sanctions and the penitenciary treatment.

Besides the irrefutable merits, the liberal feminsim had its own limits. From these ones, the equality in rights and in chances have led to equality of sexes under the physical resistance for labour or penitenciary treatment, an issue desired by the first feminsit current, but not in totality.

The marxist and socialist feminism

Centred on the idea of the working class fight in the capitalist society, the marxist traditionalism contributed substantially on the analysis of the social classes. As a result, the marxist feminism has fundamented the theory on the economical causality of social inequality.

The essence of the marxist theory has influenced the crime science but the marxist feminism had a minor role comparing to the liberal one, upon the crime research.

The socialist feminism brings into the first row the importance of family, as a nucleus of human society. It had an essential contribution in a precise establishing of the status and the domestic role of woman.

Both types of feminism, the marxist and the socialist one emphasize stron aspects of social inequality, inequalities supported by the economic or juridical power: the economical nature of sexual abuse, judiciary system as a serving instrument for superior classes, used in order to opress woman, etc.

Radical feminism

The theory of radical feminism has as its fundament the concept of masculine violence and gravitates around analyses, discovery and fighting the domestic violence. This theory approaches the physical power in the private domestic space, describing the inequality between the masculine and the feminine physical force. The problems encountered by women represented the problematic of radical feminist theory: sexual abuse on women, their sexual haressment, pornografy. Emphasizing these problems and promoting the idea woman protection in the private family space by initiating and developing some legislative measures, as well as by building some living habitats and social shelters for the abused women, have represented strength elements of the radical feminism theory.

But from the radical feminism perspective, the permanent woman placement as victims, lack of solutions and of prevention methods against the *oppresive patriarchal system*, as well as in limitting the area of domestic violence, have represented its limits.

Modern feminism

Modern feminism criticizes the feminist theories of the first two currents of feminism and tries the development of new theories concerning the genesis of the crimes committed by women.

The previous theories were focused in explaining the concepts of ”woman” and ”women committed crimes”, but crime science needs to study the life of a woman under biological, psychological, economical, juridical and social factors. For this, Cain concluded that there is no method in crime science capable of a cognitive procedure so complex and complete in the same time.

Post-modernist feminism

The post-modernist feminist theory has a totally new shape, almost not all approached until this moment. The principal problem of this theory consists in the importance of language in information transmission.

Chesney-Lind and Faith appreciated that the post-modernist feminist theories have a strong impact upon teenagers through mass-media. Thus, in the U.S.A an experiment took place, which concentrated on the report between „the crime vawe from the mass-media” created especially through communication techniques without having a correspondent in reality and the rate of crime at a national level. While in the mass-media informations were abundant of topics connected with violence, crimes, in reality, at a national level, the crime level has decreased.

The merit of these theories consist in trying to deconstract the information from media.

Multi-cultural and multi-racial feminism

The multi-racial feminist theories approach woman both under cultural, behavioural aspect but also under social structure.

Accordingly, the multicultural feminist crime specialist Beth Ritchie tries to create the prototype of afro-american delinquent, a reason for which he studies the interaction between the human race, genesis, social class, domestic violence. The risc factors are represented by: qualities of individuals who belong to the same inferior classes; the subsistence methods offered by society to those of perferic areas; cultural and behaviour model of other women of colour, sexual identity; religion; other discriminatory factors.

Multi-racial feminist theories are concentrated of demonstrating the racial discrimination. The fight against crime aims only at poor social classes.

A special emphasis on the individual characteristics may lead to the highlighting the inequalities and different problems which put marks on the life of a person.

Masculinity and genesis

Among the crime theorist of the masculine theory, Messerschmidt is detached by directing the attention on the genesis of social actions of men, with the purpose of understanding the crimes committed by these ones.

The elements which lead to the delineation of masculinity are: the working place, the social structure, the sexual structure.

Referring to the feminist theories, Messerschmidt finds that the main power upon women is reflected in masculinity.

From the need to express masculinity, men resort to different form of violence, most of them being crimes. These are committed at any age, both in public space (working place, street) and also private (family).

Post-modernist feminist crime scientits have focused on masculinity, but they have the merit of bringing new approaches on delinquency in the first line.

The future of feminist theories on crime will center on the study of genesis of gender crimes, analyzing men's and boy's life as well as of women's and girl's under biological aspect, of social structure, of races, under psychological, cultural aspect, focusing on life environment on all plans.

Another futuristic orientation in the crime feminsit theory is represented by the displacement of attention from the periphery of society towards each social segment where crimes appear and, of course, studying these ones from a total perspective. This will lead, in time, to the elimination of race, class, ethnicity discrimination of the committed crimes both in women and men.

Continuing the research of the feminist theories will mark progresses in crime theory and, not lastly, in science.

Conclusions:

The main approached directions in the above article refer to the approach of feminine crime under the sociological paradigm. The emphasis placed on the influence of actors with crime risk, directs the research in the area of gender research.

The amplitude of the presented phenomenon and the weak concern until present time to establish the place and the role of the feminine crime within social delinquency, suggests the initiation of empirical research projects, based on theoretical ideas presented by this study.

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GENDER ROLES AND COOPERATIVE BEHAVIOUR

ALICE CĂLIN[1]

Abstract
We live in a world where, without any doubt, the social, political, economical power are owned by men. Almost all the societies are more or less patriarchal and the gender roles are, generally speaking, well defined and assumed by the representatives of each gender. Also, we live in a world consisting of communities that could not exist in the absence of cooperation between individuals. However, we have to consider the fact that individuals are rational persons that choose to cooperate or not based on the gains brought by each of the possibilities.
The purpose of this paper is to show that there is a correlation between the gender roles taught by each individual in childhood according to their sex and their cooperative behaviour. The hypothesis is that gender roles and cooperative behavior are interdependent and the way men and women cooperate is determined by the gender roles taught by each person since childhood according to the sex they were born. Perhaps we all heard that women are more gentle, more peaceful and more inclined to cooperation, all this being part of "their nature", while men are stronger, more practical, more rational and more likely to compete, also according to "their nature". In this paper I will assume that all these characteristics attributed to each gender are true, but I will question the nature's responsibility in all these facts.

Keywords: *Gender roles, cooperative behaviour, women's nature, teaching gender, children's cooperation*

1. Introduction

The present study is part of the Political Science field. It aims to show that the way women cooperate influences the gender roles and their assumption. In other words, even if women have no inborn inclination to assume care and household roles and even if they have a choice in this regard, because they are more inclined to cooperation, they are more likely to assume household tasks, especially when they have an opposite sex partner. However, if women tend to cooperate more than men, we can assume that they are more suitable for managing resources and common property.

At this time, the literature has not reached a consensus on the general tendency of cooperation among women. Some studies show that women cooperate less in the prisoner's dilemma type of experiments. On the other hand, there are studies showing that women are more cooperative and more altruistic than men. But there is also a third category of studies which reveals the fact that the way women cooperate in this type of games depends on certain conditions of the experiments.

Further I will present a series of studies and the results of their experiments in various cooperative games, showing how and in which conditions women cooperate. I will also try to show the applicability of cooperative behavior in private life and on assuming the household tasks.

2. Context

In modern society cooperation among individuals is indispensable. From the beginning of humanity, the ability to cooperate is a criterion of natural selection. Nowadays , cooperation is also a criterion of social selection. Cooperation works based on a system of rewards and punishments. Individuals that do not cooperate with others are excluded. The individual's degree of cooperation can be measured using a wide range of tools. However, the best known and most used type of experiment is a Prisoner's Dilemma.

This world has always been run by men for men, as Mihaela Miroiu says - "often, what was considered to be generally human was a simple universalization of the masculine".[2] For centuries

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societies are dominated and led by men who make policy only in their favor, totally ignoring the needs of women, or treating them as inferior beings, incapable of making decisions and managing on their own, therefore needing masculine care and protection. As a result, certain rules and patterns of behavior were established as being "women specific" and other "male specific", defined in the literature as "gender roles".

3. Empirical studies

According to a research conducted by Mary Glenn Wiley, there was not observed a significant difference in behavior between men and women when they were not allowed to communicate. When verbal communication was allowed, there was no difference between men and women when they interacted in same-sex pairs. In contrast, traditional roles have occurred when communication was allowed and they interacted with the opposite sex.[3] We can assume that this behavior is due to the traditional relations of the patriarchal societies in which they live, where women are educated to "listen" and to depend on men. Men are those who make the rules, they are "heads of the family".

According to Tomasello, children begin to cooperate from the age of one year old and tend to follow social norms because "this is the way it is supposed to be". More specifically, once the children see an action carried out in a certain way, afterwards someone will do the same action in another way, they will resist to the last action, arguing that "it is not the way you are supposed to do it".[4] Assuming that there is indeed a biological inclination toward cooperation of women, girls would learn and they would conform to gender statuses since the first years of life especially because this is what they see in their family. Thus, even if women do not have a feminine nature "inborn" which makes them sensitive, obedient, gentle, ready for self sacrifice etc, given their inclination towards cooperation and compliance, they will gain, from a very early age, these attributes and will behave accordingly.

Eckel conducted an experiment - called "the dictator experiment" – in which a group of women and a group of men received $ 10, which they had to share with an anonymous partner, as they wanted to, as compensation for the fact that the anonymus partner came to the experiment and was not distributed to the "dictators" group, that had full control over resources. The result shows that women were twice more generous than men. The average amount donated by them to an anonymous partner, was $ 1.60 while the average amount donated by men was $ 0.82. Among women, only 1.47% have donated nothing, compared to 60% of men. Also, 30% of them have donated at least $ 3, compared with only 10% of men.[5] I shall, therefore, question how can women expect men to make policy especially for women, while 60% of them are not willing to share resources with someone else? This is also a good argument in favor of imposing gender quotas in Parliament, assuming that men wouldn't be willing to voluntary give up power.

A series of three experiments conducted by Van Vugt, De Cramer and P. Janssen had shown that men cooperate more within the group if the group is in competition with another group than in the situation where the group they belong to is not a competition. Cooperation of women has not changed significantly in the case of competition between groups. However, within the group, when there is no competition, women cooperate more than men. Though, when there is competition

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[2] Mihaela Miroiu, *Drumul catre autonomie. Teorii politice feministe*. (Iasi: Polirom, 2004), 16

[3] Mary Glenn Wiley, "Sex Roles in Games*", Sociometry* 36 (1973): 526, . Accessed January 28, 2012. http://www.jstor.org/stable/2786248

[4] Michael Tomasello, *Why we cooperat*e. (Massachusetts: Massachusetts Institute of Technology, 2009), 49

[5] Catherine Eckel, and . Philip J. Grossman, *Men, Women and Risk Aversion: Experimental Evidence*. In C.R. Plott and V.L. Smith, *Handbook of Experimental Economics Results*. (Amstedam: North-Holland, 2008), 730

between groups, women cooperated approximately to the same extent as they did when there was no competition, while men cooperated almost twice more.[6] This is a very interesting fact, if we consider the possible competition between women and men, for example, in sharing resources and common property.

As we know, for women in Romania, there was never the "right moment" to enjoy rights and direct access to resources.[7] So I could say that this study strengthens the hypothesis that Romanian men behaved as being in a competition between groups trying, to remove half of the competitors.[8]

4. Application in private life

I consider that the results of these researches are relevant to study the behavior of individuals in private life. There are many situations even in family life that can be explained through prisoner's dilemma type of games. From the division of roles in the household, the education of children up to the decision to divorce, family life can be translated by a long series of prisoner's dilemma type of situations.

To illustrate such a possible situation, I will take as an example a married couple that has a child and whose dilemma is who to deal with its care. I will assume that each of the actors is rational and tends to maximize its own welfare. I will not take into account the feelings, principles or other emotional factors. I will show the situation from three points of view, of each rational actor involved - the mother's point of view, then the father's and then of the group's:

From the perspective of the mother (Table 1)

- If both cooperate, each of them will lose a moderate amount of time and energy, including the mother;
- If mother cooperates and father does not cooperate, the mother will lose maximum amount of time and energy;
- If the mother does not cooperate but the father does, she wouldn't lose anything, but she will even be able to use her time and energy doing enjoyable activities for herself;
- If none of them will cooperate, no one will lose time and energy but the child will be untidy and the task will not be completed.

Mother's perspective	Mother cooperates	Mother does not cooperate
Father cooperates	4	5

[6] Van Vugt, M., De Cramer, D. si Janssen, P, "Gender Differences in Cooperation and Competition. The Male-Warrior Hypothesis." *Psychological Science* 18 (2007): 19-23, Accessed January 30, 2012. http://www.fed.cuhk.edu.hk/~lchang/material/Evolutionary/cooperation%20and%20competition.pdf

[7] Mihaela Miroiu, *Drumul catre autonomie. Teorii politice feministe*. (Iasi: Polirom, 2004), 110

[8] Mihaela Miroiu, *Drumul catre autonomie. Teorii politice feministe*. (Iasi: Polirom, 2004), 95

Father does not cooperate	0	-1

Table 1

From the perspective of the father (Table 2)

- If both cooperate, each of them will lose a moderate amount of time and energy, including the father;
- If father cooperates and mother does not cooperate, the father will lose maximum amount of time and energy;
- If the father does not cooperate but the mother does, he wouldn't lose anything, but he will even be able to use his time and energy doing enjoyable activities for himself;
- If none of them will cooperate, no one will lose time and energy but the child will be untidy and the task will not be completed.

Father's perspective	Father cooperates	Father does not cooperate
Mother cooperates	4	5
Mother does not cooperate	0	-1

Table 2

Group perspective (Table 3)

- Best situation for the group is when both partners cooperate
- The middle situation is when only one parner cooperates and the other defects
- The worst situation is when none of them cooperates

Group perspective	Mother cooperates	Mother does not cooperate
Father cooperates	5	2
Father does not cooperate	2	-1

Table 3

We see, therefore, that each of them, individually speaking, has more to gain if he/she defects and the other cooperates. However, there is a chance that, if both defect, the task is not accomplished, that would be the worst possible outcome. However, considering the results of the previously mentioned studies, which concluded that women are more cooperative than men, especially when communication is allowed between partners, the probability that the mother will be the one who cooperates is higher. If she cooperates, it would result either the middle individual situation (see Table 1), but the best for the group, in which both partners cooperate (see Table 3), or the weakest individual situation, but the middle for the group, where only she cooperates and the partner defects. Based on these facts, many men choose to defect, so they get the best individual situation. These are the most common family types, according to studies, in Romania: those in which the care of the children is in the mother's charge. The smaller percentage of men who choose to cooperate leads to the existence of partnership-based families, in which both partners share the tasks equally. This game model can be applied in many situations of private life concerning common property or collective action.

Previous studies, based on cooperative games, have shown that women are more oriented towards community and society and men are more oriented to individual. Paradoxically, however, in the real world, women are responsible for the individual space, for the private life and the men for the society. As we saw in the example above, I believe this also happens because of women's inclination towards cooperation in private life.

This behavior of women is and was useful to them as many times as they were given the opportunity to manifest in public space, especially during the battle to win their political and social rights. Let's think, for example, that the suffragettes would have been less cooperative within the group. Would women had obtained the right to vote if each of them would have chosen to defect and let someone else deal with this situation? I think I can infere from these studies that there is a greater possibility that in cooperation games, "the free rider" to be men than women. In this case, I can not help wondering, rhetorically - of course, why public goods are not managed by women, considering the fact that they are more cooperative and therefore it can be assumed that they would have the ability to manage them more efficiently than men do.

"The tragedy of common goods" is often described using prisoner's dilemma type of games. In general, the "tragedy" comes from the fact that each individual tends not to cooperate with others in order to achieve a common goal, but to defect in order to maximize their personal profit. Most studies say, however, that women are more cooperative and more altruistic than men. This means that in cases where players are women, the "tragedy" is less likely to happen.

5. Conclusions

In conclusion, the fact that women are the ones that usually take care of the house and family, may depend, in the cases when they are given the choice, of their inclination towards cooperation and altruism. But often, the choice they make is not only because of their inclination to cooperate, but also due to their partner's inclination to defect.

However, the increased tendency to cooperation makes women be more valuable for the group and therefore, when choosing it, for society or community. If women are more oriented towards the society, being more willing to cooperate and men are more oriented towards the individual, being more selfish, perhaps a reversal of roles between women and men would be needed for a better functioning of the society. Just that, given the inclination of women to cooperate, I have reasons to believe that a reversal of roles wouldn't necessarily lead also to a reversal of gender

statuses. Being more cooperative would not, automatically, make women to be directed exclusively to public life and to "defect" in private life, as at this time it does not make them focus only on private life. These choices are made, or should be made, depending on personal preferences.

I think that in the future this issue needs to be the subject of more experiments that take into account the conditions in which women are more likely to cooperate, to see if, indeed, gender roles and cooperative behavior are interdependent.

If gender roles and cooperative behavior are interdependent, women may be caught in a vicious circle: they cooperate because of gender roles and gender roles tend to preserve because they cooperate. If men are also caught in the same vicious circle, it means the only possible option is to maintain the status quo. Due to the fact that this is not desirable, I believe that the only way out is through policies to facilitate the removal of traditional gender roles, both for women and men. If the two variables are indeed interdependent, this will lead to the modification of the cooperative behavior so that there wouldn't be a "female specific" and a "male specific" anymore, but individuals will be free to cooperate or not, depending on each individual situation. Of course, we can hope for a world where most people, and not most women will choose to cooperate for mutual benefit.

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WOMEN WRITERS AND THEIR CONTRIBUTION TO THE DEVELOPMENT OF ROMANIAN INTERWAR DRAMA

CARMEN D. CARAIMAN[1]

Abstract

During the interwar period, feminine literature[2] *was no longer perceived as a bizarre cultural phenomenon in Romania, at least not by mature and balanced critics, such as E. Lovinescu, G. Ibrăileanu and Tudor Vianu. At the time, Romanian drama and theatre life*[3] *developed considerably and feminine playwriting benefited from the creative spirit of the epoch and from a more flexible political, social and cultural context.*

Although it did not fundamentally innovate Romanian dramatic discourse, feminine interwar playwriting furthered the literary tradition initiated by their 19th century predecessors and managed to come up with new topics and typologies.

The re-interpretation of past and often forgotten texts is a necessary task for literary history whereby critics complete the information upon which we rely to depict an epoch.

Keywords: Romanian interwar drama, women writers, innovative topics, female characters, feminine writing.

Introduction

The concept of *feminine literature / writing* has been differently approached in the course of time: from a sociological, historical, political, religious or cultural point of view. As far as literary critics are concerned, we can identify oscillating positions among specialists: the extremists (who either support the existence of an undoubtfully particular stylistic pattern in literary texts, which they decode by means of gendered practices[4], or who deny[5] any functional value of the concept) and the balanced critics (such as: Elena Zaharia-Filipas[6], Ioana Pârvulescu[7], Sultana Craia[8], Bianca Burța-Cernat[9] a.o., who primarily make use of the aesthetic criterion when interpreting literary texts).

The method of investigation we have adopted in our paper is the latter one. Consequently, the aesthetic value was the main principle we used when selecting the texts[10] that we have analysed in

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[2] In our paper, we use the phrase *feminine literature/writing* to refer to literary works created by women writers.

[3] During the interwar period, theatre life flourished in Romania. New private theatre companies were set up (*Compania Excelsior*, *Teatrul Maria Filotti*, *Teatrul Maria Ventura*, *Teatrul Popular*, *Teatrul Ligii Culturale*, *Teatrul Mic*, *Teatrul Fantazio, Teatrul 13 plus 1* and others). Private theatres came up with a fresh vision over topics, stage interpretation and stage direction and they managed to survive despite the "anticultural" taxes imposed by the state upon private theatres. A new generation of young stage directors appeared – Camil Petrescu (supporter of "total stage direction"), V.I. Popa, Ion Marin Sadoveanu, Haig Acterian, Soare Z. Soare, Mihai Zirra and Ion Șahighian (supporters of expressionism) – who approached the dramatic text in a new way.

[4] For a straightforward presentation of the main terms used to define gender writing, we recommend Anne Cranny-Francis, Wendy Waring, Pam Stravropoulos, Joan Kirkby. *Gender Studies. Terms and Debate*s, Palgrave Macmillan, NY, 2003.

[5] Eugen Negrici, *Iluziile literaturii române*, Bucuresti: Editura Cartea Românească, 2008.

[6] Zaharia-Filipas, Elena, *Studii de literatură feminină*, Bucuresti: Editura Paideia, 2004.

[7] Ioana Pârvulescu, *Alfabetul doamnelor*, Bucuresti: Editura Crater, 1999.

[8] Sultana Craia, *Îngeri, demoni si muieri*, Bucuresti: Editura Univers Enciclopedic, 1999.

[9] Burța-Cernat, Bianca, *Fotografie de grup cu scriitoare uitate: proza feminina interbelica*, Bucuresti: Cartea Romaneasca, 2011.

[10] In our paper, we have analysed two plays that we consider representative for Romanian interwar playwriting: *Luminița* by Ticu Archip and *Bătrânul [The Old Man]* by Hortensia Papadat-Bengescu.

our paper. Finally, we have pointed out the main particularities that interwar feminine dramatic discourse acquired in the two most representatives dramas written by Romanian female playwrights: typologies (basically the feminine ones, which are unique), topics (which can be coined as feminist since they attack patriarchal mentality) and the structure of the dialogue (the way in which replies function in the text: as a mirror that establishes the dominant position in dialogue).

If the first Romanian women playwrights (Constanța Dunca-Schiau, Sofia Nădejde, Nelli Cornea a.o.) regarded theatre as an instrument by which they could directly send the audience their feminist message while sacrifying the aesthetical value of their literary works, the second generation of Romanian women playwrights – represented by Hortensia Papadat-Bengescu, Ticu Archip and Igena Floru[11] – brought psychological depth to the profile of their feminine characters and also created well-built and coherent dramatic conflicts. Thus, feminine characters were depicted in relation to the social condition of Romanian women during the interwar period and in relation to their particular psychological profile. Moreover, the stage evolution of feminine characters was no longer a merely dull illustration of several dramatic destinies, but rather an in-depth depiction of the feminine universe and its particular characteristics in Romanian interwar patriarchal society.

The topics developed by the two writers were in part considered taboo (see the debaucherous life of Suzana and her husband in *Luminița*[12] or the immorally distructive influence of parents upon their child) or inadequte for traditionalist Romanian society (see Gina's critical attitude to patriarchal family in *Bătrânul*[13]).

The male dramatis personae were no longer the key characters in the plays written by women playwrights. On the contrary, the female character was brought into the centre of the dramatic universe.

Our attempt to bring into evidence the original typologies, topic and language innovations brought by the Romanian interwar feminine playwriting is meant to complete a fictional space which is insufficiently explored by literary Romanian criticism. Finally, our goal was to re-evaluate forgotten aesthetically valuable plays – *Bătrânul* and *Luminița* – which could be successfully represented on the stage today.

Hortensia Papadat-Bengescu. Social drama

One of the main reasons for which Hortensia Papadat-Bengescu[14]'s playwriting is less popular with the Romanian readers / theatre amateurs can be justified by her remarkable success as a prose writer. However, the author manifested a particular interest in playwriting from the very beginning of her literary career, perhaps under the influence of her uncle[15], Bengescu-Dabija[16] (an important playwright at the time). In fact, Hortensia Papadat-Bengescu's first publications dealt with theatre life: *Sur la mort de Pierre Liciu* in *La Politique* magazine, 1912, followed by an article on Bataille's literary work and several attempts to write theatre. Hortensia Papadat-Bengescu wrote her first play *Povârnişul [The Slope]*, later on known as *A căzut o stea* (1939) *[A Star Has Fallen]*, in

[11] Igena, Floru, *Fără reazem*. București: Editura Librăriei Socec & Co., 1922.

[12] Ticu Archip, *Luminița*, București: Editura S.A.D.R., 1928.

[13] Hortensia Papadat-Bengescu, *Teatru*, București: Editura pentru Literatură, , 1965; the volume *Teatru* [*Theatre*] includes the following plays: *A căzut o stea [A Star Has Fallen]*, *Bătrânul [The Old Man]*, *Medievală [Medieval Play]*, *Sora mea, Ana [My Sister, Ana]*. The first night of *Bătrânul [The Old Man]* was in 1920, at the National Theatre from Bucharest, on 2nd March1920; the play also enjoyed appreciation in Iași, in 1983 – see Ioan Holban, *Hortensia Papadat-Bengescu*, Editura Albatros, București, 1995;

[14] In 1923, Hortensia Papadat-Bengescu becomes a member of the Romanian Playwrights Society.

[15] According to Florin Mihăilescu, *Introducere în opera Hortensiei Papadat-Bengescu*, Editura Minerva, București, 1975;

[16] see Hortensia Papadat-Bengescu, *Autobiografie*, in *Adevărul literar şi artistic*, 11 July, 1937, no. 866, page 5;

1915. 31 years later she made the last attempt to write drama - *Medievală* (1946) *[Medieval Play]*. Between 1915 and 1946, the author published the social drama *Bătrânul [The Old Man]*, which we regard as her masterpiece, followed by a mediocre play *Lulu*, inspired by E. Lovinescu's similarly entitlted novel, and the unfinished drama *Sora mea, Ana [My Sister, Ana]*.

Hortensia Papadat-Bengescu's constant effort to publish theatre is also mirrored in her letters to G. Ibrăileanu and Camil Baltazar. The author considered that the difficult political context our country was undergoing at the time was an important inconvenient for building a career as a playright: "I think that now it is not the right time for fairly assessing an intellectual work because currently the events are too intense and no one is ready to make a right evaluation. I think that now a good work (everyone hopes to have written well) might be regarded with a sort of anger and unstable indifference."[17] (our translation)

In an interview with Felix Aderca, Hortensia Papadat-Bengescu confesses that technical problems she came across in the attempt to represent a play on the stage constituted another obstacle in her career as a playright: "... if the obstacles a play comes across /.../ wouldn't be so big, maybe I would write only theatre".[18] (our translation)

According to the information we have concerning theatre[19] performances, the social plays written by Hortensia Papadat-Bengescu and the psychological plays written by Ticu Archip and Igena Floru were rarely represented on the stage. The best plays published by Hortensia Papadat-Bengescu and Ticu Archip (*Bătrânul* and *Luminita*) shocked literary critics and the theatre audience that found them abominable. The less aesthetically valuable plays written by the three women writers (*Fără reazem [Without Support]*, *Inelul*[20] *[The Ring] and Lulu*) did not disturb the patriarchal mentality of the time and did not impress critics or theatre amateurs either; in fact, they had no echo.

During the interwar period, the most successful plays were comedies (Al. Kirițescu, Th. Muşatescu), "pitoresque and sentimental theatre"[21] (V.I. Popa, G.M. Zamfirescu) and "intellectualized farse"[22] (Mihail Sebastian). In this context, feminine playwriting must have appeared isolated since it did not fit the mainstream voice.

Besides political context and technical difficluties involved by the attempt to represent a play on the sate, the audience was in Hortensia Papadat-Bengescu's opinion another obstacle that a playwright had to face: "Then, after you have enjoyed the play, you have to confront the audience, which is a quite appalling experience. Many playrights know this feeling especially those who do not write in order to flatter the audience..."[23]

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[17] *Scrisori către G. Ibrăileanu*, M. Bordeianu, Gr. Botez , I. Lazarescu and Al. Teodorescu; preface Al. Dima and N. Popa, Bucureşti: Editura pentru Literatură, 1966, pag. 67: „Cred că nu e deloc timpul bun pentru o evaluare justă a unei lucrări intelectuale, spectacolul evenimentelor e încă mult prea viu, interesul fiecăruia e prea dislocat pentru o apreciere. Cred că acum o lucrare bună (fiecare speră că a făcut bine) s-ar pierde într-o indiferență nervoasă şi mobilă." (original text);

[18] Felix Aderca, *Mărturia unei generatii,* Editura „Națională" S. Ciornei, Bucuresti, 1929, pag. 217: „…dacă piedicile ce se pun în calea unei piese...n-ar fi atât de mari, cine ştie dacă n-aş scrie numai teatru." (original text);

[19] See Ioan Massoff, *Teatrul românesc*, vol. V, Editura Minerva, Bucureşti, 1974; see the following journals: *Rampa* (1920-1939), *Teatrul* (1923), *Sburătorul* (1920-1922, 1926-1927);

[20] Ticu Archip, *Inelul*, Editura Socec et Co., Bucureşti, 1922;

[21] Ov. S. Crohmălniceanu, *Literatura română între cele două războaie mondiale*, volumul III, Bucureşti: Editura Minerva, 1975, pag. 9.

[22] Ov. S. Crohmălniceanu, op. cit., pag. 91;

[23] I. Valerian, *De vorbă cu doamna Hortensia Papadat-Bengescu*, in *Viața Literară*, an I, 1926, nr. 29, pag. 1: „Apoi cu teatrul după ce te-ai delectat, mai rămâne publicul, adică ceva foarte înspăimântător. E un sentiment cunoscut de mulți confrați dramaturgi şi probabil de acei anume care atunci când scriu nu se gândesc să măgulească publicul..." (original text);

Although Hortensia Papadat-Bengescu's plays do not have a stable aesthetic value, they have unitary topics: "marital disagreements"[24] and the analysis of matrimonial conflicts are psychologically investigated in all the plays written by the author.

Povârnişul [The Slope] illustrates the marital drama of a woman, Simona Demir, who fails to be happy in all her love affairs. After falling apart with Radu Demir, her first husband, she has to face another disappointment – her marriage to Ian Balli:"Deeply disappointed with her marriage to a lawyer, Radu Demir, who offences her dignity, considering her to be his own <<property>>, Simona, the main character in *A Star Has Fallen*, falls out with her husband hoping to recover affectively."[25]

The novelty of the play consists in the writer's attempt to create a complex feminine psychology characterized by obscurity, unpredictability, soul fragility and the permanent feeling that she is a misfit in her marriages and in her role as a mother.

Simona Demir illustrates the inadaptation of a woman to the patriarchal background that marriage confines her to. The feeling that her sentimental life is a failure and her emotional unbalance gradually isolate Simona Demir from her family and friends: "Simona's drama is the drama of moral solitude because she can no longer live <<with or without people>>."[26] Her suicide is a desperate gesture by which she attempts to free herself from social cliches and her mind labyrinth.

The topic of the play and the typology of the feminine character are specific for psychological drama and should have been represented on the stage by adequate dramatic techniques. Unfortunately, the way the text is conceived reduces the characters' psychological complexity so that the dramatic conflict lacks force: Simona's psychological decline is represented indirectly by means of dialogues between the secondary characters in the play or by means of long and boring monologues. Thus, the reader has the impression that Simona's psychological evolution is perceived at the surface of the text without being illustrated by the heroine's play and stage evolution. The suicidal scene puzzles the reader/audience and it is perceived as a surprise by the other dramatis personae, too.

Simona's husbands are quite different in nature. Radu wishes to succeed in his career by all means and is ready to sacrifice his wife's happiness to see his dream come true. In his opinion, his wife is part of his fortune alongside with his property – a commonly shared view at the time:

Radu: "I do not have to be cautious to my wife...I am tired of having to handle the others with gloves...

Simona: Yes! Let us spare the others...Wife is a property...You do not have to be cautious to her...She is insured...she eats and sleeps...What else can she wish for?"[27]

Ian, her second husband, though generous and sincere in his feelings, fails to make Simona happy, too.

The first modest attempts to write theatre were followed by Hortensia Papadat-Bengescu's masterpiece - *Bătrânul [The Old Man]*, in which the author approaches her favourite topics: woman's condition in a patriarchal society, degenerescence and upstartness.

Bătrânul [The Old Man] innovates Romanian feminine character with Gina Delescu, an intellectual and contradictory woman, oscilating between sense and sensibility, a defensive and offensive attitude towards life misfortunes. Gina verbally sanctions and defies everything which

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[24] *Dicţionarul scriitorilor români*, Editura Albatros, Bucureşti, 2000, pag. 609;

[25] Constantin Ciopraga, *Hortensia Papadat-Bengescu*, Bucureşti: Editura Cartea Românească, 1973, pag. 89: „Profund decepționată de mariajul cu un avocat (Radu Demir) care-i ofensează demnitatea, considerând-o <<proprietate>>, Simona din *A căzut o stea* se desparte, sperând într-o redresare alături de armatorul Ian Balli. Noua experiență nu e mai fericită, fluidul sentimental care s-o apropie de Balli, om delicat de altfel, lipseşte." (original text);

[26] Constantin Ciopraga, op. cit., pag. 89-90.

[27] Original text: „**Radu**: N-am nevoie să fiu prudent cu nevastă-mea…Destul trebuie să-ţi pui mănuşi cu alţii…

Simona: Da! Să menajăm străinii…Nevasta e o proprietate…Pentru ea nici o precauţiune…E asigurată…mănâncă şi doarme…Ce mai poate dori?";

seems ridiculous or false to her, from patriarchal morality to political upstartness. Her husband seems to epitomise everything she criticizes most: shallowness, lie and lack of principles. The stage representation of this feminine character shocked the theatre audience and some of the literary critics[28] because of her direct, unscrupulous attitude towards her husband.

Many of those who read or saw the stage representation of Hortensia Papadat-Bengescu's play noticed that the writer's style is quite aggressive and virile: "dealing with feminine topics, Mrs. Hortensia Papadat-Bengescu writes about them in an incissive, almost scientific manner and with *Bătrânul* she created the most mature and virile work that a Romanian brain has ever produced."[29]

Most critics interpreted the play unfavourably. E. Lovinescu[30] was one of the few who praised it underlining the author's objectivity in approaching her topics.[31]

The main conflict of the play (between, on the one hand, Gina and Luca Delescu, symbolically known as Bătrânul [The Old Man] and, on the other hand, all the family members – Mrs. Delescu, Cleo and Jean – the uninstructed, penniless backbiters living on Luca's money) is multiplied and gives birth to a series of other subconflicts (between Gina and her husband, Dinu Delescu; between Cleo, Dinu's sister, and the Old Man; between Dinu and his brothers).

The social topic of the play is represented in a determinist manner. The naturalist echoes of Hortensia Papadat-Bengescu's literary work can be identified in *Bătrânul* in Luca Deleanu. The existential aversion Luca feels to having a mentally alienated child (Codea) makes him hate his wife and family. Hence his refuge in science.

Similarly, Gina is trapped in an unhappy marriage. Brought up by Luca Delescu (the Old Man)'s family after her parents died, Gina gets married Luca's son, Dinu Delescu, the successful, unprincipled politician and her unfaithful husband. This marriage makes her feel as if she were a commodity which is exchanged between her husband, Dinu, and her supposedly lover, Sandu:

"**Dinu**: ... You love my wife and she loves you (*Sandu tries to protest gently*). You are her friend and she has found a refuge in your arms. I imagine I were in your place. Things would not be different. It happens that we are rivals. It is a domain in which hierarchies do not exist. Now I want your friend. In politics, you may be in the opposition fighting against me with my own weapons. This is how I understand life... (Act IV, sc. VI)"[32]

Gina's presence in Luca's laboratory helps her develop her universe of knowledge. Thus, she evolves intellectually and adopts a pollemic attitude towards vanity, snobism, hypocrisy, demagogy and prejudice. The contrast between the group represented by Gina-Luca Delescu and the other characters constitute the main frame upon which the author builds her ironnical discourse.

In the author's opinion, woman's unhappiness is mainly caused by her soul solitude to which she is condemned by patriarchal society:

"**Gina**: You are talking of divorced women or women whose husbands died. I was talking about *widows*. About women who find no comfort for their souls in the moral support that their husbands should offer them. I was talking about modern odalisques."[33]

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[28] see Felix Aderca, op.cit., pag. 216-217;

[29] Const. Ciopraga, op.cit., pag. 13: „ocupându-se de feminități, d-na Hortensia Papadat-Bengescu le tratează cu o aprigă inciziune, aproape ştiinţifică, iar în *Bătrânul* ne-a dat una din cele mai mature şi mai virile opere pe care le-a produs un creier românesc.";

[30] E. Lovinescu, *Bătrânul*, in *Sburătorul*, an II, No. 45, 19th March, 1921, pag. 289;

[31] E. Lovinescu, *Bătrânul (II)*, in *Sburătorul*, an I, no. 51, 1st May, 1920, pag. 553-554.

[32] Original text: „**Dinu**: ... Iubeşti pe nevastă-mea şi te iubeşte (*Sandu protestează slab*). Eşti amicul ei şi s-a refugiat în braţele dumitale. Îmi închipuiesc că eu aş fi dumneata. Lucrurile nu s-ar fi petrecut altfel. Întâmplarea ne face rivali. E un domeniu unde nu sunt ierarhii. Pe amica dumitale o vreau eu acum. În politică mâine vei putea fi dumneata la tribuna adversă, luptând împotriva mea cu armele date de mine. Aşa înţeleg eu viaţa ... (Actul IV, sc. VI);

[33] Original text: „**Gina**: Dumneata vorbeşti de femeile divorţate sau cărora le-au murit bărbaţii. Eu vorbeam de *văduve*. De femeile care nu găsesc sprijinul sufletesc, nici sprijinul moral pe care au dreptul să-l ceară de la bărbatul lor. De cadânele moderne." (Actul IV, sc. V).

The discussion on the ordinary sin for which woman is considered to be responsible becomes an opportunity for Gina Delescu to cast doubt upon the biblical myth:

"**Dinu**: Man, after Eve committed the original sin, covered woman [with a veil] in order to reduce the number of serpents.

Gina: The first woman may have invented it [the veil] after having seen the real face of her man and instinctively covered her eyes." (Act V, Scene II)[34]

The scene in which Gina compares demagogy with puppet games is very suggestive; in fact she criticizes their lack of sincerity:

"**Gina**: Discourses have a strange effect on me. The effect which puppets had on me when I was a child. Something empty of real meaning... We cannot take politics for granted." (Act III, Scene IV)[35]

Gina's and Luca's running away from home represent the climax of the dramatic conflict. Their predictable return home mirrors the impossiblity to change anything in their lives. Thus, Gina's evolution – apparently circulary (from an unhappy wife to a potential frivolous woman and back to the statute of the unhappy betrayed wife) – illustrates the inner stages she follows, from revolt to resignation:

Gina: Let us go home. I am not made for love or for ambitions. These storms require stronger natures. I was brought up in the middle of ... test tubes, among two old persons...I'm afraid! I am so happy to have you! Let us proceed our work...and leave the other do their own. I have tried to prove my power. When I think of Sandu, of Dinu's lover, of him...Their lives seem so difficult...It is so difficult to live...Let us vegetate... (*The Old Man is ridden by thoughts*) Dad! Judging by their laws it seems to me that I have sinned.

The Old Man (*takes her head in his hands*): Does it?...It seems to you, my dear daughter. You have not lived according to their laws to consider that you've made a mistake. You didn't have their joys to be punished with their punishments. They didn't give you anything so that you should feel indebted to them. You've lived according to your own law, alone, like a spider. (Act V, Scene IV)[36]

Bătrânul [The Old Man] is a play about solitude and human condition, in general. However, even if the central character of the play is Luca, the main dramatis persona is Gina. The communication crisis between the couple members and degenerescence bring into evidence woman's soul solitude and the writer's nihilist vision as to human destiny. One cannot ignore the writer's own lifelong regret not to have been allowed to further her studies at the unversity and her being compelled to accept marriage as the only choice in life for a woman. From this point of view, Gina undoubtfully is an alter ego of the writer.

According to Constantin Ciopraga, the literary work published by Hortensia Papadat-Bengescu managed to do more than a feminist campaign for Romanian culture: "Hortensia Papadat-

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[34] Original text: „**Dinu**: Bărbatul, după păcatul Evei, a acoperit femeia [cu un văl] ca să micşoreze numărul şerpilor.

Gina: Poate că [vălul] l-a inventat prima femeie care a văzut adevărata faţă a bărbatului ei şi a făcut gestul instinctiv de a-şi acoperi ochii." (Actul V, sc. II)

[35] Original text: „**Gina**: Discursurile îmi fac un efect ciudat. Efectul pe care mi-l făceau în copilărie păpuşile. Ceva vid de sens real... Nu putem lua în serios politica..." (Actul II, sc. IV)

[36] Original text: „**Gina**: Aidem acasă. Nu sunt nici femeie de iubire, nici de ambiţie. Furtunile astea cer temperamente mai puternice. Eu prea am crescut...în mijlocul eprubetelor, între doi bătrâni…mi-e frică! Ce fericire că te am! Să ne vedem de treabă…să-i lăsăm la treburile lor. Mi-am încercat puterea. Când mă gândesc la Sandu, la amanta lui Dinu, la el…Ce greu e traiul lor…Ce greu e să trăieşti…Aidem să vegetăm… (*Bătrânul e gânditor*). Tată! Mi se pare că după legile obişnuite am păcătuit.

Bătrânul (*îi ia capul între mâini*): Ţi se pare?…Ţi se pare, fata tatii. N-ai trăit după legile lor, ca să greşeşti după ele. N-ai avut bucuriile lor, ca să primeşti pedepsele lor. Nu ţi-au dat, ca să le fii datoare. Ai trăit între ei după legea ta, singură, ca un păianjen." (Actul V, sc. IV)

Bengescu did not directly support feminist campaigns but her entire literature (comprising many instances in which women are disadvantaged) is subservient to the cause, doing more than some simple campaigns. Structurally, she belongs to the category illustrated by Simone de Beauvoir whose similarly deep perspective illustrates a prolific spirituality."[37]

The feminine issue in Ticu Archip's theatre

At present, Ticu Archip's theatre is hardly ever mentioned by theatre amateurs, critics or the common reader. The main reason for which her theatre is currently so rarely mentioned can be explained by the wrong reception of her masterpiece, *Luminița*[38], whose topic was labelled as being unacceptably scandalous by the interwar theatre audience.

Her first plays - *Inelul*[39] and *Gură de leu*[40] (represented on the National Theatre stage in 1935-1936) - did not convince literary critics or the theatre audience of her dramatic gift[41] and for good reason. Thus, Eugenia Tudor Anton[42] regards Ticu Archip's theatre as a temporary stage in her prose writer career. On the other hand, E. Lovinescu regards her style as *symbolist*, i.e. using suggestion as a manner of expressing her topics (in both prose and theatre)[43]. The only literary critic who appreciated Ticu Archip as a playright was Felix Aderca: "One is amazed to discover how a writer with a gentle look and inclination is concerned in her mind's laboratory with such an essential problem as the slow decomposing of a family because of one woman's lusts which are probably stirred by her unluck or simply by her sheer nature... We witness a real talent which is still developing."[44]. (our translation)

All the plays written by Ticu Archip deal with woman's psychology and her condition in the Romanian interwar society. Ana in *Inelul [The Ring]*, Suza and Luminița in the similarly entitled play, Dolly in *Gură de leu [Lion's Mouth]* – all illustrate feminine soul which is approached in relation to the bourgoisie social background, to their moral and spiritual profile and to the degree of independence they assume as women.

E. Lovinescu[45] and Felix Aderca[46] notice that the author is inclined towards creating rare feminine characters whose behaviour is scandalous (see Suza in *Luminița* and Dolly in *Gură de leu*) or passionate and inclined towards sacrifice (Ana in *Inelul*).

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[37] Constantin Ciopraga, op.cit., pag. 10: „Hortensia Papadat-Bengescu nu a întreținut campanii feministe directe, dar întreaga sa literatură (cu multe pagini din care femeile ies dezavantajate) servește tacit cauzei, făcând în acest sens mai mult decât campaniile propriu-zise. Structural, ea aparține categoriei ilustrate de ultimele decenii de Simone de Beauvoir ale cărei priviri, de o egală gravitate, atestă o spiritualitate fecundă." (original text);

[38] Ticu Archip, *Luminița*, București: Editura Societății Autorilor Dramatici Români, 1928;

[39] Ticu Archip, *Inelul*, București: Editura Librăriei Socec & Co. S. A., 1922.

[40] Manuscrisul piesei *Gură de leu* nu este disponibil în biblioteci. Deocamdată nu avem date despre existența lui; un fragment critic despre acest text dramatic, semnat H. Lazu, a fost publicat în *Adevărul literar și artistic* - anul XIV, 3-XI-1935, nr. 778, pag. 8;

[41] Dezamăgit de piesă, E. Lovinescu a apreciat că titlul acesteia, *Gură de leu*, ar fi trebuit înlocuit cu *Bâlci sentimental*, pentru a ilustra tematica ei siropoasă - Eugen Lovinescu, *Memorii. Aqauforte*, București: Editura Minerva, 1998, pag. 242-243;

[42] Eugenia Tudor Anton, *Prefața* la vol. Ticu Archip, *Soarele negru*, București: Editura Minerva, 1983;

[43] E. Lovinescu, *Istoria literaturii române contemporane*, București: Editura Minerva, 1989, pag. 296;

[44] Felix Aderca, *Un debut,* în *Viața literară*, anul III, 21-I-1928, No. 68-70, pag. 17: „Rămâi uimit văzând cum o scriitoare cu înfățișare și apucături blânde e preocupată în laboratorul creierului ei de probleme atât de esențiale ca aceea a descompunerii lente a unei familii prin morbul unei femei cu poftele avivate poate de prea mult nenoroc sau numai de firea ei…Ne aflăm în fața unui talent real, în plină dezvoltare" (text original);

[45] Idem;

[46] Felix Aderca, *De vorbă cu Ticu Archip,*în *Adevărul literar și artistic*, anul IX, seria a II-a, 6-X-1929, no. 461, 1929, pag. 1-2;

Theatre critics[47] who considered that the topic of *Luminița* is outrageous referred only to the image of the debaoucherous wife and her distructive spirit (Suza), leaving out the husband's frivolity (Şerban) and his responsibility for his wife's and daughter's unhapiness.

Returning home after 15 years of absence – in which she lived as an adulterous woman – Suza attempts to convince her husband to accept her back home near him and their daughter, Luminița, but in vain. Being refused, Suza triggers between the family members a psychological war whose effects have a dramatic ending. Three conflictual triangles are built: father-daughter, daughter-finacee and mother- daughter.

The dramatic conflict is settled through the sacrifice of the most fragile family member, Luminița. The author's message is that the hypocrit morality of society – which accuses woman of frivolity, disregarding the same sin when it comes to males, – is responsible for Luminița's death.

Moreover, Suza's frivolous behaviour after returning home – illustrated by her attempt to seduce her daughter's fiancé, Vania – must have seemed unacceptable by the bourgeoisie theatre audience. Throughout the play Suza adopts a dissimulated behaviour, trying to identify each one's weak points and to convince herself that she can manipulate the others. Shortly before the play ends, the readers / theatre audience are convinced that Suza is to blame for all her family's unhapiness. However, in the end, we find the real story of the couple. We learn of the real cause which led to the couple's fallout. Considering Şerban guilty of the family disintegration, Suza accuses him of adultery and hold hims responsible for her moral decline:

"**Suza**: ...I was brought up at your school...I was 16 when you married me...I was younger than Luminita...remember, and you did not even call my name, you did not call me any name, in fact...a few days later you replaced me...(*faster*). First with a friend, then with a servant...the third must have been a woman from an important family...the fourth..." (Act III, Scene V)[48]

Suza's final discourse brutally destroys the pure image Şerban has built about himself and his wife's past. The effect is that Luminița's inner universe is broken:

"**Suza**: ...Look at me (*to Luminita*)...I'm dying for the second time in my life... I died for the first time when I left you...Serban told you...you were little, you couldn't see me...(*distinctively*). /.../ I leave my daughter, Luminita, my whole soul fortune...my huge soul fortune...I was the lover (*Serban wants to intervene*) of how many men, Serban, do you know?...the number is not important, many, many, many. /.../ Listen to me, Luminita, listen to me...my mother used to unsew an old coat when she wanted to make a new one... Make a new soul for yourself upon my broken and dirty one... I can no longer hope to do this for me...it's over..." (Act III, Scene V)[49]

Betrayed by her own fiancé, disappointed with her own father, confused by the appearance of her frivolous mother whom she thought dead, Luminta feels that all her reasons for living are lost. The image of the fallen apart family and of the adulterous parents cancel in the young woman's pure soul any reason for living and any hope in an honest and sincere love/relationship.

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[47] Alex. Călin, *Luminița, piesă în 3 acte de domnişoara Ticu Archip la Teatrul Național,* în *Adevărul literar şi artistic*, anul IX, no. 372, 22-I-1928, pag. 6; Nicon, *Premiera dela Teatrul Național. O femeie criminală. Numeroşi morți şi răniți. Incendiul unei magazi [sic!]. Şoarecile enigmatic*, în *Rampa*, anul XIII, no. 2992, pag.2; Scarlat Froda, *Cronica dramatică. Teatrul Național: Luminița, dramă în 3 acte de d-ra Ticu Archip*, în *Rampa*, anul XIII, no. 2992, pag.4.

[48] „**Suza**: …la şcoala ta am crescut…aveam 16 ani când m-ai luat…eram mai tânără ca Luminița…adu-ți aminte, nici nu-mi spuneai pe nume, nu-mi spuneai în nici un fel…peste câteva zile m-ai schimbat …(*mai repede*). Întâi cu o prietenă, pe urmă cu o servitoare…a treia trebuie să fi fost de neam… a patra…" (Actul III, sc. V)

(original text);

[49] „**Suza**: …Uită-te la mine (*Luminței*)…mor pentru a doua oară…Întîi a fost când te-am părăsit pe tine…ți-a spus Şerban…erai mică şi nu puteai să mă vezi…(*clar*). /…/ Las fiicei mele, Luminița, întreaga mea avere sufletească…uriaşa mea avere sufletească…Am fost amanta (*gest al lui Şerban*)…am fost amanta a câți bărbați, Şerban, tu ştii?…numărul nu importă, mulți, mulți, mulți. /…/ Ascultă-mă, Luminița, ascultă-mă, mama când îşi cosea o haină nouă, descosea alta veche după care croia… După sufletul meu zdrențuit şi soios, croieşte-ți tu altul din stofă nouă şi scumpă… eu nu mai pot spera într-asta, s-a isprăvit…" (Actul III, sc. V) – original text;

The topic of the play was perceived as an abominable offence by theatre critics and the audience and, consequently, they felt obliged to criticise the author fiercely.[50]

The play comes up with an original perspective over the feminine and the masculine characters as well. Şerban and Vania represent new male dramatic personae in Romanian theatre.

Şerban is the image of the coward father who cannot recognize his faults and the negative consequences his behaviour had over his wife and child. On the other hand, Vania's gloomy nature predicts the dramatic end of his fiancée and adoptive family. Suza and Vania are the "intruders" who break the apparent harmony between Şerban and his daughter. Suza and Vania communicate well because they share a common feeling of hatred to Şerban and perceive themselves as outcasts. Suza's frivolous nature encourages Vania's taste for revolt. Moreover, Vania feels only resentment to Serban:

"**Suza**: Why do you hate him?

Vania: He told me that my dad died because of a mental illness...if he had remained silent about this, I wouldn't have known anything and I wouldn't have been afraid...I would have lived quitely or I would have gone mad, all the same to me. /.../ I owe him my present weakenss and that's why I hate him..." (Act II, Scene V)[51]

The dramatic discourse of the play is cristal clear. The geometrical organization of the scenes in the play leaves the impression that nothing can be added or removed from the text. Finally, it is the dramatic strength of the play which persists and convinces the reader of its aesthetic value.

Conclusions

The interwar dramatic discourse was superior to the 19th century one from an aesthetical point of view.

During the 19th century, the discourse of male-female characters, He-She, could be regarded as comprising *a stimulus – an answer* [52] (i.e. *authoritative statement – obedient reply*). As to interwar feminine playwriting, the male character is almost permanently criticized by his life partner's ironical comments which are actually oriented against prejudices. In fact, the male discourse is permanently sabotaged by women's revolting attitude.

As many literary critics noticed (E. Lovinescu, Felix Aderca, Bianca Burţa-Cernat), male characters created by women writers are no longer predominantly depicted as superior personalities or as models to be followed. In fact, they are in an overwhelming percentage depicted as immoral, hypocrite and agressive. Women are most depicted as victims of the unhappy marriages in which they are trapped or as victims of their fragile inner structure or of a society that confines them to the domestic universe without offering them the chance to further education[53]. We could conclude that a negative perception of reality dominated the two writers we have referred to in our study.

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[50] Felix Aderca, *De vorbă cu domnişoara Ticu Archip,* în *Adevărul literar şi artistic*, anul IX, seria a II-a, no. 461, 6-X-1929, pag. 1-2.

[51] „**Suza**: De ce îl urăşti?

Vania: El mi-a spus că tata a murit nebun...dacă ar fi tăcut, n-aş fi ştiut nimic şi nu mi-ar fi fost teamă...aş fi trăit liniştit, ori aş fi înnebunit, tot una . /.../ Lui îi datorez slăbiciunea mea de acum, şi de asta îl urăsc..." (Actul II, Scena a V-a);

[52] Maria Cvasnâi-Cătănescu, *Structura dialogului din textul dramatic cu aplicare la dramaturgia românească*, Universitatea din Bucureşti, Facultatea de limba şi literatura română, Bucureşti, 1982.

[53] As we have mentioned above, Hortensia Papadat-Bengescu is was not allowed by her family to further studies and was compelled to accept the marriage to a magistrate; her huge literary success was the result of her effort and the support of G. Ibraileanu and E. Lovinescu; on the other hand, Ticu Archip (her real name was Sevastiţa Archip), the second woman writer we refer to in our paper, used to work as a teaching assistant at the Faculty of Mathematics – The University of Bucharest;

Feminine dramatis personae created by women playwrights during the interwar period hint at a different statute – they refuse to remain obedient to tradition and confined to routine housework activities; they aspire to an independent statute without identifying themselves with the aggresive profile of Tofana in *Patima roşie*[54]; the new feminine characters (Gina and Suzana) are involved in an *ideological fight* against contemporary biases. The two characters (Gina and Suzana) adopt a non-conformist attitude to couple problems. Thus, the new feminine characters depart from the traditional perspective proposed by famous contemporary writers (V.I. Popa, Th. Muşatescu, Al. Kiriţescu, Camil Petrescu and others). The 'new woman' answers to her husbands' infidelity with adultery or by simply fleeing from home in a gesture of desperate rebellion. However, the woman's refusal to accept reality as an already made pattern leads to dramatic situations for all family members (see Suzana, Luminita and Serban in *Luminiţa*, Simona in *A căzut o stea*, Lola in *Fără reazem*[55] *[Without Support]*) or proves to be futile (see Gina's evolution in *Bătrânul*).

All in all, the short analysis we have developed in the pages of our paper offers a glimpse to texts that could be included in articles/studies on Romanian feminine playwriting and that might determine stage directors to select for future representations. On the other hand, the curious reader may also discover forgotten masterpieces which remained almost unknown to theatre amateurs mainly because of the unfavourable review they received when written or when represented on the stage.

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[54] Mihail Sorbul, *Patima roşie*, Bucureşti: Editura Librăriei şi Tipografiei H. Steinberg, , 1916;
[55] Igena Floru, *Fără reazem*, Editura Librăriei Socec & Co., Bucureşti, 1922.

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THE ROLE OF WOMEN IN PRESERVING THE ROMANIAN IDENTITY IN LOCAL ADVERTISING

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Abstract:
The following paper intends to reveal the involvement of women into coining efficient communication campaigns for different product categories promoted on the Romanian market. Product consumption explicitly depends on target interests and social integration considering its division into two directions according to age groups (the old generation and the young, "new media generation") after the 1989 Revolution. Our main purpose consists in identifying female profiles in Romanian advertising starting from Geert Hofstede's theory. He created a five-dimension model (power distance, individualism/collectivism, gender of nations, uncertainty avoidance, long/short-term orientation) of national culture, by analyzing local and global brands, on the one hand, and different product categories (dairy, coffee and chocolate, drugs, banks and insurance, mobile phones, home appliances), on the other.
This paper will apply the content analysis method, whose purpose is to reveal the Romanian identity promoted by the female characters of at least 50 TV commercials. In order to get a wealth of information, this study focuses on important aspects such as tradition, independence vs. involvement in family responsibilities, authority vs. subordination, living environment (city or countryside), as well as relationships with men and children. At the end of this research, we expect to reach two important goals. The first one is to establish a relationship between product categories, local identity, and the Romanian target, which is still in transition after the Anti-Communist Revolution. As for the second goal, we hope to discover some female patterns which are very well exploited in Romanian advertising based on cultural and social background. The hypothesis that strongly supports this research is that women have an essential role in preserving local identity, appealing to the Romanian consumer in commercials created especially for them.

Keywords: *women, advertising, profiles, identity, Romanian market.*

Introduction

The present paper is concerned with the relationship between women and national identity , which is often visible in the advertising field because consumers project their image on products and preserve brand retention. We strongly believe this article is equally important for advertising and gender studies, because the sample belongs to the first category, while female role is an issue under constant investigation. This research is essential for gender studies from several points of view, such as associating women with the Romanian local identity, recognizing female involvement in preserving the Romanian roots and understanding the reason why they are so frequently present in commercials, regardless of brand or product categories. The main purpose of this study is to create a connection between product features and Romanian female identity. The second goal is to find an advertising profile of the Romanian woman, based on their involvement in family and social life. Our starting point focuses on the simple idea that the role of women is more relevant in local commercials in comparison to the role of men, because of family portrayals social responsibilities and female power.

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The best way to reach all these research goals is to analyze aspects such as tradition, independence vs. involvement in family responsibility, authority vs. subordination, living environment, as well as relationship with men and children, by applying content analysis. The second step is to check the validity of Geert Hofstede's theory, which presupposes to identify the features of five-dimension models of the Romanian national culture in local advertising and the role of women in each case.

The role of women in promoting brand values is tightly connected to stereotypes, sexuality, and representations of male-female relationships. Erving Goffmann (1979) is one of the researchers who believed that gender relationships are socially constructed and that women are presented in ads as weak and sensitive. He developed several codes of understanding female semiotics in ads. Lindner [2]also states that since the 1950s there has been a shift in the depiction of women in advertising. Women are less often portrayed in traditional roles as housewife or mother and more often in professional roles. A contemporary researcher, Tom Reichert [3]wrote a very inspired book of advertising history, based on the feminist evolution. Analyzing the image of femininity over the ages, he concluded that advertising paid more attention to some categories, such as fragrances, coffee, travel agencies, cosmetics, given the connection between the female personality and the features of these products and less to women in connection to national or cultural identity.

2. Content:

2.1.Statistical data about men and women in Romania

Before we start approaching our research hypotheses, it is essential to emphasize he balance between men and women in Romania, according to the statistical data provided by the population censuses, registration from civil register evidence, and other administrative sources collected in 2008 by The National Institute of Statistic[4]. According to quantitative results, population reports showing gender and area prove women are dominant both in cities and in the countryside, with a greater difference margin in the rural area. Therefore, women's presence justifies their involvement in various activities and their role in preserving family values. Another very important issue that helps this paper reach its purpose, is the historically analyzed rate of living in the urban and rural areas,. A chart provided by the same survey showed a very steady percentage of people living in cities and in the countryside, between 1990 and 2008. For example, in 1990 45.8% of the Romanian population lived in the urban area, and 54.2 % in villages, while in 2008, 55% of respondents lived in cities and 45% in the countryside. These data highlight the stability of life-styles and a conservative society that does not suddenly change its structure of family and gender roles.

In 2008 and 2009 (before the economic crisis started), The National Institute of Statistic came up with additional data about the population's involvement in economic activities based on gender and living area which proves the male dominance on the market, despite of the fact that men are less represented demographically.

2.2. Theoretical framework

Geert Hofstede carried out a model based on five dimensions of national culture that considerably helps analyze the differences and similarities between cultures: power distance, individualism/collectivism, gender of nations, uncertainty avoidance, long-short-term orientation Extremely important is that Hofstede validated those two models by analyzing television commercials and print advertisements as a first research method.

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[2] Katharina Lindner, "Images of Women in General Interest and Fashion Magazine Advertisements from 1955 to 2002," *Sex Roles 51* (2004): 409-420.

[3] Tom Reichert, *The Erotic History of Advertising* (New York: Prometheus Book, 2003), 13-19.

[4] http://www.insse.ro/cms/files/Anuar%20statistic/02/02%20Populatie_ro.pdf, p. 2, accessed January 21st .

Power distance[5] reveals consumer difference in communication behaviour and the main values promoted in advertising reflect both authority and social status. This research strives to prove that local brands are less powerful, while global ones seem to be independent and influence the former. Global brands bring to light social status in high power distance cultures. The power distance influences not only consumer image within a society, but also brand perception. This concept was interestingly related to other research terms such as cultural paradox, values, and authority, by other researchers over the years. "Authority" and "celebrity" are keywords that help define power distance as the degree of understanding life differences between the powerful and the less fortunate.

The model of individualism versus collectivism[6] debates the relationship between cultures individually focused on their values as well as cultures preoccupied by social integration and harmony. In the first case, people are concerned with being unique by relying on themselves. Obviously, in terms of advertising, individual culture rejects global brands more than the collectivistic one, considering that consumers are more connected with their local context. Thus, the other side of the coin involves accepting and adapting to the universal brand image while understanding the common values.

The third model approaches the so-called "gender of nations", which is very well related to the successful societies, to the winner profile and his or her mentality. This brings to light the specificity of any nation either oriented to masculinity or femininity. Given this perspective, gender roles are clearly defined and consumption depends on society dynamics. We do believe this model reflects the relevance of some product categories connected with lifestyles and specific consumer behaviour. There are societies in which the household is more important than professional performance and femininity plays the main role -considering family a priority- whereas male-oriented societies are meant to focus on success, lots of work, and less affectivity. Advertising analyzes this balance and appeals to consumers relying on this overview of the gender nations, which is very difficult to change over the years.[7]

The next model developed by Hofstede is called "uncertainty avoidance" and refers to the way people accept and adopt innovation, and are not afraid of ambiguity and unexpected situations. [8]A society led by strict rules prefers stereotypes and likes to follow old customs, and, for this reason, either global brands adapt to its values, or local values become more important. On the other hand, a society, which is very open to changes and media innovation does not discriminate brands, and advertising uses synergetic strategies to promote them. Long-/short-term orientation explains differences in using certain product categories and considering them a consumerist or spiritual/abstract culture. For the long-term orientation culture, pragmatism and perseverance are vital and people are mainly preoccupied by concrete sciences. For the short-term orientation culture, tradition, popular culture, and folk wisdom top of their preferences.

Hofstede's theory had a great impact and was improved in 1996 by adding another 15 West European countries. Consequently, it concluded that many research topics could be influenced and developed according to it. Based on this theory, we chose to apply these models on our quantitative data to get a profile of the Romanian women, in terms of studying specificity and the relationship between local and global features.

Besides this theory, another aspect that immediately deserves more attention is the concept of identity with the double advertising meaning of brand image and local identity. Advertising creates a synergy between these two perspectives, considering local brands are oriented towards national identity. Therefore, a certain brand reputation reflected a certain country image and no confusion was

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[5] Geert Hofstede, Gert Jan Hofstede and Michael Minkov**,** *Cultures and Organizations: Software of the Mind: Intercultural Cooperation and its Importance for Survival (*USA:McGraw-Hill, 2010), 60-64.

[6] Hofstede, Hofstede, and Minkov, *Cultures* , 90-99.

[7] Hofstede, Hofstede, and Minkov, *Cultures,* 137-146.

[8] Hofstede, Hofstede, and Minkov, *Cultures,* 187-190.

possible. Meanwhile, advertising became a channel to communicate similar values by buying and using the same brands. Dealing with conceptualizing national identity, Anderson (1991) argues that nations are "imagined communities," and we believe advertising encourages the construction and deconstruction of identities. Actually, he said that "communities are to be distinguished not by their falsity/genuineness, but by the style in which they are imagined."[9] Commercials create real consumers' communities relying on product features and they build an imagined consumerist world.

The relationship between women and men has very often been approached by researchers during the last few decades, and their findings highlight various female roles, such as: *housewife, decorative elements, sex objects,* and *someone reliant on men*[10] (Ferguson, Kreshel, and Tinkham,1990); *housewives, someone concerned with physical attractiveness, sex objects, the career women,* and the *neutral women;* (the *alluring object of sexual gratification*[11] (Mayne, 2000); and *erotic and suggestive stimuli* (Henthorne and LaTour, 1995)[12]. Those roles are very well connected to social behaviour and emotional involvement, but not with cultural implications. In terms of globalization, these models are available everywhere, but differences arise from local identity. Most of research was carried out in the American world, where the image of women changed quickly. Definitely, local identity has a huge influence on the female image promoted by advertising.

2.3. Research sample and method

The main corpus of our research consists of 50 TV commercials broadcast on the Romanian market and completely dedicated to local brands. The selection was made according to several criteria which are very important for the purposes of the present study. First, there are various product categories that may receive more credibility by emphasizing the local identity. Second, ads had to include a female hero to identify one of the possible roles in preserving Romanian identity in local advertising. Third, we tried to strike a balance between older commercials (created after the 1989 Revolution) and new ones because we believe the image of femininity progressively changed. Fourth, it was essential to select commercials where women were presented in relation to men and children, basically in slice- of- life setting, not testimonials or simple demonstration. Therefore, our sample consists of only 50 ads, because all these criteria involved had to be achieved simultaneously.

The following table briefly presents the product categories and brands involved in this study:

Nr.	Product categories	Brands	Number of ads
	Phones and Communication	Romtelecom	3
	Alcoholic drinks (beer and wine)	Bucegi, Timişoreana, Murfatlar	4
	Non-alcoholic drinks	Giusto, Adria	2
	Mineral water	Izvorul Minunilor, Biborţeni	2
	Cars	Dacia	3
	Dairy	Napolact, Covalact	4
	Chocolate and cookies	Rom, Măgura	5
	Banks	CEC, Banca Transilvania	2
	Cooking oil	Untdelemn de la Bunica, Floriol	4
	Detergent	Dero	2

[9] Benedict Anderson, *Imagined Communities. A Brilliant Exegesis on Nationalism* (London: Verso, 2006), 6.

[10] Jill Hicks Ferguson, Peggy J. Kreshel and Spencer F .Tinkham. "In the Pages of Ms.: Sex Role Portrayals of Women in Advertising." *Journal of Advertising* (19,1990): 48.

[11] Iris Mayne, "The Inescapable Image: Gender and Advertising.", *Equal Opportunities International* (19, 2000):57.

[12] Tony L. Henthorne and Michael LaTour, "A Model to Explore the Ethics of Erotic Stimuli in Print Advertising ." *Journal of Business Ethics* (14, 1995): 562 - 563.

	Medicines and pharmacy	Carmol, Catena	2
	Home appliaces (Electronics)	Arctic, Altex	4
	Bakery products	Boromir, Pretzel of Buzău (Covrigii de Buzăau)	2
	Meat products (paté)	Pate de Sibiu, Pate Ardealul, Cris-tim	4
	Media	Antena 1, Adevărul	2
	Cosmetics	Gerovital, Farmec	2
	Retail Construction	Dedeman	2
	Petrol	Petrom	1

Content analysis was the method we choose to provide quantitative data. The data were further developed in a qualitative manner based on the main goals of this research. The quantitative analysis was carried on according to the following variables, which can very well be understood by answering the following questions:

What is the living environment of women involved in the commercial message?

What kind of responsibilities do women who appeared in the selected ads have?

What is the relationship between women and men and/or children?

What is the balance between authority and subordination in women' relationship to men and/or children during the commercials?

What is the balance between individualism and collectivism regarding the values encouraged by the women presented in these commercials?

What do women strive for -innovation or tradition?

2.4. Findings

What is the living environment of women involved in the commercial message?

Analyzing the living area where women play their roles involves more than making a distinction between rural and urban environment, and implies discovering a connection between products and the female profile. In this case, the urban background represents the main direction of 29 commercials in comparison with only 9 ads shot in the countryside. Only two examples describe women acting in both the urban and rural environment, which reveals that this issue is less important for female profiles. These three categories were easily identified, given the visual background and several aspects of women's lifestyles. Additionally, ads show women only in their domestic environment, preoccupied by family and specific activities. The last living area is not significant for the role of women, considering the entire plot fantasy, and the character is an Empress. Before jumping to the next quantitative issue, we may conclude that the urban environment emphasizes the role of women in preserving local identity more than the rural one. This result cannot be contested or considered irrelevant because the product categories (18) involved in this research are very diverse and are not directly linked to femininity.

2.4.2.What kind of responsibilities do women who appeared in the selected ads have?

Looking for the main responsibilities of female heroes in the selected sample, we discovered a various palette of activities, which proves that gender stereotypes have been already outbalanced or at least ignored. The following table highlights this variety and offers a complete overview on this issue by using general words that synthesize women responsibilities according to different criteria such as family status, lifestyles, beauty patterns, relationships, main activities.

No.	Responsibilities	Number of ads
	Household (specifically mother and wife)	24
	Good professionals or ex-professionals	8
	Girl-friend	5
	Storyteller-Granny	4
	Sexual object and "decorative" women	3
	Friends and colleagues	2
	Multiple responsibilities	1
	"Shopping" girl	1
	"Party-girl"	1
	Empress	1

Women as wives and mothers are at the top of this list, which is quite usual for any country and identity in the world. Obviously, this top should be connected with product categories to have some relevance for this research. Therefore, we noticed female household responsibility was used in ads created for phones, cars, dairy, chocolate, oil and meat products, a fact that helps recognize the role of women in creating a brand image. Seductive and so-called "decorative" women emphasize men's power in commercials dedicated to wine, cars and chocolate. There exists an association between product qualities and the female image, a strategy of coining the message based on irresistible attraction. In one of the TV ads for Dacia, three women follow a car (Dacia) driven by an alluring man, who tries to get home to his family. The final message is "Girls, he's taken" referring to the man's wife. This commercial shows a change of roles: the guy represents the attraction for women, and the car is a way to get home faster and escape temptation. To sum up, this issue regarding responsibilities points out the implication of women in the family and at professional level, regardless of product category or brand.

What is the relationship between women and men and/or children?

Going further, the previous conclusion implies finding out the specificity of female behavior in relation to men or children. The results are quite simple here, since there are only three possibilities revealed by the analysis: the aggressive (conflicting) relationship, the amiable one, and the undecided attitude towards people. In 28 ads of the entire sample the behavior is non-conflicting, (in 18 commercials this attitude has been noticed as directed towards men, while in 9 situations it is directed towards children and only in one case towards other women).The conflicts are oriented towards men in 18 ads for different reasons such as family disagreements, excess of authority, different perspective on the relationship between tradition and innovation. Only in 4 situations women do not clearly express their attitude, either be it friendly or dominant and aggressive. What is really interesting here is that gender conflicts arise either from family tension (the classic dispute between mother-in-law and daughter-in-law, for example), or men's incapacity to make their wives or girlfriends happy. Obviously, these findings on conflicting or amiable relationships are strongly connected with the Romanian perspective on sharing responsibilities inside the home.

2.4.4.What is the balance between authority and subordination in women' relationship to men and/or children during the commercials?

The previous issue can definitely be explained by finding out the balance between authority and subordination in relationships in which women are involved in. According to the quantitative data provided by our sample, authority belongs to women 33 situations, while men have total control of decisions and women in less ads, 15. The rest of commercials share authority and do not emphasize anyone's dominance. Returning to Hofstede's theory on "gender nations", there is no doubt that we deal with a women-oriented society and advertising highlights this dimension of

consumption, which is practically dominated by concern for the family and children and less for professional performance. Even if the sample is not bigger, selection criteria make these findings relevant, given the image of local brands, on the one hand, and the involvement of women in family and society, on the other hand. Female authority in Romanian commercials may be associated with a global trend, which consists in considering women very good consumers, decision –makers in the family and organizers of the family budget. Martha Barletta began her book evaluating the female power on the market by writing, "Women are the world's powerful consumers. They are the big spenders, whether we are talking about households, corporate purchasing or small business" [13]. Romanian women are greatly concerned about their family, being more conservative and traditional, and, for this reason, commercials broadcast on the local market for local brands emphasize their identity regardless of the product. They do not spend money on themselves so much (except for 2 commercials), but subordinate men by using sensibility and verbal authority.

2.4.5.What is the balance between individualism and collectivism regarding the values encouraged by the women presented in these commercials?

Discussion relying on Hofstede's theory applied in this research leads present research to another model of communication that regards the relationship between individualism and collectivism in the behavior of women. According to our findings, individualism dominates with 29 registrations, while the collectivist attitude draws the attention in 21 ads. Certainly, women are preoccupied by the local context and do not strive for external values or ignore their social background. Given that their authority is often emphasized, women rely on themselves and do not ask for help. The small difference between these categories could be explained by the glocalization phenomenon and the influence of global brands, which similarly advertized all over the world. In one of the TV ads for national phone provider Romtelecom, a father is a secret agent and travels a lot, being shown in action in many cities (Bucharest, Paris, New York) while risking his life. In the most dangerous situations, his wife calls him and asks him personal questions or to buy small goods. The woman reminds him to buy a Christmas present for their child and milk, as if man were an ordinary employee. At the end of the ad, the entire family is happy, celebrating Christmas in a very traditional way. The female perspective is very individualistic while the man's job depicts him as a universal James Bond. Whenever the creative idea of the commercial does not focus on domestic responsibilities, the image of woman is universal by acting as any other woman concerned about herself and she is completely out of the local context. Going shopping, emphasizing her beauty, ignoring her family means to reject the local personality and femininity for the sake of global stereotypes. Sometimes the individualistic perspective is woven with the collectivistic one, pointing out the glocalization or hybridization phenomenon.

2.4.6.What do women strive for -innovation or tradition?

The last issue this research aims to find an answer for regards the way women adopt or reject innovation in terms of Hofstede's theory entitled "uncertainty avoidance". Here we investigated not only the relationship between tradition and innovation, but we also tried to link this research result with the age of women, considering that a local identity promoted by femininity depends on this criterion as well. The following chart briefly points out these data, highlighting, in our opinion, an unexpected correspondence between age and overview on life:

[13] Martha Barletta, *Marketing to women: how to increase their share of the world's largest market* (Chicago, USA: Dearborn Trade Publishing, 2006), xxi.

	Young women	Old women	Middle-aged	Number of ads
Innovation	14	6	9	29
Tradition	11	7	2	20
Innovation and tradition	1	0		1

First, age definitely makes the difference when we speak about tradition or innovation. Young women top both aspects, which is quite unexpected, considering people got used to seeing old people anchored in their past and customs. In this case, young mothers, wives, friends or girl friends prefer tradition, almost as much as they respect it. Regarding the attitude of the old women about innovation, all 6 commercials depict them in a very humorous way, either using modern language (as like in the cooking oil commercial Untdelemn de la Bunica – Granny's Oil or for Altex- Apgreidin), or acting almost childishly (Altex-Madam Multimedia, Antena 1-The wheel). A retired woman is waiting for her pension surrounded by a computer, and a video- camera to monitor the postman, just to have fun. She is the woman ironically called Madam Multimedia, who invalidates the theory according to which old age always means being conservative and rejecting technology. To sum up, innovation and tradition do not represent real competition between old and young women, because both age-groups choose them sometimes. Expanding the target or making him or her trust the product more involves adopting a conservative or inventive attitude. This proves once again that advertising sometimes goes beyond stereotypes and reconstruct female or male profiles.

2.5. Discussion

The political and social changes permanently determine a reconstruction of the image of women who is disseminated through any kind of media and by any means. Discrimination and feminism are two words which have been dominating research studies and media market for a few decades. These terms fed other concepts like globalization, internationalization and the image of women which began to be universally framed and understood, regardless of local identity. Carolyn M. Byerly and Karen Ross considered that the relationship between the media and women has an important role in understanding femininity in a global or particular way: "The ways in which the media represent the female subject and the experiences of women working in media organizations themselves are the product of a world system of patriarchal capitalism whose globalizing tentacles currently threaten to strangle the fragile flower of change" [14]. Advertising is a real medusa, considering it exploits any type of media to promote many products both for women and men by using the female image in a global or local manner. Women could be the target, the creative support and they can positively motivate the men, because of their beauty, as well as responsibility in the household and at professional level. In terms of local identity, these general features are differently perceived or replaced by the specific ones easily recognized by the target.

In our case, this study provides some information about the female profile in local advertising in terms of promoting local products. Women living in the urban area seem to be the main characters in the analyzed commercials, and they are basically presented as housewives (mother and child), despite their age. Women do not unfriendly react towards men or children, in spite of their authority, which is obviously expressed in more than half of the selected commercials. Most women involved in commercials to get the consumers' attention prefer innovation, regardless of their age, which proves their independence. Similar in number are the female characters who individualistically behave, according to Hofstede' s theory, and preserve one's native heritage, such as tradition, religious celebrations, family rituals, and relationships. There are small contradictions here, which is not so unexpected in advertising, because women living in the city are innovative and authoritarian

[14] Carolyn M. Byerly and Karen Ross, *Women & Media, a Critical Introduction*, (Oxford: Blackwell Publishing, 2006), 75.

on the one hand, but do not appreciate collective culture, on the other. Collective culture rejects the local context and tries to integrate consumers in a global life-style. Usually, living in an urban area implies being very connected to global features having a job and many other influences.

Therefore, this research helps us identify several female patterns important in preserving the Romanian identity in local advertising:

The young and innovative woman, who also belongs to a family and promotes new changes of society (for example the Romanian integration into the European Union in the ad for Bucegi beer entitled *Bunicul - The Grandfather)*.

The young and traditional woman preoccupied by her family and preserving rituals (Murfatlar wine-the dowry).

The old and innovative woman, adapting to contemporary times (Altex campaigns) by using computers, driving a car (even if wheel is ironic in the ad for Antena 1- *The Wheel*)

Middle-aged women, dominative and always in conflict with their husbands because of their lack of skill for domestic activities (Măgura chocolate - *The perfect man,* Adria).

Middle-age women, which are traditional and skilled in preserving the taste of childhood sweets (Napolact).

3. Conclusion

The image of women in Romanian advertising reveals a range of profiles by also using the former criteria (age, tradition vs. innovation, responsibilities). The gap between young and old generation is not substantial, given their ability to adapt to what they need. The traditional perspective represents the main strategy to create campaigns for promoting dairy, bakery products, cold meat products. Revolutionary femininity arises from commercials dedicated to products that are, usually, very quickly upgraded: cars, domestic appliances, media. This apparent contradiction (young vs. old, tradition vs. innovation) points out two important aspects: first, target segmentation implies a proper association between product features and consumer image, and second, the female profile still reflects the transition from communism to capitalism by its conservative attitude combined with accepting new life-style solutions. There is, for sure, a hybridized depiction of women responsible for the family, on the one hand, and professionally involved, on the other hand. Tradition means preserving family responsibilities and considering the woman the origin of all solutions while innovation refers to the new woman who accepts challenges as much as men do.

To sum up, according to Hofstede's theory, individualism defines better femininity than collectivism, the Romanian nation relates more successfully to femininity in advertising than to masculinity, and women adopt innovation regardless of their age and this is sign of the short-orientation culture (based on popular culture, folk wisdom, and tradition). In our opinion, the role of women in preserving Romanian identity in local advertising consists of establishing a balance between past and present and emphasizing the social involvement of local brands in consumer's life. Advertising creates a challenging and nonconventional profile for women, going beyond the stereotypes, such as women in the kitchen, unemployed women, women depicted only as housewives and encouraging the power of femininity in making decisions and buying the best products for their family or themselves. Romanian Advertising does not isolate women from their family or profession by not emphasizing their beauty or sensitivity and passively presenting them. On the contrary, the main features of female portrayals are dynamism and authority, which make them a user or possible user for almost any product.

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DEDEMAN CAMPAIGNS: THE COMPENSATION OF BEING A MAN DOMINATED BY A MOODY WOMAN

MĂDĂLINA MORARU (BUGA)[1]

Abstract.
Advertising seems to be the perfect field for playing gender games, either as a relationship between authority and subordination or as a conflict. Dedeman campaigns are very well-known for targeting men by using their family background, especially women, considering product specificity. The company focuses on retail construction for home design, and is the brainchild of two Romanian owners. Basically, this company offers all the consumer needs to build a house on the outside and the inside as he or she wishes, or to modernize an existing construction.

Dedeman advertising is very rich and distributed on diverse media channels, even if the company is still young. The following research aims to highlight the relationship between masculinity and femininity in promoting brand values and service quality by analyzing print and outdoor advertisements. Therefore, we are very interested in establishing the role of the product in this difficult relationship of communication, given it is equally designed for men and for women, but establishes a different connection with them. The main purpose here is to discover the involvement of the brand and products in family life, and to identify the male and female target profile.

This research relies on the visual and linguistic sample of Dedeman print campaigns and the method approach is the analysis of the advertising discourse in texts created for billboards and print advertisements. We are very interested in the types of advertising texts (argumentative, narrative, descriptive), the linguistic representations of femininity and masculinity, and syntactic relationship between product and gender. At the end of this research, we expect to reveal a Dedeman advertising strategy applied in promoting brand's values which may involve the gender roles in a creative way.

Keywords: *gender, advertising, linguistic discourse, outdoor.*

Introduction

This paper aims to explain the advertising role in establishing various gender relationships based on product attributes and brand image. Over the ages, gender roles have been changing a lot according to the family and psychological criteria, and advertising takes advantages of these transformations. Firstly, we may start by saying that the relationship between masculinity and femininity moved towards two directions: either a global, or a local. The first dimension was definitely identified with stereotypes and male or female standards. Erving Goffmann (1979), was the first who argued that gender relationships are socially constructed and that women are presented in ads as weak and subordinated to man. He thus developed several codes of understanding women semiotics in ads. Male stereotypes have been lately enhanced, because some criteria of femininity do not quite match to masculinity, such as beauty, sensitivity, social status, sexual attraction. One of the goals of this paper consists in proving that the local aspects of this gender relationship depends on several issues that determine a rejection of the global perspective on this subject or, at least, an adaptation. Those issues may be: religion, tradition, cultural aspects, social support for the family, individualism versus collectivism.

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Secondly, this relationship in advertising develops differently in comparison with other research fields or interest areas (like politics, professional engagements), because of products and brands involvement. There are three product categories specifically approached in their campaigns: those dedicated to men (for example, retail and construction, motorcycle, fragrance), to women (home appliances, kitchen accessories, cosmetics and fragrances), and last but not least, unisex (no gender discrimination like some scents or cars). For the first two types, commercials follow either only the target profile, or the connection with the other gender. Our hypothesis is that in the last case the strategies may be equally addressed to any kind of target, or to one of them as a means of getting the attention of the other gender, not necessarily involved in. In this situation, we discuss about two possible relationships: on the one hand, collaboration and, on the other hand, conflict between genders, given the necessity of imposing one of them authority. Collaboration implies equal responsibilities and product use, while conflict changes the product and brand role. In our opinion, the conflict between genders points out other roles of the product as well: sometimes it mediates the gender relationship, sometimes it comes as a compensation against frustration, subordination, and lack of respect. The present research intends to reveal what is the product role in moderating the relationship between men and women, and how much Dedeman influences their communication by analyzing its outdoor campaigns.

2.Theoretical framework

2.1.Gender dichotomy

There is a real and understandable dichotomy between male and female roles given in society, and this is why gender studies emphasize stereotypes and differences. As for the social differentiation, the theory of the evolutionary psychology and constructivism explains its context and impact from the scientific point of view. For example, Wood and Eagly[2] analyzed these differences relying on two directions: first, the work division between men and women, and second the men status and power in comparison with women. Obviously, the psychological and biological dispositions traditionally attributed to both genders are the first option to explain the divergences. Looking from another perspective, the gender idea appeared inside a culture and it adapted to its specificity. This is the reason why masculinity and femininity will never be equally understood and developed all over the world.

Despite the globalization process, the advertising tries to find the best way to appeal to the consumers, by paying attention to the culture specificity. According to Moriarty, Mitchell and Wells there are three approaches focusing on the balance between standardization, localization and combination. The easiest model to identify is *standardization*[3] that focuses on consumers similarities all over the world, without any specific issue. In this case, male and female depiction relies on stereotypes and general overview on gender aspects. *Localization*, sometimes named adaptation, consists of considering many other important coordinates of each market, such as: lifestyles, cultural, economic and political particularities. Consequently, gender issues observe all coordinates requested by consumer's insight. *Combination* is nothing else than finding a middle way to merge the former directions in order to produce a more effective advertising both by preserving general brand strategy and translating it for local customers. Here, advertising keeps the general patterns, but it differentiates them according to local needs, and sometimes the result is a gender hybridization. For example, in Romanian advertising the dairy industry is very rich, usually promoted due to the traditional roots. Tnuva was a very well-known and global brand in Romania (it went out our market at the end of last year) which created some commercials based on the principle: *Think globally, act locally!* In one of

[2] Wendy Wood and Alice Eagly,"A Cross-Cultural Analysis of the Behavior of Women and Men: Implications for the Origins of Sex Differences", *Psychological Bulletin* (128, 2002): 699.

[3] Sandra Moriarty, Nancy Mitchell, and William Wells, *Advertising: Principles & Practice,* 8th edition (New Jersey: Pearson Education, Inc. 2009), 548-550.

the TV ads, a young woman, whose name is Măriuca (a common Romanian name), goes to work in Măriuca's Factory by bicycle, wearing traditional clothes. On the go, the camera presents us the village: the women are relaxing at SPA and drinking a cold juice, while men open the stable by using a remote control. This commercial is very strange for the local mentality where peasants are very conservative, hard-working and deeply involved. Definitely, women profile does not match the Romanian specificity and so Măriuca's factory is not credible.

2.2. The female image in advertising

The gender approach in the advertising field started far back in the past with Goffmann's classification (1976). He divided commercials into three categories, after a study on 500 ads: traditional commercials, the commercials inverted according to the gender, and neutral commercials. The first category is focusing on the gender stereotypes specified for each society, the second one reverses the gender rules, while the last one combines the expectations of a cultural and personal stereotype. His research approaches the femininity among others aspects according to the subtle message transmitted by a woman whose attitude and body language towards a product says more than anyone could describe by using mere words. The later studies have been trying to explain the female presence more often in commercials in comparison with men's appearance. This is the big truth: women draw the consumer's attention more than men. Which is the credible explanation? We are looking for one which has nothing to do with discrimination or prejudice. Gad Saad[4] from the Concordia University came up with a very good justification for this female invasion in ads: the woman's beauty and sexuality better sell products and services. The answer is a simple one as it has to do with women's genuine qualities such as: delicacy, sensitivity, fragility.

2.3. The male image in advertising

As for men, stereotypes were not so powerful at the beginning, and in advertising their masculinity was perceived in a very authoritarian or, in a sexual way. Later, a very interesting concept changed the male perspective and this was the hegemonic masculinity. This term was systematized in an article written by Carrigan, Connell and Lee, which criticized the male sex role and proposed a model of multiple masculinities and power relationships. Researchers assume the idea of a gender hierarchy historically maintained, but accept the necessity to change it. The studies focussing on this topic applied the concept on a range of topics: military world, organizations, family, professional practice. Carrigan et al. consider that gender relationships depend so much on the global or local conditions in which women and men express their power: "The global subordination of women is consistent with many particular situations in which women hold power over men, or are at least equal." [5] Many critics have been against this scientific mainstream, and some of them noticed that there is a tendency to exclude women from this analysis. Brod argues that men studies should be strongly helped by the women' studies, should be developed through feminist theory, not against it: "I think feminist men's desires to study men from feminist perspectives should be encouraged rather than discouraged." [6] For example, Connell and Messerschmidt argue that "Critiques of the concept of masculinity make better sense when they point to a tendency, in research as well as in popular literature, to dichotomize the experiences of men and women" [7]. The meaning is quite simple here: we cannot debate masculinity by ignoring the gender relationship. The researchers also pointed out that the main idea of masculinity is its opening to changes, especially on the local level. This

[4] Saad Gad, "Applying Evolutionary Psychology in Understanding the Representation of Women in Advertisement." *Psychology &Marketing* (21, 2004): 606.

[5] Tim Carrigan, Bob.W. Connell and John Lee, "Towards a New Sociology of Masculinity." *Theory and Society* (14, 1985): 590.

[6] Harry Brod, "Does Manning Men's Studies Emasculate Women's Studies." *Hypatia* (2, 1987): 156.

[7] Bob R. W. Connell and James W Messerschmidt, "Hegemonic Masculinity: Rethinking the Concept." *Gender Society* (19, 2005): 837.

conclusion calls forth new approaches of gender relationship as long as patriarchal family is not anymore the model for new generation.

In advertising the product is the master and men are first subordinate to its success and than extend their influence on women, children or friends. When they are authoritarian, this attitude definitely expresses the product credibility and features. On the contrary, being subordinated to women means being the man desired by the latter, appealing to their senses. The reverse is available for women as well, so there is no place for discrimination here. From this point of view, it is possible to associate masculinity not only with men, as we got used to doing it, buy with any other kind of oppressive behaviour. In other words, even women could be depicted in a male way, due to their power, assertiveness or dominant tendency. As Johnson points out (1997) related to this issue and Mullany (2004) explained later, "it is now possible to consider that women and men can be oppress by different forms of masculinity based on sexuality, ethnicity, class, age etc. Therefore, from this perspective, masculinities and femininities replace the monolithic categorizations of femininity and masculinity. " [8] We may say that negotiation between genders represents nowadays a strategy to balance their communication in any field.

2.4.Gender Communication

A very good comparison between women's and men's world belongs to Marti Barletta's book (2006), *Marketing to women: how to increase their share of the world's largest market,* which classified femininity according to its role on the market. The work approached many other issues related to this topic, such as: women values, social standards, psychological aspects. She explained the communication key of male and female culture that highlights the difference between genders. She established a synthesis of her research by speaking about a model entitled "the gender trends star". The first level (named title versus text) shows that women start talking with a story, while men are going directly to the subject with no focusing on details. Secondly, the reportage style relying on information perfectly matches men, while the report characterizes women. Establishing a connection between genders is another sensitive point of discussion, and in our study, a very important one. Each gender has its own social value, for men it is all about action whereas for women about stories and private details. When it comes to verbal relationship, men are always prepared for competition, while women establish relationships based on affinity and empathy.

Consequently, communication in advertising creates huge differences between men and women because of their perception of world values: extremely rational for masculinity and emotional for femininity. Thus, advertising is aware of these characteristics and applies this style of communication by connecting the male/ female consumer with the product. Each advertising channel takes this aspect into consideration, but according to the production means. TV channel is given more credibility, while outdoor and prints are provided only with verbal language, without any dynamic visual landmarks. Online advertising seems to bring to light a lot of controversial issues about differences between gender in communication per email, as Mullany (2004) argued by saying that: "advertising language using email technology at least appears to have moved backwards, strengthening dichotomies instead of breaking down the boundaries of gender identities. " [9] To conclude, masculinity and femininity differently express in advertising based on channels that provide sensorial, visual and verbal aspects.

2.5.Dedeman campaigns

To begin with, here is the best place to explain what kind of brand deserves our attention here, by integrating it in the product category and presenting its brief story. The brand belongs to retail and

[8] Louise Mullany, "Become the Men that Women Desire: Gender Identities and Dominant Discourses in Email Advertising Language." *Language and Literature (*13, 2004): 293.

[9] Louise Mullany, "Become the men", 303.

construction companies. The company relies on a very simple principle: *Do-it-Yourself,* being dedicated to those preoccupied by making their furniture and designing their own house in their personal way.

What is very interesting in Dedeman's case refers to its spectaculars and successful evolution in less than 20 years. This is a Romanian brand, integrated into new business, very welcomed on the market otherwiser. It was launched in 1992 as a private and small company with less than 20 employees and now it owns 26 big chain stores in many Romanian cities.

At the beginning, the brand positioning was the one based on consumer needs, given the slogan still powerful*: Dedeman-dedicated to your plans.* Nowadays, it is the leader on the local market, and it offers a large range of products and services starting with simple materials (cement, appliances, equipments) to furniture imported from the entire world. They cater for most consumer's need by providing them with conciliation and information in construction field, and, most important , they give him the feeling of freedom to personalize their home.

The products and services are dedicated to the entire family, because the benefices are not gender-oriented, but considering the skills requested from buyers, many of the products obviously define masculinity. The brand started investing in advertising in 2009, by using TV ads, outdoor and radio, and coining an image exclusively focused on consumers, as a gender relationship. The agency in charge with these campaigns is McCann Erickson and the strategy applied follows the same principle: somehow men and women face each other and the product is there. Last year, the outdoor advertising almost blew up on the market, and the main purpose was to attract new consumers and consolidate the trust of the current users.

2.6. Research method and sample

This study focuses on 30 billboards created in the last 2 years, since the brand has been started communicating very strongly. The outdoor material has been exhibited especially in Bucharest, but also in other big cities, such as Cluj, Braşov, Vâlcea. These billboards were homogenously coined, so that the target understand the message more easily and so the brand positioned in the consumer's mind as the one dedicated to the family preoccupied by changes in their own home. The research method applied in this study is analysis of the advertising discourse based on identifying several aspects such as: the text types, linguistic landmarks of genders in texts, the opposition or similarities, the product role. The billboards were selected to represent both woman and man as winners of their daily conflict generated by authority. Actually, Dedeman campaigns are focusing more on victimizing men who listen to the woman' s desire, giving up his wishes, all this not to generate a conflict.

3.Findings:

3.1. The types of the texts created for Dedeman outdoor campaigns

The first aspect that helps us apply the method of advertising discourse consists in identifying the type of advertising texts created for the outdoor campaigns. To better organize the sample, we found several criteria as core directions of classification: the structure, the gender relationship, the love representations. According to the structure and syntactic features, the ads sample provided us the following categories:

The double sentences, each of them representing the gender attitude. These could be interrogation (*Doesn't she wish to renovate the house, every time you wish to go on holiday?)* or affirmative sentences (*Buy the kitchen for you and you still have money to buy a jacket for him*)

The single sentence focuses on product: (*You cannot hide from love even if the Dedeman bedroom.* or Darling, *I want the tiles with dots……ots otss otss*)

The gender relationship offers two kinds of commercials: first case it is about men dominated by women and working more despite their wishes. The ad presents a very unbalanced marriage by creating such a message*: Isn't she doing her manicure, while you are cleaning the desk? At least*

change the desk. In the second case, the woman victimizes herself, hinting at the man's insensitivity to her effort: *Does he throw his shoes away, every time he takes them off*? *At least change the furniture*. Under a careful analysis, the commercials reveal a disproportion between genders in another category of commercials, because the man or the woman receives something, but one of them makes a dream become true, while the other one is not completely forgotten, by receiving a small gift. Usually femininity is represented by cosmetics or fashion, while men received objects connected with their hobbies, such as sport, electronic appliances. Buy the bedroom for you and you'll have money for his ski kit, too.

The love representations are short definitions on this topic, differently expressed by using intertextuality, old proverbs, wise sentences, and well known stereotypes, such as*: It takes two for love. And a Jazz desk.* or *There is a sofa distance between love and hate.* Some of love depictions are conflicting, some of them just suggest the negotiation between genders. Actually, this is the creative strategy: being involved in a marriage implies coping with a lot of problems, which ultimately making the relationship work. This perspective is very credible, because each family and couple has its balance between heaven and hell.

Considering the texts are very brief, they do not focus on depicting the product, as usually the outdoor advertising does, but on convincing potential consumers to buy it or try it. The texts are, according to Jean-Michel Adam[10] (2005), advertising enthymemes, because most have more than one argumentative premise, and no conclusion or a premise and a conclusion. The example below explains what kind of thinking strategy the brand created, without being boring or detailed, without positioning on product qualities, but on consumers. Therefore, the messages are deductive and only the second sentence brings the product into discussion.

Premise 1: You are coming into love with closed eyes.

Premise 2: In the bath too.

The conclusion may be the slogan: *Dedeman-dedicated to your plans*, or it is indirectly deducted. Both argumentative premises are strongly connected by using analogy or, sometimes, a comparison.

3.2.The linguistic gender dichotomy

The advertising message created for Dedeman relies on several verbal issues to emphasize the gender dichotomy and thus highlight the brand power. First, the opposition consists in using personal pronouns in the same sentences: either "you" versus "he", or "you" versus "she". Obviously, "you" represents the gender victimized, and in most of the situations this is the man (in 10 ads, while women feel indifference and the lack of respect only in 4 cases This reminds us of this paper title, men dominated by moody women, which is perfectly justified under the circumstances. Another linguistic means is the use of antonyms, whose impact is more persuasive, because they suggest not only the conflict, but a real incompatibility: *Isn't it that every time you are warm, she is cold? At least change the boiler*. Authority in a relationship is based on specific landmarks that belong to the more powerful gender. In terms of morphological features, negations (*You don't play with love*) and verbs (*like, will*) convey the control over the partner. Again, the verbs describe the moody women whose wishes are foreground, by exploiting men's weakness.

3.2.The product role in Dedeman campaigns

The main role of the product is the compensation and negotiation between women and men, as a try to dissolve the conflict. In half of the situations, Dedeman products are the best choice against frustration, gender discrimination and resignation. There are like chocolate and fashion for women or watching football for men, considering these are gender-oriented despite the generous

[10] Jean-Michel Adam, *Argumentarea publicitară*, the original title *L' argummentaire publicitaire* (Iaşi; Institutul European, 2005), 166-172.

comparison. The compensation is usually isolated in the second sentence, to be more authoritarian and, of course, credible: *You dust daily, he only on your birthday. At least change the furniture!*

Another role the product emphasizes is the inequality between genders when the man or the woman spends a lot of money on gifts for him/herself and buys something small, insignificant for the partner. There is no connection between Dedeman products and these presents for the partner involved in the relationship. Moreover, the wallet, the jacket, the scarf are only several objects whose role is to alleviate a possible conflict, to distract the attention from the big investments.

The third perspective on the product regards the relationship between love and the much desired product: *Love goes away, the shower cabin stays.* Obviously, comparisons are exaggerated, given the big difference between an abstract feeling and a concrete object, such as: a bath, a piece of furniture, a boiler etc. In this case, the product reveals its consolatory role, a way to replace feeling with comfort. This role ironically emphasizes the fragility of feeling in comparison to Dedeman home appliances by their symbolic positioning based on product qualities.

To sum up, products are not a simple promise, there are a chance to get away from an inevitable conflict inside the home. As it is, the conflict is generated by different interests, either a wrong distribution of domestic chores, or simple habits which actually characterize gender. Thus, buying a product does not necessarily mean that the consumer needs it; its subjective role maybe the one to help a relationship work better.

4. Conclusion:

The Dedeman campaigns emphasize gender dichotomy in outdoor advertising by appealing to the family, particularly to the average couple involved in minor disagreements. This paper analyzes the patterns of femininity and masculinity specific to Romanian society. It is easy to identify several profiles for each gender, which are very well developed in the commercial message and preserved in some outdoor series created on the some method. For example, we have ads addressed to the moody woman, to the lazy man, and related to the relationship within the couple. As for the female pattern, this research distinguishes three categories: the domestic woman, dedicated to her family and doing the best at work (*While you are cleaning the bathroom, does he ask you how much longer you'll put lipstick on?)*, the moody woman (concerned about her beauty and desires- *Isn't she doing her manicure, while you are cleaning the desk?*), the spoiled woman (*Darling, I want the tiles with dots……ots otss otss*) and the decision- maker woman (*Ever since you've known her, hasn't she made "suggestions" while you're working?).*These types reveal the relationship between subordination and authority in everyday life. In most cases (12 ads), men are subordinated to women, and this has a huge influence on his decisions regarding everything he wants to do or buy. As for the male pattern, the sample brought to light the following examples: an egocentric type, the so- called the "Bergenbier type" preoccupied with sport (*You're laying clothes to dry on the heater, he's out to see the game? At least change the heater*), the domestic man in charge with house renovations (*Every time you lay concrete, she wants it different ? At least change the cement mixer*), and the lazy man, with no concern for his wife, work, or home (*Every time you clean, does he rest against the wall? At least change their colour*?)

Another aspect this research approached regards the advertising texts created to get more credibility and in a very unconventional manner. As a matter of fact, even if the target is oftentimes male, the brand message is equally addressed to women as well, which is the main feature of an argumentative text: to convince people to be curious and interested in something new. Advertising texts are synthetic and connotative, opening a range of possible meanings of love and family.

These research findings may have an important impact on studying the gender relations related to other product categories in advertising, or maybe other brands. If Dedeman campaigns focus on family, they might be interested in other types of relationships as well, by developing the concept of authority vs. subordination or, why not, involving other members of the community. As

for the creative strategy, Dedeman adopted a very simple one, according to the Jim Avery[11] schema: to convince (communication objective) ordinary people preoccupied by their home and comfort (target) to buy the product (action) to solve their family conflicts and improve their relationship (emotional purpose), instead of choosing other similar building material providers (the main competition in Romania is Ikea). We believe that Dedeman is going to preserve this approach to better position itself in the consumer's mind for the sake of stability and retention on the local market.

Regarding further research, this paper could only be the beginning of these discussions: either connected with the evolution of this brand or with gender relations in other product categories. It would be very interesting to carry on a study focusing on a comparison between current findings and a future research during the next few years, by paying attention to the strategy and gender relations developed by the Dedeman campaigns. The second aspect is looking forward to finding other product categories whose brands indirectly address to both genders, by using female and male features to symbolically position their values. Consequently, the most important issue emphasized here is that studying gender does not only imply finding stereotypes or patterns, which vary in each culture and society, but also discovering other types of masculinity and femininity in a world in which role-reversals are inter changeable. That is why advertising is one of the hybridized fields in which genders play the chameleonic role for the sake of brand success and fulfilling consumer needs. We may be facing a new Babel Tower in which gender relationships could be differently perceived and explained.

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[11] Jim Avery, *Advertising Campaigns Planning,* 3rd ed. (Chicago: The Copy Workshop, 2000), 172-173.

"GLOSSY" POLITICIANS: PORTRAYING WOMEN POLITICIANS IN ROMANIAN CONSUMER MAGAZINES

ROMINA SURUGIU[1]

Abstract

Women consumer magazines (glossies) represent the most important part of the specialized media all over the world. The main ingredients of their editorial "recipe" are the positive tone of the articles, and the optimistic, yet shallow approach to all the theme/subjects covered. Magazines are considered to be beautiful objects that inspire people to cherish them.

Women magazines have been criticized in feminist media studies for portraying women in a stereotyped way and for encouraging a consumerist behavior among them. The role models offered by these media are mainly taken from the show business and fashion industry. Women politician are rarely present in the pages of these publications, especially in countries as Romania where the political participation of women is one of the lowest in Europe.

The paper presents in the first part official figures regarding the political participation of Romanian women, and it discusses the results of the most important academic studies on women and media. A previous research showed, for example, that in a four years period, three important Romanian magazines published only 9 article presenting women politicians. The general assumption in magazines desks (and in the society) is that politics is a dirty business that does not match the beautiful world of magazines.

The second part will focus on a case study, considered to be relevant for explaining the general image of women politicians and politics in Romanian consumer magazines. A visual analysis (from the popular culture perspective) will be done to Elena Udrea's pictorial feature for Tabu (Taboo) magazine (November 2011). The choice of the case study was motivated by the following reasons: Elena Udrea is a controversial, yet successful politician, she has impersonated popular culture icons (Madonna, Jackie, Cleopatra) and the feature has generated many positive and negative comments in media.

Keywords: *women politicians, consumer magazines, popular culture, icons, Romania*

Introduction

Women magazines have been always criticized in feminist media studies for portraying women in a stereotyped way and for encouraging a consumerist behavior[2]. The role models offered by these media are mainly taken from the show business and fashion industry: famous actresses and actors, models, singers usually pose in magazines.

Women politician are rarely present in the pages of these publications, especially in countries as Romania where the political participation of women is one of the lowest in Europe. Nevertheless, women magazines (also known as 'glossies') are one of the most successful editorial segments within the magazine industry all over the world, with millions of readers and billions of US dollars

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[2] Gaye Tuchman et al., *Hearth & Home: Images of Women in the Mass Media* (New York: Oxford University Press, 1978); Janice Winship, *Inside Women's Magazines* (Pandora, 1987); Liesbet Van Zoonen, *Feminist Media Studies* (London: Sage Publications, 1994); Joke Hermes, *Reading Women's Magazines: An Analysis of Everyday Media Use* (Cambridge: Polity Press, 1995); David Gauntlett, *Media, Gender and Identity: An introduction* (London: Routledge, 2002); Anna Gough-Yates, *Understanding Women's Magazines: Publishing, markets and readership* (London: Routledge, 2003).

from advertising[3]. Women's magazines are also important in building gender identity, being the one of the most important pillars of "the social construction of womanhood today"[4]. Therefore, the researcher must focus on these media, taking into account their major contribution to the socialization of girls and young women, all over the world.

The goal of this paper is to show how the Romania consumer magazines are portraying women politicians. The research is based on a case study methodological approach, and it will try to answer the above question by doing a visual analysis from the popular culture perspective of a pictorial feature from a Romanian magazine. The hypothesis of the paper is that editors of women magazine feel that politics and glossies do not match. Being in the situation of presenting a woman politician, magazines will draw attention on her physical aspect. The articles tend to focus on the woman as an attractive person, not as professional, although editors' declared intention is not to be gender biased and stereotypical. "In general, though, women's magazines speak the language of 'popular feminism' – assertive, seeking success in work and relationships, demanding the right to both equality and pleasure."[5] They actually want to empower their readers by distributing powerful women as role models.

Women in decision-making. Women in media

Currently, European statistical data regarding women's participation in decision-making show that the number of women MPs in Romania is one of the lowest in Europe: 10 percents[6]. The situation has been the same in the last 20 years after the fall of communism. In 1992, for example, women represented only 4% out the total number of MPs. Ten years after, in 2004, there were only 50 women in the Parliament and 419 men – the percentage doubled (10%), but it remained low, compared to other countries in region, and to the general distribution of women and men in the Romanian society (51%-49%)[7].

Women are also underrepresented in other key positions in decision making: local and national public authorities and they cannot efficiently intervene against procedures, laws or legislative initiatives that are or may be prejudicial to women. In political parties, women are kept in unimportant positions, marginalized and isolated in internal structures like women organizations[8].

The research recently conducted in Romania has shown that women's interests are not on the public agenda, and the social exclusion of women is a reality[9]. Women are generally not taken in consideration in decision-making process. The access of women to the public sphere is limited – they are bystanders, not active participants. "Women in politics adopt – willingly or unwillingly – the patriarchal agenda and the masculine style of doing politics."[10] Therefore, the political parties do not include women's problems on their agenda. On the other hand, media tend to follow the public agenda set by political leaders, ignoring most of time topics important to women's lives.

[3] Tim Holmes and Liz Nice, *Magazine Journalism*, chapter2: The political economy of magazines (London: Sage Publications, 2012).

[4] Gauntlett, *Media, Gender and Identity*, 187.

[5] *Ibid.*, 193.

[6] http://ec.europa.eu/justice/gender-equality/gender-decision-making/database/politics/national-parliaments/index_en.htm

[7] Oana Baluta, "Reprezentare 'in oglinda'", in: *Gen si putere. Partea leului in politica romaneasca*, ed. Oana Baluta (Iasi: Polirom, 2006), 140.

[8] Baluta, "Reprezentare", 140-142.

[9] For a pertinent discussion on this subject see: Oana Baluta, Alina Dragolea, and Alice Iancu, *Gen si interese politice. Teorii si practice* (Iasi: Polirom, 2007).

[10] Mihaela Miroiu, *Drumul catre autonomie. Teorii politice feministe* (Iasi: Polirom, 2004), 221.

According to research reports on women and media[11], gender stereotypes in Romanian media could be one of the roots of the low level of women's political representation. "Women in public life are not only less visible than men, but judged according to different standards: (…) family life and physical aspects", concluded Daniela Roventa-Frumusani[12]. Women politicians and men politicians' wives are equally represented in Romania media. When it comes to role models, women in media are portrayed as stars (VIPs, singers, actresses), and housewives. Newspaper and TV news present women as prostitutes, agriculture workers, and homemakers. Business women and politicians are rarely subject of hard news stories[13].

In television political talk shows, women politicians tend to embrace the values of a patriarchal and conservative society. The topics of discussion are influenced by the public agenda set by the men politicians. The political solutions proposed by women MPs in television talk shows are "an interesting mixture of conservatism and gender empowerment". On the other hand, the physical aspect of women politicians becomes, in some cases, a topic of discussion in the talk shows, along the political subjects[14].

Magazines as beautiful objects. Politics as a dirty business

Women consumer magazines (also known as glossies) represent the most important part of the specialized media all over the world. The financial force is given by the perfect symbiosis with the advertising industry, especially with the beauty products segment. The main ingredients of their editorial 'recipe' are the positive tone of the articles, and the optimistic, yet shallow approach to all the theme/subjects covered. Magazines are considered to be beautiful objects that inspire people to collect and cherish them[15].

A magazine is an aesthetic object. It conveys a message to the reader through its format and page quality – a premium or up-market publication will be glossy and have a large format that allows layouts with high quality photographs[16]. "The paper used by, say, consumer monthlies such as *GQ* or *Harpers* and *Queen* is expensive but helps to establish the brand image of the magazines and is an essential support for the high quality artwork which is a part of the attraction of those publications"[17]. Therefore, many journalistic resources are invested in making an appealing layout, on taking interesting pictures, and innovating graphic design.

On the other hand, politics is, traditionally, considered to be a dirty business. Politicians are portrayed as being selfish, corrupt, and greedy. This is one of the reasons why women have been advised not to participate in political fights. In past, they were prevented to get involved in the dirty political world. One historical account could help us understand the Romanian situation: in 1930 the daily *Universul* (the Universe) conducted a journalistic inquiry on how important is to allow women to participate in the political life of Romania. Men politicians (e.g Constantin Argetoianu, A. Em. Lahovary, Al. Bratescu-Voinesti) declared that women and politics do not match, and the main reason was the vicious nature of political fights, characterized by "anti-Christian feelings", "intense

[11] Ana Bulai and Irina Stanciugelu, *Gen si reprezentare sociala* (Bucuresti: Politeia, 2004); Laura Grunberg, ed., *Mass media despre sexe: Aspecte privind stereotipurile de gen in mass media din Romania* (Bucuresti: Tritonic, 2005); *Imaginea femeii in societatea romaneasca: raport de analiza media* (Bucuresti: ALTFEM, 2011).

[12] Daniela Roventa-Frumusani, "Identitate feminina si discursul mediatic", in: *Femei, cuvinte si imagini* (Iasi: Polirom, 2001), 64.

[13] According to the conclusions of the report quoted above: "Mass-media despre sexe", 56-57, 76- 77.

[14] Romina Surugiu, "Femei si doamne in talk-show-ul politic din Romania", in: *Gen si putere,* 229-230.

[15] Losowsky, Andrew, ed. *We Love Magazines* (Luxembourg: Editions Mike Koedinger SA, 2007); Tim, Holmes, "Mapping the magazine", in: *Journalism Studies* (Vol. 8, No. 4, 2007, 510-521); Charon, Jean-Marie, *La presse magazine* (Paris: La Découverte, 2008).

[16] Tim, Holmes, "Magazine design", in *The Magazines Handbook*, Jenny McKay (London: Routledge, 2001), 165.

[17] Jenny, McKay, *Magazine Handbook,* 144.

emotions" and "not so noble intentions". "It is a privilege for women to avoid them", concluded one interviewee[18].

In present days, politics and its fights are also associated by people with negative issues. In a recent interview (December 2011) the UNDP representative in Romania, Yesim Oruc, declared that women in Romania feel that politics is "dark and dirty" and do not want to get involved in it. Nevertheless, Oruc said that if women participate in the political field, the politics will transform in a positive way[19].

Romanian politicians in glossies

The topic of women politicians' image in magazines has not been approached by many Romanian researchers, as the general theme of women's representation in media is still under scrutiny. One exception is a master dissertation dedicated to women politicians in glossy magazines[20]. The research showed that on a four year time span only 9 articles on women politicians were published in three different magazines (*The One, Tango* and *Felicia*).

The underrepresentation of women politicians in women magazines reinforces by itself the gender stereotypes related to politics. By ignoring it, women magazines send to their readers the message the idea that politics is men's business and women seldom adventure in this domain. "We do not usually present women politicians, for two main reasons: the readers are fed up with politics and we work at a lifestyle magazine that has nothing to do with politics", commented the editor-in-chief of *The One* magazine, Doru Iftime, quoted in the mentioned paper. "I'm sorry, but women politicians are not part of our editorial interest and do not represent topics for the stories in our magazine", explained the editor-in-chief of *Felicia* magazine, Carmen Muntean.

The research conducted by Adela Rapeanu showed that all nine features were interviews. There were selected only young women politicians, attractive and the focus was mainly on their looks and their private life rather than on their political activity. Three of them (Daciana Sarbu, Lavinia Sandru and Raluca Turcan) were presented as mothers, in one article entitled "Politics and maternity".

Only one person – Elena Udrea - was twice interviewed in a women magazine (*The One*). "We placed twice Mrs. Udrea on the cover, because she is very much alike the magazine's profile: chic, fashion-driven, controversial – she is a character that perfectly serves the commercial and advertising interests of the magazine" explained Doru Iftime, editor-in-chief *The One* magazine. That explanation and other reasons detailed above has taken us to the idea that one of Elena Udrea's pictorial features could be the material of a pertinent academic case study on the subject of woman politicians in glossy magazines.

Case study – posing for a glossy women magazine

The academic literature considers the case study to be a "comprehensive research strategy"[21] which takes into consideration both the social phenomenon and its context. The advantage of type of empirical inquiry is that "investigates a contemporary phenomenon within its real-life context, especially when the boundaries between phenomenon and context are not clearly evident"[22].

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[18] "Sa se inscrie femeile in partidele politice?", *Ziarul nostru*, IV (2), February, 1930.

[19] Ana Ilie, "Femeile din Romania, lumina in politica intunecata si murdara", *ziare.com*, December 13, 2011, accessed January 24, 2012, http://www.ziare.com/social/romani/femeile-din-romania-lumina-in-politica-intunecata-si-murdara-interviu-video-ii-1138738.

[20] Adela Rapeanu, *Politica revistelor pentru femei privind femeile din politică* (Unpublished Master diss., University of Bucharest, January 2010).

[21] Robert K. Yin, *Case study research. Design and Methods*, third edition (Thousand Oaks: Sage Publications, 2003), 14.

[22] Yin, *Case study*, 13.

In the present paper, we comment upon a single case, considered to be representative or typical for our theme. We follow a research protocol designed for case studies, which includes five steps: asking a question, formulating the propositions, identifying the units of analysis, establishing the logic link between the data and the propositions, finding the criteria for interpreting the findings[23].

The first step of the study case is the question, formulated as it follows: "How are women politician portrayed in women's magazines?" The study propositions lead us to the second and the third question: "Why choosing Elena Udrea's pictorial in *Tabu* (*Taboo*) magazine to be relevant for the portrayal of women politician in Romanian magazines?", "How to analyze the pictorial in order to obtain fail proof conclusions?" The third step (finding the units of analysis: the photographs of Elena Udrea in *Tabu* magazine) leads us to another question: "Why images are more important that words, in this particular case?"

Elena Udrea, age of 39, is a controversial Romanian politician, with a successful political career. She is an important member of the ruling Democratic Liberal Party. She has been a MP (the Lower Chamber) since 2008 and the minister of Regional Development and Tourism since 2009. Previously, she was the counselor of president Traian Basescu. Her political activity was characterized by the media as being daring, as she is assertive and has been a main part of important political scandals[24]. On the other hand, she maintained a provocative attitude, in order to draw media attention on herself. She knitted in a TV studio; she invited journalists to see her cleaning the floor with a mop or cooking a Romanian traditional dish. In the same time, she wears designer clothes and shoes[25]. Her motto – as it appears in the pictorial taken into discussion – "You can be in politics on high heels". She also stressed the idea of challenging cultural stereotypes related to blondes. In other words, she wants to be feminine, doing a man's job.

The pictorial feature was published in November issue 2011, of Tabu (Taboo) Romanian magazine. The magazine itself has a strong editorial strategy of being "the most courageous women's publication"[26], by constantly breaking taboos and challenging stereotypes from the Romanian society. One example is illustrative: it is the only magazine for women with a column for gay people. The concept of the main story in every *Tabu* issue (and of the cover) is to show public figures - women (in most of the cases) and men - playing a role or impersonating a well-known figure. The persons are always selected from the showbiz industry, with a few exceptions.

The feature (defined by media professionals as a long, comprehensive, narrative story, typical for magazines) of Elena Udrea consists of an interview and a series of studio photographs. The article is considered to be relevant for an academic case study for three different reasons:

The character. Elena Udrea is the most prominent woman politician of the moment. She is young and controversial. She has also posed for *Tabu*, in September 2008, and twice for *The One* magazine, in 2006 and 2009.

The story. It is the main feature of the November issue of *Tabu*. The image of the cover is a part of the photo session taken for the feature. The editorial theme of the issue is "powerful women". The main cover-line is: "Elena Udrea, parables of power". The title of the feature within the

[23] Yin, *Case study*, 21.

[24] Romanian journalists claim that she provoked a political crisis in January 2007, when she made public a personal note sent by the prime-minister Calin Popescu-Tariceanu to the president Traian Basescu. (See for example: Adriana Dutulescu, "Istoria relației Elena Udrea – Traian Băsescu", *jurnalul.ro*, November 4, 2009, accessed January 31, 2012, http://www.jurnalul.ro/special/istoria-relatiei-elena-udrea-traian-basescu-526070.htm and Razvan Braileanu, "Cronologia 'afacerii biletul'", *Revista 22*, January 26, 2007).

[25] "International media writes about Romanian minister Udrea's expensive D&G dress", *romania-insider.com*, August 18, 2011, accesed January 31, 2012, http://www.romania-insider.com/international-media-writes-about-romanian-minister-udreas-expensive-gd-dress/31485/.

[26] This is the slogan of the publication, inserted under the logo, on the magazine cover.

magazine is: "Elena Udrea, I can do politics on high heels". The magazine also contains another feature about powerful women ("25 Romanian women famous worldwide").

The context. When interviewed for magazines, celebrities usually tend to establish or maintain a myth about them[27]. In this particular interview, Elena Udrea acts as she wants to follow the trend: she behaves like a celebrity in process of establishing a myth.

The analysis will try to identify the pattern matching between the theories of women politicians' representations in media, previous researches done on the popular culture field and the data collected from the present research work.

Taking into consideration that a magazine is – first of all – a visual medium, we will focus our analysis on the photographs from the feature. The five pictures shot for the pictorial feature will be discussed from the popular culture perspective, which we consider appropriate in the given context. In our opinion, every picture of the feature is overloaded with signs and mythical elements conveyed by the mass cultural products (such as Hollywood movies). The pictures refer to contemporary public (political) figures – even the image of ancient queen of Egypt, Cleopatra, is a modern one, constructed in the twentieth century by the Hollywood productions.

Discussion

The pictorial feature[28] under discussion consists of seven photographs: (1) the cover photo – Elena Udrea impersonates Madonna, 2) the main photo of the article – Elena Udrea is Jackie Kennedy, 3) the first portrait – Elena Udrea is Cleopatra, 4) the second portrait – Elena Udrea is Eva Peron, 5) the third portrait – Elena Udrea is Margaret Thatcher, 6) the fourth portrait – Elena Udrea as herself, 7) the fifth portrait – Elena Udrea as herself.

We will mainly analyze the five pictures in which Elena Udrea impersonates powerful women, as these images send the most powerful message to the readers. The function of the two photos of Elena Udrea as herself is to illustrate the interview, so they are left aside in the present analysis.

The cover photo, inspired by Madonna's cover of *Vanity Fair*, US edition (May, 2008) is powerful and meaningful. It is a full shot photograph (full body of person). The main photo of the feature (Jackie Kennedy) is a long shot, because it contains setting and other characters. The three portraits (Cleopatra, Eva Peron, and Margaret Thatcher) are medium close-up. In all three types of photos, the angle of the camera is normal (which implies neutrality), the composition is conventional and the lighting is somehow artificial, studio-like, even in Jackie Kennedy's impersonation picture where the lighting might have been naturalistic (documentary style).

The portraits' emphasis is on the face and the jewelry worn by Udrea. The key word is seduction. The distance of the camera to the subject implies even in the portraits' case a social (not personal) relationship. The audience observes, but do not intrude[29]. The conventional composition and the artificial lighting from all five pictures suggest a low degree of involvement of the subject (Elena Udrea) in the role-playing.

She is good-looking, but she does not act. She stands still, and she does not touch any object (her hands are at a certain distance to the green world globe in the cover photo). The camera caught no movement and no intention of the subject to move, even in pictures that imply action from the nature of their subject. In her attempt to be closer to the image of popular icons, Udrea fails to perform the roles of Jackie, Cleopatra or Evita, as the audience would have expected.

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[27] McKay, *Magazine Handbook*, 117.

[28] The feature was realized under the coordination of the publisher Dan-Silviu Boerescu, well-known for being the editor-in-chief of Playboy Romania, for several years. The photographs were shot by Dragos Cristescu, and the interview was made by Ramona Pop.

[29] Nick Lacey, *Image and Representations: Key Concepts in Media Studies* (London: Macmillan Press, 1998), 23.

She is Madonna.

For magazines, the cover is the most prominent and useful selling tool, and the main carrier of the magazine's brand values[30]. The feminist critique considers that: "The cover photograph then, insofar as it represents an editorial stance or identity, also reflects the ideological implications of content that in turn reflect the producers' perceptions of culturally agreed-upon rules, goals and values. In addition, producers emphasize cover photographs as potential sources of readers' identification, thereby reinforcing the importance attached to their selection and presentation."[31]

The cover photo of *Tabu* is not based on an original idea. The editors of the magazine chose to re-interpret a cover of Madonna in *Vanity Fair* US, May 2008 issue. The pop star and icon Madonna, who made a fortune from selling her sexy image, is posed in front of the world globe, in a provocative posture. The main cover-line is: "Madonna, unbowed, uncowed, still taking on the world". The feature, inside the magazine is entitled: "Madonnarama!" The *Vanity Fair* editorial concept was to introduce to the readers a reinvented Madonna, activist and filmmaker, involved in tackling issues as orphans in the Third World[32].

The original image of Udrea as Madonna was altered, with the help of digital technology. A décolletage was inserted to the black dress worn by Elena Udrea. The retouching (denied by the magazine's editors) is obvious when someone compares the images from the making-off photo sessions to the images on the magazines. Journalists, e-readers, and bloggers negatively commented upon the change[33], although magazines pictures are retouched on a regular basis despite the ethical controversies related to this aspect[34].

Being Madonna could equally be a positive and negative thing. The positive aspect is that Madonna, as popular icon and a "commodity of the cultural industries" has the unique quality of being whatever the consumers want her to be[35]. John Fiske, in his research on popular culture considered Madonna as an "exemplary popular text" and explained: "Madonna as a text, or even as a series of texts, is incomplete until she is put into social circulation. (…) She is an exemplary popular text because she is so full of contradictions – she contains the patriarchal meaning of feminine sexuality and the resisting ones that her sexuality is hers to use as she wishes in ways that do not require masculine approval. (...) she is excesive and obvious. (...) she is a provoker of meanings, (she is) a set of meanings in process."[36]

In our context, Udrea's impersonation of Madonna may be interpreted as a statement of a powerful woman. She dominates the world and she enjoys the situation. She is self-assured, calm, and sexy.

But being Madonna could be a negative thing, too. Madonna is a pop star, and stars are defined in sociology as "the powerless elite"[37]. Stars have limited institutional power, but are an object of interest, identification and collective evaluation: "their lives, their social relationships become an object of identification or a projection of the needs of the mass of the population, a

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[30] John Morrish, *Magazine Editing. How to develop and manage a successful publication*, second edition (London: Routledge, 2003), 167.

[31] Marjorie Ferguson, "Imagery and Ideology: The Cover Photographs of Traditional Women's Magazines", in: *Hearth&Home*, 99.

[32] http://www.vanityfair.com/magazine/toc/contents-200805.

[33] See, for example, the article and the readers' commentaries: "Iulia Albu: 'Elena Udrea a fost decoltata cu japca'", *realitatea.net*, November 2, 2011, accessed January 31, 2012, http://www.realitatea.net/iulia-albu-elena-udrea-a-fost-decoltata-cu-japca_883633.html.

[34] Tom Ang, "Magazine illustration and picture editing", in *Magazines handbook*, McKay, 171.

[35] "To be popular, the commodities of the cultural industries must not only be polysemic – that is capable of producing multiple meanings and pleasures – they must distribute by media whose modes of consumption are equally open and flexible". John Fiske, *Understanding Popular Culture* (London: Routledge, 1989), 158

[36] Fiske, *Popular Culture*, 124.

[37] Francesco Alberoni, "The Powerless 'Elite': Theory and Sociological Research on the Phenomenon of the Stars", in: *Stardom and celebrity*, ed. Sean Redmond and Su Holmes (Los Angeles: Sage Publications, 2007), 65-77.

benchmark for positive and negative evaluation, the chance to have experience in the domain of the morally possible and a living testimony to the possibility of achieving a rise in personal status"[38]. From this point of view, Udrea sends to the female audience a message of a powerful person, but not the message of a powerful politician.

She is Jackie.

The main picture of the pictorial feature inside the magazine reenacts the famous scene of President John F. Kennedy and First Lady Jackie Kennedy arrival at Love Field in Dallas, Texas, on November 22, 1963. The Tabu editors took the original photo and placed Udrea's image instead of Jackie's. It is a photomontage, in journalistic terms. The impersonation of Jackie Kennedy has its ups and downs, too.

Jackie is the wife with the capital letter. Her public image was constructed in relation to her two famous husbands: John F. Kennedy and Aristotelis Onassis. Media of her time, especially magazines, turned her in a heroine. She was praised for her qualities, pitied for her loss and criticized for her life of luxury. Her image is associated to important messages for women: "women lose their identity in the men to whom they are married"[39], "women cannot be alone, and men both take care of women and bear responsibility for women's life"[40] .

She is Cleopatra.

The "modern" image of Cleopatra has embedded traits taken from the mass cultural products (Hollywood movies and popular stories), originated in Shakespeare's work, and not on historical accounts.

In the twentieth century's popular culture, the most known Cleopatra is the character played by Elizabeth Taylor in 1963, in the Hollywood production Cleopatra, with Elizabeth Taylor, Richard Burton and Rex Harrison in the leading roles. The image of Cleopatra has important cultural stereotypes attached to it: extreme luxury and unorthodox methods of achieving and maintaining power (seducing a powerful man in order to obtain military support). Of course, the criticism is modern, her actions being immoral from the Christian point of view.

It is this image of modern Cleopatra that Elena Udrea impersonates in the pictorial from *Tabu* magazine. She wears the same make-up as Elizabeth Taylor's Cleopatra, her hair is done approximately the same and the dress and jewelry tries to match the movie character. Udrea associates herself with the image of ostentatious luxury.

She is Evita.

Eva Duarte de Peron was the First Lady of Argentina (1946-1952). She was a powerful woman in Argentina: during her husband's office she ran the Ministries of Labor and Health, and she was an important figure in the Peronist Party. Eva Peron was extremely admired by the working class (who were referred to as "descamisados" or "shirtless ones"). After her premature death, she was given the official title of "spiritual leader of the nation" by the Congress in Argentina.

Nevertheless, her image, as popular icon, was mainly constructed worldwide by Madonna's interpretation of Eva Peron, in the Oscar-winning Hollywood movie, Evita (1996). In the pictorial feature in *Tabu*, Udrea is impersonating Madonna playing Evita, and not the real Eva Peron, wife and politician.

"Hollywood cinema has a long standing tradition of constructing women as a spectacle for voyeuristic pleasure", commented Liesbet Van Zoonen[41]. In this context, Udrea as Evita is a

[38] Alberoni, "The Powerless Elite", 76.
[39] Carole Lopate, "Jackie!", in: *Hearth&Home*, 133.
[40] *Ibid.*, 135.
[41] Van Zoonen, *Feminist media studies*, 87.

beautiful woman, but not a politician. She also displays ambition, motivation, openness (she smiles to the camera).

She is Thatcher.

Also known as "The Iron Lady", Margaret Thatcher was the prime minister of United Kingdom between 1979 and 1990. Thatcher's though reform program led to high unemployment, racial tensions, and strikes. During her office, the controversial Falklands war took place. "Twenty five years to the day since she entered Downing Street, Margaret Thatcher remains a controversial figure. To her supporters, she was a revolutionary figure who transformed Britain's stagnant economy, tamed the unions and re-established the country as a world power. Together with US presidents Reagan and Bush, she helped bring about the end of the Cold War. But her 11-year premiership was also marked by social unrest, industrial strife and high unemployment. Her critics claim British society is still feeling the effect of her divisive economic policies and the culture of greed and selfishness they allegedly promoted."[42]

Posing as Thatcher, Udrea puts the researcher in a difficult position. Thatcher cannot be discussed from the popular culture perspective. The portrait photo shows a brown hair lady, self composed and calm, with the typical British attitude. Udrea does not resemble Thatcher in the mentioned picture: she is too young and too attractive. The only explanation behind Udrea's choice of impersonating Thatcher could be that she aspires to be Thatcher. That is: to be a powerful politician.

Conclusions

The hypothesis mentioned in the introduction is validated. The feminist media research should take into consideration the context of journalistic text and image production. In our case, the authorial intent was to introduce to audience a powerful woman. The magazine has proposed an editorial theme focused on powerful women and cast Elena Udrea in the main role. However, the oppositional reader position (in Stuart Hall words) leads to a not-so-powerful woman, trapped in a stereotypical world of meanings.

The message of the pictorial feature is characterized by ambiguity. She impersonated powerful women (two wives, one mistress, and a pop star), but not powerful politicians (with one exception, Margaret Thatcher). In this context, Udrea is a role model for readers, due to her physical characteristics, but she fails to be a role model as a politician. After all, she impersonated stars, popular icon, not politicians.

On the other hand, the visual analysis showed that she does interpret the role of well-known public figures, but she mimics. The photographs' lack of movement, the rigid posture of the character, the conventional setting and angles created the idea of mimicking the role of powerful women, and not actually being one of them. Udrea puts the emphasis on seduction. Therefore, she is a prisoner of a constantly contradictory relation between her image in magazines – attractive, seductive - and her political activity which implies a certain level of professionalism and distinction.

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GENDER DIFFERENCES IN ENTREPRENEURSHIP

SILVIA POPESCU[1]

Abstract

This study of female entrepreneurship traditionally has been inspired by gender equality issues. Female entrepreneurs were assumed to experience gender-related discrimination and to experience more difficulties when starting up and running a business than their male counterparts. Today research and policy have been more and more fuelled by the idea that female entrepreneurs are important for economic progress. Even when issues such as barriers and obstacles to female entrepreneurs are raised in the gender and entrepreneurship debate, this is usually done from the perspective that female entrepreneurs are an untapped resource and have potential to contribute to a country's economic performance. Indeed, although gender equality is one of the arguments underlying the support for female entrepreneurs within the European Union, the argument that female entrepreneurs (have the potential to)contribute to economic performance continues to play a role here. The global growth of female entrepreneurship in the last decades has been accompanied by an increase in the number of studies on female entrepreneurship. Unlike most existing studies, which focus primarily upon female entrepreneurship in Western European countries, the present thesis investigates gender differences in entrepreneurship in the Eastern European countries. Different aspects of entrepreneurship are studied including the individual, the organization and the environment. A systematic distinction is made between direct and indirect gender effects on entrepreneurship to be able to disentangle 'pure' gender effects from effects of factors that are correlated with gender.

Keywords *:Managing diversity, female entrepreneurship, economic performance, gender differences, entrepreneurial diversity*

Introduction

As the contemporary economy is characterized by an ever-increasing demand for quality in its broadest sense, it is of vital importance that the best qualified people are selected for (available) jobs, independent of their sex. In this way the process of emancipation becomes an important driver of economic progress. At present the share of women in total entrepreneurial activity varies between 20 and 40 percent across the developed countries. Female entrepreneurs have an important contribution to employment creation and economic growth and contribute to the diversity of entrepreneurship.. The studies in this thesis show evidence of gender differences in entrepreneurship both at the macro and the micro level. In the report *Good practices in the promotion of female entrepreneurship* of the European Commission (2002, p.3) it is argued that women face a number of gender-specific barriers to starting up and running a business that have to be tackled as women are considered "*a latent source of economic growth and new jobs and should be encouraged*". Hence, the main argument to date for studying women's entrepreneurship is that female entrepreneurs are an "*engine of economic growth*" (Ahl, 2002, p. 125). The basis for this argument is the acknowledgement that entrepreneurship (in general) is important for economic performance. The link between entrepreneurship and economic growth has been established by several scholars and is well documented (see Carree and Thurik, 2003, for an overview).

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Are gender differences worth studying?

In the present thesis there is an implicit assumption that studying gender differences is important. However, several arguments have been brought forward why the study of gender differences in entrepreneurship would *not* be very useful. A related argument is that the differences *among* women and *among* men are larger and more important than those *between* women and men, and accordingly, that research should focus upon these intra-group (or in-group) differences instead of intergroup (or between-group) differences (e.g., Kimmel, 2000; Ahl, 2002). In this respect, Moore (1999, p. 388) advocates that: "*It is time to stop clumping entrepreneurs together in one group. Much is to be learned by studying women entrepreneurs as members of various groups*". Also, there are likely to be differences between female entrepreneurs of different generations. Moore (1999) distinguishes between 'traditionals' (i.e., female entrepreneurs with traditional values, adhering to stereotypical female work roles) and 'moderns' (i.e., later generation female entrepreneurs who are more similar to than different from their male counterparts other words, there may be a generation effect which outweighs the gender effect, where female entrepreneurs from earlier generations are different from those of later generations. Indeed, over time gender differences have become less pronounced. We see a gender convergence rather than divergence, and women and men nowadays are far more alike than they were some decades ago (Kimmel, 2000). Obviously, there will be a range of other factors including age, educational background, firm size and sector, that may be more important in explaining differences between entrepreneurs than gender[2] The present paper incorporates studies on gender differences in entrepreneurship, spanning different aspects of entrepreneurship at different levels of analysis, including the individual, the organization and the environment. In *Section 1* attention will be paid to the participation of women in entrepreneurial activity distinguishing between the number of female entrepreneurs per female labor force (female entrepreneurial *activity*) and the female share in entrepreneurial activity (female entrepreneurial *participation*). Also, attention is paid to the economic contribution of female entrepreneurs. In *Section 2* the state of research on female entrepreneurship is discussed, giving on overview of gender differences in entrepreneurship, and identifying knowledge gaps based upon under-studied themes and insufficient or inadequate methodological development. These knowledge gaps are the basis for developing a research agenda. Section 2 also familiarizes the reader with the concept of gender and gender issues in research. Section 3 presents the research agenda, giving an overview of the research questions (or themes) and presenting a research framework. Section 4 draws overall conclusions, discussing the evidence on gender differ rences, paying attention to scientific and social learning and implications as well as giving suggestions for further research.

1. The Economic Contribution of Female Entrepreneurship

1.1. Measuring Female Entrepreneurship

There are different ways in which female entrepreneurship (whether in established businesses or in new venture creation) can be measured. First, one can investigate the number of female entrepreneurs per (female) labor force (i.e., female entrepreneurial activity). Second, one can have a look at the female share in total entrepreneurial activity (i.e., female entrepreneurial participation). Whereas the first measures female entrepreneurship vis-à-vis the number of women in the labor force, the second measures female entrepreneurship vis-à-vis the total number of entrepreneurs. This paper will discuss female entrepreneurship from both perspectives, also distinguishing between self-employment and new venture activity[3]. Because female entrepreneurship rates are not similar across

[2] Brush (1992, p. 13) refers to research indicating that women business owners differ with respect to the 'individual' dimension depending upon a woman's age (see Kaplan, 1988) and the location of the business (see Holmquist and Sundin, 1988).

[3] Self-employment here refers to business owners (i.e., employers and own-account workers), excludingventure activity is measured in terms of Total Entrepreneurial Activity (TEA) as proposed by the Global

countries, the present section also touches upon some country differences, but this is not the main focus of the present section.[4] Although it is interesting to see where cross-country differences in female entrepreneurship come from, at the end of the day a more important question (in particular for policy makers) is whether these differences lead to variation in economic performance across countries. Hence, special attention is paid to the relationship between female entrepreneurship and economic performance.

1.2 Entrepreneurial Diversity, Economic Performance and Gender

The present thesis it is assumed that female and male entrepreneurs have a different profile, e.g., they have a different way of doing business and start and run different types of firms. Thus, female entrepreneurs can contribute to the diversity in entrepreneurial activity and economic performance by way of their distinctive characteristics. In terms of products and services it may be argued that female entrepreneurs tend to operate in niche markets. Female entrepreneurs often pursue a specialization strategy offering tailor-made goods and services (Chaganti and Parasuraman, 1996). Assuming that tailor-made products and services are different from other products offered within the industry, it can be said that female entrepreneurs offer new non-competing or complementary products, insulating them from competition. Because over time consumer demand has become more versatile (Brock and Evans, 1989), niche markets have become more important, i.e., diversity in demand has to be met by diversity in supply of goods and services. From this perspective it may be important to stimulate female entrepreneurship, in particular as at present the share of women in entrepreneurial activity is still below 50 percent. Hence, stimulating female entrepreneurship may be a way to increase entrepreneurial diversity..

2. What Do We Already Know About Female Entrepreneurs?

2.1 Overview of gender differences in entrepreneurship

Within entrepreneurship research, female entrepreneurship can be considered a 'separate' field of study[5]. Researchers focusing upon the issue of female entrepreneurship have traditionally been female, and still continue to be[6]. In general entrepreneurship researchers appear to have become more aware of the possibility of gender differences, and gender is increasingly used as a control variable. To give an overview of the many studies undertaken in the area of gender issues in entrepreneurship, this section builds upon review articles by Brush (1992), Ahl (2002) and a review of studies identified in Gatewood et al (2003). The aim is not to provide a full picture of research in the area of female entrepreneurship, but rather to give the reader an idea of the state of research on

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Entrepreneurship Monitor (GEM). TEA refers to the share of people in the adult population (aged 18-64 years old) who are actively involved in starting a new business or in managing a business that is less than

42 months old (Reynolds et al., 2002, p. 5). Hence, whereas self-employment is a measure of established businesses, TEA can be seen as a measure of new venture activity

[4] Several factors may account for these differences in entrepreneurship rates, including technological, economic, demographic, institutional, and policy factors. It is outside the scope of this introduction to further investigate the origin of country differences in total and female entrepreneurial activity

[5] Based on the number of researchers involved in female entrepreneurship research, the special issues in entrepreneurship journals (such as those in the journals Entrepreneurship Theory and Practice, and International Journal of Entrepreneurial Behaviour and Research, planned for 2005 and 2004, respectively), the Diana project (an international research consortium, consisting of renowned scholars in the field of female entrepreneurship), collected series of female entrepreneurship studies in books or edited volumes (e.g., International Handbook of Women and Small Business Entrepreneurship, edited by Fielden and Davidson), and the fact that gender or women in entrepreneurship has been a separate issue in the Proceedings of the Babson Kaufmann Entrepreneurship Research Conference, Frontiers of Entrepreneurship Research, from 1996 onwards (with the exception of the year 2000).

[6] This is shown by the overrepresentation of female researchers and contributors within the Diana project; the gender section of several issues of *Frontiers of Entrepreneurship Research* and the *International Handbook of Women and Small Business Entrepreneurship*

gender issues in entrepreneurship. The subject of the present thesis is situated at the intersection of two broad fields of study: entrepreneurship and gender. Research on female entrepreneurship can be structured around different themes. Brush (1992) uses Gartner's (1985) framework distinguishing between four key components of new venture creation: individual, process, organization, environment[7]. Here the same classification is used discussing gender differences with respect to the different subjects within the field of entrepreneurship[8].

Most studies on female entrepreneurship focus upon the individual, covering topics such as motivations, demographics and background characteristics (such as education and experience). Up to the early 1990s research on female entrepreneurship identified gender differences with respect to individual characteristics. Brush (1992; p. 13) concludes that: "*women business owners are more different from than similar to men in terms of individual level characteristics such as education, occupational experience, motivations, and circumstances of business start-up/acquisition*". However, contemporary research indicates that for a range of individual characteristics (including psychological, attitudinal and personal background factors) there are more similarities than differences between female and male entrepreneurs (e.g., Ahl, 2002). With respect to research intensity, the 'individual' studies are followed by studies on the environment, organization and process of entrepreneurship, respectively (Ahl, 2002)[9]. In particular the number of studies dealing with environmental aspects has increased since the early 1990s. The process of starting up and running a business as well as environmental influences on entrepreneurial activity seem relatively similar for female and male entrepreneurs (e.g., Ahl, 2002). However, in terms of organizational characteristics businesses of women have been found to be more different from than similar to businesses of men. In particular, this is found for sales volumes, management styles, goals, and the acquisition of start-up capital (Brush, 1992). Ahl (2002) finds that the scarce research (usually studies with few observations) focusing upon organization refers to a distinctive (relational) management style of female entrepreneurs as compared to that of male entrepreneurs. The most consistent gender differences are found for firm size and sector, where businesses of women are on average smaller than those of men (whether measured in terms of financial indicators or employees) and with female entrepreneurs being more likely to operate retail or service firms. In addition to studies that fall into one of the categories – individual, organization, environment, and process – there are studies that are more comprehensive, taking into account and covering several aspects at the same time. For example, studies classified as mixed studies include overview articles and articles investigating individual and firm performance[10]. In her review of performance articles, Ahl (2002) argues that the

[7] Gartner's (1985) framework for new venture creation distinguishes between four key components of new venture creation and ownership: *individual* (e.g., demographics, education, experience, psychological characteristics of the entrepreneur), *process* (referring to activities of an entrepreneur, including opportunity recognition, resource accumulation, venture creation and sustenance), *environment* (referring to the interaction between entrepreneur and his/her environment, including availability of resources, government regulation and support, industrial structure, urbanization) and *organization* (referring to firm characteristics, including strategic decision-making, organizational structure, business profile).

[8] It should be noted that the use of the components of new venture creation as proposed by Gartner (1985) may not be ideal. The components of new venture creation are by no means exclusive. For instance, the process of new venture creation may not easily be disentangled from the entrepreneur, the organization and its environment (Steyaert, 1995).

[9] As Ahl (2002, p. 97, footnote 1) argues: "*the general tendency of focusing on the individual remained, with over half of the papers in this category*". "*The rest were divided about equally between the other three headings …*".

[10] Because performance may not necessarily be classified as a component of new venture creation, but rather may be considered a consequence of new firm creation, its classification is not straightforward. This may also be the reason why Brush (1992) does not explicitly discuss female entrepreneurship studies from the perspective of performance. Nevertheless, when outlining directions for future research Brush (1992) argues that each of the suggested research areas should be studied also in combination with its effects on performance.

topic of firm performance has become more popular in female entrepreneurship studies in the past decade. Until the early 1990s this topic did not receive much attention. Discussing performance differentials between businesses of female and male entrepreneurs, Ahl (2002, p. 108) argues that "*The 'female underperformance hypothesis' .... did not hold when put to rigorous tests accounting for structural factors*". And if preferences are taken into account there appears to be no support for the proposed gender differences in entrepreneurial performance. With respect to the particular subjects dealt with within each of the categories, it can be said that environment studies mostly focus upon resource availability and (to a lesser extent) support structures for female entrepreneurs. The organization studies emphasize business profile characteristics, such as sector, firm size and age. Process studies tend to focus upon the process of new venture creation, including topics such as networking and resource acquisition. In addition, most studies within the area of performance differentials focus upon firm performance. Although individual studies in the area of female entrepreneurship have a broad focus, they tend to focus upon

2.2.Perspectives on Gender Differences

2.2.1.Nature versus nurture

There are two basic schools of thought proposing different reasons for the existence of gender differences (in general): *biological determinism* (referred to as nature) and *differential socialization* (referred to as nurture), the latter of which has served as input for the social feminist perspective. Biological arguments for gender differences generally draw upon three streams of research, including evolutionary theory, brain research and endocrinological research on sex hormones. The implication of the biological determinism perspective is that because differences between women and men are attributed to their different biological nature, one automatically assumes that the existing societal arrangements between women and men are inevitable, dismantling the need for policy intervention and support structures. Social scientists refute the perspective that innate biological differences lead to behavioral differences which – in turn – construct the social, political and economic environment. They argue that gender inequality in society leads to observable differences in behaviors, attitudes and traits. The differential socialization school of thought assumes that women and men are different because they are taught to be different. In essence both the biological determinism perspective and the socialization view assume that women and men behave differently, and that they are different from each other. Moreover, both streams of thought assume that the differences between men and women are greater and more decisive (and therefore more worthy of study) than the differences within groups of women and men[12].

2.2.2 Social versus liberal feminism

The identified gender differences in entrepreneurship research have been explained in different ways, either assuming that women and men are different from each other or that they are in essence the same and the environment causes them to behave in different ways. These perspectives are consistent with the *social* and *liberal* feminist perspective, respectively (Fischer et al., 1993). According to the social feminist perspective gender differences in entrepreneurship are due to differences in early and ongoing socialization. Hence, female and male entrepreneurs are inherently different, giving rise to different ways of viewing the world and, accordingly, different ways in which entrepreneurship is practiced. The liberal feminist perspective argues that in essence women and men are the same and that female entrepreneurs experience more problems or structure their firms in a distinct way (as compared to male entrepreneurs) because they are confronted with unequal access to

[11]Ahl (2002) refers to divergent definitions of what constitutes an entrepreneur, heterogeneous samples and inaccurate referral practices

[12]Also, these schools of thought assume that gender domination (males over females) is a result of gender differences (Kimmel, 2000, p. 4).

resources and gender-based discrimination. To summarize, both perspectives expect female and male entrepreneurs to behave in a different way, either determined by situational differences and/ or barriers (liberal feminism) or by dispositional differences and/or barriers (social feminism). A different way of explaining gender differences in entrepreneurship is by investigating situational factors that are correlated with gender. Female and male entrepreneurs may behave in the same fashion, provided they have the same personal and business profile. For instance, because female entrepreneurs tend to have smaller firms, their firms are characterized by different performance rates and organizational structure. This perspective on studying and explaining gender differences may be more similar to than different from the two perspectives proposed above. Indeed, differences in the personal and business profile of female and male entrepreneurs may be explained by situational or dispositional differences.

2.2.3.Sex versus gender

Most social and behavioral (i.e., *nurture*) scientists make a distinction between the terms gender and sex, where sex refers to biological aspects and gender refers to the meanings that are attached to these differences between women and men within given a culture. Thus, whereas a person's sex (male or female) is based on physiological characteristics, a person's gender (masculinity or femininity) is based on differences in social experiences (Bem, 1993; Korabik, 1999)[13]. Because there is likely to be withinsex variation in experiences, sex may not completely determine a person's gender (Fischer et al., 1993). However, Korabik (1999, p. 12) argues that: "… *although sex and gender are theoretically independent, the sex-linked gender-role socialization that is still commonplace in Western culture means that empirically they are often not*". Therefore, gender is often operationalized by using biological sex as a proxy variable

(i.e., assuming bio-psychological equivalence)[14]. Because biological sex may be confused with a range of other factors (Ridgeway, 1992), it is important to take into account the situational context. As Kimmel (2000, p. 12) argues: "*It turns out that many of the differences between women and men that we observe in our everyday lives are actually not gender differences at all, but differences that are the result of being in different positions or in different arena's*". Most studies investigating gender effects in entrepreneurship take the unidimensional model of gender, assuming bio-psychological equivalence, as a starting point. However, there have been studies taking a bidimensional gender approach to studying entrepreneurship, focusing upon femininity versus masculinity. For example, Watson and Newby (2004) argue that sex roles (masculinity or task focus versus femininity or relationship focus) may be more important in explaining entrepreneurial characteristics. Moreover, White et al. (2003) investigate the relationship between the level of testosterone and entrepreneurial behavior[15]. In these studies gender no longer constitutes a dummy variable but measurement of gender (or masculinity versus femininity) is more complex and diverse. However, using sex as a determinant of gender has the advantage of measurement consistency. In addition, it enables comparison of the studies in the present thesis with the bulk of studies that have been done in the area of gender issues in entrepreneurship. The present thesis focuses upon

[13] Hence, whereas biological sex may be seen as an exogenous variable (that is not determined by other factors), gender may be considered an endogenous variable (that is determined by other factors, such as life experiences).

[14]This is in line with the unidimensional model of gender, placing masculinity and femininity at opposite sides of the continuum, where men and masculinity are at one end and women and femininity are at the other end. Biological sex is used as a determinant of psychosocial gender. Bidimensional models of gender – on the other hand – assume that gender consists of two independent dimensions, masculinity and femininity. These dimensions are considered to be independent of biological sex. For a detailed discussion, see Korabik (1999).

[15] Testosterone may be considered a measure of femininity versus masculinity. Although testosterone levels tend to be higher for men than for women, this is not necessarily the case. It should be noted that the relationship between level of testosterone and new venture creation was tested using male-only sample

differences between female and male entrepreneurs, and does not investigate the influence of femininity (or masculinity) on entrepreneurship. Whereas 'sex' of the entrepreneur is measured, the term 'gender' is used to capture all underlying characteristics and experiences of women and men. To avoid misinterpretation of the results, in this study a distinction is made between *direct* and *indirect* gender effects. Indirect gender effects refer to effects of various economic and social factors with respect to which female and male entrepreneurs differ (e.g., sector, firm size), whereas direct gender effects refer to gender differences that are not due to other factors included as controls in the study. The direct gender effect should be regarded as a residual effect as it may be that there are still other determining factors (correlating with gender) that have not been controlled for. When studying gender issues (in entrepreneurship) it is virtually impossible to control for all intermediary factors[16].

3. Female Entrepreneurship Research

3.1.Neglected themes

Brush (1992) identified areas in need for further research, several areas of which up to date still have received little attention of female entrepreneurship researchers. Knowledge gaps that are due to neglected themes particularly exist with respect to the organization and environment dimension. Although the latter area of research has received more attention in recent years studies within this category have mainly focused upon one aspect, such as resource acquisition and the relationships between banks and female entrepreneurs, rather than focusing upon the complex network of external actors with which female entrepreneurs are confronted. Moreover, in spite of the fact that there have been some studies focusing upon support structures for female entrepreneurs, thus far there has not been a comprehensive overview of macro-level influences on the start-up and or management of businesses by female entrepreneurs. Organization studies have emphasized organization context or business profile factors (e.g., firm size, sector, location) rather than organizational structure factors (e.g., management, goals). The individual dimension has been relatively well studied. Today there still has not been much attention for (self)-perception issues in female entrepreneurship research. With respect to performance studies, most of the research has been performed at the organizational level, while no research has been done investigating the (economic) performance of female entrepreneurs at the country level (Ahl, 2002).

3.2 Research Framework

The studies within the present thesis focus on different levels of analysis, paying attention to issues at the individual, organizational and environmental level. At the environmental (or macro) level the causes and consequences of female entrepreneurship are discussed. In the present thesis it is assumed that the gender of the entrepreneur influences individual characteristics of the entrepreneur, including demographics (e.g., age, ethnicity); personality, values and attitudes and ability; perception, motivation and goals, and learning; and behavior. For example, women may have specific motivations for starting a business (e.g., combining work and household responsibilities). Although it is argued in the present thesis that women and men may differ with respect to characteristics of their organization, we assume that most of these organizational differences can be related to differences with respect to individual characteristics. The individual characteristics influence organizational characteristics. Organizational characteristics include organizational context variables (e.g., sector, firm size, strategy, location, networks, suppliers and other external parties), organizational structure (e.g., management, firm structure) and organizational performance. Obviously, there will be linkages between organizational context, structure and performance. For example, small firms have a different organizational structure than larger firms. And larger firms are

[16] The intermediary factors used in the present study are all based upon a review of the literature.

more likely to have higher performance in terms of financial indicators, e.g., revenues and profits. In addition, there may be 'feedback' effects from the organizational characteristics to the individual characteristics. For example, the performance of a firm is likely to influence the attitude towards work and the time allocated to the firm. Within this framework and thesis gender is considered to be a source of diversity, as we expect to find differences in individual and organizational characteristics between female and male entrepreneurs. This diversity at the individual and firm level is seen as input for entrepreneurial diversity at the level of the environment (i.e., the macro level).

3.3. Social Learning

From a societal perspective the present study is important for different reasons. The studies in the present thesis show that the observed gender differences in entrepreneurship can largely be explained by way of characteristics of female entrepreneurs and their businesses, rather than (only) by way of gender-related obstacles and discrimination. Creating insight into the origin of gender differences in entrepreneurship leads to more awareness with policy makers of the 'real' underlying factors influencing female and male entrepreneurship, which accordingly can be targeted to stimulate high quality entrepreneurship. In this respect, it is found that the productivity of working hours for female entrepreneurs is lower than that for male entrepreneurs, and this is partly due to lower amounts of human, social and financial capital of female entrepreneurs. These *capital* constraints may be lifted by the government through (better) provision of information and education; enhancing the (general) availability of financial capital for start-ups[17] and stimulating entrepreneurs to join and become members of networks. More knowledge about female entrepreneurship or the origin of gender differences in entrepreneurship may also do away with misconceptions with respect to (the characteristics of) female entrepreneurs and their firms. With respect to the economic importance (or performance) of female entrepreneurship, the profile of the *average* female entrepreneur at the micro does not provide a particularly 'glamorous' picture of women starting and running businesses. This may have its effect on economic performance. However, the present thesis shows that at the country and regional level female entrepreneurship (as measured by the share of women in entrepreneurial activity) is not harmful, but may be positive for economic performance. And although it appears that women tend to be less productive with respect to the time they invest in their firms, this is largely due to indirect gender effects, suggesting that when comparing similar female and male entrepreneurs (with respect to personal and business profile) there is no significant productivity difference. Also, the risk-averse attitude of women is likely to influence the growth patterns of the businesses of women, where women choose to adopt low-or slow-growth strategies because they want to keep control over (the growth of) the business. This cautious approach of women may not only suppress growth of female owned or-led firms, but may also result in fewer bankruptcies of businesses of women (as compared to those of men). Indeed, Blom (2003) argues that – as compared to men – women in the in the western countries have a better chance of succeeding in business. Although increasingly women start and run businesses in the the western countries and the female share in both self-employment and new venture creation is among the highest rates of all OECD countries, we have seen that on average female-owned firms remain relatively small and show low growth rates. This may be attributed to the choices of women themselves (focusing on quality rather than quantity), but also to socio-cultural values regarding the distribution of household and childcare responsibilities within the household where women still take on the bulk of household responsibilities even if they also work for a living (limiting the time and effort that can be invested in the firm). Indeed, time restrictions may be an important factor explaining the particular profile of the businesses of female entrepreneurs. Emancipation in the western countries is relatively low,

[17] Because female entrepreneurs tend to be more risk-averse than male entrepreneurs, the relatively small amounts of financial capital used by female entrepreneurs may be attributable to their own choice rather than a restricted availability of financial capital.

hindering the flow of women into the higher executive jobs or positions within organizations.[18] Although this may stimulate women to start up their own firms, enabling them to be more independent and have flexible working hours, it is likely that time restrictions also play a role within the entrepreneurship of women, in particular since self-employment requires higher time investments as compared to wage-employment. To enable women to participate more fully in the labor market and run large and high-growth firms (if they choose to do so), social roles need to change, establishing a more equal distribution of tasks within the household. To establish this it is important that working women are (to some extent) relieved of the pressure of household responsibilities, stimulating the combination of work and private responsibilities by men through providing facilities such as parental leave, part-time work, and childcare (Duyvendak and Stavenuiter, 2004). Although in the western countries there is a generic entrepreneurship policy, not distinguishing between groups of entrepreneurs (Stevenson and Lundström, 2001), and there are no specific measures in place to stimulate female entrepreneurship (Bruins, 2003), this may not be a problem as long as there are measures taken at a more general level, stimulating and facilitating women who want to participate full-time in the labor market either through self-employment or wage-employment.

3.4.Scientific Learning

From a scientific viewpoint the present thesis creates awareness of the interrelatedness of female entrepreneurship with a range other business and individual factors and helps explain the observed gender differences in entrepreneurship. The present thesis avoids misinterpretation of the results, wrongly attributing differences in entrepreneurship to gender (rather than to other explanatory variables that are correlated with gender), by adding relevant control variables in the analysis to single out direct and indirect gender effects. Accordingly, this study departs from the

viewpoint that it is relevant to study gender differences in entrepreneurship, but that 'pure' gender effects are hard to find. Instead, research should focus upon the explanation of the distinct characteristics of female and male entrepreneurs and their businesses, including as many relevant 'controls' or intermediary variables as possible. Although female entrepreneurship researchers have become more aware of the different ways in which the gender of the entrepreneur can influence entrepreneurial characteristics and behaviors, the present thesis advocates more precision in analyzing gender effects. A distinction can be made between *total*, *direct* and *indirect* gender effects, where total effects are the *average* gender differences that can be observed in practice. If, on average, we do not observe any gender differences, this does not mean that there are no (underlying) gender effects. That the distinction between total, direct and indirect effects is universal, and also applies to other influences than gender, becomes apparent from other studies in the present thesis. Moreover, the distinction between direct and indirect effects has shed light on the underlying reasons for many of the observed gender differences in entrepreneurship. It can be argued that gender is one of the many lenses that can be used for studying the phenomenon of entrepreneurship. By focusing upon one characteristic (i.e., explanatory factor) and its linkages, distinguishing between direct and indirect effects, a better insight can be created in the complex relationships between explanatory factors and their influence on entrepreneurship.

3.5.Pitfalls and Drawbacks of Female Entrepreneurship Research

An important criticism is that gender studies often overemphasize the focus on gender differences, ignoring similarities. This often results in reporting the results of studies that find significant gender differences, neglecting the discussion of studies where no differences are found .Moreover, findings that indicate that there are no gender differences are sometimes not accepted

[18] See Parool, October 16th, 2004, Emancipatie stelt weinig voor [Emancipation is low] by Michiel Couzy. This article refers to research done by Annelies van der Horst at the Universiteit Maastricht.

(Ahl, 2002). And statistically significant results (e.g., finding gender differences) do not always reflect socially significant results .Hence, if a significant effect of the gender of the entrepreneur is found, it is important that a plausible explanation of this gender effect is provided, possibly through follow-up research. In female entrepreneurship research there is a risk of attaching too much weight to the findings of gender effects. Often, a dummy variable is used and it is easy to find a gender effect, in particular if other (intermediary) factors, correlating with gender, have not been taken into account. Also, gender research may be dictated by stereotype thinking. Women tend to be viewed as less entrepreneurial than men. Entrepreneurship is often associated with male values, such as decisiveness, risk-taking, and competitive. This stereotype thinking may direct female entrepreneurship studies towards anticipated results or interpretation of the results in conformity with gender stereotypes. For instance, because of this stereotype thinking of the entrepreneur as male, female entrepreneurs may be perceived as less entrepreneurial or even less successful. Hypotheses may be formulated and justified based on this stereotype image. A more 'positive' stereotype is that of the women as democratic leaders building relationships rather than managing from a hierarchical perspective. When researching management styles of female and male entrepreneurs, this image of the female entrepreneur as a relationship builder can be very pervasive and can impose itself upon the research(er) even though there has been only limited evidence of this finding in entrepreneurship research.

4 .Conclusions and Future Research Suggestions

The present thesis shows that female and male entrepreneurs differ significantly with respect to a range of aspects of entrepreneurship. The studies show that there is evidence of gender differences in entrepreneurship both at the macro and the micro level. At the macro level the present thesis shows that there is some evidence of a positive relationship between female entrepreneurship (vis-à-vis male entrepreneurship) and economic performance at both the regional and country level.[19] With respect to the determinants of entrepreneurship at the macro level it is found that the factors influencing female and male entrepreneurship are similar rather than different. Most of the factors that influence entrepreneurship in general, also influence female entrepreneurship. However, differential effects have been found for unemployment and life satisfaction, suggesting that the female *share* in self-employment is influenced by those factors. At the micro level most of the gender differences are attributable to indirect effects, although some evidence has also been found for direct gender effects. Even though most of the micro-level studies find some evidence for the existence of *direct* gender effects, these may be residual effects that exist because it is virtually impossible to take into account all factors that influence entrepreneurship. The present thesis has studied the characteristics of the *average* female entrepreneur, the profile of which has been described in one of the previous paragraphs. However, it may be that new generations operate their businesses in a different way than older generations of female entrepreneurs. It is therefore interesting to investigate the (differences in) profile of younger and older female entrepreneurs. In general, the

information on female entrepreneurship can be enriched by investigating different types of female entrepreneurs in addition to the average female entrepreneur. For example, part-time versus full-time female entrepreneurs; married versus single female entrepreneurs; female entrepreneurs with and without children; and women running service versus production firms. Distinguishing between different types of female entrepreneurs also enables the comparison with male entrepreneurs in similar circumstances. Furthermore, this thesis has studied gender diversity in entrepreneurship in terms of individual and business characteristics. Most of the studies deal with business structuring and the input side of the business, focusing upon time investments, financial structure, (human

[19] However, the exercises do not take into account a range of other factors influencing economic performance. In particular, the share of the service sector

resource) management, and organizational structure. The output side has not been investigated and, although there have been several studies investigating performance differentials between businesses of women and men, there is still need for further research. First, research should explore the type of output female entrepreneurs produce and the extent to which these are unique and contribute to entrepreneurial diversity. For example, because female entrepreneurs tend to pursue combinations of goals, they may also be more likely to engage in social entrepreneurship. Second, we have seen that businesses of women tend to be small, and are less likely to experience growth. Arguing that female entrepreneurship is important for economic performance thus seems a paradox. Future research may be able to unravel this paradox by focusing both upon the quantitative and qualitative contribution of (female) entrepreneurs. To summarize, the relations between female entrepreneurship, entrepreneurial diversity and economic performance should be further explored in empirical studies[20]. Measurement issues are crucial here as female entrepreneurship can be measured in different ways .If the aim is to investigate the link between entrepreneurial diversity and economic performance, researchers should take the female share in entrepreneurial activity (as a measure of entrepreneurial diversity) as a starting point. Using female entrepreneurial activity rates (measured vis-à-vis the labor force) is likely to only establish a link between entrepreneurial activity and economic performance, as countries with relatively high total entrepreneurial activity rates also tend to be characterized by relatively high female entrepreneurial activity rates. Finally, future research on gender issues in entrepreneurship should explore different ways of approaching and measuring gender. In the present thesis gender is measured by way of biological sex. In this way sex and gender coincide. However, since some

women may be more masculine than some men (and vice-versa), it is important to also explore other ways of measuring gender, investigating the *degree* of gender and using a continuous variable rather than a dummy variable (i.e., male versus female). As the feminization of society advances and it does not pass over men, studying masculinity versus femininity in the arena of entrepreneurship may be a fruitful alternative and/or complement to studying differences between female and male entrepreneurs in the future.

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FINANCING INNOVATION IN ROMANIA

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Abstract:
This article based on an examination of empirical literature, analyses the financing of innovative enterprises in Romania and presents the characteristics of Romanian policies in this regard. It sets forth an estimation of the number of innovative enterprises in Romania based on figures from different sources. Assessing the role of financial restrictions on innovation reveals that a firm is facing obstacles to finance its innovative activities but also other difficulties to innovate which appears to be enhanced. This article also puts forward the role of different financing actors and instruments at different stages of the firm's life cycle and emphasizes the function of proximity capital in filling the gap between supply and demand of financing. Finally a framework for policy is recommended.

Keywords: *Cluster, Incubator, Innovation, Private Equity, Venture capital*
Jel Classification*: E 22, G 24, O 38*

1. Introduction

The theoretical literature widely stresses that innovative projects are more likely to encounter financial constraints. Indeed, for such projects finding external financing is difficult and costly to SMEs due to the strong asymmetry relevant with such innovative investments (Hall, 2002) and the problems banks face in defining appropriate models to evaluate risk. However, empirical evidence about the impact of these constraints on innovation is dissipated and not as unquestionable as one might expect. Some authors even consider that instead of being constrained, firms mostly face an excess supply that leads them to undertake unnecessary or too risky investments (De Meza and Webb, 1987).

Romania is no exception from this situation. One strand in the empirical literature concludes that there is a single financing model, the model currently used by firms being largely determined by institutional and macro considerations, whereas another concludes that there is a particular financing process for innovative SMEs.

This article looks at financing the innovative SMEs in Romania, examining the existing empirical literature and numerous reports and studies concluded in this area. No specific survey has been conducted because the data available is already abundant. Therefore the report attempts to present the conventionalised facts, some stable patterns that emerge from different sources of empirical data, and proposes a framework to better understand the structural characteristics of

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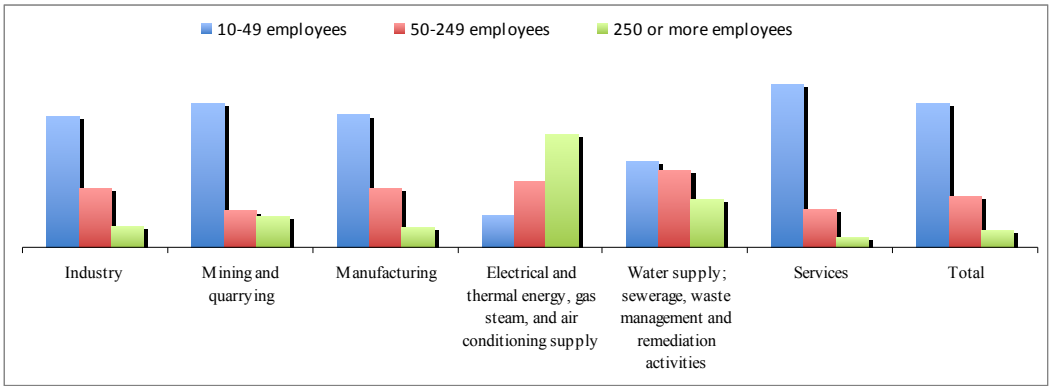
Romanian policies addressing these SMEs. It starts by identifying the subset of firms concerned by innovation, which is important for determining the scope of policies to implement. The study then presents an assessment of the financial constraints those firms are facing and explains how complementarities among financial actors intervene in order to decompress the constraints felt by some companies. The study continues by pointing to proximity as an additional element to improve relations between borrowers on one hand and investors on the other. The financial commitment of the state then is illustrated. It concludes by proposing a structural framework, to capture the policy changes that could arise from the firms behaviour to promote a collective dynamic and changes in the coordination process.

2. How many enterprises are innovative?

Based on the findings of the 2008 Community Innovation Survey (CIS 2008, 2006-2008), in Romania nearly 20% of companies where active in technological innovation from 2006 to 2008 compared to nearly 40% in the EU-27. This innovation activity may have lead to a new product (or service), or a new process, although not necessarily during the observation period.

Under a wider definition that includes organisational and marketing innovation, more than 33% of the enterprises in Romania report innovation. Organisational innovation is the most widespread form of innovation activity with almost 69% of total innovation activities, irrespective of the enterprise business sector or size. Process innovation is generally more common than product innovation, having respectively percentages of 20% and 7 %. Small enterprises are more innovation-active than large ones in all the activities except electrical and thermal energy, gas steam, and air conditioning supply as we can see in the Figure 1 hereafter. In these last industries very few SMEs can be found, therefore the innovative configuration is affected.

Figure 1. Percentage of enterprises active in PPAOM[2] innovation by activity and size, Romania



Source: INS National Institute fo Statistics of Romania, Community Innovation Survey 2008

3. An assessment of the financial constraint of SMEs – the financing gap

It is generally admitted that SMEs have more difficulty surviving, are less profitable and default more frequently than large firms due to lack of economies of scale advantages. Helping them

[2] PPAOM: products processes, innovation activities, organisation, marketing

to counterbalance this weakness is, then, a structural characteristic of Romanian innovative financing.

3.1. Factors hampering innovation

Cost factors (lack of financial resources, too-high innovation costs) are the main explanation given by the majority of innovation-active enterprises in the Community Innovation Survey 2006, the last available survey which analysed the factors hampering the innovation activities. Romania is one of the most affected countries in the EU by the financial constraints, 31% of the innovative enterprises complaining about the lack of funding within the enterprise or the group. Furthermore, 31% of the innovative enterprises complain about the lack of finance from sources outside the enterprise and 29 % about the cost of the innovation as illustrated in the Table 1 hereafter.

Table 1 - Main barriers to innovation, Romania
(Percentages of innovative enterprises in 2004 and 2006)

Related factors		2004-2006	2002-2004
Cost-related factors	Lack of funds within your enterprise or group	30.6	8
	Lack of finance from sources outside your enterprise	31.0	30.3
	Innovation costs too high	28.6	29.9
Knowledge-related factors	Lack of qualified personnel	13.5	14.2
	Lack of information on technologies	5.5	7.3
	Lack of information on markets	5.3	0
	Difficulty in finding cooperation partners for innovation	14.4	15.9
Market factors	Uncertain demand for innovative goods or services	13.3	21.2
	Markets dominated by established enterprises	18.9	16.1
Reasons not to innovate	No need to innovate because no demand for innovations	2.1	5.4
	No need to innovate due to prior innovations	2.9	4.2

Source: Community Innovation Survey 2006 and 2004

Experts and politicians often mention finance as a strong constraint to innovation. Numerous surveys carried out, particularly by World Bank, highlight that the access to finance is often mentioned by the SMEs as one of the most important barriers for their "doing business". According to the World Economic Forum, in 2010 the most problematic factor for doing business in Romania is the access to financing for more than 16% of Romanian survey participating enterprises.

Furthermore, Romania is among the last countries where innovative companies received public funding: 11% in 2008 and 12% in 2006 (out of total innovative enterprises) compared to 39 % in Italy or 37 % in Netherlands both in 2008.

Therefore, it is impossible to ignore the potentially negative effect that insufficient financing has on innovation. It has been shown (Rivaud-Danset, 2001) that when an innovative project encounters financial constraints the average number of obstacles nearly doubles, whatever other difficulties the project is facing.

3.2. The credit rationing and the financing gap

A better understanding of the so-called financing gap is nevertheless required, which led many authors to study more carefully the sources of disappointment mentioned by entrepreneurs in surveys on bank-firm relationships. In doing so they refer to credit market literature in order to propose econometric models that make it possible to measure the different sorts of credit rationing.

The literature distinguishes three types of credit rationing: the well-known weak[3] and strong[4] credit rationing and a self constraint bound to the discouragement of entrepreneurs on the credit market. Many French studies (SESSI 2002; Bonnet, Cieply and Dejardin, 2004; Savignac, 2007) show that a large part of new firms are not credit constrained. According to Bonnet, Cieply and Dejardin (2004) the strong credit-rationing hypothesis only concerns 3.26% of the firms created in 1994 and 5.3% of the subsample of the innovative ones. Credit rationing, according to Stiglitz and Weiss (1981), also pertains to a very small proportion of new firms in France during mid-nineties. Weak rationing concerns 14.76% of the sample and only 8.21% of the subsample of the most innovative firms. It finally appears, that self-constraint is the most important financial impediment new firms have to suffer. Empirical studies carried out by OSEO[5] offer strong evidence favouring this assertion.

The main conclusions drawn from these studies are as follows:

The results obtained in all literature concerning the effectiveness of credit rationing to small innovative firms in France support all academic assumptions based on entrepreneurs' expectations of

[3] "Weak credit rationing" (or type I) corresponds to the situation where a borrower x does not succeed in getting sufficient credit at the moment t (Keaton, 1979). This borrower is granted access to credit, but for a level of debt that is inferior to the level (s)he desires. This rationing occurs when some applicants receive, at the current interest rate, smaller loans that they desire.

[4] "Strong credit rationing" (or type II) occurs when some borrowers' demands are turned down by banks although these borrowers are ready to pay all prices and non-price elements of the loan contract, while apparently identical demands are accepted by banks. In this situation, a customer x does not receive at moment t any sort of credit, although a customer y who does not apparently differ from x gets it. This situation was first described by Stiglitz and Weiss (1981).

[5] OSEO was created in 2005 by merging ANVAR (the French innovation agency) and BDPME (the SME development bank), with a mission of general interest to support the regional and national policies. Its mission is to provide assistance and financial support to French SMEs in funding innovation and investment.

investors' future decisions. The new theory of credit rationing based on discouragement of entrepreneurs seems sound and promising;

Despite the existence of financial constraints, when new firms want access to bank loans, banks remain their main provider of external finance (87% of Romanian SMEs according to the Flash Eurobarometer study of the European Commission 2009b, p. 42). The current financial crisis has resulted in a significant reduction in the availability of bank loans to the SMEs (Roman and Rusu, 2011);

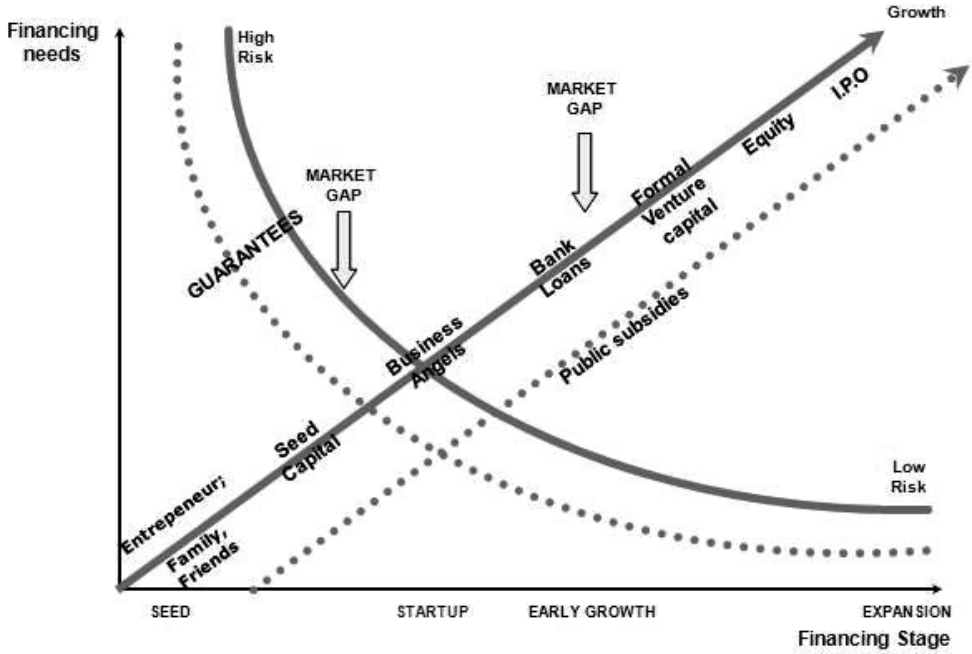
Inter-firm and external finance are unimportant when it comes to newly created and innovative firms. When only innovative sectors are concerned, the frequency of highly intensive relationships between new firms and these two kinds of investors tends to increase but remain at a very low level.

The banks have an important role in the financing of new firms in Romania and self-constraint appears as a major phenomenon almost impossible to explain by any standard theory of financing. Other means of financing such as venture capital, business angels and trade credit have played a minor role in financing of Romanian innovative firms. These findings detract from the assumption of a new firm credit gap, but they may equally support the general direction of public aid in Romania, which favours guaranteeing funding granted by banks to finance the riskiest firms - and in particular the innovative enterprises.

4. A general architecture to bridge the gap

European literature agrees on a general financing stages model for innovative SMEs as presented in the Figure 2.

Figure 2. Financing stages for innovating SMEs



Splitting the financing path into three main stages offers a view of the general architecture: there is the start-up phase, the first financial rounds that correspond to the take-off of the firm, and the subsequent financial rounds that are activated whenever a firm aims at entering new markets, tries to develop new products or attempts to manage some turmoil. Several financing solutions correspond to each of the stages, as shown in Table 2.

Table 2. Three stages of financing

Start-up phase	First financial round	Subsequent financial round
Seed capital fund Loans without interest and/or guarantee University and research centres spin-off funds Micro credit Public or para-public funds for creation of innovation Public grants Reimbursable loans	Business angels Seed capital fund Banks loans/overdraft Guarantee funds Public or para-public investment funds Regional public venture capital Public grants Corporate venturing	Private venture Bank loans Share subscription bonus Mezzanine
Indirect support: Pre-incubation, incubation, nurseries and easy-in/easy-out workshops, tutorship (coaching, mentoring, hands-on management), legislative work (financial services, capital adequacy, etc.).		
Integrated actions: Financial value chain, intermediation		

5. Innovative SMEs and their financing vehicles

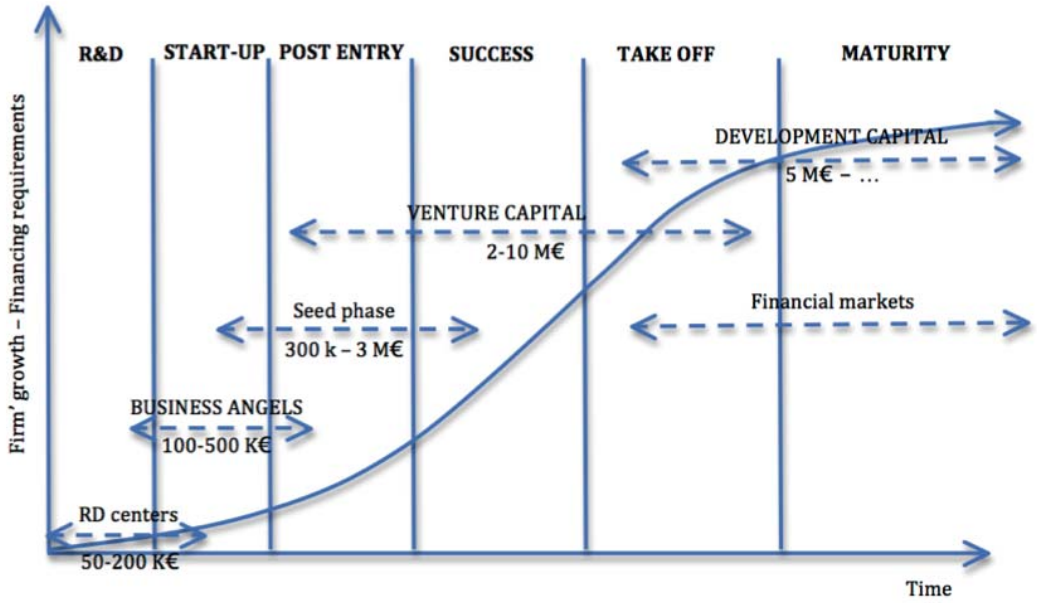
Innovative SMEs may be important in strengthening economic growth and employment, but they still face particular problems when attempting to access financing as they represent a higher risk than households, traditional SMEs or large firms. Therefore, they are not good candidates for traditional bank loans as seen above, but are used to rely on themselves or on love money gotten from friends and family to finance their riskiest projects. Instead of a financial gap, it is more accurate to speak of a mismatch of the expectations of borrowers and lenders. This results in a market failure strengthened by exogenous elements (the burst of the "dot.com" bubble after the steep rise of Internet in the late 1990s, the subprime crisis) that pushes banks to announce a credit shortage due to a more strict selection process.

Because of the supposed reluctance of banks to commit themselves to a credit relationship with innovative SMEs, these firms often tend to expect much from investors who will provide risk capital, generally in return for a share in the company. The risks for the investor are high, but so are the potential rewards if he or she is backing a winner.

Financing for innovative SMEs is complicated by the fact that these firms are likely to require a range of financing vehicles at different stages of their development. The "seed" money to start up the company generally comes from friends, professional contacts and family.

A simplified presentation of the venture capital industry in connection with the life cycle of the firm is presented below.

Figure 3. Innovation firms' lifecycle and the venture capital market



Source: CDC Entreprises, "PME innovantes et Capital risque", Novembre 2005

In European developed countries, where venture capital and private equity are more developed, "business angels" are seen as a key link in the financing chain at the early stage of business development, as they bring business experience to the table as well as their own capital in a context of proximity and coaching for the new entrepreneur. In Romania Associations of "business angels" should be stimulated by the public authorities via tax advantages for investing in start-ups and innovative SMEs.

6. Equity capital financing and proximity

Most SMEs are not connected to the financial places and only have access to financial markets. The inability to produce standardised information and to provide extensive administrative follow-up are the first barriers to entry on the stock exchange. All the impediments have been studied extensively in the literature. Furthermore admission to the stock market is not worthwhile for most SMEs, either because they run a family business or because their capital is so concentrated that the number of transactions remains extremely low. The result shows that it is not easy to estimate the price of a share. Most studies, thus, confirm the survey conducted by Belletante and Desroches in the 90s (1993); they concluded that when entering the secondary market, SMEs are not looking to raise funds but rather to play with announcement and reputational effects that will permit them to get a better interest rate from the banks. Even so, that behaviour does not say anything about the way SMEs self finance equity capital.

The notion of proximity capital that expanded over the past twenty years opened the path, in France as in other countries, to providing a suitable financial instrument for innovative SMEs.

Proximity capital refers to funds that are invested in a company in the form of equity capital or quasi-equity capital; these derive from persons, companies or institutions that maintain – either directly or, more rarely, indirectly – sustained relationships with the receiving company or with persons inside that company. Those relationships do not relate solely to financial aspects.

Therefore, the salient point of this definition is the relationship between the company and the investors that provide the equity finance. Instead of mainly resting upon financial criteria such as EBITDA[6] or P/E Ratio[7], the relationships between partners become the central element of the financial commitment. Rivaud-Danset (1996) referred to these as financial relationships "à l'engagement" – implying a long-lasting commitment. In this case, proximity capital, even if it mimics the functioning of a stock exchange, mainly rests on the "personalisation" of the relationship. This feature strengthens the role of individuals in the SME. In those firms, there is a close relationship between the holding of shares on the one hand and decision-making power in the firm on the other. That confusion between ownership and control tends to exclude SMEs from ordinary financial markets. It makes it difficult to attract new investors, who are reluctant to take part in a project whose profitability is questionable without having any say in the strategy of the firm since the owner-manager is reluctant to share its power with anyone else.

How can proximity solve some of these problems? Assuming that any innovation or expansion project requires equity capital, the entrepreneur has to find funds from those around him – from members of the family, former work colleagues, various public economic promotion agencies, persons or firms whose participation the entrepreneur has succeeded in securing. Apart from their skills as a technician or a manager, the entrepreneur's personality and ability to mobilise their social relations are a determining factor. That type of relation frequently depends on geographic proximity, and policy actions should aim at creating proximity investment funds to provide SMEs with the equity they need to strengthen their position and to permit them to diversify the origin of financial resources received. However, while geographical proximity is presumed to play a key role, the social and institutional relations of a territory will also come into play (Dei Ottati, 1994).

SMEs should have at their disposal other instruments such as the French FIP[8] ("Fonds d'investissement de proximité") which leverages private financing through equity investment. Furthermore the so-called French FCPI[9] ("Fonds communs de placement dans l'innovation") aim at

[6] EBITDA is the acronym for Earnings before Interest, Taxes, Depreciation, and Amortization. It purports to measure cash earnings without accrual accounting, cancelling tax jurisdiction effects, and cancelling the effects of different capital structures.

[7] The P/E Ratio is a measure of the price paid for a share relative to the annual net income or profit earned by the firm per share. It is a financial ratio used for valuation: a higher P/E ratio means that investors are paying more for each unit of net income, so the stock is more expensive compared to one with lower P/E ratio.

[8] Local investment funds (FIP in French) are the result of the law on economic initiative dated 1st August 2003 (articles 26 and 27), which deregulated the Private Equity business. It is a savings scheme open to the general public, approved by the Autorité des Marchés Financiers (the French financial markets regulator or ombudsman), which authorises investments in the equity of SMEs in up to three regions and for no more than 3 years. They are mainly aimed at private investors and the funds are invested in areas not currently targeted by private equity schemes. So they are essentially small schemes and do not have to have a technological focus (unlike the French FCPIs: Innovation investment funds)

[9] This finance vehicle gathers individuals willing to invest, in innovative, early stage and private companies (venture capital), at least 60% of the money collected. SMEs listed on French Financial Markets (Alternext and "Marché Libre") are considered to belong to the private company pool within a FCPI portfolio. Also, up to 20% of the

investing 60% of the money collected in non-listed innovative SMEs employing less than 200 people. A tax rebate is proposed by the public administration to investors. These models of proximity capital financing should be available for Romanian SMEs in order to strengthen their innovation financing.

7. Entrepreneurship and SME policy

SMEs are prevailing in the Romanian economy and represent over 99 % of all enterprises. In recent years, the SME sector has consolidated its role in the economy in terms of the number of employees and the average turnover per enterprise although the crisis has left its marks. The recession has resulted in higher restrictive credit terms for SMEs and larger enterprises. Although the steady decline in private credit growth appears to have bottomed out, SMEs in particular suffer from insufficient access to bank financing as the latter appears to be crowded out by the financing needs of the public sector. The financing problems of SMEs are further compounded by excessive delays of VAT refunds and other payments to companies by state-owned enterprises and the government. All these have contributed to the number of SME bankruptcies, which increased in 2009 and 2010. Being aware of these problems and in order to reduce payment arrears, the government has recently adopted a number of measures in order to address these issues. In this respect, good progress has been made by reducing the payment arrears by two thirds since 2009 to present.

In the wake of the crisis, Romania had taken a small number of stimulus measures regarding business support and helps to weather the crisis. Some of the measures announced in early 2009 have been adopted very late (e.g. the temporary tax exemption for reinvested profits), thus considerably delaying the expected effects while some have not been adopted at all. Financial support to SMEs is primarily being provided via multi-annual national programmes and guarantee instruments. The National Credit Guarantee Fund for SMEs was capitalised and improved its guarantee activity, also as a result of the establishment of the Counter Guarantee Fund of Loans to SMEs in 2009. In addition, legislative measures were taken in 2009 to ensure the implementation of the JEREMIE initiative.

The JEREMIE initiative developed in cooperation with the European Commission, offers EU Member States, through their national or regional Managing Authorities, the opportunity to use part of their EU Structural Funds to finance small and medium-sized enterprises (SMEs) by means of equity, loans or guarantees, through a revolving Holding Fund acting as an umbrella fund. The JEREMIE Holding Fund can provide to selected financial intermediaries SME-focused financial instruments including guarantees, co-guarantees and counter-guarantees, equity guarantees, (micro) loans, export credit insurance, securitisation, venture capital, Business Angel Matching Funds and investments in Technology Transfer funds.

Starting with February 2011 the guarantee facility under this initiative has become operational while the risk facility should be operational in 2012. According to the European Investment Fund the main advantages of JEREMIE are:

Flexibility: Contributions from the Operational Programmes to the JEREMIE Holding Fund will be eligible for interim up-front payments by EU Structural Funds, giving Managing Authorities

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funds may be invested in listed companies (except Alternext and "Marché Libre"). FCPI funds could be invested everywhere in EU (27 countries) and their duration is usually of 8 years. Today, the maximum investment per FCPI fund is 2.5M€,¬ per year, therefore venture capital firm may use several FCPI funds under their management to make larger ticket. Most FCPI funds have been managed within venture capital firms.

more flexibility in allocating these resources. Structural Fund contributions to the Holding Funds must be invested in SMEs by 2015.

Benefits of a portfolio approach: The Holding Fund will be able to re-allocate the resources to one or more financial products in a flexible way, depending on the actual demand over time. The umbrella fund approach will allow a diversification of risks and expected returns due to financial products having different default rates, as well as active cash flow management to allow for a swift response to changing market requirements.

Recycling of funds: The Holding Fund is of a revolving nature, receiving repayments from the financial intermediaries for further investments in the SME sector. This makes SME support via EU Structural Funds sustainable, unlike the pure grant approach.

Leverage: A significant implied advantage of JEREMIE is its potential ability to engage the financial sector either at the Holding Fund level, with additional capital from financial institutions, or at the level of financial instruments, through co-financing, e.g. in both cases potentially in cooperation with the EIB.

Moreover, there are several actions, financed by the OP Increase of Economic Competitiveness, which provide support for new investments, for the internationalisation of SMEs, for the implementation of international standards, and for advisory services. In addition, support for investment projects of micro-enterprises as well as for developing the regional business infrastructure is provided through the OP Regional Operational Programme. Finally, the projects financed through the OP Administrative Capacity Development aiming at implementing a coherent plan for improving the business environment, implementing at national level the Small Business Act, and developing an operational one-stop-shop pilot model were completed.

Romania's efforts to help SMEs to survive the economic crisis were hindered by the need for fiscal consolidation, which left little room for manoeuvre to launch costly recovery measures. Mitigating further high financing costs, overcoming the scarcity of credit and reducing the lack of working capital are therefore the main challenge in the short term. Related to these, Romania needs to increase support to enterprises, particularly SMEs, in accessing EU funds, as well as to reduce effectively payment arrears. Moreover, facilitating the access of Romanian companies to markets could help to offset the decline in domestic demand. In this respect, using public procurement in a more proactive manner and further supporting the internationalisation of SMEs could be important steps.

8. Romanian policy mix towards increased private RDI investment

8.1. Main public funding instruments

The main RDI public funding instruments consist of a set of programmes that address a broad target of R&D performers both in the public and the private sector (national R&D institutes, public R&D organisations, academic research centres, business firms with R&D activities, etc. The main public funding instruments are:

2007-2013 National Plan for R&D and Innovation. Launched in 2007, this is the most important funding instrument of NASR, both policy- and budget-wise, and has the largest budget of all current national programmes (multi-annual budget of about €4,700m). It is organised in six programmes, similarly to the EU FP7: (1) Human Resources, (2) Capacities, (3) Ideas, (4) Partnerships in priority domains, (5) Innovation and (6) Sustaining the institutional performance (not active yet, to be launched in 2011). Participation in all these programmes is competition-based.

Two complementary funding instruments to the RDI National Plan were launched in 2003 and have been continued to present:

The Core R&D Programmes are initiated and developed by the national RDI institutes on an annual or multi-annual basis in accordance to the National RDI Strategy priorities. They provide institutional funding to support institutes' own medium-to long-term R&D strategies (in addition to the funding gained through competition-based programmes). The Core R&D Programmes are validated by the line ministries of the respective institutes, and are approved and financed by NASR. In 2009 NASR supported 46 core R&D programmes, with a total budget of approx. €83m , which was about 30% higher than in 2008, in view of helping them maintain the R&D personnel, especially the young researchers trained abroad. In 2010, NASR funded 47 Core R&D Programmes (NASR, 2010).

Some national R&D institutes proposed the **Sectorial R&D Plans** for the technological development of the respective sectors.

Structural Funds (SF) for RDI activities

Sectorial Operational Programme 'Increasing Economic Competitiveness' (SOP IEC) aims to increase the competitiveness of Romanian enterprises and reduce the productivity gaps between Romania and the EU, with the specific target that Romania should reach 55% of the European average productivity by 2015. SOP IEC is also the only SOP which mainly targets the private sector, and as such is much more demand-driven and dependent on its attractiveness to potential beneficiaries than other SOPs that are mainly or completely focused on the public sector. Relevant for RDI objectives are Priority Axes 1: An innovative and eco-efficient productive system and 2: Research, Technological Development and Innovation for competitiveness. SOP IEC's Management Authority is the Ministry of Economy, Trade and Business Environment, while the Priority Axis 2 is managed by NASR as Intermediate Body.

SOP Regional Development (ROP) is the main instrument for regional development policies. It is managed by the Ministry of Regional Development and Tourism (MRDT) and covers all development regions, without any particular regional focus. Relevant for innovation objectives is Priority Axis 4 'Strengthening regional and local business environment' which supports regional and local business support structures (e.g. industrial, business parks, business incubators etc.), especially in the less developed and declining areas, regional and local entrepreneurial initiatives in order to attract investors, job creation and sustainable economic growth, technology transfer to microenterprises, in line with the Regional Innovation Strategies. This Priority Axis aims to narrow the large disparities between regions in terms of entrepreneurial and industrial development that have widened in recent years.

SOP Human Resources Development (SOP-HRD) supports the development of human capital and the increase of competitiveness by linking education, lifelong learning and labour market and providing enhanced opportunities for future participation in the labour market. Relevant for RDI objectives are Priority Axis 1: Education and training in support for growth and development of knowledge-based society, which promotes doctoral and post-doctoral programmes in support of research, and Priority Axis 3: Increasing adaptability of workers and enterprises supports the development of entrepreneurial skills and training in new technologies). SOP-HRD is managed by the Ministry of Labour, Family and Social Protection.

8.2. The national policy mix towards stimulating private RDI

The policy mix aiming to stimulate private RDI (Research, Development and Innovation) investment comprises:

8.2.1. Programmes of the 2007-2013 National RDI Plan

Romanian BERD relative to the GDP over the last 5 years was relatively stable in the period 2005-2007, at approx. 0.22% of the GDP, but dropped to 0.17% in 2008 and further to 0.15% in

2009, as a consequence of the economic crisis (EUROSTAT). The same trend was observed in the evolution of the Romanian BERD relative to the EU27 average: from approximately 0.18% of the EU27 average in 2005-2007, to 14% in 2008 and further to 11.7% in 2009, increasing even more the existing gap to the EU27 (EUROSTAT).

The main programmes of the 2007-2013 National RDI Plan are: Capacities, Partnerships in priority RDI domains and Innovation with two main focus:

Partnerships in priority domains (1 354 projects funded in 2009 and 1 347 projects in 2010). Most coordinating units were R&D institutions of national interest, especially universities, followed by national R&D institutes, and to a smaller extent firms, NGOs and SMEs[10].

Innovation (285 projects in 2009, 263 in 2010, all coordinated by firms that contributed with approx 43.6% of the budget in 2009, especially SMEs in 2010). The programme is characterised by a very high share of high-tech projects (97%) (NASR 2009). Commercialisation of results was under the expected level, because of results freezing in the experimental development stage generated b the contraction of public funding by 26.1% to the value agreed upon at the contracting stage (NASR 2009, 2010).

8.2.2. National technological platforms

There were 39 national technological platforms in 2009 and 32 in 2010 in several industries: alternative energy sources, genomics and plant biotechnologies, water management and quality control, manufacturing technologies, nano-electronics, nano-medicine, innovative medicine, sustainable chemistry, maritime transport, aeronautics (NASR 2009, 2010). Romania is also involved in several European Technology Platforms.

8.2.3. Joint Technology Initiatives (JTI)

Romania currently participates in 32 active *ERA-NETs*, and has also been part of other 16 ERA-NET that are now finished (inactive). By domain, the participation was highest in: Environment (8 active, 3 inactive), Food, agriculture and fisheries (5 active, 1 inactive), ICT (5 active, 1 inactive), Nano-science and nanotechnologies (5 active), Energy (4 active), Transport (3 active, 2 inactive). The lowest participation was in: Health (2 active), Government and social relations (2 active), space (1 active), Services (1 active). ERA-NETS are currently under the coordination of the Executive Unit for Funding Higher Education, Scientific Research, Development and Innovation (UEFISCDI), which has taken over this coordination task from the National Centre for Programme Management.

Participation in initiatives undertaken under Art. 185 of the Treaty of Lisbon (EUROSTARS) - In the 2nd call of the EUROSTARS programme (launched in 2008, results announced in 2009) Romania had 13 eligible proposals, of which 1 was accepted for funding following the international evaluation. In the 3rd call (September 2009), Romania had 11 eligible proposals, of which 4 have been accepted for funding as coordinator (E!5112 RELIS, E!5119 EUGEN).

Participation in European public-private partnerships - Joint Technology Initiatives (JTI) and European Technology Platforms - In 2007-2008, Romania registered as member to four of the approved six Joint Technology Initiatives: ARTEMIS (integrated information systems), ENIAC (nanotechnologies), IMI (innovative medicines) and CLEAN SKY (aeronautics). Romania is a founding member of CLEAN SKY, in which it participates through a consortium of two research institutes and two plane manufacturers. Romania is also a founding member of IMI, through the

[10] Source: NASR National Authority for Science and Research 2009, 2010

Romanian Association of International Medicines Manufacturers. In November 2009 Romania became full member of ENIAC Joint Undertaking JU15.

8.2.4 Tax incentives for R&D

In general, tax incentives are poorly represented at present, as only a few remained active after the revision of the Fiscal Code in 2007 and the cancellation of many measures in 2009, as part of the austerity measures adopted by the government to limit the effects of the crisis. In this context, the adoption of new tax incentives, although promoted in most of the recent policy documents, has faced a lot of obstacles in 2009 and 2010. Specific measures for RDI in the Fiscal Code include: VAT exemption for RDI activities performed under the National RDI Plan or financed in international, regional and bilateral partnership. The tax regime for micro-enterprises that was in force in 2009 stipulated a reduced tax of 3% of the turnover, but the provision was modified in 2010 with the option to pay a 16% flat tax or a tax on profits, depending on the company turnover[11]. In 2011, the 3% tax for micro-enterprises was reintroduced, as it was considered to be more favourable to firms and less problematic for the tax collection system than the previous dual provision.

An income tax exemption for IT specialist programmers (software engineers, system designers, system engineers or analysts) has been in force in 2009-2010 (introduced in 2001 and also continued in 2011, due to its positive economic effects on economic growth and considerable improvement of the IT sector contribution to GDP)[12]. There are also tax incentives for the establishment and development of an industrial park, in terms of a more favourable regime of local taxes. In June 2010, a project law granting tax facilities to young entrepreneurs (up to 35-years old) setting up their first enterprise was approved by the Parliament[13]. Other deductible costs under the Fiscal Code are related to the management of information systems and quality management systems; marketing, market study, promotion of existing or new markets; participation in trade fairs and exhibitions; environmental protection and conservation. The Fiscal Code also introduced flexible options for the depreciation of some categories of expenditure[14]. In 2010, the Ministry of Finance approved NASR's initiative to support the private sector by increasing the deductibility of R&D expenditure[15] from 100% to 120% for units whose R&D activities account for at least 15% of their total yearly expenditure.

8.2.5. "Increasing economic competitiveness" through SOP and ROP

These Sectorial and Regional Operational Programmes (SOP and ROP) are referring mainly to SOP (Priority Axes 1 and 2), ROP (Priority Axis 4) and SOP-HRD) (Priority Axis 1 and Priority Axis 3).

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[11] If the turnover is below €100,000 the company can pay a tax of 3% of the turnover in the next fiscal year. If the turnover exceeds €100,000 then the company must pay the tax on profit.

[12] Continuing this measure in 2011 was appreciated by some as the only effective anti-crisis initiative of the government, as "it brings a €450m annual contribution to the state budget, which represents the annual gross salary of 83,500 public sector employees or the annual pension of 235,000 pensioners" (http://www.ziare.com/articole/eliminare+scutire+impozit+programatori)

[13] The law stipulates that young entrepreneurs (up to 35 years old) can set up their first enterprise with a capital of min. 10 RON (€2.5) and benefit of salary and profit tax exemption for 3 years.

[14] Purchase of patents, copyrights, licenses, trademarks or trade; manufacturing and other similar development expenses (purchase of technological equipment, machinery, tools, computers and peripherals); non-taxable revenues of patent owners for 5 years from the first application.

[15] Law n°. 2086/4504/2010

The dynamics of operations implemented under these SOPs shows several key features of the public and private RDI institutions:

high interest of the scientific community in public research infrastructure and a lower interest in administrative and project management projects;

high interest of the scientific community for complex RDI projects involving foreign specialists, and relatively low interest of enterprises in RDI projects in partnerships with universities and research institutes. This low interest can be attributed to some extent to the effects of the economic downturn, which obliged many enterprises to adopt a survival rather than a collaboration strategy, but a more likely explanation is their limited internal R&D capacity, especially in large enterprises. The difficulty of providing co-financing (up to 75%, apart from non-eligible expenses) and some restrictions on eligible expenses also contributed to the low response rate from enterprises.

strong investment need of SMEs in order to carry on existing operations and survive on the market, reflected in the high level of investment financing they requested, exceeding by far the budget allocated, while consultancy financing remained well under the budget allocated.

poor innovative capacity of Romanian enterprises and difficulty to access Structural Funds for RDI without a means of facilitating access to capital to cover co-financing.

low level of public-private partnerships and lack of motivation of local public authorities participating in local and regional development projects in preparing and submitting project proposals. This, in turn, is determined by the state aid restrictions applicable to business support, the high co-financing share of the projects (up to 50% of eligible expenses), unclear ownership provisions in respect of land and building(s), and lack of clear regulations on public-private partnerships. The Law 178/2010 on public-private partnerships clarifies these aspects.

large number of cancellations of signed contracts (50 by end 2009). Some were caused by the failure to provide co-financing in the context of the economic crisis, while others were caused by irregularities.

As a conclusion, the success of the current policy mix in increasing private R&D investment is very modest taking into account the declining public RDI spending levels since 2007, and was further reduced by the financial limitations induced by the economic crisis. Several key initiatives to stimulate private RDI investment were expected to start in 2011 (e.g. the elaboration of a National Innovation Strategy and four foresight studies in nanotechnologies, services, green energy and cell therapy to assess Romania's potential to participate in EU and other international programmes in these fields).

9. Risks and opportunities for attaining the objectives of 2007-2013 National RDI Strategy

9.1. Framework for private investment in R&D - Venture capital and private equity

The Romanian venture capital market is at an early stage, because of the unfavourable tax regime for private equity investments and underdeveloped domestic fund structure for private equity and venture capital. The tax regime is one of the most burdensome in the world, with companies paying 113 taxes per year, accounting for nearly 45% of the firm profit and spending 222 hours per year on tax payments (World Bank, 2011). A recent study conducted by the European Private Equity and Venture Capital Association and KPMG ranked Romania 24th out of 27 countries surveyed in terms of tax regime for private equity investments (Vrinceanu, 2009), pointing out the great potential for private equity investments in Romania, especially in infrastructure development projects.

The survey shows that in spite of some slight improvements, the Romanian risk capital market continues to be affected by unfavourable regulations for pension funds, a difficult fiscal

environment and the lack of references to private and risk capital in the legislation. The survey also pointed out that Romania does not provide any incentive or tax reduction to encourage private and risk capital investments and the fiscal system is rudimentary and ineffective, being used only for tax collection. Because of these weaknesses, the fiscal system contributes only 32% to the GDP and encourages tax evasion in some sectors, like agriculture and construction. Financial instruments are also poorly developed, contributing about 30% to the GDP, in contrast to some 120% in other European countries. Although the creation of risk capital funds for innovation was foreseen in several policy documents (e.g. the 2007-10 National Strategy on RDI, the 2007-10 National Reform Plan, etc.), such funds are in progress to be created and the JEREMIE Fund for Romania just became functional.

9.2. The effects of the financial crisis on the Romanian economy

Romania's economic performance declined significantly in 2009 compared to 2008 after having been hit hard by the global economic downturn that became more visible from the second half of 2008. Among the most important crisis effects were falling exports due to declining external demand, reduced access to credit as international financial markets froze, declining internal demand caused by rapid and massively dropping exchange rate, declining foreign capital inflows and high bank interests. Consequently, the GDP slowed down and the unemployment rate went up, especially for private firms in construction, road transport and chemical industries, extraction of crude oil and natural gas. Large firms have been hit, but even more dramatically so, the SMEs. SMEs bankruptcies doubled in the first half of 2009 compared to the same period of 2008, particularly in trade, construction and real estate, and start-ups followed a similar trend (Mediafax, 2009).

The rising unemployment rate created labour market imbalances, aggravated by labour shortages and large migratory outflows, skill obsolescence, low adult participation in education and training, lack of basic skills amongst young people, resulting primarily from weaknesses in the education system and inefficient active labour market policies. Both anti-crisis plans proposed by the government (in January[16] and May 2009[17]) have failed, the public deficit continued to grow and Romania applied for a €20b financial loan from IMF (including a share from the EU, the World Bank and the EBRD). The money is channelled over 2010-2011 and will be repaid by 2015, at a 3.5% annual interest rate (Interpress Service, 2009).

9.3. The weak R&D capacity in the business sector

The R&D capacity of Romanian domestic firms is weak, since most of the R&D potential is concentrated in the national R&D institutes, while private firms are only marginally involved in R&D and innovation. The innovative capacity is low, both in SMEs and in large firms (see the chapter 2. How many SMEs are innovative?). Only 21% of the innovative enterprises were successful innovators in 2004-06 (National Institute of Statistics, 2010a) and only 15% were both product and process innovators. SMEs accounted for the largest part of innovative companies (nearly

[16] The first anti-crisis plan comprised a package of 74 measures (investments in roads, highways, rehabilitation of residential buildings, health and education infrastructure, agriculture, environment, tourism, etc.) but no explicit RDI measures, which reflects the low visibility and importance of these fields in the country. The plan was widely contested on various grounds, such as addressing the effects and not the causes of the crisis, providing state aid for unprofitable industry sectors, etc. and had significant implementation flaws, which considerably delayed the expected effects, while some measures have not been adopted at all.

[17] The second anti-crisis plan included state aid schemes for firms in strategic sectors (agriculture, constructions, infrastructure, tourism, environment and health), guarantees for the credits contracted by youth for the first home purchase, support to agricultural production and simplification of tax and tariffs.

90%). A 2008 study of the National Institute of Statistics shows that SMEs have a higher share of innovation expenditure on machinery, equipment and software, and a higher R&D expenditure compared to large firms (about 30% in SMEs, 15% in large firms). Moreover, SMEs place a higher focus than large firms on the development of own R&D capacity rather than on acquisition of external knowledge, while large firms spend more on acquisition of external knowledge.

According to Erawatch 2010 for Romania the low levels of business R&D, lower in large firms than in SMEs, are rooted in several structural and managerial deficiencies, including:

poor competitive environment;
firms' reluctance or inability to take on financial and commercial risks arising from R&D; and
absence of financial services and instruments to mitigate the risk.

The European Innovation Scoreboard (EIS) 2009 indicators also reflect this poor innovation performance. Romania is one of the growth leaders among the Catching-up countries, with an innovation performance well below the EU27 average (SII in 2009 = 0.294, in slight progression from 0.278 in 2008), but a rate of improvement that is one of the highest of all countries. Relative strengths, compared to the country's average performance, are in Innovators and Economic effects, and relative weaknesses are in Finance and support and Throughputs. Over the past 5 years, Finance and support and Throughputs have been the main drivers of the improvement in innovation performance, in particular as a result from strong growth in Public R&D expenditures (18.0%), Private credit (25.8%), Broadband access by firms (46.7%), Community trademarks (34.5%) and Community designs (37.3%). Performance in Firm investments, Linkages & entrepreneurship, Innovators and Economic effects has increased at a slower pace.

9.4. Industry structure and FDI[18] distribution

The capacity of industry revival based on innovation is low. The country does not have an innovation-based development strategy and innovation has a low-profile among government priorities, although it is formally recognised as a priority of the 2009-2012 Governing Programme. Nearly 90% of innovative enterprises were SMEs in 2004-06 (National Institute of Statistics, 2010a), but SMEs are also those that have been hit the hardest by the economic crisis and their innovation activities have been sharply reduced. Also, the largest concentration of innovative firms, mostly in traditional processing industry, rather than in emerging R&D intensive industries, points to a low capacity for innovation-based revival. Fuelled by the large privatisation programmes of the 1990s, FDI was encouraged by the low labour cost, proximity to the euro-zone, successful disinflation, high economic growth rate and increasing domestic market potential. The record FDI inflows that Romania benefited of over 2004-2008, thanks to macroeconomic stabilisation, strong GDP growth, large scale privatisations and the prospect of EU membership, have dropped by more than 50% in 2009 (National Bank of Romania, 2009). In addition, successive wage negotiations have driven up unit labour cost, affecting Romania's international competitiveness, especially in light industry, in favour of low-cost Asian countries. Faced with slowing FDI inflows and with an erosion of the low-cost advantage in certain sectors due to skill shortages, partly due to large outward migration, Romania needs to step up efforts to attract investment in higher value-added sectors, which are less dependent on low wages, by further improving the business climate, upgrading infrastructure and developing labour skills (Pauwels and Ionita, 2008).

[18] FDI: Foreign Direct Investment

9.5. National RDI strategy – what should be improved?

Given the reduction of public R&D and innovation spending in 2009 (50 % less than foreseen in the multiannual planning and 25 % less than in 2008) and with no significant changes thereafter, there are concerns about how to ensure adequate funding for ongoing research programmes and projects. In light of this, the Romanian government adopted in May 2010, in line with the conditionalities attached to the Memorandum of Understanding (MoU) of the EU financial assistance to Romania concluded in June 2009 in the framework of the EU-IMF adjustment programme, a plan setting out a number of measures with a view to improve the efficiency and effectiveness of R&D and innovation. These measures aim at facilitating the adjustment to more limited financial resources, ensuring the consistency of R&D and innovation policies and programmes, stimulating private sector activities, as well as establishing and implementing uniform procedures for monitoring and evaluation of R&D and innovation activities.

The challenge remains to increase the innovative potential of enterprises, particularly SMEs. Another major challenge is to improve technology transfer and the business support infrastructure (business incubators, technology transfer offices, science and technology parks and clusters) which is still underdeveloped and poorly functional, in spite of recent significant improvements. In this respect, there are bottlenecks in the absorption of foreign technology as well as challenges to reduce high innovation costs, particularly for SMEs, which could be addressed through appropriate assistance programmes, the availability of information regarding technology, and facilitating access to financing instruments.

Moreover, partnerships among industry, university and R&D institutions could be improved and public funding could be used more to leverage private sector investments, strengthen links between business and research institutes and better adjust research to market needs.

An overview of the key barriers to increasing private R&D investment and opportunities generated by the policy mix is presented in the Table 3, hereafter.

Table 3. Barriers and opportunities of the policy mix

Barriers to RDI investment	Opportunities generated by the policy mix
Low innovative capacity of industry, low innovation culture, predominance of technological renewal based on imported technologies, products and services rather than on domestic ones	Stimulate regional innovation capacity through regional innovation strategies correlated with the National RDI strategy and other strategies of the country (education, employment, IT and communication, health, energy, environment).
Weak science-industry linkages	Stimulate the third mission of universities through higher support for R&D in universities, strengthening of entrepreneurial education in universities, introducing measures to stimulate academic entrepreneurship and technology transfer from university to industry (e.g. creation of spin-off firms[19], mobility between university and industry)

[19] The support systems to facilitate knowledge transfer from universities to the economy are in an early stage. Consequently, spin-off creation based on recent research results, patents or licenses is a slow process, which has been further hindered by the lack of capital and difficult access to bank financing determined by the economic

Economic structure of industry mostly based on traditional manufacturing industries, with little capacity for new technologies with high knowledge and R&D content	Increase the funding for knowledge-intensive industries, improve business infrastructure, provision of entrepreneurship and innovation incentives
Virtual absence of venture capital for RDI, unfavourable tax regime, dysfunctionality in the market competition and public procurement system, high systemic corruption and weak public administration	Introduction of venture capital for RDI schemes, use of FDI for RDI activities. Using of JEREMIE support to leverage private financing

10. A structural framework: From individual support to a collective dynamic

Romania has no longer advantages of lower work cost attractiveness in order to rely on FDI for catching–up with the economic development of the other European countries. Financial crisis came to early after the accession of Romania to the EU and Romanian SMEs, which represents 99 % of all national enterprises, even with a consolidated role in the economy, are confronted with financing obstacles for their development.

Insufficient financing has negative effects on innovation and represents one of the most important factors that hamper Romanian innovation. Financial constraints have been identified as having mainly two natures: a financial gap and credit rationing.

The financial gap should be covered by the business angels and venture capital. In Romania, these structures should be reinforced. Furthermore, policy should aim at creating proximity investment funds (like French FCPI and FIP) to provide SMEs with the equity they need to strengthen their position and to permit them to diversify the origin of financial resources received.

The credit rationing is adjusted through public reinforcement of guarantees for the banks to finance the riskiest enterprises – and in particular the innovative firms. The existing National Credit Guarantee Fund for SMEs together with the Counter Guarantee fund of Loans to SMEs should be strengthen by the recent funds brought by the European Investment Fund through JEREMIE Holding Fund. This fund should bring flexibility regarding co-participation financing in EU financed grants, the benefits of a portfolio approach, the recycling of funds and the leverage of private financing.

In addition, a set of public funding instruments is aiming to finance RDI both in public and private sector. Given the reduction of public RDI spending from 2009, the main challenge remains to increase the innovative potential of SMEs. It can be done through adapting the pure grant approach for financing innovation and using of revolving funds which leverage private financing being managed on a portfolio basis, which should be efficiently with the support of JEREMIE. A set of risks and opportunities have been identified as to support future key initiatives to stimulate private RDI that should be soon taken.

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crisis. SOP Increasing Economic Competitiveness, Priority Axis 2, Operation 2.3.1 – Support for innovative start-ups and spin-offs, which was launched in 2008 with a

total budget of €18.5m, provides funding for the creation of spinoffs implementing recent results resulted from research projects, doctoral theses of researchers employed in public R&D institutes or academics from public universities. This operation also supports innovative start-ups (implementing research results or a patent or other IP right) which are micro-enterprises or small firms with maximum 20 employees and no older than 3 years.

SMEs are generally too small to undertake an innovative project by themselves and should be supported in collective projects to which universities, research centres, large firms and other actors commit as well. The shift from policies concentrated on individual actions to systemic policies involving interaction and synergies characterises the changes in Romania over the past years.

As far as SMEs are concerned, Romanian industrial policies are characterised by a major evolution: the importance of SMEs as a target for policies has grown over time. Originally addressed in measures concerning the productive system as a whole, SMEs are increasingly identified as the sole recipient of aid. Devoted to what is often improperly considered a homogeneous class, the measures implemented aim at strengthening SMEs' place in the national productive system, helping them to circumvent the impairment that leads to high insolvency rates and limited growth.

In this perspective, three intermediate goals for industrial policies that aim at promoting innovation, competitiveness, and macroeconomic growth are identified:

Small firms have to grow, so that they can reach a minimum efficient[20] scale that permits them to increase their probability of survival and, better for long-term expectations, to undertake bigger projects.

Production cost kept high by the low scale of production has to be artificially decreased.

Public policy must wider the access to new resources or new markets for innovative SMEs.

Over the past few years these goals have remained the same, giving rise to many lines of action undertaken by some institutions acting at a national or local level. Three main dimensions should be emphasised: the content of policy (employment, R&D, etc.), the administrative level, and the medium of action (subsidies or tax rebates). These three dimensions are reminders of the distinction between state grants to individual firms and domestic subsidies to collective operations implemented at industry level introduced in the typology proposed by the European Union. Whereas the former is decreasing, collective actions are expanding – mainly because they permit market failures to be solved without introducing any bias into the competition among economic actors.

Public measures that aim at strengthening SMEs belong to the second group. This is also the case for R&D and innovation, environmental industries, energy saving development of capabilities, and local development.

In order to present these policies in a systemic fashion, a framework used by Favereau and Quiers-Valette (1998) to illustrate the diversity of economic policies can be transposed to innovative SMEs.

A first level distinguishes the policies according to their goals. On one hand, they can aim at changing the behaviour of economic agents to improve their performance realising already known productive processes. On the other hand, these policies can promote the adoption of new behaviours to replace obsolete ones or to introduce a radical change in the routines of the firms. A second level differentiates the kinds of support: public procurement, grants conditioned by successful co-operative actions, etc. Four families of policies represented on Table 4 can thus be identified.

[20] Minimum efficient scale (MES) is a term used in industrial organisation theory to denote the smallest output that a plant (or firm) can produce such that its long-run average costs are minimised. This concept is useful in determining the likely structure of a market. For instance, if the minimum efficient scale is small relative to the overall size of the market (demand for the good), there will be a large number of firms. The firms in this market will likely behave in a perfectly competitive manner due to the large number of competitors.

Table 4. A general typology of SME policies

		Goals	
		Change in the existing behaviour	**Adoption of a new behaviour**
Means	**Incentives through changes in costs of production**	**TYPE 1** • Investment subsidies • Reduced labour cost • Access to the public procurement	**TYPE 2** • Policies directed at lowering the cost of business support services • Subsidies for innovative firm creation • Innovation/R&D policies
	Incentives conditional to inclusion in a collective process	**TYPE 3** • Collective or systemic projects • Cost sharing	**TYPE 4** Grants for collective research conducted in competitive clusters

- **Type 1** groups together policies involving price distortions, subsidies, tax burden decreases, that aim at creating jobs and promoting investment. Pushing down the prices of production factors aspire to lessen the drawbacks of small-scale production. Investment subsidies and rebates on payroll taxes (or social contributions) constitute the backbone of these sorts of policies. They were first introduced in France in the seventies and were usually applied to any SME employing unqualified workers. They have now been strengthened to promote the employment of highly qualified workers (researchers, engineers, etc) in small firms.

- **Type 2** also aims at reducing costs of production, but their ultimate goal is completely different. Instead of providing better access to resources already used in the production process, these measures are targeted to change the recipient's behaviour. The so-called "business support grant" is given to any SME having recourse to external services, in order to improve its managerial know-how. Promotion of RDI is the scope of the Inno-voucher, for example, which has been launched in Romania in October 2011 with a budget of 2 millions euro, under the management of NASR. What is expected from these means is not better price competitiveness, but a higher level of efficiency thanks to an increase in productivity, better organisation and deeper involvement in structural change.

Transition from Types 1 and 2 to Types 3 and 4 rests upon the idea that improvement of the internal organisation of firms is not enough to ensure their competitiveness. Instead of helping them strengthen their internal capacities through individual and specific grants, policy makers consider that an additional element should also be taken into account: the fact that firms and other institutions work together.

- **Type 3** groups together measures that promote collective projects shared by several economic actors but led by an external leader (venture capital, business angel, syndicates, associations etc…). Even these actions can result in a decrease of production costs for SMEs that belong to the group; the main goal is to initiate a common strategy shared by many SMEs. "Technology diffusion networks", "clubs of innovative firms" and "local innovative clusters" are some (of the many) examples of such policies.

- **Type 4** is the most recent strand of policy initiated by the states in Europe. Competitiveness clusters resulting from the "local productive systems" implement a common economic development strategy that is consistent with the area's overall development strategy; create extensive partnerships

among players for specific projects; and focus on technologies for markets with high growth potential. By building a network of players at the forefront of innovation, the ultimate goals of the new policy are the creation of new wealth and jobs in local areas. At an analytical level, these policies focus mainly and sometimes even only on the necessary adoption of co-operative behaviour by firms, research institutions, universities, etc. in order to promote innovation.

What distinguishes the 3rd and 4th types of policies lies in what is expected from the firms themselves. Instead of reacting to external incentives and being consumers of grants and subsidies, firms are supposed to be proactive in a co-operative process built in order to produce innovations that will foster the future competitiveness of the industry, the area and the domestic economy.

Tax exemptions at an individual level remain favourite tools because of their neutral effect on public expenses in the short term[21] there has been a definite structural change in the policy-making process over the past years. Instead of being oriented mainly towards the firm as an independent actor, new policies accord priority to collective processes in which a large number of firms and other institutions take part. This is especially clear in the case of the competitiveness cluster, for which the mix of different organisations is a key condition to obtain finance.

Therefore, instead of focusing on the innovative SMEs at an individual level, their role and their place in the financial system must be conceived in accordance with their involvement in networks and other clusters in order to be more effective than individual strategies when it comes to launching a domestic growth process.

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MEDIATION - THE ONLY VIABLE SOLUTION TO RESOLVE THE CONFLICT IN ROSIA MONTANA

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ABSTRACT

In modern society, located in a continually growing population, one of the main problems is related to the exploitation of natural resources, a source of richness limited and usually non-renewable.

That is the exploitation of Rosia Montana, where an old gold mine continues to produce interest for what might be called "gold fever" in Romania.

But, unlike the ancient and medieval times, where such operations were encouraged as a development factor, today environmental protection and sustainable development theory says that such mining destroys the nature and the community are serious demage, even if part of the local community wants to work, further mining, considering it a way of life and a reliable source of income.

Thus we have two opposing positions camps: those who want to protect nature and those who want to exploit it, and in such a dilemma can not get out only with mediation

Mediation is the only one who can bring the same opponents at the negotiation table, in the presence of specialized environments, and fully impartial stranger to conflict, to find a common solution to resolve the conflict, thus brains "peace" sustainable, that can be subsequently implemented.

This study aims to review the advantages and the role that mediation can bring it into such a sensitive issue, as the Rosia Montana

***Keywords**: conflict, mediation, environment, natural resources, gold mine.*

1. Introduction.

Rosia Montana is one of the oldest cities in Romania, documented before the conquest of Dacia by the Romans, as wax tablets found in the mines at Rosia and museums spread across Europe, considered by experts as a birth certificate the Romanian people.

Moreover waxed sheet no. XVIII, dated February 6 131, is known for the first time the name of the village of Alburnus Maior, here are the places where Dacia is extracted gold, making Rosia Montana as one of the oldest settlements in traditional precious metals operation in Europe hypothesis confirmed by tests carried out at Bochum (Germany) on the mining of Orlea, Carpen and Gauri.

All Rosia Montana territory hundreds of households are made in time with great toil, a historic building architecture and the age and various administrative buildings, economic, social and cultural, a unique mining museum with pieces held, memorial houses, an archaeological reserve and many other wonderful geological and vigorous roots of our history, but here is also rich resources, estimated by experts at about 330 tons of gold (the largest gold deposit in Europe) and 1,600 tons of silver (whose removal would bring a net profit of 915 million dollars), but nothing excludes the emergence of a third stakes: copper, at Rosia Montana there are the greatest career in Romania for copper surface porphyria belonging to the state.

It notes the importance of the village and the area as a nature reserve, protected by law, the pace of life to carry on as before in agriculture, animal husbandry and ecological tourism, and value precious metal deposits that are in these places and can their operation, although the environmental consequences arising from this.

This will be analyzed in a totally objective, the importance of precious metals deposit and benefits and damages caused by such exploitation in the community, in order to see how it is possible

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to resolve between two different lifestyles through mediation, the only way, in our opinion, which can lead to finding a viable solution for the entire community.

2. Precious metal deposit at Rosia Montana - costs and benefits.

The costs of precious metals deposits exploitation, designed for a 16-year operational period, in Rosia Montana amounts to a total investment of $ 615 million (reported, it is true to a profit of $ 915 million), which would bring direct benefits to the state $ 583 million (taxes, fees, dividends, royalties and profit, given that the state owns 20% of RMGC (Rosia Montana Gold Corporation - the company that wants to do this operation, 80% owned by Canadian company Gabriel Resources and 20% of Romanian State by Minvest Deva).

Among the investment involved in such exploitation are displaced population (approximately 970 households in Rosia Montana and Corna, over 2000 people, who have already spent $ 20 million to acquire 43% of them), demolition of buildings (including historical monuments), 8 churches (2 of them will be rebuilt in other locations) and moving some cemeteries.

It is also about building a pool and accumulation of waste (tailings pond with a storage capacity of 250 million tons of tailings, with a body of water spread over an area of less than 80 ha, 1200 ha of the total how is the actual operation) behind a dam 185 feet high waste rock which closes the valley of Corna, resulting in surface modification of biotopes of the site and land use categories in which the worst areas will be reduced irreversibly pastures and meadows from 60% currently to 22% and forests, from 18% to 5.6%, while increasing productive land area 13 times from 5% currently to 65%.

But it's not just about money in this operation, but also the implications it has on the local community and the environment, because the operation (which takes place in a populated area) involves the destruction of the Rosia Montana community, while the displacement and relocation of the population, leading to a loss of important social cohesion by destroying the local community, which has so far affected by depopulation Apuseni mountains, a sparsely populated area.

May occur and the implications for biodiversity, because mining at Rosia Montana in four open pits Cetatea, Carnic, Orlea and Jig, as presented, will lead to changes in forest composition by changing the age and species types forest (while the Rosia Montana area includes important habitats and species of fauna and flora that are protected under national and international legislation on the conservation of natural habitats and wild flora and fauna) and can lead to destruction of wetlands, which can be the effect of altering migration routes.

There are also issues that the operation of the surface will produce a serious disfigurement of the landscape and the proposed dam was built, it provides security in extreme situations, as demonstrated by the experience of several countries where serious accidents occurred in various mines. The presence of such a storage tank and dam in the immediate vicinity of Abrud is a big risk and there is no guarantee that an accident can not occur.

Another cause that must not forget is the fact that most environmental problems associated with mining is the generation of ARD, which can be active for decades, perhaps centuries, and will be stored in sterile whose dam, built after a model "upstream" offers no guarantee that will be resistant to earthquakes, and the conditions under which sustainable development has no chance without the existence of a quality environment[2].

Besides the feasibility study does not present risks of a landslide or earthquake, or standards that will meet the dam to prevent such risks, and sodium cyanide in the process and waste storage pond containing cyanide residue, produced by "neutralizing" (very toxic) and heavy metals are serious environmental problems under national legislation and EU.

[2] Daniela Marinescu, *Environmental law treaty* (Bucuresti: ALLBeck,2003), 37.

Be taken into account that the concentration of gold will be very close to the limit of profitability, so that the feasibility of operation will be highly sensitive to volatile price of gold and increasing investment costs, especially amid the privatization of many sectors in Romania is that of water, electricity or fuel, with possible disruption of Rosia Montana Gold Corporation work on mining before the deadline and without meeting its obligations, working with disastrous effects in an area that needs long-term economic solutions based on renewable resources, especialy is the oldest documented mining settlement in Romania, which houses important archaeological remains, including Roman temples, fortified buildings, galleries and mining.

On the other hand a good part of the population expected to start mining work could have a stable job, in condition that Rosia Montana Gold Corporation promise to provide a number of jobs and continue the tradition of work in existing mining families of all generations, especially since the company Rosia Montana Gold Corporation has been extremely convincing with locals who have offered free mobile phones, especially the elderly in remote areas, "Goldu", as locals say to the Canadian company, becoming a kind of Republic of Montana Gold Corporation, which acts as a paternalistic state: buying property in the area, is the largest employer, largest consumer of resources and the largest investor.

More investment is seen as an opening to the outside of a closed community such as the Apuseni Mountains, which would attract new investment in infrastructure, construction, tourism and services, the possibility of building roads to link the of the other cities, facilitating an easier life for the local community, especially the Rosia Montana Gold Corporation plans talk of restoring the area after the operation.

3. Legal situation of Rosia Montana exploitation

Following the processes started by non-governmental environmental agreements for drilling had been suspended for 39 judicial drilling points, by irrevocable sentence, making it impossible for the moment, continuing the company's activities, even if it is a small part of 1,000 points of the drilling.

The situation of the urbanism certificate is not clear because the Ministry of Environment announced the impossibility of continuing the procedure of environmental impact assessment for the Rosia Montana project, after initially suspending the certificate by the court, and dismiss the appeal the company's suspension of the certificate, obtained by being required to issue any necessary authorizations RMGC activities

Problems are also archaeological discharge certificates, essential in an area with many historical relics from Roman times and without which it can issue construction permits for proposed surface mining, while the NGOs, who oppose project go to the courts for any new certificate obtained by RMGC.

But key to the whole equation is the Ministry of Environment and Forests has rejected environmental agreement at the end of the procedure involved analyzing the quality of the report on environmental impact assessment (EIA) done by RMGC, while the analysis includes public consultation (in Romania and abroad), the examination report by the numerous technical committees and obtaining the consent of several ministries and government agencies on specific issues (agriculture, health, transport, tourism or culture).

Especially as the officials are quite confused about this project, there are contradictory statements ranging from critical project as stated Codrut Seres, Minister of Economy and Commerce in the Journal of November 4, 2005: "*I do not think there is something more than post-communist views a mono-industrial town ravaged by the "new capitalist system." (...) The mines at Rosia Montana is as*" up to acceptance.

Problems are, also, outside Romania, Hungary, which fears the risk of pollution of the Tisza River Basin, categorically opposing project and threatening European Court of Justice for its realization.

4. Local perception and the role of mediation in conflict resolution.

Civil society is divided, various NGOs and public institutions, including the Romanian Academy, intervening on both sides of the fence, including the vicious fight at slogans: the "***Let's Save Rosia Montana***", the new RMGC slogan from investors, at the opponents of the "Alburnus Maior" whose call is "***Save Rosia Montana***".

and most importantly and directly affected by the mining population is divided between those who want to work on the mines, hoping for a better life, even if they are aware that the environment that affected seriously and those who do not wish operation, wanting a traditional lifestyle based on domestic livestock, agriculture and why not, ecotourism.

Because the camps are about equal a clear solution seems to appear out of nowhere, so clearly needed, yet not a debate because debates have been enough but a mediation.

Mediation is a process in which a neutral person conflict, impartial mediator brings the parties has been designated to the negotiating table to determine their own to find a solution[3] under his supervision.

It s also a major difference and face trial on Rosia Montana, where a foreign judge would give a solution at all, without being himself part of the community. In mediation community to find solutions that would be most convenient for the community, possibly with the assistance of recognized experts, such as those of the Romanian Academy.

Variants exist because man is a superior being who lives in the community so the community knows she must protect not only him as being single, keeping the memory of past generations, but also providing future generations[4].

Under these conditions a mediation involving these factors, local community, local authorities and specialists recognized by the Romanian Academy, with Rosia Montana Gold Corporation has great chance of success, being able to weigh the benefits of mining - jobs, leaving them with financial stability, primarily for residents, invest in infrastructure: roads, hospitals, shops, the possibility of better communication with other communities and out of isolation, leading consequently to an increase in local community / birth with the disadvantages of this operation, namely: environmental destruction and the traditional life style, lack of guarantees that this project will be carried out and will be made all the works to redevelop the area, as if after starting operation RMGC bankrupt or refused operation will lag behind them a real ecological disaster, destruction of existing settlements and historical sites important to the history of Romania, the local community in the coming change component of many people working in foreign service for a longer or shorter period of time, concerns about way of life after operation will be closed, that the sources of income of local communities, given that various substances used in mining, damage soil, and thus agriculture and livestock, and destruction of historical sites, corroborated by traces of exploitation mining can scare potential tourists in the area.

More than a successful mediation in this matter would be of benefit for all local communities in Romania, because it would provide a way to solve their local problems, which can be translated and a responsibility of the parties involved in this problem is the mine from Rosia Montana, to be the initiators of a new era of dialogue and consensus in solving local problems.

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[3] Adina Oprea and Dragos Marian Radulescu, "Mediation (yet) start-ups," Dezbateri Social-Economice 1 (2012): 4.

[4] Federico Mayor, *Memory of the future* (Bucuresti: Romanian Cultural Fundation,1995), 140.

Do not forget that just because the purpose of mediation is to help the parties find a favorable solution for everyone involved, so that no the court of law can achieve.

5. Conclusions

This study examined the tense situation at Rosia Montana where existing reserves of gold and silver have attracted the interest of foreign companies that want their operation, even there are the risk to destroy existing settlements, some important historical artifacts and the environment

To compensate the damage the company promises to create jobs in a poor area, investment in infrastructure, relocation and rebuilding villages destroyed area after operations cease.

But part of the community with environmental NGOs, do not want such changes and to try to preserve current life style and to save resources for future generations in mining for a sustainable development.

Court sentences obtained so far, debate and studies have made no evident majority camp and no viable solution so the single way to solve this problem remains appealing to mediation as only bringing two sides together with local authorities, representatives of Rosia Montana Gold Corporation and in the presence of specialists of the Romanian Academy can find a viable solution for everyone, making it a local problem-solving model for all communities in Romania.

More than that and studies by scientists should consider calling the opportunity to mediation as the only viable option the parties themselves negotiate their own interests and find solutions that can be applied and respected by the entire community especially.

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THE CULTURE OF COMMUNICATION IN THE KNOWLEDGE SOCIETY
Gender differences in the listening process

ELENA NEDELCU*

Abstract
We can't speak about a "knowledge society" in the absence of a culture of communication, more precisely in the absence of a culture of non violet communication.
This type of culture produces the context for the affirmation and accomplishment of the human being, and it also intensifies the processes which imply creation and innovation in all the areas related to the social aspect.
In a world lead by man, non violent communication requires the valorization of the empathetic listening, of cooperation, in general and particularly in gender relation.
The paper intends to show that active listening represents an ability which must be learnt by all the people, but mostly by men who score greater deficiencies than women regarding this issue.

Keywords: *communication, listening, communication style, culture of communication, gender differences.*

Introduction

People can't help communicating. Non-communication is a form of communication. Although they communicate 11 hours a day (L. Sfez), most people is not satisfied by the communication quality. Their dissatisfaction is related to the violent or superficial or insufficient character of the interpersonal communication, to the sentiment that, too often, they are not listened and understood.

Or, in the development of the satisfactory human relations, one of the most important factors is the communication ability, the ability to demonstrate the kindness and the comprehension in communication. People complain the absence of such things, the insufficient[1] manifestation of the empathy and kindness in communication. Women complain more then man. Why? The paper bellow tries to find some answers starting from the analyze of the gender differences in communication, especially in listening

Listening is a very strong requirement both in interpersonal and organizational communication (J. Salome, 2002, p.102). Nevertheless, people are inclined to talk rather that to listen. We like to hear oneself rather than hear other people. And that is because each of us considers that his problems are the most important, simply because these problems belong to him. A famous history of an American producer, otherwise a seductive man but unable to listen. After he is talking to his girlfriend for an hour about his recent professional achievements, he stops embarrassed and tells her: Don't you want to say something? I have spoken so far only me. Would you like to tell me what do you think of my works?

How important and how difficult is to listen?

Listening is a very strong requirement both in interpersonal communication (J. Salome, 2002, p.102) and organizational communication.

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Although they spend most time listening, people does not pay enough attention to the listening skills. Studies show that the percentage time devote to the 4 communication skills favorites the listening, respectively: (53%). At considerable distance is listening (17%), speaking (16%), and the writing (14%). In conclusion, although we spend the most time listening, we allot the least time to the appropriation of this skill.[2]

Employees from the large companies spend about 60% of their time listening, while their senior staff only 57%.

In these conditions we may say that, in business, listening could be seen in euro, dollars, Romanian lei. Listening errors can result in a bankrupt of a company. Sperry corporation declared that if 100 millions commit an error of listening of 10$, the total cost would be $ 1 billion.

Researchers discovered that there is a direct connection between the listening skill and workloads. Employees that participated to trainings regarding the development of listening skills – even before the initiation in computers techniques –have been more productive than those who did not received training in listening.

In a survey of the most 500 successful US companies, 59% of respondents said that they have paid for listening courses for their employees.

When the researchers surveyed 450 graduates of the economy sector about the communication skills they need to work, they said that listening is the most important quality for the professional success. When they were asked what kind of skills they wanted to have achieved in high school they answered "listening".[3]

Active, comprehensive listening is necessary in any field, not only in business. The need to practice it is felt at least as much in school as in family. Psychological studies show that, in a relationship, if the two would frequently practice emphatic listening, the level of the marital satisfaction would increase and the divorce rate would drop significantly. A good communication represents the key to a harmonious couple relationship.

2. Content

Obstacles in the listening process socio-cultural and psychological factors

Listening, like any other skill, must be learned and practiced. There are cultures, societies that realize and sustain that need more than others. There are some subcultures, mentalities that ignore that need, as for example the institutions, the companies specified for the primitive capitalism. These institutions were guided exclusively by the express requirement to increase profits, to face competition not always fair. Usually they ignore the human being need to be listened, understood and heard. In their search for profit, they sacrifice satisfying the human need, ignoring the boomerang effect of this sacrifice.

In developing country, small companies, with limited financial resources, even if they have a flexible, even if they have modern organizational culture, even if they are managed by resonant

[2] Sperry Corporation, Your Personal Listening Profile(Sperry Falls Church, VA:1980), p.4

[3] DiSalvo, Vicent, David C. Larsen, William J. Seiler, ''Communication Skills Needed by People in Business, Communication Monographs 25 (1976):274

managers, they do not afford to sped money to improve employees communication and listening problems. On a simple Google search demand on the offer and demand of courses/ trainings in communication in Romania, we observe the existence if a gap in favor of the offer. A lot of consultancy/ training companies appeared. These companies offers services regarding the development of the communication skills, the interpersonal and organizational efficiency etc. Requests from private companies are however modest, especially for small companies.

In addition, there are common mentalities especially in post communist societies, where the listening is confounded with obedience. I think there is also a terminological confusion. For example, in Romanian "listener" means also obedient. There are confusions which could contribute to reduce individual aspiration to learn listening.

Besides socio-cultural factors, there are many psychological factors that creates obstacles to listening. In the famous work „Communicating effectively'', Saundra Hybels, Richard L. Weaver II, Mc. Graw Hill emphasis the fact that listening is non an easy thing and that there are many psychological causes that generates loss of attention, such as: cognitive dissonance, anxiety, dominate listener attitude and passive listener attitude.

According to the cognitive *dissonance*, a person feels a conflict, a contradiction, a discomfort if she/he has two or more information/opposite attitudes toward the same person or the same thing. For example, the students may think about Professor X is an erudite person as well as they believe that the sexual harassments allegations against him are probably true. Students who hold this convictions simultaneously (the teacher is good but the sexual harassment) suffer of cognitive discordance.

To draw out from the conflict, a solution would be for students to ignore, to reject the information that causes (the accusation of sexual harassment, in our case). It is a reaction that we have especially when accepting all information that we could put in conflict with people important to us. On the other hand, listening carefully this information is necessary if we want to sustain and respect others' ideas.

Anxiety is another psychological factor that jams the listening process.

You pass an important exam. You gave a bad answer to a simple mathematic problem. You are looking for the error but you don't find it. You become more and more nervous, anxious. You don't even hear when the teacher gives you a clue regarding your error. You lost totally your self confidence and your anxiety level is so high that you are not capable to listen any more. The anxious person feels a permanent anxiety, an intense and unjustified fear facing a real danger that affects his capacity to listen.

Researchers in the field shown that if teachers tell students that they will receive difficult tests, the students will be inclined to anxiety, and this will affect they listening capacity.[4]

The dominant listener attitude is another disturbing factor in listening.

A lot of people don't want to listen at all; they prefer to talk all the time. These kinds of people can not dialogize. They engage in endless monologues, ignoring nonverbal and disapprobative cues from the speakers (inexpressive look, absent look, discreet verification of the time etc) for dominate listeners the only problems, experiences that deserve to be discussed are their problems and experiences.

[4] Ayres,Joe,A. Kathleen Wilcox, and Debbie M. Ayres, receiver Apprehension: AQn Explanatory Model and Accompanying Research,", Communication Education, 44(1995):223-35

Listening is affected also by the passive, disinterested attitude of some speakers. The lack of interest for a certain subject determines the student to not listen the teacher pleading even if it is a good, documented theory. Listening effort is even higher as the subject seems less interesting, exciting.

Sometimes, people think that listening doesn't implicate efforts. Depending on what you listen, you need a variety of listening skills. Listening involves effort and skill as well in speech as in writing.

Gender style in communication ; listening style

We don't need special studies to discover that women and men listen differently, have different listening styles. Phrases like:„ He doesn't hear me when I talk to him" , "My boyfriend/ my husband doesn't know to engage in a dialogue, he doesn't listen to me" are met much more frequently to women than men.

Usual gender differences in communication are often due to conflicts between men and women. It seems that sometimes there are two distinct communication styles: the masculine style and the feminine style. A better understanding of the differences between these styles may reduce the divergences between men and women.

Jane Tear (cited Meier, 1991) summarizes what most experts consider to be the usual differences between the masculine communication style and the feminine communication style.

The men often use the conversation in a competitive mode, probably in view to settle the dominant position in a relationship, while women tend to use conversation in an associative mode, hoping to establish a friendship relation. Women tend to use good listening behaviors (such as eye contact, shaking their heads in sign of approval, focusing on the speaker and asking relevant questions), while men seem to focus less on listening and more on response. Men tend also to speak a lot but are less disposed to reveal personal information about them. Women tend to communicate as a modality to contact people and ideas.[5]

Deborah Tannen's work completes the synthesis of Tear communication styles. In his work, „*You don't understand : Women and men in conversation* ", Tannen (1990) relates the conversation of a couple which were driving with their personal car. The woman asked: „Would you like to stop the car and drink something?"; her husband answered sincerely: „No" and he didn't stop. Later, he felt frustrated hearing that his wife is upset because she wanted to stop the car and to drink something. He was asking: „Why didn't she said what she wanted? Why she has played with me?"

The woman was not so much upset about the fact that he didn't do what she wanted, but that her husband didn't take care about her desire. From her point of view, she was always interested of her husband desires while he didn't respect her preferences.

Tannen considers that, in this case, husband and wife used different but valid communication ways and both have to learn how to decipher the communication approaches of each of: the man has to realize when his wife is asking what he would like- in fact she is not ask something (information) but she starts a negotiation about they -both of them - would like; the woman has to realize that, when the man answers "yes" or "no" is his decision and not the intention to negotiate something. (1990, p. 22)

[5] *Marriage and the Family* , *Diversity and Strenghts* -David H. Olson--John DeFrain-

The study regarding the cultural listening styles emphasis that women are better listener than men. Deborah Tannen, the famous researcher in the linguistic field affirms that, in communication, the woman and the man belong to different cultures. While women are interested in relationships and networks/commitments, men are more interested in the competitive communication.[6]

This theory explains why husbands, often, manifest disinterest in listening to stories related by the wife regarding the new wardrobe of her colleague or the small office disputes. There are issues that are bothering women, but that don't concern usually males. In the same time, the wife gives less attention when her husband talks about the car reparation or about the score of a football match.

The studies realized by Deborah Tannen emphasis that, in communication, the boys cultures is based on the statute and on maintaining the statute; boys will search to remain in focus making a spectacle of oneself and telling jokes and blood and thunder/ "sensational " stories.

Tannen discovered also that, in a conversation between a woman and a man, women are inclined to play the listener role. The author sustain that the study of the old literature confirms that role for women as a very old role, coming from ancient times. Few things changes until contemporary days regarding this role. For example, in XV century, Shakespeare, in "Iulius Caesar", Portia asks Brutus to talk to her and to not have secrets from her. The same think happened to the hero from "Beowulf", the legend of the XVIII century and the examples may continue.[7]

Generally, men socialize being competitive; they live in a hierarchical word in which every unanticipated meet with another person is seen as a challenge to their status. When the fight is over, the man is making a self-evaluation setting a success or a failure. Conversations between men are almost symbolic fights in which the competitors try to obtain a superior result, to protect him from threatening movements and to do not permit to be rejected. So, men are uncomfortable talking about their feelings as opposed to women because feelings can be interpreted as signs of weakness.[8]

Women tend to be close to people not as competitors, as individualist persons or independent person but as persons interconnected with each other. Women tend to socialize; men tend to compete. Tannen sustain that for women conversations represents „negotiations for approach in which people try to search and to offer approval and support and to reach a consensus" (Tannen, 1990, p. 25). Women tend to search a community and to try to keep their intimacy and to avoid isolation. Even if women are interested to obtain such a status and to avoid failure, these are not the most important aim in their life.

Even if, it seems that all of us need to have both a sense of independence and a sense of intimacy with other people, men incline to independence and women to intimacy. The greater is the difference in communication style between a man and a woman, the greater is the potential for misunderstanding. A woman, needing approach, will naturally want to tell her husband where she goes, with whom and when she will be back home. A men, needing independence and control, would understand with difficulty why is so important to give her this information.

Similarly, a woman is more preoccupied to build a strong relation; she will tell her husband about every purchase that she wants to do – even on those which are relatively inexpensive. Her husband might not agree with asking her permission for every purchase, seeing in the diminution of the budget control the loss of the life control (Tannen, 1990, p. 26).

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[6] O'Brien, Patricia, ''Why Men don't Listen…and What It Costs Women at Work '', Working Women 18(2), February, 1993, 56(5), online: Infotrac, Expanded Academic ASAP

[7] Deborah Tannen ''Listening to Men, Then and Now", New York Times Magazine, May 6, 1999, pp.56ff

[8] Olson, H., David, DeFrain, John, *Marriage and the Family*, *Diversity and Strenghts*,p.71

Gender differences in conversational style may lead to misunderstandings if people are not aware of them. Women tend to see the conversation as an occasion to establish a relationship with another person; men tend to see the conversation as an arena where they establish the domination. Communication in an intimate relationship involves a continuous balancing of the needs for intimacy and independence. Tannen emphasis that intimacy suggest that „we are close and identical" and independence suggest that „ we are distinct and different". Independence may also represent the base of a hierarchy in a relationship. – that is: „If I am independent of you and you are dependent of me, I am higher than you on the hierarchical scale. I am in power". Perhaps that's why men who socialize following power and control, tend to put more emphasis on independence than women. Independence is best for the world in which men were prepared to live. (Tannen, 1990, p. 28).

Tannen explain the naggy nature of the woman arguing that it comes from a different approach of the. Women are inclined to do what people ask from them. While men are inclined to reject if someone, especially a woman, is asking something from him. Women tend to repeat their requirements, becoming nuggy, because they supposed that men think how they think. "Of course he would do what I am asking from him even if would understand what I am asking".[9]

Nobody is guilty about these differences in the attitude and the reactions of listening and communication. They are simply a reflection of the roles in masculine and feminine gender in the conversation styles. Tannen is careful to emphasis that women also love freedom and independence but they tend to emphasis more the interdependence and the approach. Similarly, men enjoy the approach but consider the independence more important.

Women are often perceived in family as „gabbers", unlike men who can act as „strong and silent". This phenomena, has also the origin in the differences between the masculine and feminine gender roles. Women wishing to affiliate are doing this through communication. Men, being competitive, tend to be aware of what they are saying. Women, by contrast tend to seek social situations centered on conversation as for example taking lunch together. A good conversation heart to heart build intimacy and worm feelings. (Many homosexuals prefer conversational style that is based on the intimacy development)

In group of men, men tend to be the gabbers but a lot of this conversation between them is guided to the performance, to the attempt to establish the domination. When the subject is politics, sport or other debates which could be discussed vigorously, men lead the conversation. This communication style oriented to performance is not about privacy but to clarify who has the power.

Men, also, tend to focus on the problems solution, while women focus on sharing their feelings regarding the problems. Because of these differences of concentration, men often think that women talk only about problems and women feel frustrated and misunderstood.

Masculine and feminine gender roles start to influence boys and girls from early age. Generally, boys are playing in open air, most of the times in big groups, hierarchically structured. Girls tend to play more in small groups or pairing, and their life resumed to a relationship, as for example: „the best friends". For girls, intimacy represents an essential factor in a relationship. (Tannen, 1990, p.43). During adolescence, men and women fight to integrate among others. Although they are attracted to each other, they have problems to understand each other. These problems continue during dating and in marriage. It is logically to argue that gender role differences contribute to the unhappiness experimented by many people during their marriage.

[9] Olson, H., David, DeFrain, John, *Marriage and the Family*, *Diversity and Strenghts*, p.72

When women start to be implied in the executive/ administrative or professional field, their problem is to catch/ achieve men attention. When Sandra Day O'Connor, the first woman judge, was asked what problem she had in her career, she answered that the biggest problem was to make others listen to her. Finally she found a technique to determine people listen to her:' I have trained myself to speak slowly – pronouncing rarely each word –when I wanted to obtain from somebody complete attention. (O'Brien, Ibid.)

The strategy she has chosen is an effective strategy. Usually, people are doing exactly the opposite: when they see that they are loosing somebody attention they tend to talk faster and faster.

Another mistake that women often do in business administration – said O'Brien- is to smile and to wait their turn to speak. Thus, they are risking waiting for their turn not to come. They should change their attitude and to touch the men technique chipping in a discussion when they have something to say. Men are not accustomed to wait for their turn. Patricia O'Brien advises women who want to be heard at work, to stay in the center of the conference table, there where they can not be ignored, to speak determined, to avoid uncertainties such as : "Maybe I am right…but…',,I think so, but I am not sure,,. They need to have a convinced attitude in a dialogue, to be on subject and to avoid details.

Studies that have focused on the gender differences regarding the communication styles and especially Tannen studies gave rise to many controversies. According to Elizabeth Aries (Tannen & Aries, 1997), the main counterargument for her researchers is that she unnecessarily polarizes the differences between men and women, diminishing the importance of the fact that men and women communication styles largely overlap. This is an argument similar to that which Sandra Bem gives to the gender roles: The differences between individual women and individual men are bigger than the differences between women as group and men as group. In fact, even if men and women as groups may differ, there are many persons in each group that defy the stereotypes. The key is to recognize that the communication styles seem to differ on average, but the averages do not tell the whole story, they are not an exhaustive reflection of reality.[10]

Conclusions

Studying the gender differences in communication and in listening, we conclude that they are not insurmountable obstacles in communication, in the development of healthy and constructive relationships between speakers of the opposite sex. We need more mutual tolerance, more mutual investment in understanding the styles communication specific to the gender.

Both sexes need to develop their availability to accept and to understand these differences concerning the communication style. Such behavior is enriching, beneficial for some and for others. As Tannen observed (1990, 1993) we could learn from each other. Women could learn to accept some conflicts and differences without consider them as a threat of their intimacy; men could learn from women that interdependence does not represent a threat of their personal liberty.

Finally, we can not say that the masculine communication style is better the feminine style and not vice versa. Tannen suggested that „the best" communication style is a flexible style: finding that delicate balance between differentiation and connectivity.

[10] Olson, H., David, DeFrain, John, *Marriage and the Family*, *Diversity and Strenghts*,p.74

Rather than blame each other for the attitude and for the communication style, men and women would be better to avoid „the blame game" and focus on cooperation in order to find acceptable solutions for some and for others. While blame is a competitive effort where a part try to beat the other, authentic communication represents a cooperation effort in which the participants focus on understanding.

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BRIEF CONSIDERATIONS REGARDING MEDIATION IN CRIMINAL MATTERS

LUMINIȚA DRAGNE[1]

Abstract
Mediation is an alternative means of conflict resolution, is designed as a flexible procedure whose utility was observed in contrast to the deficiencies of the judiciary system. In the field of criminal law, mediation is part of the larger concept of the restorative justice whose aim is restoring the main victim in its rights. From this perspective, to the criminal process is intended, in principal, repairing of the victim's prejudice and, subsequently, to encourage the delinquent in taking responsibility and to acknowledge his guilt, and also to determine him to actively participate in repairing the damage caused. The ultimate goal of the process is giving back the delinquent to society and consequently, reducing the relapse.
Romanian legislator has not taken this concept, and how it is regulated mediation in criminal matters is hesitant, cautious and ultimately ineffective. Specifically, in situations that will actually occur, victim-delinquent mediation will only take the form of "assisted reconciliation."

Keywords*: mediation in criminal matters, restorative justice, optional procedure.*

1. INTRODUCTION

Mediation as an alternative dispute resolution stems in the American legal system, where over the years has proved effective and, along with other methods of alternative conflict (arbitration, conciliation, negotiation), has an extensive media promotion and support of the judicial bodies, but also from administrative institutions. Usefulness and success of this system has led the implementation of similar forms of conflict resolution in most legal systems of modern states. In Europe, the institution of mediation is assimilated by imitation, but the process was a remarkable success in countries such as England, Austria, Germany, Sweden, Spain, Italy or Portugal, but unlike the American model where mediation is binding, the European model is mainly optional.

Institution mediation is conceived as a flexible procedure, accessible and from a pecuniary point of view, able to provide to the parties the opportunity to resolve conflicts without resorting to judicial organs, avoiding the drawbacks of probation order, formalism, time and psychic consumption specific to the court procedure.

Moreover, the usefulness of this procedure was observed in contrast to the deficiencies of the judiciary system. Judiciary process qualifies trial parts as being adversaries, which creates a visible psychological barrier between the parts involved in the conflict. By pronouncing a judge decision, only one part is successful, the dispute between them is getting deeper. The court will grant a compensation of a party, but often the parties' actual interests and needs are ignored. This way of treating the conflict is, on a long term, harmful in parties relationships, the decision of the judiciary is one absolute, and psychologically creates frustration and damage one of the parties, deteriorating relations between participants in an irremediable manner.

The purpose of this scientific approach is to emphasize that aspect of restorative justice represented by mediation, to highlight the usefulness of mediation in criminal matters and to support the reform process in the sense of civil society, as we believe that the Romanian public is not sufficiently responsive to this new way of dealing with conflicts. The lack of responsiveness is due to how inefficient the mediation in criminal matters, and not only is publicized in local media.

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Romanian legal system, following the directions of principle established in the European Union has adopted legislation that enshrines the possibility and conditions of settlement in civil, commercial, and a narrow category of criminal cases through mediation.

But, the way in which the legislature has regulated mediation in criminal matters is evidence for lack of understanding of the institution itself and its disinterest in the matter of adopting an effective and viable private implementation of this institution.

Therefore, mediation in criminal matters is a relatively new in Romanian legal system, this prompting some interest much later than in other European countries[2].

2. THE CONCEPT OF RESTORATIVE JUSTICE

In criminal law, mediation is part of the broader concept of restorative justice[3].

Restorative justice is modern civil society response to punitive criminal justice system and the main purpose of this new concept is the restoration of the victim - and often ignored secondary participant in the criminal - in his rights. In light of this new trend, the main purpose is not criminal punishment but repairing the prejudice caused to the victim. Subsequently, wishes and aims to encourage the offender to take responsibility, to plead guilty and to determinate him to actively participate in recovery of damages caused. The ultimate goal of this process is reintegration of the offender in community, society, and consequently reducing of recidivism.

The main purpose of restorative justice is balancing the concerns of the victim and the community with the need to reintegrate the offender into society[4]. Restorative justice aims to assist the victim in the recovery process and to enable all parties directly affected by judicial proceedings to participate effectively and fruitful at its development.

Restorative process means any process in which victim, offender and other persons or members of society affected by a crime participate together to solve problems caused by crime, often with an impartial third party. This may include victim-offender mediation, conferencing, circles, victim assistance, assistance convicted, compensation, community service.

Mediation between victim and offender is the most used way of solving conflicts in European legal systems. In this process, an independent and qualified third party assists the parties to discuss the circumstances of committing the crime and the effects and to reach an agreement whereby they agree on how to repair the damage caused to the victim.

Mediation can manifest directly, in which case all parties are present, or indirectly, a situation supposing that the third party mediator will discuss separately with each party and will transmit the intentions and requirements to each other help them in this way to establish an agreement. In this procedure, the focus is primarily on the material interests of the parties and less side affective component, which involves discovering the causes of conflict and mutual understanding of needs and wishes of each party[5].

The conference assumes a wider group of people involved in restorative processes, people both directly and indirectly affected by crime committed - victim and perpetrator, their family members, other close persons, representatives of judicial bodies or other authorities, social workers, representatives of non-governmental organizations, teachers, and other representatives of affected communities. The role of discussion is to discover the causes, effects and accountability act, to agree an effective way to repair the injury and prevent possible relapses.

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[2] Only in 2006 has been adopted the Law no. 192/2006 regarding mediation and the profession of mediator, published in the Official Gazette, Part I, no. 441/22.05.2006, and they were devoted several articles on mediation in criminal cases.

[3] Restorative justice (engl.).

[4] United Nations Economic and Social Council (2002), *Basic Principles on the use of Restorative Justice Programmes in Criminal Matters*, http://www.un.org/en/ecosoc/docs/2002/resolution%202002-12.pdf

[5] Dragne L., A. Tranca, *Mediation in Criminal Matters*, Pro Universitaria Ed, Bucharest, 2011, pp.13-14.

Circle model best reflects the democratic principles and requires, at the discussion, the presence of the more significant number of community members affected by the illegal act. The victim, offender, people who support them, community members and representatives of the criminal judicial bodies shall meet in the same circle and determine who belongs with responsibility, identifies the negative consequences of the crime and agree on a method of repair, as well as ways to prevent a repetition of the conflict situation[6].

Community service programs support the victims, community councils are secondary forms of realizing the restorative process and put less emphasis on direct communication between the victim and offender.

Restorative outcome may result in the agreement of the parties, which in turn may consist of damage, performing services on behalf of the victim or the community, and any other programs or commitments to provide cover for injury to the victim and community and reintegration into society the victim and offender.

3. SOME ASPECTS OF CRIMINAL MEDIATION ROMANIAN LEGAL SYSTEM

Mediation in criminal matters, as regulated in the state of the Romanian national legislation, adopts only one of the forms in concept application of restorative justice: mediation between victim and offender that the criminal aspect that may result in the removal of criminal responsibility.

Romanian Mediation Legislator has chosen to regulate only a limited number of crimes, namely those for which the law[7], withdrawal or prior criminal complaint reconciliation removes the criminal responsibility: crimes of impact, injuries caused by negligence, entering the home without permission, etc.

We believe that the reason for which the legislator has limited the mediation procedure in these crimes is the fact that, in these cases, the parts, even in the absence of mediation, can reach to an agreement on the offense committed and its consequences, the will of the parties being an essential element both in starting and in finalizing criminal trial proceedings, the principle of penalty process officially is clearly limited by the will of the parties.

Parties can use mediation both before - extrajudicial mediation - and after initiation of criminal proceedings - judicial mediation.

Extrajudicial mediation takes place at the initiative of one or both parties before the injured party to make prior complaint.

The legislator is only concerned with extrajudicial mediation result: if the mediation procedure is completed through reconciliation, the injured party could not refer to the same act on criminal investigation or court. We point out the inaccuracy of the term used in the sense that reconciliation can take place only after making a complaint, situation in which we are not in extra-judicial mediation, which is why the terms of agreement or arrangement would have been more appropriate. Another observation concerns the hypothesis of referral to the court by prior complaint, this last sentence was repealed[8] and, although the Law no. 192/2006 on mediation and the profession of mediator has been amended on two occasions, there was a legislative proposal to make this provision consistent with the new version of the Code of Criminal Procedure.

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[6] *European best practices of restorative justice in the criminal procedure*, Conference publication, 2010, European Crime Prevention Network, www.eucpn.org/download/?file=RJ_ENG.pdf&type=8

[7] By The Decision - European Union Council Framework from 15 March 2001 on the standing of victims in criminal proceedings, it was established for the Member States of the European Union to promote mediation in criminal cases for offenses it considers appropriate for this type of measure, each member will ensure that any agreement made between the victim and the offender will be taken into account during the mediation in criminal cases.

[8] Provision repealed by Law no. 356/2006 amending and supplementing the Criminal Procedure Code and to amend other laws, published in the Official Gazette, Part I, nr.677/07.08.2006.

Successful completion of the mediation process acts as a cause to prevent the entry into the penalty action.

If mediation is not completed by agreement, the injured party may submit the prior complaint. A useful provision is contained in Art. 69, para. 2 of the Act, which enshrines the only case for suspending the deadline for lodging the prior complaint. If the parties require mediation during the deadline for lodging the prior complaint of two months, this period shall be suspended during the procedure, and it resumes its course after considering the duration elapsed before mediation. Suspension period will therefore be included between the date of signing and the conclusion of the mediation process - closing minutes of the mediation.

Judicial Mediation takes place after notification of penalty investigation authorities with prior complaint. In this case the parties may request mediation or to their recommendation from the court or prosecuting authority. The consequence for judicial mediation is suspending prosecution or trial (where the parties have turned to mediation by the prosecution), the measures taken in the mediation agreement presented by the parties.

The suspension lasts until the closure of mediation in any manner provided by law, but no more than 3 months after signing the contract of mediation.

Criminal proceedings are officially resumed immediately after receipt of the report stating that the parties were not reconciled, or if it does not communicate the deadline of 3 months.

Unlike the American model, the Romanian legal system, criminal, and not only has a voluntary mediation.

Unfortunately, experience shows that without proper information on this new alternative dispute resolution and the benefits of mediation, the practice is almost non-existent in this area, not far signed no agreement in criminal matters.

4. USEFULNESS OF MEDIATION

Mediation would be, theoretically, a major evolution in criminal proceedings. Through this institution, the victim has a greater role in the conduct of proceedings and quickly finds satisfaction through its faster ongoing and prejudice recuperation, and the perpetrator can realize the wrong done and accept repairing it, society allowing his reintegration by other means than isolation in a place of detention.

Possibility of mediation procedure initiation between offender and the injured person will depend almost entirely on the will of the former. In the couple victim - offender, victim is the most sensitive position, it is affected by the criminal act, and in most cases, willingness to communicate with the other party is a prerequisite condition for initiation of proceedings.

If, from this point of view, the position of the victim conditions the procedure of mediation, the offender will to participate in the proceeding should not be neglected. In turn, he must show voluntary consent in starting the procedure, only a sincere willingness of the perpetrator being a part in the process of reconciliation can give mediation a chance of success, otherwise there is the possibility that the conclusion of the mediation to be regarded by perpetrator only as a simple way to avoid criminal liability, which would remove the mediation of its purpose.

According to the definition given by the EC Recommendation, no. R (99) 19 on mediation in penal matters[9], criminal mediation is a process by which victim and offender are enabled, if the free consent to participate actively in solving problems arising from infringement by third parties impartial (the mediator).

[9] Recommendation no. R (99) 19 on mediation in criminal matters was adopted by the Council of Europe Committee of Ministers on 15 September 1999.

The mediator cannot impose a solution on parties to conflict mediation as subject to its role in this process is that of a facilitator of communication between the parties, helping them to identify key issues of their conflict and to identify possible solutions and remedies.

In our view, mediator's mission is not that of a single witness, but an active, contributing to the reconciliation process by carefully listening to their stories, intervening only in cases where the dialogue degenerates, and helping parties to highlight the problems that even these they have brought into question.

From such a perspective, the focus is not on the needs and interests of the parties but on their emotions and feelings. Conflict is de-structured narrative discourse and the direction is changed towards identifying key issues and their resolution.

In mediation, effective solution is determined solely on the wishes, needs and interests of the parties, without constraining the scope of the rules of procedure. The parties may choose the solution that satisfies their interests, giving mediation a more practical nature in restoring the situation of the parties.

In addition, the confidentiality of the proceedings, a principle which guarantees that nothing will be said or used outside the room where the mediation takes place, is that mediation is particularly attractive in particular for certain subjects, as it allows parties to maintain confidentiality of information concerning their personal lives or their property.

5. BRIEF CONCLUSIONS

Generally, mediation allows finding creative remedies and, away from the solemn hearings and rigid rules of procedure, is likely to provide proper conditions to a real and effective communication between the parties. Also is a quicker procedure and involves far less cost than a trial.

We can say that mediation is a complete success when the agreement between the parties resolves their material interests and, what are more important, their emotional needs, as this effect guarantees the stability agreement between the parties.

However, shortcomings of the Romanian law legislative regulatory of this institution are evident especially in terms of mediation in criminal matters. As is known in this moment, mediation victim - offender is clearly inefficient and unable to produce concrete results.

Legislative approach to mediation victim - offender is already criticized in the literature[10] and we join these criticisms. Institution mediation victim - offender is part of a much broader concept, not represent only a particular aspect of manifestation of the concept of restorative justice, originally developed in the United States.

Our law has not taken this concept and how it is regulated mediation in criminal matters is hesitant, cautious, unimaginative, and ultimately, ineffective. Specifically, in situations that will actually occur, mediation victim - offender will only take the form of "assisted reconciliation."

At this point we want to highlight just two of the major shortcomings of how the legislative regulation of mediation in criminal matters. First, unlike most European countries, Romanian legislator sought not to regulate ways to control judicial authorities on how they are fulfilled obligations under the mediation agreement. In many European countries - England, Austria, Poland, Germany, Italy, etc. - an agreement to mediate does not automatically affect the termination of criminal proceedings, but his suspension for a variable period of time that the judiciary oversees how obligations undertaken by the agreement are complied with, the termination of criminal proceedings is conditional upon the offender who committed the obligations in the mediation. In some cases (Austria, mediation of rape offenses) that supervisory role is given to the mediator.

[10] Gh Mateut, Mediation in Criminal Law Review no. 7/2007, C. Ignat, Z. Sustac, C. Danilet, Mediation Guide, University Publishing House, Bucharest, 2009.

A second major shortcoming of mediation is given by the impossibility of judicial authorities to send, themselves, the cause to a mediator. In states that have adopted this system, mediation remains voluntary, but the invitation is sent to the parties to mediation by the mediator appointed by the court or prosecutor, when the file is already in its possession. The parties may accept or not mediation, but the impact of this particular trigger mediation is much higher in the availability of the parties to resolve the dispute through mediation. In such a system, in addition, mediation is free, which is a real incentive for participants in conflict.

In conclusion, the institution of legal mediation as currently regulated has no practical use. But can acquire such utility by sustaining the reformatting process of the civil society, but only in a constant media support, real and effective, combined of course with the active involvement of judicial authorities.

Reference:

- Dragne L., A. Tranca, *Mediation in Criminal Matters*, Pro Universitaria Ed, Bucharest, 2011.
- Gh Mateut, *Mediation in Criminal Law* Review no. 7/2007.
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MEDIATION IN PENAL MATTERS IN ROMANIA

MIRELA GORUNESCU[1]

Abstract

In Romania, the field of restorative justice is still an unknown one, and it is still a dilemma if this kind of judicial activity (successful in other jurisdictions around the world) will be a success in our county. In this context, becomes even more difficult to find the correct answer to the question if the mediation, as a form of restorative justice, is a viable solution, in Romanian system, and even more difficult to see the future of mediation in criminal matters. This possibility legally exits since 2006.

Keywords*: restorative justice, criminal liability, mediation, criminal trial, crimes*

INTRODUCTION

1. This study focuses on the problem of the incidence of mediation in solving criminal law conflicts.

It is well known that the mediation has proved its utility in this field from during the last years, in different jurisdictions all over the world, even in criminal matters, but this possibility exists only from 2006 in Romanian Legislation. The Law no. 192 on mediation and the mediator profession[2] was put into force in this year and created a new instrument to solve the conflicts, including the conflicts which may occur in criminal law area.

2. From our point of view it is very important for all the actors involved in Criminal Law enforcement effort to have a correct a clear image on the utility, on the rules and on the particularities of the mediation in this sensitive field. That is why the present study has the aim to observe some special aspects of the mediation in criminal law: is it easy for the state authority to renounce to its so called "right to punish" and to accept the elements of restorative justice, including the mediation; which are the specific elements of Romanian legislation in the criminal law mediation area; is this instrument only a theoretical one for the Romanian judicial authorities nowadays, or it already has a practical utility in particular cases brought in front of judges; which is the future of this instrument in the New Romanian Penal Procedural Code.

3. In our study we will analyze the Romanian legal provisions on mediation in criminal matters, with all the particularities determined by the national specific. In order to realize a better understanding of this domain, we will put it in a larger framework – the one of the restorative justice. In this part, we will observe the general principles of this criminal policy, and will stress the differences from the traditional approaches.

Also, we will illustrate the future of the mediation in criminal matters according to the New Penal Procedural Code which is already adopted and about to enter into force in Romania.

4. In terms of the Romanian doctrine in the field of interest, the present study has the merit to be among the first studies ever published on this topic. The study will observe the legislative framework into force in the special law and in the Criminal Procedural Code (after the modifications operated by Law 202/2010).

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[2] Published in The Romanian Official Monitor, Part I, no. 441 from 22th May 2006.

"THE RIGHT TO PUNISH" – JUST A TRADITIONAL APPROACH

It has been historically accepted that the state authority has a so called "right to punish" a person who committed a crime and perturbed the social equilibrium, only the fundament of this right has been different during the time.

Although, the first theories in this field allowed the punishment as a form of private revenge – the relatives of the victim had the right to cause harm directly to the offender, even an exaggerated one. That is why, when the Talion Law appeared it was considered an important form of progress, just because it imposed the proportionality limits.

Another age in the evolution scale was the "retributivism". In this theory the punishment is the harm the offender has to suffer to compensate the harm he or she produced to the victim – *poena est malum passionis guod infligitur ob malum actionis*. In some variations of this theory it was stated that the punishment is a right of the offender, an act of his or hers own will because he or she consider the law infringement as their right. A crime, as an act, is not something positive, not a first thing, on which punishment would supervene as a negation. It is something negative, so that its punishment is only a negation of a negation[3].

As a general characteristic, this theory reduces the aim of the punishment to a simple equivalent of the harm cause by crime, in order to reach the equilibrium between *malum passionis* and *malum actionis*. In this way, the repressive function of the state is reduced to put the offender in the position to expiate guilt by through suffering, to give the own right.

The Theory of utility is the one according to which the aim of the punishment is not to repress the harm caused by the crime, but to prevent the citizens to commit other offences. In this way, the punishment is an instrument for the future, an instrument which prevents the recurrence of the criminal behavior – *punitur ut ne peccetur*.

The state has even a more privileged position in the Social Contract Theory, because it is only an arbitrator between the society and the individuals. According to this theory, when the state applies a sanction it is only because it has a contractual obligation to fulfill, without having an interest in that case[4].

The adepts of The Social Defense Theory negated even the validity of a right to punish of the state. Instead of such a right, the state should have the possibility to take based on human rights legal, moral and social measures. A person who committed a crime is an ill person, who needs treatment no punishment. In this way, it is not needed a Penal Code, but only social defense measures, especially medical measures[5].

This was the first step in the direction of changing the perception over the punishment and the so called "right to punish" of the state. The person who committed a crime must be treated not punished.

Nowadays, the Restorative Justice Theory is the one which makes itself more and more present in the Romanian legislative realities.

FROM RETRIBUTION TO RESTORATION

The Restorative justice theory is a new movement in the fields of victimology and criminology. This theory, acknowledging that crime causes injury to people and communities; it insists that justice must repair those injuries and that the parties be permitted to participate in that process.

So, the restorative justice programs, therefore, enable the victim, the offender and affected members of the community to be directly involved in responding to the crime. It aims to the

[3] G. W. F. Hegel, Grundlinien der Philosopfie des Rechts, Berlin, 1821, p. 541.
[4] Hugo Grotius, On the Laws of War and Peace, Stiintifica Publishing House, Bucharest, 1968, p. 478.
[5] Chronique de defense sociale, Revue de science criminelle et de droit pénal comparé, p. 3/1964, p. 652.

objective of ending the conflict relations in criminal law by the mediation of that conflict with all the involved parties.

Among the general principles of this kind of justice we can indicate: the crime is seen as a prejudice; the restorative effort is concentrated more on the prejudice than on the rule infringement; it pays equal interest to the victim and to the offender, as active actors of the justice; stresses the importance of victims' rehabilitation by support them the way they fill the need to be helped; gives attention to the offenders and tries to determines them to realize that they have to fulfill the obligation to the victim and to the society; the victims' point of view on the most appropriate way to repair the harm is very important; the communication between the victim and the offender is a key factor to realize the cooperation of all the implied parties; the results of the justice act are quantified by the proportion the harm caused by crime was repaired and not by the severity of the punishment.

COUNCIL OF EUROPE AND THE MEDIATION IN CRIMINAL MATTERS

The Council of Europe adopted in 1999 one important legal instrument in order to stress the utility of the mediation in criminal matters[6]. In this legal instrument, the European organism observed that in member States are some strong developments in the use of mediation in penal matters. This instrument is seen as ”a flexible, comprehensive, problem-solving, participatory option complementary or alternative to traditional criminal proceedings”.

The interest of victims to have a stronger voice in dealing with the consequences of their victimisation, to communicate with the offender and to obtain apology and reparation is considered to be legitimate. Also, the indicated legal instrument recognizes that mediation may increase awareness of the important role of the individual and the community in preventing and handling crime and resolving its associated conflicts, thus encouraging more constructive and less repressive criminal justice outcomes.

The mediation in penal matters is defined as any process whereby the victim and the offender are enabled, if they freely consent, to participate actively in the resolution of matters arising from the crime through the help of an impartial third party (mediator).

Some general principles are stated by this legal instrument: 1. Mediation in penal matters should only take place if the parties freely consent. Also, the parties should be able to withdraw such consent at any time during the mediation; 2. Discussions in mediation are confidential and may not be used subsequently, except with the agreement of the parties; 3. Mediation in penal matters should be a generally available service; 4. Mediation in penal matters should be available at all stages of the criminal justice process; 5. Mediation services should be given sufficient autonomy within the criminal justice system.

So, at the Council of Europe the mediation it is seen as a solution to better solve the penal law conflicts.

THE ROMANIAN SPECIAL REGULATION INTO FORCE IN MEDIATION IN PENAL MATTERS

Under these, and others, influence, the Romanian legislator adopted in 2006 the Law no. 192 as the first regulation dedicated to the mediation field. According to the first article of this law, the mediation represents a form of solving the conflicts consensually, with the help of a third person specialized as a mediator, with respect or neutrality, impartiality, confidentiality and with the free will of the involved parties.

In this law, the Chapter VI includes special provisions on conflict mediation, and, in its second section, the special rules on mediation in penal cases.

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[6] Recommendation no. R (99) 19 of the Committee of Ministers to member States concerning mediation in penal matters *(Adopted by the Committee of Ministers on 15 September 1999 at the 679th meeting of the Ministers' Deputies), https://wcd.coe.int/ViewDoc.jsp?id=420059&Site=DC*

The incidence area is restricted by the article 67 from the Law no. 192/2006 to the penal cases which regards crimes for which, according to the law, the withdrawal of the preliminary complaint or the reconciliation of the parties removes the criminal liability.

Neither the victim nor the perpetrator can be constrained to accept the mediation in their conflict and even they accept it, all the human rights guaranties must be respected. During this procedure, the parties must benefit of juridical assistance, interpret (in case the situation imposes) and the minutes signed on the mediation final must provide information in this field.

If the mediation procedure takes place before the trial start and it has as a result the reconciliation of the parties, the mediation contract has *res judicata* power. That is because the victim may not notify any judicial authority on the same fact. The mediation procedure has also a suspensive effect for the term established by the law for the prealabile complains to be introduced (2 months starting from the day the adult victim knew who the offender is, according to article 284 par. 1 from The Romanian Procedural Penal Code). But, if the parties did not come to reconciliation, the victim may introduce the complaint in the same term, which will continue from the day the mediation document will be written.

If the mediation takes places after the penal trial started, the prosecution or the judgment will be suspended when any party presents the mediation contract. The suspension should be as long as the mediation lasts, but no longer than 3 months starting with the day the contract was signed. The mediator has the obligation to communicate to the judicial authority a copy of the document signed in the end of the mediation procedure.

The penal trial resumes at the judicial authority initiative immediately after it receives the document according to which the parties have not reached a consensus or when the 3 months term expires.

THE MEDIATION IN THE ROMANIAN GENERAL LEGAL RULES

Although the special regulation from the Law no. 192/2006 was into force for a while, the Penal Procedural Code has not been amended in order to be put in accordance with new institution till 2010. In this year, the Law no. 202, so called "The Little Reform", amended the Penal Procedural Code (PPC) into force since 1969 and, among other interventions, included in this important legal instrument some provisions related to the mediation. First, it is about the article 10 PPC which establishes the cases the prosecution cannot start or cannot continue. The point h) from this article was completed with a new impediment – which exists when a mediation accord was signed for the offences indicated by law as being pursuable only after a special complaint was formulated.

In the same way, the transaction and the mediation are indicated as methods to end the civil action in the penal trial. According to article 16^1 PPC, during the penal trial, the parties involved in it may sign a transaction or a mediation accord on the civil aspects of the case. In this situation, if all the legal provisions were respected, the court must take in consideration the transaction or the mediation accord and must record them in the decision. If the mediation on the civil aspects of the case is realized during the prosecution, the prosecutor has to record it in the indictment.

Even these provisions are into force since 2010, respectively since 2006, the practical activity demonstrates that they are rarely applied.

THE FUTURE IN REGULATION OF THE MEDIATION IN PENAL MATTERS

In the future Romanian Penal Procedural Code (FPPC) there are even more mediation elements.

First, the articles 16 and 23 are the correspondents of the previous analyzed articles 10 and 16^1 form the Romanian Penal Procedural Code into force since 1969. These two legal texts states that the prosecution cannot start or cannot continue if the parties signed a mediation accord, respectively, that the transaction and the mediation are the methods to extinguish the civil action in penal trial. In essence, these texts were put into force earlier by their inclusion in the actual legislation.

But, the new penal procedural code gives a more important role to mediation because it states that the victim (article 81 New Romanian Procedural Penal Code), the offender (article 83 New Romanian Procedural Penal Code), the civil part (article 112 New Romanian Procedural Penal Code), and the civil responsible part (article 112 New Romanian Procedural Penal Code) all have a *right to address to a mediator*. Moreover, the article 111 New Romanian Procedural Penal Code stipulates that all these parties must be informed on the possibility to exercise the right at the first hearing.

In the article 275 paragraph 2 New Romanian Procedural Penal Code it is stipulated that when there are some judicial expenses advanced by the state, these expenses are supported by a different part, depending on the solution. In case of the penal trial stopped, the expenses are supported by the offender (when this part benefits by a unpunishment cause), by the victim (in case this part withdraws the complaint, or when this complaint was tardily introduced) or by the part established during the penal mediation procedure and indicated in the mediation accord. So, after this new penal procedural code will enter into force, through the penal mediation will be possible to make an exception from the general rules in the field of judicial expenses. It will be possible to determine explicitly that these expenses to be let in the duty of the other part that the one indicated by the general rules.

In the article 312 New Romanian Procedural Penal Code, the legislator settled the prosecution suspension cases. Among these cases, near a serious disease and a legal impediment, it is also indicated the mediation procedure duration. As long as a mediation procedure will be developing, the previous started prosecution must be suspended. But, in order to produce this effect, it is required that the procedure respects all legal provisions imposed by the Law 192/2006, by the Penal Procedural Code, or by any legal instrument into force.

At the same time, the article 367 New Romanian Procedural Penal Code indicates the judgment suspension reasons. The legal provision states that these causes are: the serious illness (established by a medical expertize), the suspension of the cause for another offender in the same case, but also the mediation duration, but only when this procedure respects all legal provisions imposed by the law. The penal trial officially resumes at the end of the mediation procedure. Also, during the suspension of the judgment, the court has to verify periodically the subsistence of the suspension causes. These investigations of the court must be developed at interval at less than 3 months. In this way, it will be impossible as a mediation procedure to have duration longer than 3 months, and to cause unjustified prolongations of the penal trial.

It is obvious that after this New Romanian Procedural Penal Code will enter into force the penal mediation will get a more important role and a better visibility at the same time. In this new legal instrument there are more consistent legal provisions which create the possibility for the penal mediation as a new procedure in the penal law field to gain in effectiveness and to become a more practical instrument.

CONCLUSIONS

1. The present paper started the investigation from the so called “right to punish” the states have assumed during the ages and observed the evolution from the retributivism to a present and modern theory – the restorative justice. Under the influence of some European legal instruments as The Committee of Ministers to the Council of Europe member States no. R (99) 19, elements of this theory were included in The Romanian Penal Procedural Code into force since 1969, only from 2010 and completed the legal framework created by the Law 192/2006. Among these elements there is the penal mediation and this institution is included in the New Romanian Procedural Penal Code which is about to enter into force in short time.

2. This study represents a documentation source for every person interested in criminal law field, both theorists and practitioners. The impact on the doctrine will be an important one because there are only a few such studies published in Romania, which reveal the mediation as a restorative

justice instrument and which points the legislative framework into force in present. Also, the paper has the merit to include an analysis of the future regulation included into the future Romanian Procedural Penal Code, published in the Official Monitor and which is about to enter into force in a relative short term.

3. This study opens the perspective for future researches related to this topic. It is about a new domain for the Romanian penal law and that is why such future studies should concern some particular aspects of mediation in penal matters, as for instance, the relationship between the mediation accord and the unconditioned withdrawal of the complaint. A subject like this is interesting from the both perspective as well – theoretical and practical.

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SPECIAL ISSUES REGARDING THE MEDIATION PROCESS IN THE COMMERCIAL FIELD

SEPTIMIU STOICA[1]

Abstract

The purpose of the research subject to this paper is to find proper solutions for the increase of the volume and efficiency in the field of commercial mediation. Starting from practical remarks, after an analysis of the substance, a new concept is suggested to be included and put into operation, namely the special commercial mediation, and a plead is made for its use in the current activity of alternative dispute resolution.

The first major objective of this paper is to demonstrate once again the need and utility of mediation in the commercial field, insisting though on its remarkable specific nature. The second objective is, starting from the outlined differences between the commercial mediation and the classical mediation, to define and to conceptualize the special commercial mediation, as a separate branch of mediation. The third objective of this paper is to draw the regime of the newly defined category of commercial mediation from a regulatory point of view, of the implementation structure and techniques as foreseen.

KEY WORDS: *mediator, arbitration, facilitative, negotiation, evaluation*

Introduction

This study has for object the use of mediation, as ADR, in the commercial field. Although in the countries where the mediation is used intensively, the commercial area for its application is not avoided, the results are not up to the level of the possibilities. ADR star is still the more expensive, complicated and risky commercial arbitration, especially at international level. Moreover, in the countries where mediation is incipient, such as Romania, the cases of commercial mediation are singular and fortuitous, without outlining a positive increase trend. This paper aims to identify the reasons for such failure and to suggest a new approach, more pragmatic and more efficient of this field.

By this paper, we are building and suggesting the solution to the above-mentioned issue, which is a new category of mediation, deviating from the classical mediation, namely the commercial mediation. Once adopted, we believe that the effect would be of extreme importance: a better and more efficient resolution of commercial conflicts, a spectacular increase of the number of cases brought in for resolution, a recovery of the commercial relations, the relief of the Courts of law from most of the pending litigations. Therefore, the objectives of the paper are to individualize and to delimit the commercial mediation within the context of general mediation and to build a new concept, namely the special commercial mediation, and to configure it.

In order to reach such objectives, the paper underlines the need to use the mediation in the commercial field, identifies its particular features, sets forth its similarities and differences compared to the regular mediation with a facilitating nature, defines the special commercial mediation, explores the ways of its prescriptive assimilation and outlines some of the fundamental techniques that may be related thereto.

The subject of mediation in the commercial field is approached in the specialty literature. Emphasis is made more on the use of mediation as such and on case studies, but less on finding the deficiencies of its classical form. Although the evaluative approaches are present, we were not able to identify the theorization of a new concept as a separate branch of mediation detached from the trunk of regular mediation, even if we have the feeling that the idea is hovering and – in an intuitive and

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empirical manner – that there are practitioners who use it, to a certain extent and not systematically. That is why we hope that an original contribution in this field is made by our paper.

Utility of commercial mediation

Commercial conflicts represent a divergence area presenting a special interest and importance in the relational landscape of modern society. Commercial law, as a branch of private law, covers the entire performance of economic activity, with its major importance and inclusion in the contemporary existence.

Obviously, the commercial activity means interactions among people, among individuals and legal entities, among legal entities as such. The relations among protagonists are governed by laws and contracts. The inevitable misunderstandings among the parties are settled in a canonic way in front of the Court. The number of disputes is high, and the complex nature of the cases is huge, therefore it is important to settle them efficiently.

But it is the efficiency of settling the cases in front of the Court that is more and more often questioned. The methods of alternative dispute resolution (ADR) are current options in this field. The most popular is the commercial arbitration, an extremely widespread institution during the last decades, both at national and at international level[2]. Following its steps, mediation started to strongly impose itself after having been preceded by the simpler formula of the conciliation.

Why is it necessary to have an alternative to traditional justice in the commercial field and - in particular - why can this be better used in the business field? We'll give some answers herein below, in this introductive chapter of our paper.

Thus, first of all, it should be mentioned that the approaches of the participants in the economic life are harsh, but rational. Rationality is specific for the entire field so it is natural for it to be present in the disputes' resolution. The parties may foresee the costs and risks of each method of dispute resolution and decide on the most suitable one, and also when this one represents a compromise. The emotional elements are not preponderant here, as they are in the conflicts among common individuals[3] or within the community, and to establish a communication platform is also natural and accepted. Negotiation is the universal language for closing businesses, all the more so as the parties may use it again - why not? - for the conflicts' resolution. These are circumstances which - at least apparently, we are going to get back seriously to this aspect! - are in favor of ADR, especially the mediation.

The second reason refers to a major coordinate of the commercial relations, namely the continuity, at least by defined time periods. Incidents are possible, and even probable in the commercial relation between two partners. But it is necessary to manage them in an efficient manner, to find an economic solution in order to surpass the same. A "*win - lose*" solution, as the solution dictated by justice and even by an arbitral proceeding, may give entire satisfaction to either party, but it is quite difficult for someone to rely on the fact that the losing party will still wish to continue the contractual relation, or somehow that both parties will accept to initiate new relations between them. Such additional price that is paid, the long-term discrediting of the relation, represent *per se* a common cost that is not worthy to be rationally, pragmatically incurred. It leads to the decrease of the turnover, to the lessening of the potential partnerships. The consequences are often more dramatic in an asymmetrical situation when one of the belligerent parties holds a privileged position in its field of activity (for ex.: *de facto* monopoly). The other party, avoiding or being from now avoided, risks to seriously influence its activity, almost compromising it. Therefore it is natural for this one to find suitable a method of resolution which avoids the sacrifice of the relation.

[2] Christian Buhring-Uhle – "Arbitration and Mediation in International Business", Kluwer Law International BV, The Netherlands, 2006, pp.180-195

[3] Jennifer E.Beer, Eileen Stief – "The Mediation Handbook", New Society Publishers, 1997, p.84

There are also other aspects which may influence the interests of a trader in case of a public judgment. Its involvement in a lawsuit, even without any evident guilt - but especially in case of an apparent guilt - is likely to deteriorate its image and to adversely influence its present or future partnerships. A negative reputation, including the aggressiveness in justice, but also noticeable vulnerabilities as a result of involvement and attrition in long or costly lawsuits, or weaknesses caused by the execution of certain Court decisions, may cause additional vulnerabilities in the relation with current or future business partners. Not to forget also the virtual prejudice caused by the divulgations resulted from the public performance of lawsuit-related debates regarding the involved parties, non-public information which loses its confidential nature until then.

The commercial cases are, by their nature, complex, full of technicalities. Their resolution in front of the Court implies time, attrition. The expenses[4], even in case of success, are high, and not always nor fully covered by the opposing party which was found guilty. However, often the repair occurs with delay, is late, or has a weak coverage and efficiency. Traders search in fact rapid solutions, with the lowest costs possible, and the legal proceeding does not answer - evidently - to such criteria, on the contrary.

Time and cost are not the only adverse consequences of the complexity of commercial conflicts in common law. Their high technicality, given the absence of economic and technical training of the judges in the field of the dispute (fatally and innocently only jurists!), which can be only partially covered by expert reports, makes commercial cases be difficult to understand by law people. Correlated with the high busyness level of those judges, with the inherent weaknesses and the unavoidable idiosyncrasies of human nature, the judging process in which a third party, not qualified in issues related to the substance of the case, decides and imposes without your consent, you being a trader under litigation, may lead to unexpected and inconvenient Court decisions, even when the lawful appearance is in your favor. The above-mentioned aspects are valid, *mutatis mutandis*, even when it is about the ADR star, arbitration.

Finally, the conclusion may be that the resolution of commercial cases using common legal ways presents different risks and costs, material and non (immediately) material for the parties.

Resulted most often from negotiations, the commercial relations can be saved also by negotiations. But it is necessary that such negotiations take place under a special format[5]. They should be assisted by a third party who is dedicated, neutral, competent and respected by the belligerent parties. The procedure for dispute resolution that is outlined here has already a name. It is called **mediation**. Using mediation is a rational option, deeply in compliance with the spirit and the instruments of traders. But even a regular mediation does not have a maximum efficiency in business - in our opinion -, but a special one. This paper tries to present certain aspects about such special mediation.

Features of the commercial mediation

The previous chapter of our paper enunciated some of the inconveniences of using legal means for settling commercial litigations. This chapter highlights how to surpass by mediation the inconveniences referred to and - in the same time - explores the targets and lines of a special regime of the commercial mediation, such as this idea has already been proclaimed at the end of previous chapter.

In our opinion, the main deficiency of the solution for commercial disputes' resolution in front of the Court is the risk regarding the Court decision. The legal mechanism, when this is chosen, supposes the dictate of a third party, namely the Court. Even in case of the existence and use of remedies at law that could correct the subjectivism or the mistake of the first instance, these do not

[4] Alina Gorghiu (coordonator) – "Medierea – oxigen pentru afaceri", Universul Juridic, Bucuresti, 2011, pp.127-128

[5] Douglas N. Frenkel, James H.Stark – "The Practice of Mediation", Wolters Kluwer, 2008, pp.119-124

eliminate the difficulties faced when identifying and imposing a correct solution. The luxuriance of the commercial facts and aspects, both quantitative and qualitative, make often difficult to include them in the abstract and simplifying patterns of law. Being busy with a lot of cases pending in front of the Court, with at most a superficial understanding of the field, organizing the cases according to some legal stereotypes, the judges are not always ruling correct solutions. It is a common joke that good commercial lawyers are not necessarily winning your lawsuits in front of the Court, but help you not to get there. Anyhow, many times the parties must take into account a risk of Court decision different from zero.

Obviously, rationally thinking, the traders should eliminate such risk, if possible, by an alternative method, under certain conditions that make it efficient. A first condition for such alternative uses an asset of the legal proceeding itself: to draw on a third party when the mere dialogue between the parties has failed[6]. A second condition refers to the availability and commitment of the third party. This one should be actively and continuously involved, as long as necessary, for the exclusive purpose of settling the conflict. The third condition refers to the third party's expertise as regards the substance of the case. In order to understand and then to be an useful participant in settling the issue, the third party must have the competences and – ideally – the accepted experience specific to this field. Finally, the solution found is advisable not to be imposed, but validated by the parties' agreement. The alternative resembles to mediation. But a revised form of mediation.

The issue is that, in the commercial field, in many cases, we do not simply deal with a breach of the obligations, but in reality, at the beginning, with deadlocks and not with conflicts. The initial challenge is not to administer justice (as subjective as justice often is!), but to identify a way to surpass the above-mentioned deadlock. The impossibility or the difficulty to surpass in due time a crisis situation that occurred or to continue the normal course makes appear the conflicts, which shortly after become constant. As regards the commercial relation, justice cannot but decide *post mortem* and impersonally the liabilities. It makes an autopsy and not a therapy. Its intervention is no longer useful in reality but – at most – partially reparative. Again, an agreed solution, able to save the relation and make it operational, is the better one.

The important assets of canonic mediation are, of course, also awarded accordingly in the commercial field. The material values in dispute are often impressive. The expenses for settling the conflict (taxes, fees, expert reports, etc.) are incurred accordingly. Naturally, the substantial reduction of costs is wished and appreciated by traders. Also the celerity or confidentiality, which are the well-known advantages of the mediation.

As it may be noticed, strong reasons plead for using mediation in the field of commercial conflicts resolution. That is what happens in reality in the countries that are economically developed and have a tradition in this field. But why is this not happening at a larger scale, including in developing countries, such as Romania? Why is mediation still a Cinderella compared to the commercial arbitration that is the unchallenged international star of the ADR? In our opinion, two explications exist:

a) canonic mediation has a facilitating nature. Mediator is declared to be the third party who only restores the dialogue. Its part is to make some valves operational in order to release the adverse emotions and to restore the dialogue. Then the parties, relieved and finally capable to collaborate, will find the solutions.

This pattern is not operational in the commercial field. There are no emotions here. In addition, the parties communicated and incline to continue communicate. They have already tried, most often, to find the solutions together. They did not succeed. They need a third party to substantially contribute also as regards the substance, not only procedurally, to their identification or construction. A simple communicator is not enough for them. With its standard methods and its

[6] Douglas N. Frenkel, James H.Stark – "The Practice of Mediation", Wolters Kluwer, 2008, p.9

optimism and peace recipes, this one risks becoming slightly ridiculous. The mediator in the commercial field, taking the risk involved by such enormous enunciation, must be at least a valid interlocutor as to the substance of the issue of the parties in dispute.

b) canonic mediation may fail[7]. In exchange, a lawsuit or arbitration ends with a solution. As long as the parties, for not reaching an agreement, may fail the mediation procedure, this risks becoming a loss of time. Moreover, the actual danger exists for them to divulgate their positions, defenses, evidence, which afterwards may be annihilated in Court. In addition, a Court decision or an arbitral award is easy to be made enforceable. In exchange, the management of the parties' behavior after mediation is more difficult to be made operational, and the mediator is practically no longer involved in the process. Its part was – wasn't it? - only to "conciliate" (for the moment?) the parties! This aspect is discouraging for the pragmatic, lucid traders.

The above-mentioned obstacle is difficult to surpass in mediation because it is correlated to an inherent feature of this one: its optional nature, including of adhering to the solution.

We are going to try in the next chapter to identify however some non-standard versions for resolving this major adverse aspect of using canonic mediation in the commercial field.

Similarities and differences between commercial mediation and canonic mediation

The previous chapter underlined two important theses:

- mediation is critically needed in the commercial field
- in order to be efficient and attractive, mediation in the commercial field must be redefined and improved in comparison to canonic mediation

For the purpose of answering the second thesis, this chapter tries to outline the differences between canonic mediation and what we define herein as being commercial mediation. We'll start by emphasizing once again the fundamental useful features of canonic mediation, and then we'll analyze which one is fit and which one is not for the commercial mediation. We mention once again that in this paper **commercial mediation** means a new procedure of approaching the mediation process in the commercial field, as we are going to define herein below and not the classical approach and application of mediation with facilitating nature in the commercial field (less different than the canonic mediation and – in our opinion – not enough efficient, at least in the countries with weak experience in the field of ADR, such as Romania).

(Canonic) mediation supposes[8]:

1 the existence of a dispute occurred between the parties
2. not using the legal proceeding for settling the dispute
3. the appointment of a third party which catalyzes finding a solution for resolution - the mediator
4. the mediator is impartial, independent and reputed
5. the mediator is not a specialist in law or does not use its legal knowledge
6. the mediator is not a specialist in the field of the substance of the case
7. the mediator has competencies, at least natural, in communication and psychology
8. the parties are under the influence of emotions and the lack of communication
9. the mediation process takes place according to a standard procedure (method)
10. the solution for the dispute resolution is sought by negotiation
11. the negotiation is based on interests and not on rights
12. no proofs are produced, no guilty parties are determined
13. the case is not analyzed nor assessed legally, not even by the mediator
14. no decisions are ruled

[7] Douglas N. Frenkel, James H.Stark – "The Practice of Mediation", Wolters Kluwer, 2008, p.126

[8] Cristopher W.Moore – "The Mediation Process – Practical Strategies for Resolving Conflict", 3-rd Edition, John Wiley & Sons, 2003, pp.43-55

15. the participation is voluntary
16. each party voluntarily adheres to the solution
17. the solution is generated in common by the parties
18. the mediator does not participate in the discovery or construction of the solution
19. the mediation process ceases as soon as the parties reach an agreement (or when the negotiations fail, as ascertained)
20. the part of the mediator is (exclusively)
a) to release emotions
b) to restore and ensure the dialogue
c) to formally conduct the works
d) to ensure going through the stages and performing the method

As regards the commercial mediation, following the order of the above-mentioned features, the following details and distinctions are necessary:

1. Obviously, commercial mediation may occur as a result of a dispute between the parties. As a rule, this is due to the failure to accomplish or the faulty accomplishment of a commercial obligation. It should be noticed however that such dispute is often translating the occurrence of a deadlock in the commercial relation between the parties, which can no longer take place as initially agreed by them. The deadlock may be most of times noticed prior to the failure of the commercial obligation, which this one precedes. It is the result of the issues faced by one of the parties, or maybe both of them.

Without questioning the behavior or the individual liability of the parties, the deadlock represents more critically an issue of the relation *per se*, than of the parties. More than in other conflicting situations, the question is not in the terms according to which the parties should have evolve and interfere peacefully in proximity, but that those traders had to work, in a broader sense, together. Therefore the intention is not to simply to extinguish, by mutual compromises, a conflict, but to really find solutions acceptable for both parties to solve a deadlock, during a joint activity.

That is why, in most cases, mediation in the commercial field is dedicated no so much to settle a dispute[9], but to identify a solution in order to surpass a deadlock. It is not about an understanding point where the parties may split, but a line that the parties understand to follow.

2. If an alternative solution is chosen for solving the relational crisis, the traders waive (at least temporarily) to use legal means.

3. In commercial mediation of course it is called on the services of a third party: the mediator.

4. The neutrality, independence and reputation are also in the commercial field conditions required for the mediator. Given that the mediation in the commercial field is mainly cerebral and not emotional, we mention that the first two aspects are more related to nature and less to essence. They must relate rather to the current procedure of the actual case resolution (based, for example, on a commitment). The third aspect is mainly pertaining to the competency and honesty (pragmatic aspects) and less to fame.

5. The lack of competence or of legal perspective or the agreed mediator's waiving to use the same does not represent, in our opinion, an advantage in commercial mediation, but rather a handicap. Without setting oneself up as a judge or lawyer, the mediator must understand the legal context of the conflict. He must be able to distinguish and to show the parties (individually) the risks they might face in justice and to assess the case (similarly to the evaluative mediation). Not accepting in discussion the legal aspects during a commercial mediation is deceitfully and may cause participants' mistrust or discontent. The cases have several sizes, among which the legal aspect is essential. A solution different from the legal one is searched, and not because the lawful aspects would not have a major importance, but for rational reasons that were talked about. But to ignore law

[9] Cristopher W.Moore – "The Mediation Process – Practical Strategies for Resolving Conflict", 3-rd Edition, John Wiley & Sons, 2003, pp297-299

is not realistic. In fact, it must operate as a pressure for those who hesitate or simulate, reminding them that it may come back in force unless a solution through mediation is not found.

Moreover – we'll see –the possibility exists to use certain hybrid mediation branches, in which the mediator formulates a decision (facultative or mandatory).

6. The concept of general mediator, who is not a specialist in the field in which the mediation takes place, represents a hot spot in the mediation theory. The formula enounced is almost a taboo. It is deemed to be a mediation pattern in which the parties, on one hand, do not succeed (mostly because of emotions) to communicate, and on the other hand have a rigid, positional approach. The mediator should solve those difficulties, based on a panacea method, and then the parties, knowing the field, would find the solution, using joint efforts.

In the commercial field, in most cases, the approach described above is naive. The parties communicate and – in general – have prospected (individually or jointly) the unblocking solutions, but without success. They need a decision made by a third party, as it happens in the legal or arbitration field, or a reexamination of the theme along with a third party. In order for his intervention to virtually have success, until he suggests and uses the stock of techniques, a first condition is to have – at least – the competence[10].

7. The communication competences of the mediator are useful in commercial mediation, but these must not be transformed into fetishes. The psychological competences are a bonus, but not essential.

8. In commercial field, setting up communication between the parties does not usually represent an issue. Communication functions or has functioned until a certain moment. As a rule, the parties' adhesion to mediation is a prior consent for dialogue.

Emotions do not characterize either the affected relation between the parties. They represent, at most, an ingredient, should they be sincere, or otherwise a way to put pressure. Getting over or ignoring them is not an issue.

9. In commercial field, the standard method of carrying out the mediation process becomes difficult and inefficient. There are useless, formal stages and steps. Indeed, discipline and strictness of the mediation meetings, as well as planning the objectives continue to be useful. However, in our opinion, a (new) method is necessary, being inspired only by the classical one. We plead for a lighter approach of the cases *per se* and – if possible – which may be individualized. In our opinion, the emphasis must be on the techniques and procedures selected and used specifically in management and the commercial field.

10. The key of the commercial mediation is the negotiation, both based on interests, and the positional one (unlike the canonic mediation)[11].

11. A great common interest exists in the commercial field, that is to continue the relation between the parties. Also, there are similar interests regarding the celerity, confidentiality, minimizing the costs, etc. Together, they led to the selection of mediation as dispute resolution method. Even due to such reason, the interests are the principal factor taken into account. The rationality of the parties, the pragmatism specific to this field make us understand that rights are ancillary to the interests.

On the other hand, it must not be neglected the fact that the parties are aware of their rights and of the possibility (under given circumstances) to use them in justice. That is why they cannot be and will not be ignored. The parties do not enter as equals in the negotiation during the mediation process. They are charged with their (infringed) rights and their (unobserved) obligations. The interests form into desiderates, while the rights and obligations represent however the legal reality.

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[10] Douglas N. Frenkel, James H.Stark – "The Practice of Mediation", Wolters Kluwer, 2008, pp.77-79

[11] Cristopher W.Moore – "The Mediation Process – Practical Strategies for Resolving Conflict", 3-rd Edition, John Wiley & Sons, 2003, p.252

This distinction is that the rights must come under the larger interests and that they may be reviewed (fully or partially capitalized) in a wider arrangement and not that they must be ignored or abandoned.

An approach which would claim to approach the rights in exchange of the interests is not only wrong, but could discourage the participation of traders in mediation. The solution would rather be to enlarge the negotiation area in order to identify new common interests which may compensate the current deficiencies.

In conclusion, the negotiation in the commercial field tends to use the current and future interests, based on the parties' current rights and obligations.

12. As a principle, the procedural methods related to the legal field are not used either in commercial mediation. The parties know each other's situation and agreed to jointly search for a solution, and this is based on an elementary good-faith. However, the possibility exists that certain aspects or facts be differently seen or construed. Under such circumstance, some evidence (for example, written deeds) or even expert reports might be necessary.

Also, the (joint) analysis of the situation and facts cannot ignore the unobserved obligations or the infringement of the rights, namely to determine, even in a declarative manner, of certain guilt, which must be compensated.

It must be added to all the above mentioned that (if necessary) in the hybrid versions in which a decision is ruled, the third party must be made available the investigation and administration methods.

13. The canonic mediation having a (purely) facilitating nature does not seem the most suitable for the commercial mediation. In our opinion, the mediation evaluative (and not only these!) elements must be added in this case.

14. In case the usual procedure is used, the solution in the commercial mediation is not ruled by the third party, but is jointly generated and accepted by the parties. The hybrid versions may bring new elements to this effect.

15. As in any mediation, the participation of the parties in the commercial mediation is voluntary.

16. The adhesion of the parties to the solution built during the mediation process is voluntary. Only in the hybrid versions of commercial mediation other possibilities may be held.

17. The commercial mediation preserves the nature and the advantage of the canonic mediation when the parties generate the solution, using analysis, debate and negotiation.

18. The most important change that we suggest, without being mandatory, for the commercial mediation practice is as regards the part played by the mediator in identifying/constructing the solution. We believe that the mediator's active participation is useful and particularly appreciated by the parties even in the activity of generating the solution. Such capacity, based the mediator's on competences and/or the experience in the basic or a related field, would be added to the part that this one plays anyhow to organize, order and manage the mediation process works. The lucid, objective, neutral and competent contributions are the major element that the traders search in fact when the negotiations among them have failed and they resort to the mediation.

Depending on the format and the provisions of the agreement between the actors, an evolution is possible also toward other hybrid forms of negotiation, in which, after using the means for the identification of an agreed solution, the third party acting as mediator or another person may make even a decision, either mandatory or to which the parties may voluntarily adhere.

19. One of the mediation's weak points which must be recognized is the legal force of the mediation agreement. Its investiture in justice supposes an additional procedure, likely to complicate and putting it in danger. Assuming a voluntary performance, as it is natural, the parties' comfort and trust would significantly rise if an authority supervising such process could operate. The mediator himself is the most suitable as he knows the case and the turns of its resolution, the particular features and the conditional aspects of the solution built, but also as his authority is recognized and

consolidated in the process. Though, his part ends in case of a conventional mediation. As a complete formula of the commercial mediation will have to cover this deficiency also, completing the process with an after-mediation stage.

20. As already mentioned, besides the fundamental classical functions of the canonic mediator, we suggest in the commercial mediation also the parts of assessor, expert, solver, (possibly) arbiter, organizer and supervisor of the post – mediation process.

Thus, the mediator not only becomes liable for the communication between the parties and is the guide during the mediation procedure (a facilitator), but also actively involves himself in the practical resolution of the dispute.

The conclusions of the comparison in twenty points above will lead us in the next chapter to the definition of the new form of commercial mediation that our paper suggests.

Definition of the concept of special commercial mediation and its regime

The considerations developed in the previous chapters were meant to argue our thesis according to which mediation in the commercial field may be configured separately from the "regular" mediation. We called the first form of mediation "special commercial mediation" (briefly and only in this paper **commercial mediation**), and the second one, regular mediation or **canonic mediation**.

Obviously and essentially the commercial mediation is a form of mediation. That is why, the essential features of the canonic mediation are characterizing it too. They represent its proximal genre. What differentiates it from the canonic mediation is its specific distinction. We are going to briefly identify them herein below so that we define the concept of (special) commercial mediation we are going to present.

Thus, the commercial mediation has the following features that pertain to

a) the proximal genre (canonic mediation):

- represents an alternative for dispute resolution
- the participation of the parties is voluntary
- appeals to the participation of a third party (the mediator)
- the mediator is impartial or independent (towards the case)
- the solution is not (as a principle) imposed from outside
- the solution is built by negotiation of the parties
- the mediation process is conducted by the mediator
- the mediator uses and implements communication techniques between the parties
- the negotiation takes (also) into account the interests

b) the specific distinction:

- the general nature of the case is commercial
- the mediator may be actively involved in the process of building the solution[12]
- the mediator has legal expertise and may offer the parties a legal assessment of the case
- the mediator has the expertise and or the experience in the field of the substance of the case and/or in a related one[13]
- the negotiation takes (also) into account the rights
- the mediation process is simplified and focuses on generating options and building the solution
- in case of deadlock, a decision may be made by the third party, to which the parties may adhere

[12] Alina Gorghiu (coordonator) – "Medierea – oxigen pentru afaceri", Universul Juridic, Bucuresti, 2011, pp.229, 232

[13] Alina Gorghiu (coordonator) – "Medierea – oxigen pentru afaceri", Universul Juridic, Bucuresti, 2011, pp.127-128

- if necessary, the process may be settled (also) by assisted competitive negotiation
- it may be instrumented, with the parties' agreement, a procedure for post – mediation supervision, managed by the third party

Thus the definition being the (special) commercial mediation, related to the proximal genre and the identification of the specific distinction, there are two aspects we are going to detail hereinafter: its legal nature and functionality.

Legally speaking, the special laws of mediation are definitely covering the canonic mediation (with facilitating nature). That is what happens in Romania too. Although the law avoids defining it univocally, the way it is officially construed and practiced lead to its restrictive reading, such as it (only) allows to exercise the mediation with a facilitating nature.

The commercial mediation pattern (not so facilitating or not only with facilitating nature) that we suggested is not however just an exercise of imagination. It succeeds an analysis and represents a solution (if not the solution itself!) so that mediation operates in the commercial field. As this is defined and practiced today, simply facilitating, it is neither attractive nor efficient.

The laws are drafted in order to meet the needs of the reality and not to impose on the reality. That is why, our opinion follows the school of reasoning according to which what is useful and claimed by the economic reality must be allowed by the laws meant to favor it. Namely we adhere to the doctrine of the ascendant of the economic (of the real life) over the legal (the instrument). In this case, three solutions exist.

The first solution, the simplest and rational one, is another positive and permissive reading of the current law. Mediation must not transform itself into a dogma. That is, on one hand, in its essence, a right granted to the parties to settle themselves their disputes, and the law approves this. On the other hand, the same law regulates and gives stability to the profession of mediator, for the primary purpose of protecting the parties in conflict. That's all and nothing more. As regards how this thing takes place, here it should be the freedom that allows adapting it to the needs of those who are in conflict and to the arsenal specific to each mediator separately. In case of interpersonal disputes, of course psychology is necessary, as for other disputes, knowledge of law or economy is required, as it happens in the commercial field. It would be ridiculous to favor the first ones (because everybody knows psychology, don't they) and to prejudice the other ones, by generalizing the approaches in the field of inter-personal mediation at the level of the mediation for economic organizations. Such wide line of reading the law in favor of which we plea is, as a matter of fact, to our information, compatible with what happens in the countries having a developed mediation practice, where, besides mediation with facilitating nature, are also used the evaluative mediation, the transformative mediation, the narrative mediation, etc.

The second solution, more complicated, is amending and complementing the law. With a view to the future law, it should be expressly defined other forms of mediation too in order to settle the disputes among professionals, such as the commercial mediation. The text formulas that might be adopted are either those generically permissive (which are preferred), or those elaborate and specific.

Finally, the third solution is to relate to common law and not to the special mediation law. Mediation, as an agreement between the parties, was able to operate (and still operates in some countries) also without a special law. it may be seen as an agreement between the parties and the mediator, under the conditions of the mediation process as provided by the contract. The freedom to extinguish conflicts by negotiation is natural; in addition common law provides even a special institution to this effect, namely the transaction. Then, there are even professionals, such as lawyers, who have a general vocation for mediation, not expressly circumstantiated within the strict framework of a law, such as mediation law.

So, the solutions for recognizing and practicing the special commercial mediation, such as defined herein, exist under the versions above or a combination thereof.

By the end we'll make some brief references also to the instruments indicated to be used during the commercial mediation.

As already mentioned, besides the formal aspects relating to the process' organization and initiation, some of the stages of the classical mediation process are no longer necessary or their importance or the time spent on them during the procedure is going to decrease.

The central part of the process will be represented by the actual construction of the dispute resolution solution. The methods used relate to the technique of group analysis and to the decisions theory[14]. The mediator must be able (including by persuasion) to transform the parties from an antagonist duo, into a working group. In relation to this aspect, the communication and psychological techniques are intensely used. A special attention will be paid to the mediations with multiple parties.

There are two possible evolutions of such process. In the favorable situation when the efforts of the mediator succeed and the parties accept to cooperate in aiming to accomplish a joint solution, the next step is to generate options. Now, it is a negotiation based on interests. The techniques used usually are those of brainstorming or collective management of decisions. A provocative, modern and creative method is, for example, the technique of parallel thinking. The mediator will participate actively, using in a constructive manner its competences in the legal field and in the field of the substance of the case.

In the less happy situation, when the parties still remain on different positions (the second possible evolution), the mediator will assist them and organize the framework of a competitive negotiation. In order to avoid the risks of confrontation, the technique recommended to be used with priority is that of individual discussions (*caucus*), when, on one hand, the mediator will be the messenger of the parties' suggestions, and on the other hand will interactively assess with each party the legal situations separately, as newly configured.

Finally, in case no solution is accepted by both parties after using both versions, if they accept and if evidence has been produced during the procedures, the third party may rule a solution itself. Such solution may be accepted voluntarily or mandatorily, or may be used as a reference for another (final) stage of negotiations. The above-mentioned development is included in a broader concept of hybrid ADR called med-arb ("*mediation&arbitration*")[15].

Both the solutions of prescriptive accommodation as well as the techniques around the special commercial mediation are to be detailed in a future research. These have been formulated above, just as examples and not restrictively, complementing and adjusting the new concept suggested hereunder.

Conclusions

This paper tries to identify a solution for making the mediation process in the commercial field more efficient. The presentation strategy follows a practice – theory – practice path. It starts from remarks regarding the appetence, which can be and is ascertained, for mediation of the commercial field, and from practical remarks regarding its specific nature and desiderates. A theoretical table was drafted with the features of the classical mediation and the similarities and differences between this one and the commercial mediation were analyzed according to the doctrine. A concept of a new form of mediation resulted, namely the special commercial mediation. Finally, an attempt was made for identifying the most suitable formula of legal accommodation of the method and some practical approaches of the method have been suggested.

The results of the research are likely to stimulate the optimism as regards the viability and feasibility of the newly suggested formula of mediation in the commercial field.

We think that the global result of the research should have an impact and possibly to cause controversies which are prolific from the point of view of the debates on ideas among the mediators.

[14] Alina Gorghiu (coordonator) – "Medierea – oxigen pentru afaceri", Universul Juridic, Bucuresti, 2011, p.235

[15] Christian Buhring-Uhle – "Arbitration and Mediation in International Business", Kluwer Law International BV, The Netherlands, 2006, pp.148-152

We hope that it will be convincing and that the newly suggested paradigm will conquer the dogmas or the prejudices in this field and will have a liberating effect.

The new pattern of commercial mediation will be lighter, more fitted, more efficient. The reshaped mediation would correspond to a greater extent to the needs of the traders' conflicts resolution, would attract more cases in front of the Court, which would be settled to a greater extent and more convincing. Also, we hope that in this way we'll stimulate actual, substantial and intellectual debates among practitioners, jurists and representatives of the business environment.

The future research activities will be able first of all to deepen and to test the concept, to check its theses. Secondly, an actual way of accommodation to the current legal framework must be found. A study will be conducted to see to what extent the concept is supported by the special law of mediation, if necessary, as an alternative, taking into account only the regular commercial laws and not the special ones, or if it is necessary to amend the special laws in this field.

The efforts for theoretical drafting and the practical tests will outline the structure of the related procedure and the combination of facilitating, evaluative techniques and of hybrid procedures which will equip it.

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DIVISIONS AND SEGREGATIONS OF THE PATRIMONY

CRISTIAN GHEORGHE[1]

Abstract
For a long time, dispute resolution and alternative techniques like mediation have been dealing with a classic conception: every part involved in dispute resolution was carrying exactly one patrimony. Irrespective of physical or moral person the rule was the same: one person, one patrimony.
Alternative dispute resolution, like mediation, dealt with persons in order to reach a mutual agreement affecting their unique patrimony.
The rule is already history. Still remain the first premise: every person has a patrimony. But under present Civil code the provision is stopping here. As a result, the uniqueness of the patrimony vanished from new law.
Dealing with different patrimonies a dispute solver should be able to understand the new notion and to assist the parties to finals agreements according to the rules of the divisions of the patrimony.
First at all we should observe that any division of the patrimony of a person have to have a legal basis. The "liberalisation" of the patrimony is not so advanced in order to accept any voluntary division of the patrimony of the person.
Second, the prominent creation in this field are represented by fiducia (a kind of Anglo-Saxon trust concept) and assigned patrimony. Fiducia is new for our legal system only, following in fact the Quebec civil code regulation.
The assigned patrimony was already been present in our legislation. The Ordinance no 44/2008 was dealing with this concept in commercial field.

Keywords: *patrimony, assigned patrimony, new civil code, mediation, trust.*

Introduction

Mediation is now widely accepted as an effective method of resolving disputes. Mediation has recognized advantages than ordinary court proceedings: is faster, cheaper, even more trusted and easier accepted by parties.

Mediation avoids parties' confrontation inherent in judicial proceedings and allows the parties to keep their business, professional or personal relationships beyond the dispute. Mediation also enables the parties to find their own, creative solutions to their dispute, usually not rendered by court judging strictly by law.

Mediation is well-fitted for civil and commercial law branches, (although other law branches are not excluded) in patrimonial disputes. The main premise for mediation is the economic character of the dispute, the money expressed claims parties can dispose of. The concept of patrimony, the extent of the assets parties can dispose of is very important in such settlements, mutual agreements involved by mediation process.

The concept of patrimony and its extent is changing dramatically now, according with new Civil Code. Observing this new concept is important for law scholars and practitioners in mediation (mediators) in order to understand the border of the individual patrimony which settlements can affect.

We intend to define the new concept of patrimony as the aggregate of the person's economic rights and obligations and its relation with enterprises and persons (natural and legal).

Old theory of the patrimony. Classic doctrine.

First of all we are dealing with a civil-law system concept (in common-law system the concept is related with inheritance), the total of all personal and real entitlements, including movable

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and immovable property, belonging to a natural person or a juristic (legal) person; in some respects the concept is similar to the common-law concept of a person's estate.

Old civil law doctrine follows a simple principle: every juridical person (natural or moral person) has just one patrimony. It means there aren't a patrimony without a corresponding person as well as there aren't a person without a patrimony.

The general principle of the old civil law doctrine on patrimony stated the uniqueness of the patrimony[2]. Every person has exactly one patrimony conferred by his legal status.

Classic theory of patrimony pursues to full identification of patrimony with legal capacity (personality) claiming that nothing remains outside the patrimony. As legal capacity may remain just a latent concept till future events, the patrimony can be only an abstraction, an "empty bag" ever ready to receive further legal effects of acts and deeds.

Critique of this doctrine tempered these allegations making distinction between abstract legal personality and patrimony which must remain close to the "contingent reality". Emphasizing monetary value of the rights and obligations of a person, elements of the patrimony, the differences between this notion and legal personality are better underlined.

Uniqueness of the patrimony theory has always created difficulties in explaining practical realities. Concept such patrimony of affectation (distinct division of a patrimony reserved for a recognized purpose), tendencies of identifying a group of goods and individual rights within a patrimony, all these were struck by the uniqueness of the patrimony inflexibility and had to retreat in front of the prestige and infallibility of this theory.

At present, in the civil law approach, the patrimony of affectation is a patrimony, or legal entitlement, that can be divided for a purpose, as being distinct from the general patrimony of the person. The corresponding common law approach of the concept is trust in some aspects where property is held by an administrator for the benefit of third parties. The property remains entirely outside the patrimony of the grantor, thus if the grantor become bankrupt or has liabilities, the property remains untouchable and may continue to benefit the intended beneficiaries.

The new patrimony theory in the new Civil Code.

The new regulation of the patrimony is stepping apart from the old approach. Every person still has a patrimony. There isn't a person without a patrimony.

This notion, patrimony, as defined in Civil Code, comprises all rights and obligations of a person that can be valued in money[3]. Further, this legal concept evolves and allows distinct patrimony masses, separated within the general patrimony of a person and delimitated by a purpose according to the law.

Civil Code imported into national law the concept of *fiducia* following the "trust" concept from common-law system. In this case, by his will, the grantor conveys a distinct mass of assets to a person (administrator, trustee) on behalf of a beneficiary (which may be the grantor itself, the trustee or a third person). The trustee holds or manages and invests assets for the benefit of another. These

[2] The uniqueness of the patrimony theory has a long life in juridical doctrine, starting with its founders: Charles Aubry, Charles Rau, *Cours de droit civil français* (1839-46). The core provisions of the theory are: every patrimony belong to a person; every person has a patrimony which cannot be divided in distinct groups of rights. Against this theory has raised the assigned patrimony theory which basically stated the independence between patrimony and legal personality. The division of a patrimony is built from its the goals: a person should be free to assign part of his patrimony to different activities. Accordingly, a person can possess many patrimony masses delimitated by his authorized activities.

C. Bîrsan, "Drept civil. Drepturile reale principale", ALL Beck, Bucureşti, 2001, p. 1-28; V. Stoica, "Noţiunea juridica de patrimoniu", "Pandectele Române", G. Luţescu, "Teoria generala a drepturilor reale", Bucureşti, 1947, p. 9-80.

[3] Civil Code, Art. 31 al. 1.

assets are his property till the termination of the contract (trust) but they remain distinct from his own patrimony.

Other new situation appears in the collective enterprise (simple partnership) case. Such enterprise doesn't enjoy the legal person status. It remains a partnership. But such enterprise has capital stock and an own patrimony consisting of the individual contributions of the associates.

It is generally acknowledged for a company (legal person status) that for all legal purposes the assets of the company shall constitute a separate estate from the personal assets of the founders (associates, shareholders). But a collective enterprise in the form of association (simple partnership) isn't a legal person. It remains a partnership. In such circumstances we encounter a case when a patrimony is recognised beyond the legal person status. This is an inflexion point between old and new regulation in civil and commercial matters.

The simple partnership enjoys the occurrence of a distinct patrimony[4] which is actually difficult to understand without a legal person status. Creditors of the enterprise have to execute these assets first. Still they have a second option in case of lack of assets; they are allowed to ask the partners to indemnify them, following an ingenious rule: each partner have to indemnify creditors with its own assets "proportionally with its contribution to the patrimony of the enterprise, only if the creditor could not be satisfied with the assets of the enterprise". In this way the obligations of the partnership is guaranteed in the end with the associates' patrimonies.

Any mediation process shall observe the limits imposed by this mechanism. Personal asset are not in safe harbour for persons who establish a collective enterprise in the „simple partnership" form. The solution of the parties exposed in a mediation process, under mediator surveillance, shall observe the new concept of the patrimony of the enterprise, with its legal bounds.

Patrimony divisions.

New Civil Code innovates once again by recognition of divisions of the individual patrimony within the unique classic personal patrimony.

Assigned assets of the general patrimony are regulated as fiduciary property (trust) and assets affected to authorized profession practice; besides these situations the law allows the creation of such patrimony divisions subject to strict legal regulation ("other patrimonies determined by law"[5]). Patrimony divisions shall be strictly regulated; they are not governed by person's free will.

Fiducia is a purely civil concept, available to any person (underwriter) which transfers rights (property rights, receivable, securities or other property rights or an ensemble of such rights, present or future) to one or more person (trustee). All these transferred rights remain distinct in the trustee's patrimony; they constitute a separate division, forming an autonomous mass inside trustee's patrimony distinct from other trustee's rights and obligations.

The division of the patrimony involved in a trust (*fiducia*) scheme is reflected primarily in creditors' rights for each patrimony division. Therefore the trustee's personal creditors cannot execute assets from fiduciary patrimony; they are not reachable for these creditors. Symmetrically, creditors whose claims are derived from the exploitation of the trust can execute assets from this patrimony division only.

Patrimony divisions operate therefore as effective barriers which limit the liability of the person up to specially constituted property mass.

The question is whether such a provision acts for any patrimony division. The answer will be given after observing the situation of professionals (persons which operate enterprises).

[4] Ibidem, Art. 1920.
[5] Ibidem, Art. 31 al. 3.

Patrimony of affectation.

From commercial point of view the relevant concept concerning the patrimony division is assigned patrimony ('patrimony of affectation' in civil-law system). Under the Civil Code, the assigned patrimonies are represented by fiduciary property, patrimonies affected for authorized professions and other patrimonies determined by law[6].

Patrimony divisions include those patrimony affected for authorized professions. The law stated on these professions referring to professional entities which enjoy a special regulation, including the individual forms of practicing (lawyers, notaries, bailiffs, mediators, doctors, architects, etc.) Under civil law, the formation of the assigned patrimony established in order to individually practice an authorized profession is done by the act concluded by the holder according to special law. Termination of this patrimony (liquidation of individual affected patrimony) is in line with similar provisions governing the simple partnership unless the law provides otherwise. This rule raises questions about the professionals' situation. Accordingly, if individual enterprise is involved, does it enjoy the legal status of the assets within assigned patrimony affected for authorized profession or its legal situation is different.

Finally the question is whether the professional's situation subsumes the notion of authorized profession. Does the professional pursue an authorized profession or not? In the old classic commercial doctrine the trader's situation was considered that of a person who exercises acts of trade as a profession (as a usual occupation). Trading activities used to have a broad recognition as profession irrespective the fact that "authorized professions" was concerned then as well as now with those occupations organized in the form of legal and professional bodies.

Sill, under present Civil Code the professionals, as traders' successors, are not pursuing an "authorized profession" and the rules governing the assigned patrimony affected for individual practice doesn't cover the situation of the professional, the patrimony affected for exploitation of an enterprise. The distinction conducts to different legal effects.

Rules on patrimony divisions.

Accepting patrimony divisions makes it necessary to observe the relationship between property rights and obligations derived from each patrimony divisions.

Prohibition of balancing rights ad obligations born in different patrimony divisions. Generally speaking when the quality of creditor and debtor belongs to the same person the obligation shall be extinguished by confusion. This rule ceases when different patrimony divisions are involved[7].

The transfer between different patrimony divisions are subject to private creditors rights. The occurrence of property divisions appears with clarity when transfers of rights between these divisions are intended. The rule of law is that the transfer of rights and obligations from a patrimony division to another should not harm the creditors' rights from each patrimony division (and comply with the requirements laid down by law for such divisions).

We cannot speak of a ban, but a test. Any prejudice inflicted to creditors is a barrier for rights and obligations transfer from a patrimonial division to another[8].

Legal protection of assets in case of trust and patrimony of affectation for authorized professions.

Civil Code has rules for possible interactions between patrimony divisions. Situation of a trust (fiduciary patrimony) and authorized professions (patrimony of affectation) is comparable.

Common rule for any obligations is that the debtor is required to cover his obligation with all his "movable and immovable, present and future"[9] that serve as the joint guarantee of its creditors.

[6] Ibidem, Art. 31 al. 3.
[7] Civil Code, Art. 1624.
[8] Ibidem, Art. 32.

Despite such general rule, the assets subject to an assigned patrimony affected for an authorized profession practice may be executed by creditors whose claims have been born about the profession only. Even more, these creditors cannot pursue other assets of the debtor[10].

As stated, the assigned patrimony established due to an authorized profession practice results gives rise to a true separation of patrimonies: the „professional" creditors are not entitled to person's personal assets and the person's personal creditors are not entitled to any claim upon assigned patrimony for authorized profession.

Such situation must be considered a legal benefit for person who exercising authorized profession who finds a safe harbour for his personal property against any obligations arising from exercising his profession.

Assigned patrimony regarding professionals (undertaking economic activities) who operate a sole proprietorship (individual) enterprise.

According to the law this category of commercial law subjects shall not enjoy the separation of patrimonies benefit granted to persons authorized to exercise a profession.

The rule is that creditors whose claims have been born about a particular patrimony division are obliged to raise claims upon this patrimony division first. But if such assets (from the patrimony division) fail to cover all the claims the creditors will pierce through the assigned patrimony veil. They are permitted to pursue other assets of the debtor up to the value of their claims[11].

This is the legal position for all individual subjects of commercial law (individual economic enterprises). The assigned patrimony recognized for these professionals is clarified by other existing special rules[12]. Consequently, the assigned patrimony in commercial matters is defined as "all assets, rights and obligations of an authorized individual, business owner or individual members of the family business, affected the purpose of exercising an economic activity, constituted as a distinct part of the natural person's patrimony, separate from the general pledge recognized to their personal creditors."[13]

We find out in the end that the personal creditors and the creditors of the individual enterprise compete on the same assets. The obvious rule laid down herein is included in special regulation too, that person (professional) is responsible for his commercial obligations up to his assigned patrimony and, in addition, with all his assets[14].

Conclusions

Mediation (like any alternative dispute resolution) involves a social interaction in order to reach, under mediator assistance, a mutual agreement between persons affecting their patrimonies.

Under Civil Code the provisions the old uniqueness of the patrimony theory was replaced by a more flexible approach including patrimony divisions.

Dealing with different patrimony divisions a mediator should be able to understand the new notion and to assist the parties to finals agreements according to the rules of the divisions of the patrimony.

A mediator should observe that any division of the patrimony of a person have to have a legal basis and voluntary division of the patrimony are prohibited. Second, the prominent creation in this field is represented by *fiducia* (a kind of Anglo-Saxon trust concept) and patrimony of affectation.

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[9] Ibidem, Art. 2324 al. 1.

[10] Ibidem, Art. 2324 al. 4.

[11] Civil Code, Art. 2324, al. 3.

[12] GO no 44/2008 regarding economic activities undertook by authorized individual, individual enterprise and family enterprise, with further modification.

[13] Ibidem, Art. 2

[14] Ibidem, Art. 20 (for authorized individual), Art. 26 (for individual enterprise), Art. 34 (for family enterprise).

These cases only operate a real and total division of the patrimony of a person with all the legal effects.

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THE ADVANTAGES OF USING A COLLABORATIVE INFRASTRUCTURE IN VIRTUAL ENTERPRISES

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Abstract
The purpose of this work is to provide a collaboration support for small and medium enterprises which cannot or do not want to fulfill a major contract alone. In that case, in order to better meet a higher external demand, the managers are willing to subcontract parts of their contracts even to competitors.
This approach is illustrated by a business-to-business interaction, being proposed a sample scenario where partners are autonomous gas stations grouped in a virtual enterprise (VE). In such a VE, we present a schematic example of a collaboration process using negotiation and coordination mechanisms that we proposed in this paper.

***Keywords**: SME, B2B interaction, subcontracting, cooperation, collaboration.*

1. Introduction

Recent advances in the information technology have made possible the development of a new type of organization, the virtual organization. Taking into account the connection between the new communication technologies and the relationships between the industrial organizations, two main directions are distinguished. The first direction considers the Internet and the Informatics as being the main technologies that facilitate the communication between persons. The second direction, more visionary, is focused not only on the communication but mainly on the modalities that allow the information technologies to coordinate in an efficient fashion and with minimal effort requirements the activities of individuals.

Related to the second direction, the concept of "Virtual Enterprise (VE)" or "Network of Enterprises" has emerged to identify the situation when several independent companies decided to collaborate and establish a virtual organization with the goal of increasing their profits. Camarinha-Matos defines the concept of VE as follows: "A *Virtual Enterprise (VE)* is a temporary alliance of enterprises that come together to share skills and resources in order to better respond to business opportunities and whose cooperation is supported by computer networks"[1].

Given this general context, the objective of the present paper is to develop a conceptual framework and the associated informational infrastructure that are necessary to facilitate the collaboration activities and, in particular, the negotiations between independent organizations that participate in a virtual alliance.

The starting point in the development of this work was the goal to support small and medium enterprises that are not able or are not willing to perform alone a large contract since in this situation the association in a virtual alliance provides the opportunity to subcontract the tasks of the contract to other partners within the alliance. To achieve this goal, research was dedicated to the development of a model to coordinate the negotiations that take place within an inter-organizational alliance. Our research was focused on the topics of virtual alliances, automation of the negotiations and of coordination aimed to provide the mechanisms for coordinating the negotiations that take place among autonomous enterprises that are grouped in a virtual alliance.

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[1] Camarinha-Matos L.M. and Afsarmanesh H.,(2004), *Collaborative Networked Organizations,* Kluwer Academic Publisher Boston.

Assuming that the nature of the roles that may be played in a negotiation are similar in multiple approaches, the number of participants involved at the same time in the same negotiation is considerably different.

Depending on the number of participants involved in a negotiation, we may distinguish various negotiation types: *bilateral negotiation (one-to-one)*; *one-to-many negotiation; many-to-many negotiation*.

Taking into account the complexity of the negotiations modeled by multi-agent system, we can state that to conduct in an efficient fashion one or many negotiations that involve a large number of participants and to properly account for all negotiation dimensions, it is necessary to develop a coordination process that is defined outside of the specific constraints of a given decision mechanism or communication protocol.

The negotiation process was exemplified by scenarios tight together by a virtual alliance of the autonomous gas stations. Typically, these are competing companies. However, to satisfy the demands that go beyond the vicinity of a single gas station and to better accommodate the market requirements, they must enter in an alliance and must cooperate to achieve common tasks. The type of alliance that we use to define their association emphasizes that each participant to this alliance is completely autonomous i.e., it is responsible of its own amount of work and the management of its resources. The manager of a gas station wants to have a complete decision-making power over the administration of his contracts, resources, budget and clients. At the same time, the manager attempts to cooperate with other gas stations to accomplish the global task at hand only through a minimal exchange of information. This exchange is minimal in the sense that the manager is in charge and has the ability to select the information exchanged.

When a purchasing request reaches a gas station, the manager analyses it to understand if it can be accepted, taking into account job schedules and resources availability. If the manager accepts the purchasing request, he may decide to perform the job locally or to partially subcontract it, given the gas station resource availability and technical capabilities. If the manager decides to subcontract a job, he starts a negotiation within the collaborative infrastructure with selected participants. In case that the negotiation results in an agreement, a contract is settled between the subcontractor and the contractor gas station, which defines the business process outsourcing jobs and a set of obligation relations among participants[2].

The gas station alliance scenario shows a typical example of the SME virtual alliances where partner organizations may be in competition with each other, but may want to cooperate in order to be globally more responsive to market demand.

The collaborative infrastructure, that we describe, should flexibly support negotiation processes respecting the autonomy of the partners.

We are starting with a presentation in Section 2 of a VE life cycle model. Then, we are briefly describing in Section 3 the architecture of the collaboration system in which the interactions take place.

The main objective of this paper is to propose a collaboration framework in a dynamical system with autonomous organizations. In Section 4 we define the Coordination Components that manage different negotiations which may take place simultaneously.

In Section 5 we present how the structure of the negotiation process can be used by describing a particular case of negotiation. Finally, Section 6 concludes this paper.

[2] Singh M.P., (1997) *Commitments among autonomous agents in information-rich environments*. In Proceedings of the 8th European Workshop on Modelling Autonomous Agents in a Multi-Agent World (MAAMAW), pp. 141–155

2. The main steps of the Virtual Enterprise life cycle

The life cycle of virtual enterprise is classified into six phases. The relevance in different phases is shown in Figure 1 and the statement for each phase is given as follows:

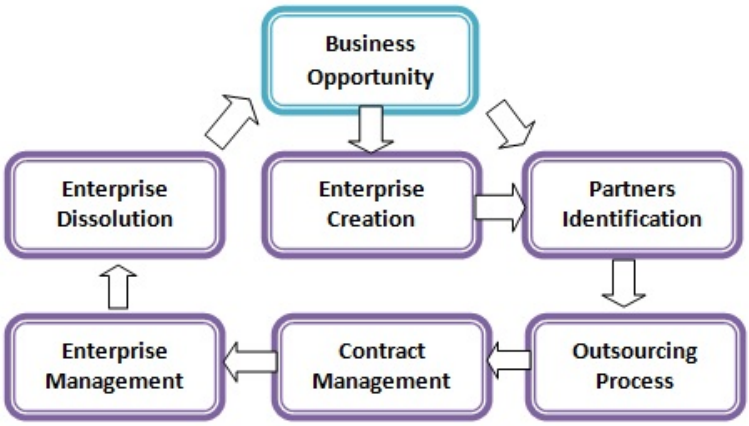

Figure 1. Life-cycle of a virtual enterprise

a) VE creation

When a business opportunity is detected, there is a need to plan and create the VE, identify partners, establish the contract or cooperation agreement among partners, in order to manage the processes of the VE.

b) Partners search and selection

The selection of business partners is a very important and critical activity in the operation of a company. Partners search can be based on a number of different information sources, being private, public, or independent. The enterprise's private suppliers' list is a data repository that contains information about the companies that have had commercial relationships with this enterprise. This information composes an *Internal Suppliers Directory (ISD)*. External sources include directories maintained by industrial associations, commerce chambers, or Internet services. This information composes the *External Suppliers Directory (ESD)*. Another emerging solution is the creation of clusters of enterprises that agreed to cooperate and whose skills and available resources are registered in a common *SME Cluster Directory* (CD).

c) Outsourcing of tasks within a VE

In this stage of a VE life cycle, we can assume that a gas station company receives a customer demand. In this respect, the Manager of this company may negotiate the outsourcing of a schedule tasks that cannot perform locally with multiple partners of selected gas station companies, geographically distributed. The Manager can select the partners of the negotiation among the database possible partners according to their declared resources and the knowledge he has about them.

The outcome of a negotiation can be "success" (the task was fully outsourced), "failure" (no outsourcing agreement could be reached) or "partial" (only part of the task could be outsourced).

d) Contract management in the VE

In case the negotiation process ends in a successful, a contract is established between the outsourcing company and the insourcing ones. The contract is a complex object, which is based of trust in this coordination mechanism. Moreover, it contains a set of specific rules, such as penalties, expressing obligation relations between the participants.

In case of failure of a partner, the Manager will have to supervise if the obligations are honored (for example to oblige the partner to finish his work or to set penalties) and to modify the business process renegotiating parts of the work that have not been realized.

e) Management of the VE

A VE is a dynamic entity in which a new company may join or leave it. Members may need to leave for many reasons, when they change their activity or when they don't want any more to collaborate with the partners of the VE. In case of departure from the VE, the leaving partner may either notify all the partners. It also may leave without giving any information. The departure of a partner from the VE will have an important impact on ongoing contracts especially when this partner is an insourcer of an important amount of task.

f) VE dissolution - after stopping the execution of the business processes.

3. The Collaborative Infrastructure

The main objective of this software infrastructure is to support collaborating activities in virtual enterprises. In VE partners are autonomous companies with the same object of activity, geographically distributed.

Taking into consideration, the constraints imposed by the autonomy of participants within VE, the only way to share information and resources is the negotiation process.

Figure 2 shows the architecture of the collaborative system:

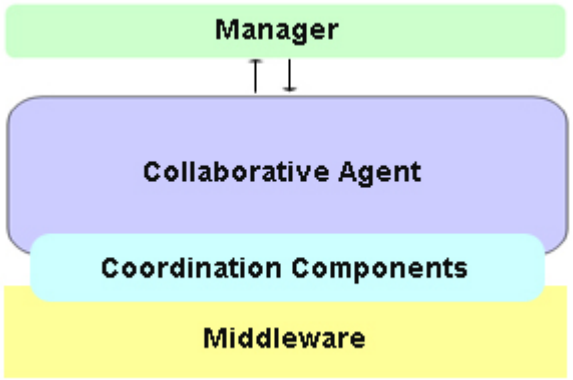

Figure 2. The architecture of the collaborative system

This infrastructure is structured in four main layers[3]: Manager, Collaborative Agent, Coordination Components and Middleware. A first layer is dedicated to the Manager of each organization of the alliance. A second layer is dedicated to the Collaborative Agent who assists its gas station manager at a global level (negotiations with different participants on different jobs) and at a specific level (negotiation on the same job with different participants) by coordinating itself with the Collaborative Agents of the other partners through the fourth layer, Middleware[4]. The third layer,

[3] Cretan A., Coutinho C., Bratu B. and Jardim-Goncalves R., (2011), *A Framework for Sustainable Interoperability of Negotiation Processes*. Paper submitted to INCOM'12 14th IFAC Symposium on Information Control Problems in Manufacturing.

[4] Bamford J.D., Gomes-Casseres B., and Robinson M.S., (2003), *Mastering Alliance Strategy: A Comprehensive Guide to Design, Management and Organization*. San Francisco: Jossey-Bass, pp. 27-38

Coordination Components, manages the coordination constraints among different negotiations which take place simultaneously.

A Collaborative Agent aims at managing the negotiations in which its own gas station is involved (e.g. as initiator or participant) with different partners of the alliance.

Each negotiation is organized in three main steps: initialization; refinement of the job under negotiation and closing[5]. The initialization step allows to define what has to be negotiated (Negotiation Object) and how (Negotiation Framework)[6]. A selection of negotiation participants can be made using history on passed negotiation, available locally or provided by the negotiation infrastructure[7]. In the refinement step, participants exchange proposals on the negotiation object trying to satisfy their constraints[8]. The manager may participate in the definition and evolution of negotiation frameworks and objects[9]. Decisions are taken by the manager, assisted by his Collaborative Agent[10]. For each negotiation, a Collaborative Agent manages one or more negotiation objects, one framework and the negotiation status. A manager can specify some global parameters: duration; maximum number of messages to be exchanged; maximum number of candidates to be considered in the negotiation and involved in the contract; tactics; protocols for the Collaborative Agent interactions with the manager and with the other Collaborative Agents [11].

4. Coordination Components

In order to handle the complex types of negotiation scenarios, we propose five different components[12]:

- *Subcontracting* (resp. *Contracting*) for subcontracting jobs by exchanging proposals among participants known from the beginning;
- *Block* component for assuring that a task is entirely subcontracted by the single partner;
- *Divide* component manages the propagation of constraints among several slots, negotiated in parallel and issued from the split of a single job;
- *Broker*: a component automating the process of selection of possible partners to start the negotiation;
- *Transport* component implements a coordination mechanism between two ongoing negotiations in order to find and synchronize on the common transport of both tasks.

These components are able to evaluate the received proposals and, further, if these are valid, the components will be able to reply with new proposals constructed based on their particular coordination constraints[13].

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[5] Sycara K., (1991), *Problem restructuring in negotiation*, in Management Science, 37(10), pp.24-32.

[6] Smith R., and Davis R., (1981), *Framework for cooperation in distributed problem solving*. IEEE Transactions on Systems, Man and Cybernetics, SMC-11, pp. 42-57.

[7] Zhang X. and Lesser V., (2002), *Multi-linked negotiation in multi-agent systems*. In Proc. of AAMAS, Bologna, pp. 1207 – 1214.

[8] Barbuceanu M. and Wai-Kau Lo, (2003), *Multi-attribute Utility Theoretic Negotiation for Electronic Commerce*. In AMEC III, LNAI, pp. 15-30.

[9] Keeny R. and Raiffa H., (1976), *Decisions with Multiple Objectives: Preferences and Value Tradeoffs*. JohnWilley & Sons.

[10] Bui V. and Kowalczyk R., *On constraint-based reasoning in e-negotiation agents*. In AMEC III, LNAI 2003, pp. 31-46.

[11] Faratin P., (2000), *Automated service negotiation between autonomous computational agent*. Ph. D. Thesis, Department of Electronic Engineering Queen Mary & West-field College.

[12] Cretan A., Coutinho C., Bratu B. and Jardim-Goncalves R., (2011), *A Framework for Sustainable Interoperability of Negotiation Processes*. Paper submitted to INCOM'12 14th IFAC Symposium on Information Control Problems in Manufacturing.

[13] Vercouter, L., (2000), *A distributed approach to design open multi-agent system*. In 2nd Int. Workshop Engineering Societies in the Agents' World (ESAW), pp. 32-49.

From our point of view the coordination problems managing the constraints between several negotiations can be divided into two distinct classes of components:

Coordination components in closed environment**:** components that build their images on the negotiation in progress and manage the coordination constraints according to information extracted only from their current negotiation graph (*Subcontracting, Contracting, Block, Divide)*;

Coordination components in opened environment: components that also build their images on the negotiation in progress but they manage the coordination constraints according to available information in data structures representing certain characteristics of other negotiations currently ongoing into the system (*Broker, Transport)*.

Following the descriptions of these components we can state that unlike the components in closed environment (*Subcontracting, Contracting, Block, Divide)* that manage the coordination constraints of a single negotiation at a time, the components in opened environment (*Broker, Transport)* allow the coordination of constraints among several different negotiations in parallel[14].

The novelty degree of this software architecture resides in the fact that it is structured on four levels, each level approaching a particular aspect of the negotiation process. Thus, as opposed to classical architectures which achieve only a limited coordination of proposal exchanges which take place during the same negotiation, the proposed architecture allows approaching complex cases of negotiation coordination. This aspect has been accomplished through the introduction of coordination components level, which allows administrating all simultaneous negotiations in which an alliance partner can be involved.

The coordination components have two main functions such as: i) they mediate the transition between the negotiation image at the Collaboration Agent level and the image at the Middleware level; ii) they allow implementing various types of appropriate behavior in particular cases of negotiation. Thus we can say that each component corresponding to a particular negotiation type.

Following the descriptions of this infrastructure we can state that we developed a framework to describe a negotiation among the participants to a virtual enterprise. To achieve a generic coordination framework, nonselective and flexible, we found necessary to first develop the structure of the negotiation process that helps us to describe the negotiation in order to establish the general environment where the participants may negotiate. To develop this structure, we proposed a succession of phases that are specific to different stages of negotiation (initialization, negotiation, contract adoption) that provided a formal description of the negotiation process.

The advantage of this structure of the negotiation process consists on the fact that it allows a proper identification of the elements that constitute the object of coordination, of the dependencies that are possible among the existing negotiations within the VE, as well as the modality to manage these negotiations at the level of the coordination components.

5. The structure of the negotiation process

According to our approach regarding the negotiation, the participants to a negotiation may propose offers and each participant may decide in an autonomous manner to stop a negotiation either by accepting or by rejecting the offer received. Also, depending on its role in a negotiation, a participant may invite new participants to the negotiation.

In order to illustrate this approach, we present a schematic example of a negotiation process using negotiation and coordination mechanisms that we proposed in this paper.

Negotiation process that we present in Figure 3 is divided into five parts (initialization, choice of tactics, choice of partners, negotiation and contract adoption).

Initialization. The Manager initiates a subcontracting of a task, defining and communicating to the Collaborative Agent the properties and the constraints of the negotiation object and the negotiation framework. The negotiation process begins by creating an instance of the component

[14] Muller H., (1996), *Negotiation principles.* Foundations of Distributed Artificial Intelligence.

Subcontracting. This instance will initiate other stages of negotiation, based on constraints provided by the Manager: the invitation of the coordination components (*Contracting*, *Broker*, etc.). Moreover, this instance will conduct negotiations in terms of construction and evaluation of proposals for subcontracting proposed task.

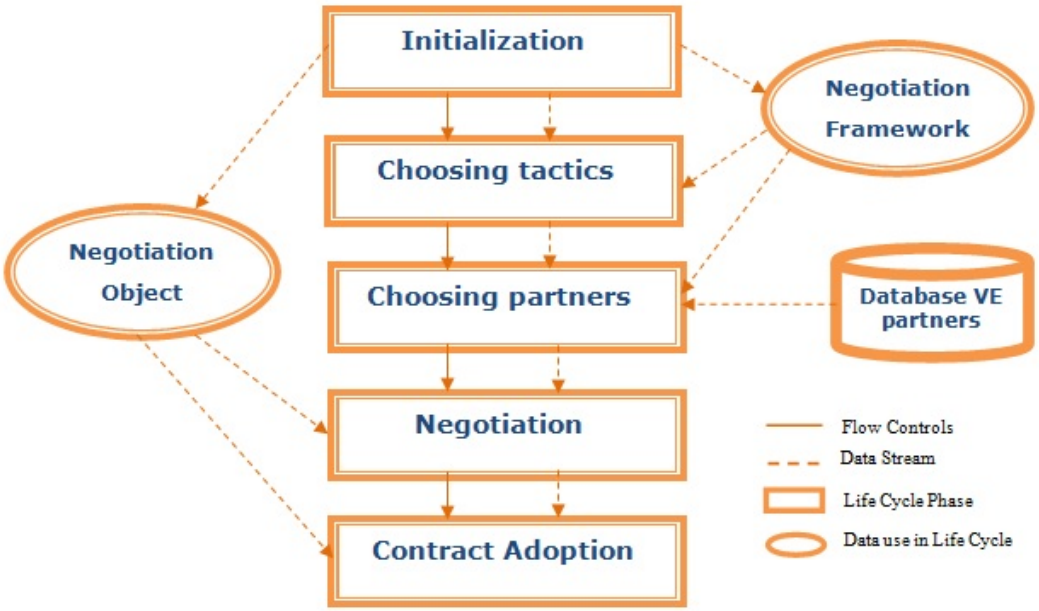

Figure 3 – The structure of the negotiation process

Choosing tactics. Using the tactics of negotiation specified in the negotiation framework, the coordination is decomposed into several coordination schemes. We considered three tactics that correspond to three coordination schemes: Block, Divide and Transport.

Choosing partners. We have two choices of partners:

- among known partners – The Manager who initiating the outsourcing can specify any constraints on the set of possible alliance contractors. To do this, the manager uses the description of the job that follow to be subcontracted and also the database alliance partners and/or the different adhesion contracts which they signed[15];
- among unknown partners - in this case, the entire research activity of the potential partners is managed by the infrastructure through Broker component.

Negotiation. At this stage, during exchanges of proposals, the negotiation object evolves according to the constraints imposed by the manager on negotiated attributes of the subcontracting task. The final objective of the negotiation process is to build an Instantiated Negotiation Object from initial specification of negotiation object[16]. An Instantiated Negotiation Object is a negotiation object whose attributes have been accepted by the all partners. After that, this object will be used to establish a contract.

[15] Hurwitz, S.M., (1998) *Interoperable Infrastructures for Distributed Electronic Commerce*, http://www.atp.nist.gov/atp/98wpecc.htm

[16] Robinson W., and Volkov V., *Supporting the negotiation life cycle.* Communications of the ACM, 1998.

Contract Adoption. In the final negotiation phase, the negotiation properties are fixed values. In this case, the Collaborative Agent asks Manager to validate the result of negotiation and makes contact with other partners' agents.

Depending on the answers obtained, the Manager may decide to: i) to restart or to suspend negotiations; ii) to enable the contracting phase, which allows reaching an agreement[17].

The negotiation process involves several parties (for several bilateral negotiations), each having different criteria, constraints and preferences that determine their individual areas of interest[18]. Criteria, constraints and preferences of a participant are partially or totally unknown to the other participants. The job under negotiation is described as a multi-attribute object. Each attribute is related to local constraints and evaluation criteria, but also to global constraints drawing dependencies with other attributes[19].

In conclusion, the proposed architecture provides the following features:

- to define the negotiation process structure: participants, interaction protocol, negotiation protocol, tactics and coordination components, the negotiation object and the negotiation strategies;
- the modeling all negotiations for a gas station in the form of a set of bilateral negotiations, which the agent can operate independently;
- the modeling of the coordination among the negotiations based on a set of coordination components and the synchronization mechanisms at the middleware level.

Thus, we can say, that we have proposed an infrastructure that manages, in a decentralized manner, the coordination of multi-phase negotiations on a multi-attribute object and among a lot of participants.

6. Conclusions

The functioning of this kind of alliance suppose task achievement, which cannot be individual treated, by a single participant for better adjustment of the clients requirements.

The proposed infrastructure aims to help the different SMEs to fulfill their entire objectives by mediating the collaboration among the several organizations gathered into a virtual enterprise.

A specific feature that distinguishes the negotiation structure proposed in this work from the negotiations with imposed options (acceptance or denial) is that it allows the modification of the proposals through the addition of new information (new attributes) or through the modification of the initial values of certain attributes (for example, in the case of gas stations the gasoline price may be changed).

The business-to-business interaction context in which our activities take place forces us to model the unexpected and the dynamic aspects of this environment. An organization may participate in several parallel negotiations. Each negotiation may end with the acceptance of a contract that will automatically reduce the available resources and it will modify the context for the remaining negotiations.

In the current work we've described in our collaboration framework only the interactions with the goal to subcontract or contract a task. A negotiation process may end with a contract and in that case the supply schedule management and the well going of the contracted task are both parts of the outsourcing process.

In order to illustrate our approach we have used a sample scenario where distributed gas stations have been united into virtual enterprise. Take into consideration this scenario, one of the

[17] Ossowski S., (1999), *Coordination in Artificial Agent Societies*. Social Structure and its Implications for Autonomus Problem-Solving Agents, No. 1202, LNAI, Springer Verlag, pp.56-69.

[18] Schumacher M., (2001), *Objective coordination in multi-agent system engineering – design and implementation.* In Lecture Note in Artificial Intelligence, No. 2093, Springer Verlag, pp.72-88.

[19] Kraus S., (2001)*, Strategic negotiation in multi-agent environments.* MIT Press, pp.56-67.

principal objectives was related to the generic case and means that this proposed infrastructure can be used in other activity domains.

Regarding research perspective continuation, one first direction which can be mentioned is the negotiation process and the coordination process taking into consideration the contracts management process. In this way the coordination can administrate not only the dependence between the negotiations and the contracts which are formed and with execution dependences of those contracts.

Another perspective is to deliver to the user one instrument which allows him negotiation protocol definition according with the restrained negotiation interactions possibilities. Consequent, this will be a problem of coordination on which the infrastructure must solve on negotiation protocol administration and protocol build perspective.

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GPGPU COMPUTING

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Abstract
Since the first idea of using GPU to general purpose computing, things have evolved over the years and now there are several approaches to GPU programming. GPU computing practically began with the introduction of CUDA (Compute Unified Device Architecture) by NVIDIA and Stream by AMD. These are APIs designed by the GPU vendors to be used together with the hardware that they provide. A new emerging standard, OpenCL (Open Computing Language) tries to unify different GPU general computing API implementations and provides a framework for writing programs executed across heterogeneous platforms consisting of both CPUs and GPUs. OpenCL provides parallel computing using task-based and data-based parallelism. In this paper we will focus on the CUDA parallel computing architecture and programming model introduced by NVIDIA. We will present the benefits of the CUDA programming model. We will also compare the two main approaches, CUDA and AMD APP (STREAM) and the new framwork, OpenCL that tries to unify the GPGPU computing models.

***Keywords**: CUDA, Stream, OpenCL, GPU computing, parallel computing*

Introduction

Parallel computing offer a great advantage in terms of performance for very large applications in different areas like engineering, physics, biology, chemistry, computer vision, econometrics. Since the first supercomputers in early '70s, the nature of parallel computing has changed and new opportunities and challenges have appeared over the time. While 30-35 years ago computer scientists used massively parallel processors like the Goodyear MPP[1] Connection Machine[2], Ultracomputer[3] and machines using Transputers[4] or dedicated parallel vector computers, like Cray computer series, nowadays off-the-shelves desktops have FLOP rates greater than a supercomputer in late 80's. For example, if Cray 1 had a peak performance of 80 Megaflops and CRAY X MP had a peak performance of 200 MFLOPS an actual multicore Intel processor has more than 120 GFLOPS. These figures emphasize a major shift in computer and processors design.

The processors speed increased as the clock frequency and the number of transistors increased over the time. The clock frequency has increased by almost four orders of magnitudes between the first 8088 Intel processor and the actual processors, and the number of transistors also raised from 29.000 for Intel 8086 to approximately 730 million for an Intel Core i7-920 processor[5]. The increased clock frequency has an important side effect - the heat dissipated by processors. To overcome this problem, instead of increasing the clock frequency the processor designers come with a new

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[2] Lewis W. Tucker, George G. Robertson, (1988), Architecture and Applications of the Connection Machine, *Computer*, vol. 21, no. 8, pp. 26–38.

[3] Allan Gottlieb, Ralph Grishman, Clyde P. Kruskal, Kevin P. McAuliffe, Larry Rudolph, Marc Snir, (1982), *The NYU Ultracomputer—designing a MIMD, shared-memory parallel machine*, ISCA '82 Proceedings of the 9th annual symposium on Computer Architecture, pp. 27 – 42.

[4] Barron, Iann M. (1978), D. Aspinall. ed. "The Transputer". The Microprocessor and its Application: an Advanced Course, Cambridge University Press.

[5] INTEL (2012), Microprocessor Quick reference guide.

paradigm – multicore processors. Both INTEL and AMD offer multicore processors that are now common for desktop computers. Multicore processors turn normal desktops in truly parallel computers. Although the computing power of multicore processors is amazing, new applications demand more and more computational power.

In 2003, Mark Harris[6] recognized the potential of using graphical processing units (GPU) for general purpose applications. Modern GPUs are high performance many-core processors that can obtain high FLOP rates. In the past the processing units of the GPU were designed only for computer graphics but now GPUs are truly general-purpose parallel processors. Since the first idea of using GPU for general purpose computing, GPU programming models have evolved and there are several approaches to GPU programming now: CUDA (Compute Unified Device Architecture) from NVIDIA and APP (Stream) from AMD. A great number of applications were ported to use the GPU and they obtain speedups of few orders of magnitude comparing to optimized multicore CPU implementations.

GPGPU (general-purpose computing on graphics processing units) is used nowadays to speed up parts of applications that require intensive numerical computations. Traditionally, these parts of applications are handled by the CPUs but GPUs have now MFLOPs rates much better than CPUs[7]. The reason why GPUs have floating point operations rates much better even than multicore CPUs is that the GPUs are specialized for highly parallel intensive computations and they are designed with much more transistors allocated to data processing rather than flow control or data caching[8].

Khronos Group's OpenCL (Open Computing Language)[9] is a new emerging standard, that tries to unify different GPU general computing API implementations like CUDA or APP (Stream) and to provide a general framework for writing programs executed across heterogeneous platforms consisting of both CPUs and GPUs.

The CUDA programming model

Figures 1 and 2[10] shows the advances of the current GPUs that become highly parallel, multithreaded, manycore processors with an amazing computational power and very high memory bandwidth. Figure 1 plots the FLOP rates of GeForce GPUs compared with Intel processors while figure 2 plots the memory bandwidth of the NVIDIA GPUs.

[6] Harris, Mark J., William V. Baxter III, Thorsten Scheuermann, and Anselmo Lastra.(2003), Simulation of Cloud Dynamics on Graphics Hardware. In *Proceedings of the IGGRAPH/Eurographics Workshop on Graphics Hardware* 2003, pp. 92-101.

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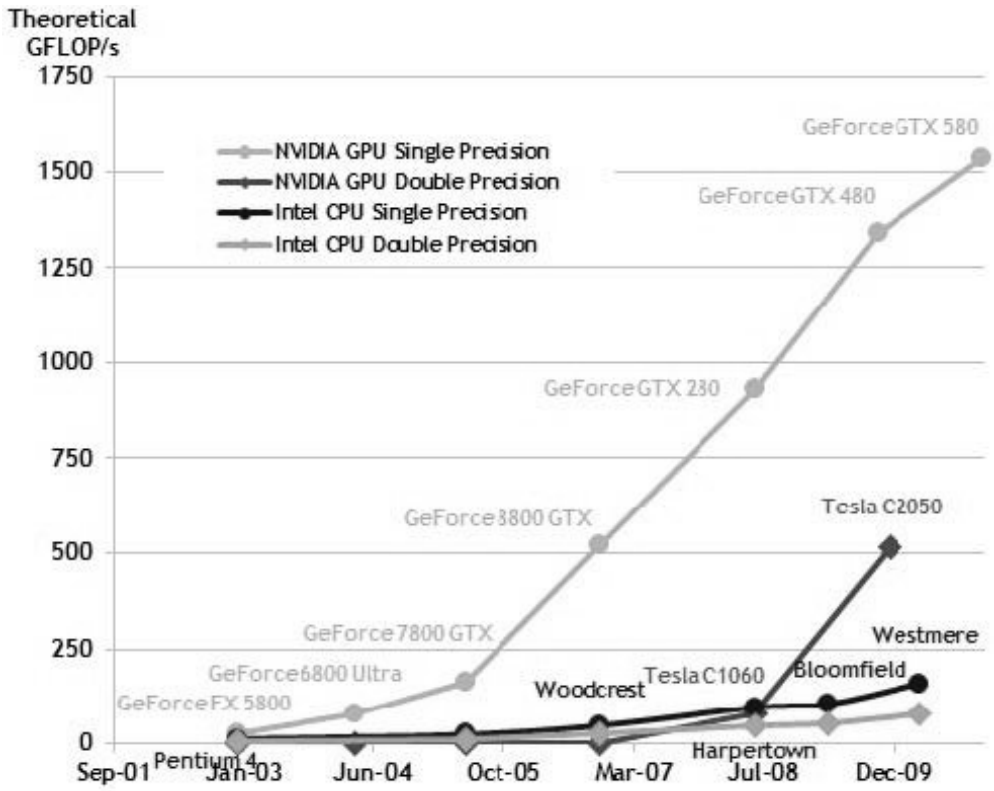

Figure 1. Theoretical FLOP rates of the GPU and CPU

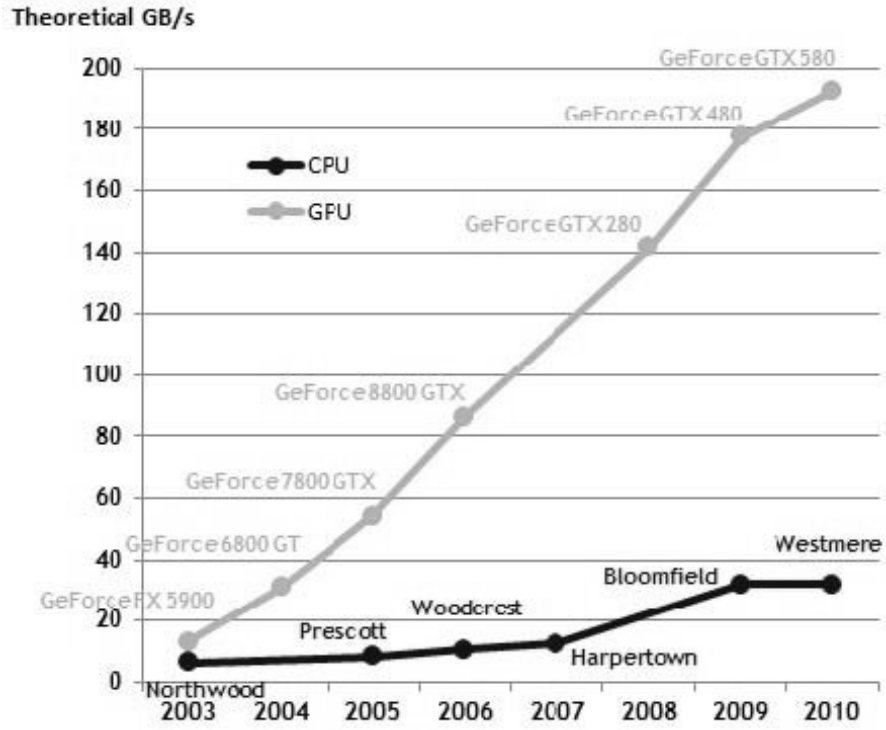

Figure 2. Theoretical memory bandwidth of the GPU

GPU can obtain such high FLOP rates because it is specialized for highly parallel computation and it has more transistors dedicated to data processing rather than flow control or data caching which is the case of a CPU. This is the main reason of the big difference in floating point computational power between GPU and CPU. Figure 3[11] (NVIDIA, 2011) shows this design shift in GPU.

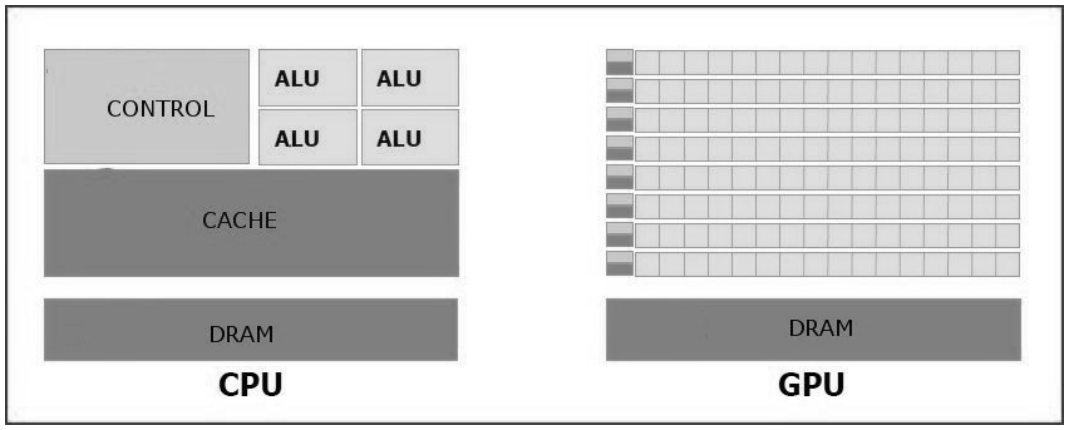

Figure 3. Design differences between GPU and CPU

[11] NVIDIA, (2011), NVIDIA CUDA C Programming Guide, version 4.0

GPUs are designed to solve problems that can be formulated as data-parallel computations – the same instructions are executed in parallel on many data elements with a high ratio between arithmetic operations and memory accesses. This is similar with the SIMD approach of the parallel computers taxonomy. Because the same instructions are executed on each of the data element there is no need for complicated flow control circuits and the memory latency can be hidden by arithmetic computations instead of using data cache.

Data parallel programming paradigm can be found in many applications like 3D rendering, image scaling, pattern recognition, video encoding and decoding, linear algebra routines, computational biology, computational finance or econometrics. All these applications can obtain very high speedups by mapping data elements to parallel processing threads that are executed in parallel by the GPU.

CUDA (Compute Unified Device Architecture) was introduced for the first time in 2006 by NVIDIA. It is a general purpose parallel programming architecture that uses the parallel compute engine in NVIDIA GPUs to solve complex computational problems in a more efficient way than a CPU does. At the time of its introduction CUDA supported only the C programming language, but nowadays it supports FORTRAN , C++ , Java, Phyton, etc.

The CUDA parallel programming model has three main key abstractions – a hierarchy of thread groups, shared memories, and barrier synchronization. These abstractions are exposed to the programmer as language extensions. They provide fine grain data parallelism and thread parallelism together with task parallelism that can be considered coarse grain parallelism.

The CUDA parallel programming model requires programmers to partition the problem to be solved into coarse tasks that can be independently executed in parallel by blocks of threads and each task is further divided into finer pieces of code that can be executed cooperatively in parallel by the threads within the block. This model allows threads to cooperate when solving each task, and also enables automatic scalability. Each block of threads can be scheduled for execution on any of the available processor cores, concurrently or sequentially. This allows a CUDA program to be executed on any number of processor cores. Figure 3[12] shows how a program is partitioned into blocks of threads each block being executed independently from each other. A GPU with more cores will execute the program in less time than a GPU with fewer cores.

[12] NVIDIA, (2011), NVIDIA CUDA C Programming Guide, version 4.0

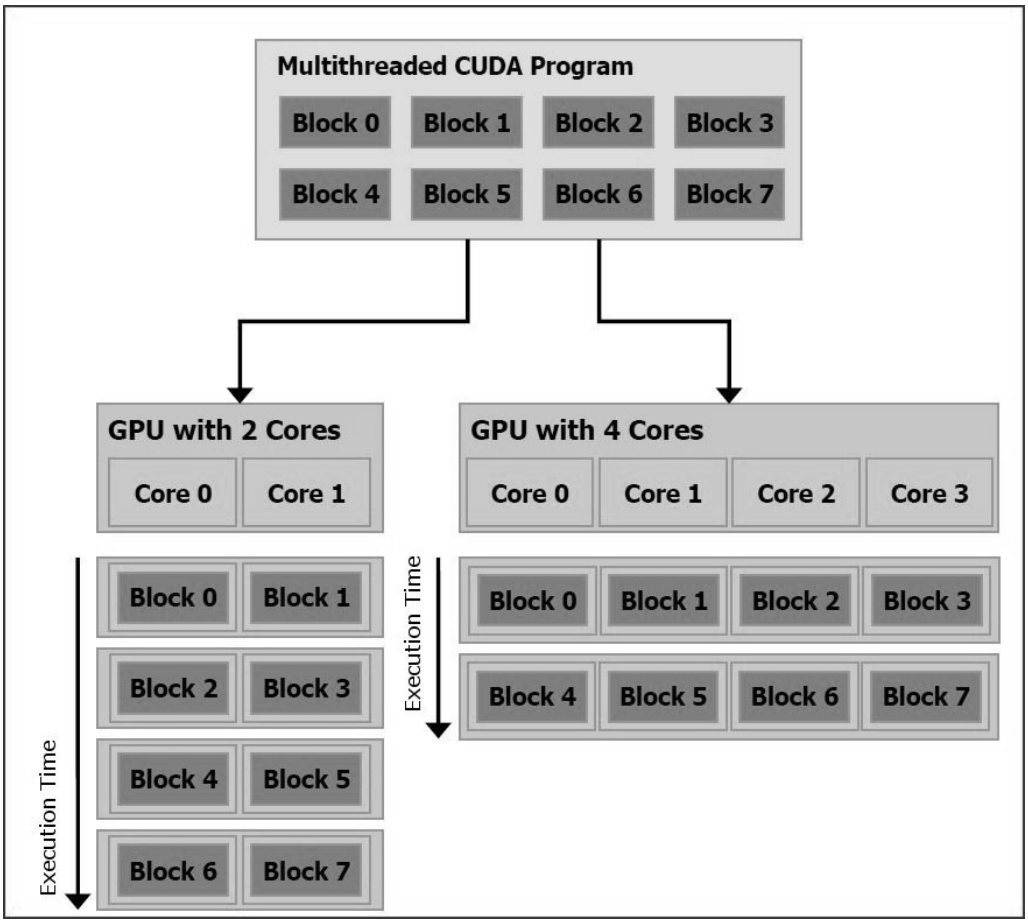

Figure 3. A multithreaded program divided into blocks that are allocated on 2 or 4 cores

The main C language extension of the CUDA programming model allows the programmer to define C functions, called **kernels**, that are executed N times in parallel by N different CUDA threads.

A CUDA **kernel** definition specifies the number of CUDA threads that execute that kernel for a given call. A unique *thread ID* identifies each thread that executes the kernel. This ID is accessible within the kernel through the built-in **threadIdx** variable. **ThreadIdx** variable is a 3-component vector, so that each thread can be identified using a one-dimensional, two-dimensional, or three-dimensional *index*. By indexing the threads in this way one can execute computations on data elements organized in a vector, matrix or 3D space.

The thread number per block is limited because all the threads of a block will be executed by one processor core and must share the limited memory resources of that processor core. This limitation on current GPUs implies that a thread block can contain up to 1024 threads. The blocks are structured into one-dimensional, two-dimensional, or three-dimensional grid of thread blocks. The number of thread blocks in a grid is limited by the size of the data being processed or the number of processors in the GPU.

In the CUDA programming model, threads can access data from multiple memory spaces during their execution life time. Each thread has its own private local memory, each thread block

shares a memory visible to all the threads in that block and all threads have access to the same global memory.

CUDA threads are executed on a physically separate *device* that operates like a coprocessor to the *host* processor running the C program. The device is located on the GPU while the host is the CPU. The CUDA programming paradigm assumes that the kernels execute on GPU and the rest of the program executes on the CPU. It also assumes that that both the host and the device maintain their own separate memory spaces in DRAM, referred to as *host memory* and *device memory*. Using CUDA programming model a matrix multiplication code $C = A \times B$ can be structured like in the following example:

```
/* allocate memory for the matrices A, B, C in the host memory, A,B,C, being N x N matrices*/
host_matrix_A = (float*)malloc(N * N * sizeof(host_matrix_A[0]));
host_matrix_B = (float*)malloc(N * N * sizeof(host_matrix_B[0]));
host_matrix_C = (float*)malloc(N * N * sizeof(host_matrix_C[0]));
/* generate random test data */
randomTestData(host_matrix_A, host_matrix_B, host_matrix_C)
/* allocate memory for the matrices in the device memory space*/
cudaAlloc(N*N, sizeof(device_matrix_A[0]), (void**)&device_matrix_A);
cudaAlloc(N*N, sizeof(device_matrix_B[0]), (void**)&device_matrix_B);
cudaAlloc(N*N, sizeof(device_matrix_C[0]), (void**)&device_matrix_C);
/* copy the values from the host matrices to the device matrices */
cudaSetVector(N*N, sizeof(host_matrix_A[0]), host_matrix_A, 1, device_matrix_A, 1);
cudaSetVector(N*N, sizeof(host_matrix_B[0]), host_matrix_B, 1, device_matrix_B, 1);
cudaSetVector(N*N, sizeof(host_matrix_C[0]), host_matrix_C, 1, device_matrix_C, 1);
/* call the matrix multiplication routine*/
cudaMatMul(device_matrix_A, N, device_matrix_B, N, beta, device_matrix_C, N);
/* Copy the result from the device memory back to the host memory */
cudaGetVector(N*N, sizeof(host_matrix_C[0]), device_matrix_C, 1, host_matrix_C, 1)
```

CUDA GPU applications

Since its introduction in early 2007, a variety of applications have benefitted by the tremendous computational power of current GPUs. These benefits include few orders-of-magnitude speedups over the previous state-of-the-art implementations. Few of CUDA enabled applications are presented in the following.

Medical imaging is one of the earliest areas that benefited most from the CUDA programming model on GPU. Very large images from Ultrasound imaging devices or CT can be processed in only few minutes. For example[13] reports an improved algorithm for medical imaging reconstruction that benefits from the computational power of a Quadro FX5600 device that can shorten the processing time of an image, making the reconstruction practical for many clinical applications.

Another important challenge in the medical imaging field is the amount of data that is collected for a single patient. For a 4D (3D + time) computed tomography (CT) dataset can be of the resolution 512 x 512 x 512 x 20 and require more than 10 GB of memory storage. A first step in processing such an image is to apply image denoising. For a dataset of about 10-15 GB this can take several hours on the CPU, compared to 10-15 minutes on the GPU.

[13] Sam Stone, Justin P. Haldar, Stephanie C. Tsao, Wen-mei W. Hwu, Zhi-Pei Liang, Bradley P. Sutton, (2008), *Accelerating Advanced MRI Reconstructions on GPUs,* Proceedings of the 5th International Conference on Computing Frontiers, May 5-7, http://doi.acm.org/10.1145/1366230.1366274.

Computational fluid dynamics is another area that benefitted from the GPU developments. Several ongoing projects on Navier-Stokes models or Lattice Boltzmann methods have shown very large speedups using CUDA-enabled GPUs.

Other GPGPU applications that benefits from the advantages of CUDA programming model are:

- Linear algebra and large scale numerical simulations;
- Molecular dynamics, protein folding;
- Finance modeling;
- Signal processing (FFT);
- Raytracing;
- Physics simulation (fluid, cloth, collision);
- Speech and Image recognition;
- Databases;
- Sorting and searching algorithms;
- Astrophysics;
- Lattice QCD, theoretical physics.

The authors of this paper developed a CUDA based library that implements iterative algorithms for linear systems. Our library implements Jacobi, Gauss-Seidel, CG, GMRES and BiCGSTAB methods[14] [15].

The general flow of a solver implemented in our library is:

Allocate memory for matrices and vectors in the host memory;

Initialize matrices and vectors in the host memory;

Allocate memory for matrices and vectors in the device memory;

Copy matrices from host memory to device memory;

Define the device grid layout:

- Number of blocks
- Threads per block

Execute the kernel on the device;

Copy back the results from device memory to host memory;

Memory clean up.

We've tested our iterative solver for both single precision and double precision floating point numbers. We used a computer with Intel Core2 Quad Q6600 procesor running at 2.4 Ghz, 4 GB of RAM and a NVIDIA GeForce GTX 280 graphics processing unit (GPU) with 240 cores running at 1296 MHz, 1GB of video memory and 141.7 GB/sec memory bandwith. We compared the results obtained using the CUDA code with a single threaded C implementation run on CPU that used the optimized ATLAS library (Whaley, 2001) as a BLAS implementation. Our performance tests show speedups of approximately 80 times for single precision floating point numbers and 40 times for double precision. These results show the immense potential of the GPGPU.

Other GPGPU frameworks

AMD Accelerated Parallel Processing (former ATI Stream technology) is a set of advanced hardware and software technologies that enable AMD graphics processors (GPU), working in together with the central processor (CPU) to accelerate applications (AMD, 2011). The APP programming model resembles the CUDA paradigm. It supports data-parallel and task-parallel programming models.

[14] Golub, G. H., and C. F. Van Loan, Matrix Computations (1996), Johns Hopkins Series in Mathematical Sciences, The Johns Hopkins University Press

[15] Saad, Y. (1996), Iterative Methods for Sparse Linear Systems, PWS Publishing Company.

OpenCL (Open Computing Language)[16] is the first open, standard for general-purpose parallel programming of heterogeneous systems. It tries to provide a unique programming environment for software developers to write portable code for servers, laptops, desktop computer systems and handheld devices using a both multi-core CPUs and GPUs.

OpenCL programs are divided in two parts: one that executes on the **device** (the GPU) and other that executes on the **host** (the CPU). The *device program* is the part of the code that uses GPU for parallel execution. Programmers have to write special functions called kernels which uses OpenCL Programming Language (an extension to the C programming language). These kerneles are scheduled to be executed on GPU. The host program offers an API so that the programmer can manage the execution of kernels on device. The host program can be programmed in C or C++ and it controls the OpenCL environment.

Open CL uses a SIMT (SINGLE INSTRUCTION MULTIPLE THREAD) model of execution that reflects how instructions are executed in the host. This means that the same code is executed in parallel by a different thread, and each **thread** executes the code with different data. Another concept of the Open CL is the work-item. The work-items are the equivalent of the CUDA threads being the basic execution entity. They have an ID accessible from the kernel. The ID is used to differentiate the data to processed by each work-item When a kernel is launched for execution a number of work-items specified by the programmer are also launched, each of them executing the same code. Work-items cooperate between them within a work-group. A work-group specifies the organization of the work-items which can be a N-dimensional gridwith N = 1, 2 or 3. Work-groups are equivalent to CUDA thread blocks. Work-groups also have an unique ID that can be referred from the kernel. The next level of organization of the device code is the ND-Range. It specify how work-groups are organized: as N-dimensional grid of work-groups, N = 1, 2 or 3. Table 1 summarizes the different but equivalent terms used by CUDa and OpenCL

Table 1. C for CUDA terminology versus OpenCL terminology

CUDA	OpenCL
Thread	Work-item
Thread block	Work-group

Conclusions

This paper presents a new trend in parallel processing – GPGPU. This means using the GPU for execution of numerical intensive parts of general applications. GPUs have evolved over the years and now they are truly general processors and it outperforms CPU for numerical computations.

There are now two main frameworks that use the GPU for general applications: CUDA developed by NVIDIA and APP developed by AMD.

In the future the GPU devices will become more and more capable. This performance improvement will be mainly due to increased levels of parallelism. There is one limitation to the increase in the computational power of the GPU: the memory bandwidth that will play an increasing role.

Maybe one of the important developments in GPGPU field will be in the programmability of the GPUs. A particular attention should be paid to OpenCL framework which is a crossplatform and device-independent approach. This is very attractive to developers because is independent from hardware vendor.

[16] Khronos OpenCL Working Group (2009), The OpenCL Specification - Version 1.0. The Khronos Group, Tech. Rep.

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IMPROVING THE PERFORMANCE OF THE LINEAR SYSTEMS SOLVERS USING CUDA

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Abstract
Parallel computing can offer an enormous advantage regarding the performance for very large applications in almost any field: scientific computing, computer vision, databases, data mining, and economics. GPUs are high performance many-core processors that can obtain very high FLOP rates. Since the first idea of using GPU for general purpose computing, things have evolved and now there are several approaches to GPU programming: CUDA from NVIDIA and Stream from AMD. CUDA is now a popular programming model for general purpose computations on GPU for C/C++ programmers. A great number of applications were ported to CUDA programming model and they obtain speedups of orders of magnitude comparing to optimized CPU implementations. In this paper we present an implementation of a library for solving linear systems using the C-CUDA framework. We present the results of performance tests and show that using GPU one can obtain speedups of about of approximately 80 times comparing with a CPU implementation.

Keywords: *CUDA, GPU computing, parallel computing, linear systems, iterative methods, matrix factorization*

Introduction

Parallel computing can offer an enormous advantage regarding the performance for very large applications in almost any field: scientific computing, computer vision, databases, data mining, and economics. GPUs are high performance many-core processors that can obtain very high FLOP rates. Since the first idea of using GPU for general purpose computing, things have evolved and now there are several approaches to GPU programming: CUDA from NVIDIA and Stream from AMD. CUDA is now a popular programming model for general purpose computations on GPU for C/C++ programmers. A great number of applications were ported to CUDA programming model and they obtain speedups of orders of magnitude comparing to optimized CPU implementations.

Mark Harris[1]recognized for the first time the potential of using graphical processing units (GPU) for general purpose applications. Since then GPU programming models have evolved and there are several approaches to GPU programming now: CUDA (Compute Unified Device Architecture) from NVIDIA and APP (Stream) from AMD. A new standard OpenCL (Open Computing Language)[2] tries to unify different GPU general computing API implementations and to provide a general framework for writing programs executed across heterogeneous platforms consisting of both CPUs and GPUs.

In this paper will we use C-CUDA extension for developing a GPU accelerated library that implements direct and iterative methods for large linear systems. In our library we used the CUBLAS[3] library as a BLAS GPU accelerated library.

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[1] Harris, Mark J., William V. Baxter III, Thorsten Scheuermann, and Anselmo Lastra.(2003), Simulation of Cloud Dynamics on Graphics Hardware. In *Proceedings of the IGGRAPH/Eurographics Workshop on Graphics Hardware* 2003, pp. 92-101.

[2] Khronos OpenCL Working Group (2009), The OpenCL Specification - Version 1.0. The Khronos Group, Tech. Rep.

[3] NVIDIA (2007) CUDA – CUBLAS Library.

Serial iterative and direct methods for solving large linear systems

The classical approach for solving a linear system using iterative methods consists in Jacobi, Gauss-Seidel and SOR methods that are well known are presented in many textbooks[4].

For very large linear systems, the most appropriate iterative methods are the Krylov techniques[5]. Contrary to stationary iterative methods such as Jacobi or Gauss-Seidel, Krylov techniques use information that changes from iteration to iteration. For a linear system $Ax = b$, Krylov methods compute the i^{th} iterate *x(i)* as :

$$x(i) = x(i-1) + d(i) \quad i = 1,2,...$$

Operations involved to find the i^{th} update *d(i)* are only inner products, *saxpy* and matrix-vector products that has the complexity of $\Theta(n^2)$, so that Krylov methods are computational attractive comparing to the direct methods for linear systems that computes a decomposition of the matrix A into two triangular matrices.

Perhaps the best known and largely used in real applications Krylov method is the conjugate gradient method (CG). This method is used to solve symmetric positive definite (SPD) systems. The idea of the CG method is to update the iterates *x(i)* in such a manner to ensure the largest decrease of the objective function $\frac{1}{2}x' Ax - x' b$, while keeping the direction vectors *d(i)* *A*-orthogonal. This method can be implemented using only one matrix-vector multiplication per iteration. In exact arithmetic, the CG method gives the solution for at most *n* iterations. The complete description of the CG method can be found in (Golub, 1996).

Another Krylov method for general non symmetric systems is the Generalized Minimal Residuals (GMRES) introduced by (Saad, 1996). The pseudo-code for GMRES is:

GMRES
Given an initial solution x(0) compute r = b – Ax(0)
$\rho = ||r||_2$, v(1) = r/ ρ, β = ρ
for k = 1,2,... **until** convergence
  for j = 1,2, ... k,
    h(j,k) = (Av(k))'v(j)
  end
  $v(k+1) = Av(k) - \sum_{j=1}^{k} h(j,k)v(j)$
  $h(k+1,k) = ||v(k+1)||_2$
  v(k+1,k) = v(k+1)/h(k+1,k)
endfor

The most difficult part of this algorithm is not to lose the orthogonality of the direction vectors *v(j)*. To achieve this goal the GMRES method uses a Gram-Schmidt orthogonalization process. GMRES requires the storage and computation of an increasing amount of information,

[4] Golub, G. H., and C. F. Van Loan, Matrix Computations (1996), Johns Hopkins Series in Mathematical Sciences, The Johns Hopkins University Press

[5] Saad, Y. (1996), Iterative Methods for Sparse Linear Systems, PWS Publishing Company.

vectors *v* and matrix *H*. To overcome these difficulties, the method can be restarted after a chosen number of iterations *m*. The current intermediate results are used as a new starting point.

Another Krylov method implemented by the authors is the BiConjugate Gradient method[6]. BiCG uses a different approach based upon generating two mutually orthogonal sequences of residual vectors and A-orthogonal sequences of direction vectors. The updates for residuals and for the direction vectors are similar to those of the CG method, but are performed using A and its transpose. The disadvantage of the BiCG method is an erratic behaviour of the norm of the residuals and potential breakdowns. An improved version, called BiConjugate Gradient Stabilized BiCGSTAB, is presented bellow:

BiCGSTAB

Given an initial solution x(0) compute r = b – Ax(0)
$\rho_0 = 1$, ρ_1 = r(0)'r(0), $\alpha = 1$, $\acute{\omega} = 1$, p = 0, v = 0
for k = 1,2, ... **until** convergence
$\beta = (\rho_k / \rho_{k-1})(\alpha/\acute{\omega})$
p = r + β(p- $\acute{\omega}$v)
v = Ap
$\alpha = \rho_k/$(r(0)'v)
s = r – αv
t = As
$\acute{\omega}$ = (t's)(t't)
x(k) = x(k-1) + αp + $\acute{\omega}$s

For the BiCGSTAB method we need to compute 6 *saxpy* operations, 4 inner products and 2 matrix-vector products per iteration and to store matrix A and 7 vectors of size *n*. The computational complexity of the method is $\Theta(n^2)$ like the other Krylov methods. The operation count per iteration cannot be used to directly compare the performance of BiCGSTAB with GMRES because GMRES converges in much less iterations than BiCGSTAB. We have implemented these iterative methods and run experiments to determine the possible advantages of them over the direct methods. The results of our experiments are presented in the next section.

The alternative to solve a linear system $Ax = b$ is the ***direct method*** that consists in two steps:

- First, the matrix A is factorized, $A = LU$ where *L* is a lower triangular matrix with 1s on the main diagonal and *U* is an upper triangular matrix; in the case of symmetric positive definite matrices, we have $A = LL^t$.
- Second, we have to solve two linear systems with triangular matrices: $Ly = b$ and $Ux = y$.

The standard LU factorization algorithm with partial pivoting is (Golub, 1996):

[6] Golub, G. H., and C. F. Van Loan, Matrix Computations (1996), Johns Hopkins Series in Mathematical Sciences, The Johns Hopkins University Press

Right-looking LU factorization
for k =1:n-1 **do**
find ν with k≤ ν≤n such that $|A(\nu,k)| = \|A(k:n,k)\|_\infty$
A(k,k:n)↔A(ν, k:n)
p(k) = ν
if A(k,k) ≠ 0 **then**
A(k+1:n, k) = A(k+1:n,k)/A(k,k)
A(k+1:n,k+1:n) = A(k+1:n,k+1:n) - A(k+1:n, k)
A(k, k+1:n)

The computational complexity of this algorithm is $\Theta(2n^3/2)$. After we obtain the matrix factors *L* and *U* we have to solve two triangular systems: $Ly = b$ and $Ux = y$. These systems are solved using forward and backward substitution that have a computational complexity of $\Theta(n^2)$, so the most important computational step is the matrix factorization. That's why we have to show a special attention to the algorithms for matrix factorization.

In practice, using actual computers with memory hierarchies, the above algorithm is not efficient because it uses only level 1 and level 2 BLAS operations[7]. As it is well-known, level 3 BLAS operations[8] have a better efficiency than level 1 or level 2 operations. The standard way to change a level 2 BLAS operations into a level 3 BLAS operation is delayed updating. In the case of the LU factorization algorithm we will replace *k* rank-1 updates with a single rank-*k* update.

We present a block algorithm for LU factorization that uses level 3 BLAS operations. The $n \times n$ matrix A is partitioned as in Figure 1. The A_{00} block consists of the first *b* columns and rows of the matrix A.

A_{00}	A_{01}		L_{00}	0		U_{00}	U_{01}
A_{10}	A_{11}	=	L_{10}	L_{11}	*	0	U_{11}

Figure 1. Block LU factorization

We can derive the following equations starting from A=LU:

$L_{00}U_{00} = A_{00}$ (1)

$L_{10}U_{00} = A_{10}$ (2)

$L_{00}U_{01} = A_{01}$ (3)

$L_{10}U_{01} + L_{11}U_{11} = A_{11}$ (4)

[7] Dongarra, J., J. Du Croz, S. Hammarling, and R. Hanson (1988): "An extended set of FORTRAN basic linear algebra subprograms", ACM Transactions on Mathematical Software, 14, (1), 1-17.

[8] Dongarra, J., J. Du Croz, S. Hammarling, and I. Duff (1990): "A set of level 3 basic linear Algebra subprograms", ACM Transactions on Mathematical Software, 16 (1), 1-17

Equations (1) and (2) perform the *LU* of the first *b* columns of the matrix *A*. Thus we obtain L_{00}, L_{10} and U_{00} and now we can solve the triangular system from equation (3) that gives U_{01}. The problem of computing L_{11} and U_{11} reduces to compute the factorization of the submatrix $A_{11}' = A_{11} - L_{10}U_{01}$ that can be done using the same algorithm but with A_{11}' instead of A. The block LU factorization algorithm can now be derived easily: suppose we have divided the matrix A in column blocks with *b* columns in each block. The complete block LU factorization algorithm is given below.

Block LU factorization

for k_b =1 to n-1 **step** b **do**

$b_f = \min(k_b + b - 1, n)$

{LU factorization of $A(k_b : n, k_b : b_f)$ with BLAS 2}

for $k = k_b$ **to** b_f **do**

find k such that $|A(k,i)| = \|A(i:n,i)\|_\infty$

if $i \neq k$ **then**

swap rows i and k

endif

$A(i+1:n, i) = A(i+1:n, i)/A(i,i)$

$A(i+1:n, i+1: b_f) = A(i+1:n, i+1: b_f) - A(i+1:n, i)\ A(i, i+1: b_f)$

endfor

{Let $\tilde{L}$ be unit lower triangular matrix $b \times b$ stored in $A(k_b : b_f, k_b : b_f)$}

Solve triangular systems $\tilde{L}Z = A(k_b : b_f, b_f + 1 : n)$

Update $A(k_b : b_f, b_f + 1 : n) \leftarrow Z$

{Delayed updating}

$A(b_f + 1 : n, b_f + 1 : n) = A(b_f + 1 : n, b_f + 1 : n) - A(b_f + 1 : n, k_b : b_f)A(k_b : b_f, b_f + 1 : n)$

endfor

The process of factorization is shown in Figure 2. The factorization of the current column block is done with the usual BLAS 2 operations and the active part of the matrix A will be updated with *b* rank-one updates simultaneously which in fact is a matrix-matrix multiplication (level 3 BLAS). If $n >> b$ almost all floating point operations are done in the matrix-matrix multiplication operation.

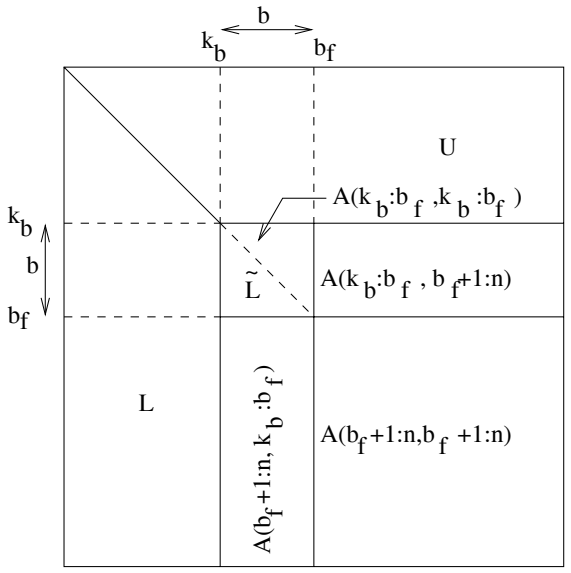

Figure 2. Block LU factorization with BLAS 3 operations

Cholesky factorization consists in finding the factorization of the form $A = LL^T$ where A is a symmetric positive definite (SPD) matrix. Figure 3 shows the partitioning of matrices A and L.

$$A = \begin{pmatrix} A\_11 & * \\ A\_21 & A\_22 \end{pmatrix}$$

$$L = \begin{pmatrix} L\_11 & 0 \\ L\_21 & L\_22 \end{pmatrix}$$

Figure 3. The partitioning of matrices A and L.

From $A = LL^T$ we can derive the following relations :
$A_{11} = L_{11}L_{11}^T$
$L_{21}L_{11}^T = A_{21}$
$A_{22} - L_{21}L_{21}^T = L_{22}L_{22}^T$

If matrix *L* will overwrite the inferior triangle of *A*, then the Cholesky factorization consists in the following three computations:
$A_{11} \leftarrow L_{11} = Cholesky(A_{11})$
$A_{21} \leftarrow L_{21} = A_{21}L_{21}^{-T}$
$A_{22} \leftarrow A_{22} - L_{21}L_{21}^T$

Parallel implementation of the direct and iterative algorithms using CUDA

Our library implements LU and Cholesky factorization as directs methods and Jacobi, Gauss-Seidel, CG, GMRES and BiCGSTAB iterative methods.

The general flow of the solver implemented in our library is:

- Allocate memory for matrices and vectors in the host memory;
- Initialize matrices and vectors in the host memory;
- Allocate memory for matrices and vectors in the device memory;
- Copy matrices / vectors from host memory to device memory;
- Define the device grid layout:
  - Number of blocks
  - Threads per block
- Execute the kernel on the device;
- Copy back the results from device memory to host memory;
- Memory clean up.

We've used CUBLAS library in the implementation of the direct and iterative algorithms for performing BLAS operations. We also implemented the same algorithms in a single threaded program developed in C and run on CPU. The CPU library uses ATLAS[9] as a high performance BLAS implementation.

Results

We've tested our direct and iterative solvers for both single precision and double precision floating point numbers. For our tests we used a computer with Intel Core2 Quad Q6600 procesor running at 2.4 Ghz, 4 GB of RAM and a NVIDIA GeForce GTX 280 graphics processing unit (GPU) with 240 cores running at 1296 MHz, 1GB of video memory and 141.7 GB/sec memory bandwith. The operating system used was Windows Vista 64 bit.

We compared the results obtained using the CUDA code with the single threaded C implementation run on CPU. The CPU implementation of the direct and iterative algorithms used the optimized ATLAS library as a BLAS implementation. This gives better performances than a standard reference implementation of the BLAS.

Table 1 shows the speedup obtained by the C-CUDA implementation of the iterative solvers compared with the traditional CPU code for single precision floating point numbers and table 2 shows the speedup for double precision numbers. From the results presented below one can see that GPU outperforms CPU for numerical computations.

Comparing the results for each method, it can be noticed that BiCGSTAB has better performances than the other methods. For GMRES, in our experiments we restarted the method after 35 iterations. The tolerance for the solution was fixed at 10^{-4} for all methods. For our experiments we have considered linear systems containing between 2000 and 20000 variables.

Table 3 shows the speedup of the CUDA implementation of the direct method for linear systems compared with a single threaded C implementation (the standard block-level implementation that can be found in LAPACK). We considered linear systems with 500 to 3500 equations.

Our performance results show the net advantage of GPU computing compared to the classical CPU code. The results also emphasize the advantage of the iterative solutions compared with the direct solution. Another advantage of using CUDA programming model is that the code can be easier

[9] Whaley, R. C., A. Petitet, and J. Dongarra (2001), "Automated Empirical Optimization of Software and the ATLAS project", Parallel Computing, 27(1-2), 3-35

read and support. The major drawback of CUDA is that it is only available for NVIDIA devices. A port of our library to OpenCL is intended for the future.

Table 1. Speedup of the CUDA library for single precision FP

Matrix dimension	Speedup			
	Jacobi	Gauss-Seidel	GMRES(35)	BiCGSTAB
2000	67.4	69.3	78.3	82.2
4000	56.2	65.5	81.8	84.5
8000	68.3	67.4	80.1	81.9
12000	66.7	68.4	81.4	84.1
16000	71.1	69.2	79.3	86.0
20000	72.8	69.9	81.3	86.9

Table 2. Speed up for double precision FP

Matrix dimension	Speedup			
	Jacobi	Gauss-Seidel	GMRES(35)	BiCGSTAB
2000	35.2	36.1	39.6	41.7
4000	36.1	36.0	41.2	42.3
8000	29.1	35.2	41.6	43.6
12000	33.6	37.8	40.5	43.9
16000	32.3	35.9	42.8	44.0
20000	35.6	37.1	43.2	46.1

Table 3. The speedup of the direct method based on LU factorization for double precision

Matrix dimension	C-CUDA
500	8.99
1000	12.45
1500	11.41
2000	16.78
2500	16.23
3000	14.39

Table 4. The speedup of the direct method based on Cholesky factorization for SPD matrices double precision

Matrix dimension	C-CUDA
500	13.50
1000	19.75
1500	19.71
2000	23.17
2500	24.45
3000	22.585
3500	23.90

Conclusions

We developed a C-CUDA library that implements the direct method with LU and Cholesky factorization and Jacobi, Gauss-Seidel and non-stationary iterative methods (GMRES, BiCGSTAB). The matrix-vector and matrix-matrix computations were done using CUBLAS routines. We compared the performance of our CUDA implementation with classic programs written to be run on CPU. Our performance tests show speedups of approximately 80 times for single precision floating point numbers and 40 times for double precision for the iterative methods and about 10-25 for the direct method with double precision FP. The lower figures of the speedups for direct methods may come from the memory bandwidth.

These results show the immense potential of the GPU accelerated numerical computations. In the future we intend to extend our direct and iterative solver library and to port it to OpenCL.

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MANAGING HUMAN FACTORS IN IMPLEMENTING ELECTRONIC DOCUMENT SYSTEM IN THE PUBLIC SECTOR

TOMS LEIKUMS*

Abstract
Document management underlies the activities of almost every organization. Correctly managed correspondence and organized document circulation characterize successful performance particularly in the public sector organizations. Even though production of documents itself is not the main task of governmental institutions, document creation and processing are crucial processes for the provision of basic functions in public sector. In the 21st century it gets more important to use the new possibilities offered by modern technologies, including electronic document management. Public sector itself is a heavy bureaucratic apparatus in the need of elasticity and ability to change its working processes and habits in order to gradually switch to the digital environment. Western European countries have already turned to electronic document management whilst most of the Eastern European countries, including Latvia, have just recently started a gradual electronization of document circulation. When implementing electronic document management systems in the public sector organizations, it often comes to resistance of the staff and unwillingness to change the accustomed methods of work – paper format document circulation. Both lower level staff and higher level managers put obstacles to electronic document management. In this article author inspects cases of successful practice and analyses possible action mechanisms that could convince public sector personnel of advantages of electronic document circulation and prepare them to switch to work with digital documents.

Keywords: *Electronic document management, public sector, document management systems, electronic workflow, educating personnel*

Introduction

The implementation of any information system is a responsible and important process. The implementation phase largely determines both further users' attitude towards the system and successful performance. When developing and implementing information systems, one must pay attention to great number of elements: business process analysis, financial aspects, platforms to use, system analysis, programming, testing etc. However, often among these important elements another factor tends to be forgotten – system users. Even the best projected and developed systems can fail if during the stages of system development and implementation the work with the users has been neglected.

All organizations, including the public sector institutions, gradually switch to partially or completely electronic document management. In Western Europe the shift was undergone during the last decade, but Eastern and Central European countries have activated the issue right now and are trying to apply principles of electronic document management to public sector. However, this process is not simple and presents several problems, for instance, lack of qualified software developers, financial and technical restrictions, but mainly – the unwillingness of users to change their work practice and habits. Exactly the last reason is one of the most important obstacles in further development of electronic public sector, and this article deals with this issue in a greater detail – how to manage human factors and improve the environment for the implementation of electronic document management systems.

In order to detail the problem scope and offer solutions, the author of the article uses personal experience of system analysis, software development and implementation gained in working in the public sector. Additionally the article contains good practice examples from specialists of implementation of information systems and document management systems' developers.

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Many authors of specialised literature have paid attention to involving users into development projects of information system and training for the work with the software. However, mainly there are only some general advices, for instance, to involve the potential system users when running the acceptance testing. User attitude and specific wishes, on their turn, usually do not get special attention. The specifics of the analysed research target group – public sector institutions in Eastern Europe – also has to be taken into account – unfortunately these countries are on a considerably lower level of the IT development, if comparing to Western Europe or USA. Respectively, the workers in the public sector are less keen on using the computers and the attitude towards innovations is often plain aggressive. The author of the article pays special attention to features of document circulation in the public sector institutions in the post-soviet space and outlines directions of further development on the way to e-government.

Risks in implementation of electronic document management system

In order to apprehend the problems in question and the sphere of activity, one must first view the possible risk factors. Thorough risk planning during the initial phase of the project allows avoiding many obstacles in the implementation of the new document management system. In the following we will inspect the most important risk factors related to users and their attitude towards the information system.

- Weak legislation environment

Public sector is a specific branch and the actions of its workers are regulated by a large number of legislative documents both on the state and individual institution level. Document management system can also be regulated by, for instance, document circulation regulations, record-keeping rules, safety policy, job responsibilities description etc. Public officials follow such regulation very thoroughly and do not want to change their working habits or accept alternatives – as an electronic document management. Respectively, the implementation of electronic document management system can be negatively influenced by the lack of basic legislative regulations on the state level and unadjusted rules and regulations inside the institution.

- Low quality user training

Nowadays almost every IT project contains user training sessions. Only in cases when the organization acquires a generally known out-of-box software solution, e.g. *Microsoft Office*, no user training is organized. However, user training can be conducted in several ways – both on high level and by paying necessary attention to it, and carelessly, obviously only for the fact of conducting the training itself. Often no direct user trainings are organized at all and the developers prepare a manual instead and assume that it would be enough for a basic user to get to know the new system and accomplish his/her functions in it. Probably this approach is cost-effective for some smaller information systems. However, document management systems are usually huge IT solutions, projected for the usage by several hundreds of even thousands of people and therefore they are complicated and functionally crowded. Thus the potential users when first seeing the voluminous manual even do not want to read it. Direct user training is also not always the optimal solution as many organizations conduct them very superficially in order to mark that there has been a training, e.g. for all the workers at the institution at once, even though there are more than ten or even hundred workers. Obviously this is not the correct approach of quality training and one can assume that after such training most users' attitude towards the system will not be positive.

- Indifference of managers

Every IT project is based on humans. Also in public sector the suggestion to acquire one or another information system comes from the staff, usually – from the IT specialists. If in private sector software acquisitions are usually initiated also by managers, then in the public sector higher lever

managers are usually occupied with their direct responsibilities and are almost never interested in IT solutions. Often they think that IT solutions function for itself (e-mail, internet). However, it is the higher level managers who are entitled to meet decisions about acquiring new purchases or starting projects. Respectively, it is them whom the IT specialist has to convince of the need to spare some financing and acquire an information system. Though convincing the managers and getting the financing is not enough – the manager has to show some interest or support to the project during the whole process, but especially – during the implementation. If users see or learn that the manager does not use the new software, they automatically assume that they do not have to do it as well.

- Traditions of document circulation in the public sector

Public sector institutions can be regarded as the most conservative organizational group at all. Similar incredulity against new information systems exists only in banking sector. Since ancient times the officials have been used that they work with documents – with paper, respectively. There are papers on the working desks, huge amounts of paper are being printed, coordinated, placed in folders; notes are being taken in paper notepads, and the document search means searching through piles of paper. In the age of modern technologies such approach can seem foolish but one has to take into account that it is not only traditions determining it – in some ways working with paper documents has always been and will be more comfortable than the most elaborate document management system. Miles L. Mathieu and Ernest A. Capozolli even forecast that in the nearest future the situation will not be changing rapidly and electronic document circulation might not come to reality: "Reality has proven that a paperless office has been impossible to achieve thus far. Today's individuals, computer savvy as they are, have shown they are unwilling to give up the convenience and low cost of paper for more cumbersome and costly digital display devices. Individuals have also relegated printers, copiers and fax machines into the "for granted" category, believing one belongs on everyone's desk. Until digital display devices transfer data from computer to medium as simply as printers do with paper, the paperless office may never be a reality."[1]

Suggestions for a successful transition to electronic document management

Many authors regard involving users into different system development and implementation phases as the key to success. Already in 1995, when different information systems were very far from the highest peak of their popularity, the prestigious magazine *Compuworld* wrote about user involvement in software development: „Involving users early on to speed up systems development isn't exactly new advice. Still, it remains something many IS developers fail to do on a regular basis because „it takes more time initially. You can't just sit down and code"."[2]

User involvement has also been emphasized in order to ensure positive attitude towards the newly implemented system: "Users do not make best use of information systems unless they feel that these systems have been designed with their involvement and in their interest."[3]

One has to take into account that in an optimal way users have to get involved in the IT project as soon as possible. In many places there is praxis that users (in reality only a minor part of them) first see the system during the phase of acceptance testing. Though this is not the worst case since the users can still express their opinion and indicate errors or mistakes in the system. However, it is not possible to perform any significant changes of the system at this stage anymore. For user involvement in different phases of an IT project several methods can be used. "The way to be user-centered is to involve users and pay attention to their views.

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[1] Miles L. Mathieu and Ernest A. Capozzoli, "The Paperless Office: Accepting Digitized Data" (paper presented at the Troy State University, System-wide Business Symposium, 2002).

[2] Julia King, "Consult users early, often," *Computerworld*, October 16, 1995.

[3] Patrick C. J. Nolan et al., ed., *Pathways to institutional improvement with information technology in educational management* (New York: Kluwer Academic Publishers, 2002), 63.

This can include a variety of approaches, from simply observing users' working practices as part of collecting system requirements, to using psychologically based user-modeling techniques, to including user representatives on the design team. More important, users should be involved in the testing and evaluation of the system during its design and development."[4] In order to comprehend the processes of document circulation in an organization and offer an optimal alternative – electronic document management system, the developers would have to spend lots of time for system analysis and evaluation of the current situation. It is not enough to have discussions with IT staff only (since they are sometimes not related to document circulation) and record managers (who in their turn are so familiar with document circulation that they cannot pictures themselves in the role of a standard office worker). It is necessary to acquire information from other potential users of the system. Interviewing particular workers or groups of workers or surveys might be used as methods for this task. If safety policy of the institution allows and no workers are against it, it is advisable to conduct staff observation. This method can prove to be especially helpful during the implementation and usage of pilot versions of the system (if intended). "Going to observe users in their natural setting – observing them while they are doing real work in their real working environment or using a home system in their homes – is an essential part of user-centered design. In addition to finding out what users do, you can also discover what aspects of the current system they like and dislike."[5]

As one of the most important recommendations we have to mention the need to individually train as much system users as possible. When an organization acquires a new system, usually it is being inspected only by managers, record managers, and possibly IT staff who will have to administer the system in the future. Yet one cannot forget all the other system users. In many institutions there is an opinion that user manual, provided by the developer, is enough for basic users. However, one has to reckon that in the user manual the supplier or the developer describes only the system functions, respectively, which button to press in order to navigate between forms etc. Yet, for the users the context between processes is much more important, since they have to work with specific tasks, for instance, to create a return letter. An instruction on how to do it might as well be *scattered* between different parts of the manual because the description of the process can be found on different programme windows. Another wrong approach is to organize one common user training for all the staff where they are being carelessly informed on the fact the institution now has a new document management system, that it can be used for different functions and from now on everybody has to use it. Even if amongst the staff there are people who are capable of learning to use new software fast, most of the staff will not ask any questions, postponing them to the moment when they will really start working with the system. This is the moment when they call the IT specialists or the office clerks who in their turn have to carry out an individual training on operations of the document management system. The experience of the article author that has been gathered during several years indicates that document management in the public sector is a process important enough to spare time for individual trainings for the users. Usually it takes up to 30-40 minutes but the prospective time savings are worth the investment. It is very important that the users are being trained according to their position in the institution. For instance, senior officers and other lower lever workers of the hierarchy will be using different options of the document management system than the middle level managers; higher level managers, on their turn, will be interested in functionality of various monitoring options, assignation of resolutions and control mechanisms etc. The only common elements for all users are basic system actions and document search.

For the specifics of public sector institutions – much more than for the private business companies – it is necessary to gain support of the management for the processes in the institution, including the transition to electronic document circulation. Therefore as a very important example of good practice one has to mention management involvement into planning document circulation and

[4] Debbie Stone et al., *User Interface Design and Evaluation* (San Francisco: Morgan Kaufmann, 2005), 17.
[5] Debbie Stone et al., *User Interface Design and Evaluation* (San Francisco: Morgan Kaufmann, 2005), 29.

implementing electronic document management. In order to achieve it, one could have to go through several stages. First of all, the management has to be convinced of the need for the electronization of the document circulation. Heads of institutions are not always competent with modern technologies and mainly do not fully comprehend the potential gains. Therefore there is a need for a person who is capable of comparing the current situation of an organization with its possible status in the future, when electronic document circulation could be carried out. It is important that this person is not a marketing specialist or software supplier for any of the companies distributing document management systems – in their presentations they basically tend to concentrate on design details and use common arguments, like, "electronic document system will save money for you" or similar. However, a long-term employee of the institution who has full understanding of workflows and organization processes in the institutions is capable of giving real examples and explaining to the management what changes are to be expected. If possible, management has to get involved into process planning, purchase and testing of the electronic document management system. One has to take into consideration the peculiarity of public sector that it is the like or dislike of the head of the institution that determines further destiny and success of the system in the whole institution. If the head of the institution who is the only one having the authority to sign, will not be willing to edit and sign documents electronically, then all the other staff will have to continue creating letters and regulations in paper format. Involving the responsible managers into the project already during planning and testing stages can bring up ideas of how they want to see their electronic workspace to look like and how to structure the information so that it would be comfortable to use.

As one the examples of good practice document management system developers, for instance, *Optical Image Technology, Inc.*[6] often name the possibility to implement document management solutions gradually. Thus functionality modules can in the beginning only get used partially. One can start with document input, saving and output. In this case there is the problem that users will learn how to work with the system *incorrectly*. And in future it can be much harder to make them change habits and start using additional functions of the document management system. For instance, the institution decides to start using the document management system and create and store documents in the classified folders electronically. However, this workflow functionality will have to be started by the next year. Therefore the users get used that after creating a document it has to be printed out, reconciled and signed on paper. Also the managers get used to this process and afterwards they do not want to reconcile documents electronically. Therefore the author of the article recommends to thoroughly consider if there are significant obstacles and the system has to be implemented partially, thus distorting business processes of the institution. Perhaps a far better solution would be to spare some more time for staff training on all functions of the system and migrate to an electronic document management somewhat later – when everyone conceives what and how has to be done and what is expected of them as of system users.

For the institution staff to support the electronic document circulation and system, it is valuable to start using the system for their everyday tasks, replacing e-mail. Nowadays in public sector most of the information circulates in two ways. First one is e-mail that is being used for forwarding huge amounts of documents and their different versions. Another one is shared server folders, far less used for the sheer process of workflow organization. They are mainly used for the storage of completed documents or their final versions. A modern document management system supports document editing in groups or collaboration. There is, for instance, such project function that allows organize documents as electronic environment of a particular work group. In this case there would be much less data sent per e-mail (one cannot forget the fact that there are backup copies created for e-mails and the increase of their number reduces performance of both servers and user

[6] "Five Document Management Best Practice Considerations for County Government Offices," Docfinity, accessed January 15, 2012, http://www.docfinity.com/index.php/news-a-events/docfinity-articles/42-tips-for-government-offices/205-five-document-management-best-practice-considerations-for-county-government-offices

computers) and documents would be accessible to all group, not only to some of its members. Any modern document management system surely supports versioning of documents and therefore anyone can use document management system for a gradual document creation with options to view what changes have been done, by whom and when. In the coming years it will be hard to prevent the fact that people will continue to prefer printing the documents and reading them on paper – most people think it's more comfortable. "In fact, studies have even shown that people are able to retain 30% more information if it is shown to them on paper than if they see it on a computer screen."[7]

One of the most important factors that have to be paid attention to in the development of electronic document management system is the usability of it. The system can be exceptionally rich and voluminous with function but still the first thing the users see is its interface. The fact that the usability is closely related to user satisfaction has been emphasized also by Debbie Stone, interface specialist: "A computer system that is usable in one context, may be unusable in another. As a user interface designer, it is important to consider the context in which the system will be used. A user interface that users find pleasurable is likely to be more acceptable than one that annoys them. Users are more likely to use a computer system that they enjoy than one that irritates them. Contented users are likely to be more productive, so usability is clearly related to user satisfaction."[8] Undeniably significant role in gaining users' trust is played by high-speed performance as well – nobody likes being held up. Ralph Stair and George Reynolds mention that user satisfaction with the system is directly related to its quality, or precisely, to four properties: "User satisfaction with a computer system and the information it generates often depend on the quality of the system and the value of the information it delivers to users. A quality information system is usually flexible, efficient, accessible, and timely."[9] Developers of document management systems do not always rank usability in its list of highest priorities. This is caused by the principles of public sector purchases – when purchasing an information system, the requirements are mainly functional and technical (high-speed performance, maintainability, restorability etc.). As can be seen, the emphasis is on measurable criteria, not usability – it is hard to measure or cannot be measured at all. Therefore the developer will never decrease the performance of the system if that would be necessary to improve its usability. This has to considered as a significant problem that indicates lack of comprehension during the transition process to an electronic document management system. Also Wilbert O. Galitz emphasizes that a system has to cover the needs of the customer's users, not developers: "All users, including customers and other interested parties, today expect a level of design sophistication from all user interfaces, including Web sites. The product, system or Web site must be geared to people's needs and the system's goal, not those of the developers."[10]

In order to make electronic document management system reality, it is not always necessary to start with projecting an information system. Almost always when migrating to electronic document management system, the public sector institution has to change its business processes. There is no need for a system that only duplicates paper document circulation and thus causes more work, or a system that is complicated to use and cannot be fully used in conformity to usual document circulation model in the institution. Often business process optimisation is needed. For instance, electronic document reconciliation has almost no sense if afterwards the document in question anyway has to be printed and signatures have to be collected on paper. Optimizing business processes could gradually lead to creation of automatic work flows in the document management system that would in the future facilitate processes of document registration or creation. In frames of

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[7] Miles L. Mathieu and Ernest A. Capozzoli, "The Paperless Office: Accepting Digitized Data" (paper presented at the Troy State University, System-wide Business Symposium, 2002).

[8] Debbie Stone et al., *User Interface Design and Evaluation* (San Francisco: Morgan Kaufmann, 2005), 7.

[9] Ralph Stair and George Reynolds, *Principles of Information Systems, Tenth Edition* (South-Western, 2011), 59.

[10] Wilbert O. Galitz, *The Essential Guide to User Interface Design. An Introduction to GUI Design Principles and Techniques. Third Edition* (Indianapolis: Wiley Publishing Inc., 2007), 62.

the same business process optimization it is necessary to create and always maintain a clear vision on who is responsible for document management. People in the public sector have to understand which person or at least which structural unit is responsible for document circulation. Especially important it is for new members of the staff who have until then not worked with the bureaucratic apparatus in the public sector and who do not have the comprehension what difference there is between a regulation, order, instruction or a letter. Mainly in ministries record-keeping sections are responsible for document management and it is also their task to develop an order for document circulation that can be then presented to all staff members.

In order to standardize information exchange between interested parties, a mutually accepted document management terminology has to be used. Problems arise when staff members connected to document circulation cannot understand each other because of differently used terminology. For instance, an records keeper and an IT administrator (who possibly administers the document management system) have fundamentally different opinions on what is to be called a 'file'. A basic user often sees no difference between 'putting a visa on' and 'reconciliation'; however, from the document circulation point of view these are two different processes with different purposes. In order to avoid potential misunderstandings it would be recommended to include a chapter with definitions and explanations into the order for document circulation. Misunderstandings can significantly influence future prospects also when the institution purchases or develops new document management system and uses different terms than those used by the suppliers/developers of the new document management system. In such cases before starting the project it is recommended to agree on a common basic vocabulary.

Conclusions

Managing human factors is one of the most important tasks to make a document management system get recognized and used at all. Public sector institutions are not typical business organizations whose workers are profit-guided. Unlike them, to motivate staff in the public sector it is not enough to present a return-on-investment chart showing that the system will pay off in one year. Habits and traditions are more important in the public sector. However, as everywhere else also in the public sector there will be both supporters and opponents of the implementation of new information systems: "In the worst of cases, individuals will react negatively to change and they will resist using the new system. In best cases, they will incorporate the new system into their work habits as long as they perceive that the supplementary effort needed to learn it and to use it is worthwhile given the perceived usefulness of the system."[11]

When planning the transition to electronic document circulation, it is not enough to purchase or develop a document management system. It is a long-haul project making the institution to perform both organizational and technical changes. In fact, it is a continuous and never-ending process since the technological progress persistently asks for changes also in the institutions that have long undergone the transition to electronic document management. For example, for states of European Union it is now especially current to ensure mobility and public sector workers want to access the documents of their institution from anywhere, using mobile phones, tablet PCs or notebooks. Therefore it is necessary to adapt the document management systems for operations in public network. However, despite the rapid development of technologies, there is still a long way to a completely electronical document management system. "Modern society may be far away from the day when one can reach into a pocket and unfold a viewer in order to show a store clerk, boss or friend notes made on a digitized piece of paper. Office workers are closer, however, to the day when they can plug a viewer into their computer, access the daily paper of choice, and download the information before they go to work and society accepts this as the normal routine. But until the day

[11] Jane Carey, ed., *Human Factors in Information Systems: The Relationship Between User Interface Design and Human Performance* (London: JAI Press Ltd., 1997), 163.

when digital viewing devices are as simple to use, disposable, storable, and as widespread as paper, there will never be a truly paperless environment."[12]

In spite of different sceptical opinions, electronic document circulation will sooner or later reach public sector institutions. However, in order to make it happen, it is necessary to head towards e-government both on the level of the state, as well as in every separate institution. As recommendations for further research the author can mention electronic document management development trends regarding the IT progress, problem scope of the electronic signature, as well as possible case studies about transition to electronic document circulation in different governmental institutions – both in ministries, and in state agencies and services. The topicality of the research subject remains intact as public sector institutions have always worked with documents and document management will always be the main supportive process in public sector.

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Cuprins